

CIVIL LIABILITY AND INSURANCE

**(AN ANALYSIS OF CIVIL LIABILITY AND ITS INSURANCE, UNDER THE
LEGAL VIEWPOINT OF THE "COMMON LAW" AND "CIVIL OR
CONTINENTAL LAW" SYSTEMS)**

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Abstract

We think essential considering prevention to who start reading this article. In effect, the topic which relates is one of those that assume most practical interest. From the law viewpoint compared to the civil liability. For this reason, this will be object of analysis soon, by early May of this year by the AIDA International Civil Liability Insurance working group, which I am honored to chair and will be meeting for such purposes in the city of Istanbul, Turkey. In consequence, since it is a topic of interest which deserves to be deeply analyzed and which will be in the short-term future by the mentioned working group. This work shall not be considered a monographic investigation work and analysis of the doctrine and international legislation. But rather as general exposure of the main aspects impacting on the determination and compensation payment on the civil liability insurance, thus for us in the quality with we will participate in the mentioned international colloquium of May 2012, constitutes in a certain way, a start point for a deepening of the topic which is in process.

It is also important precise that the work circumscribes the topic announced in its title. By this, precise which are the different types of damages that may be covered by Civil Liability (C.L.) insurance and the way these are established by agreement between the parties (insured, third party injured and insurer) or by final rule passed in the respective process for terminating on the compensation payment. The work does not extent to any other additional topic, except the analysis done on the liability characteristics on the legal systems governed by the civil law of Roman roots (or "continental") and on the "common law" system, since the main topics are raised in view of both systems.

Therefore, in this work there is not any reference or comment related to the contracting of the C.L. insurance or on the insurable interest, good faith, pre-contractual information of the risks or its subsequent aggravation, neither on the so controversial topics relative to the occurrence of the claim and its information, the "claims made" clauses, neither to the direct action.

Having made these clarifications, we would like to stress the features the civil liability insurance presents on the aspects we analyzed in this work. And constitute the cause by which the determination and compensation payment have special features in this insurance, separating it from the great majority, or from all the other damages or property types of insurance.

In effect, the civil liability insurance is characterized firstly, because the policy holder (and the insured, if it is a different person than this), contracts the policy. Whether it this wants to protect its property or because has the legal obligation of contracting it, but for responding, in one or another case, to the claims of third parties injured by a wrong doing of which the insured is responsible, *such in any case the beneficiary of the compensation is a third party.*

However or precisely in consequence of the previously mentioned singularity, in the civil liability insurance, the person that receives and perceives the compensation is not insured who contracts the policy. But the third party injured as beneficiary of a compensation that is the purpose compensate the damages caused by the insured or that in objective liability regimes, is in all its forms obliged to assume them. Summarizing, this insure assigns in exclusive benefit of a third party who has no party in its contracting.

Also it is own feature of this type of insurance, the fact that adjustment and determination of the compensation are very different to the form claims are generally adjusted in the rest of property damage insurances. Changing the role the Loss Adjuster performs (or adjuster), It is not him who determines the compensation, whereas, the out-of-court settlement with the third parties affected, acquires fundamental importance, and in case of no reaching to an agreement such settlements, the definite regulation of the compensatory damages is delivered to what justice may determine.

Finally, also is special the attitude of the insured, of whom contracts the policy, before the occurrence or claim for loss. In all the rest of the rest of the damages insurances cases, is the insured who presents the compensatory claim and claim the loss with the purpose of perceiving for him the compensation. Evidently, implying that is the insured who states the existence of such loss and evidence the damages suffered, as necessary evidence for claiming the payment.

This does not happen in the case of civil liability insurance, because in this the victim is not the same insured, but a third party who states his claim must be precisely allocated to the insured his responsibility due a wrong doing. Such in many cases, contrary to the general rule, the insured will be in the predisposition of denying the existence of such responsibility, or to question the extension or amount of the damages caused.

The cause of this attitude of the insured can be clearer. The accusation of a liability constitutes accusing of having observed a conduct (action or omission) contrary to the duty of care and diligence that persons must exercise for not causing damage to another. This in some cases cannot only be derived in the pecuniary consequences the civil liability insurance covers, but also criminal, minor or administrative sanctions, or a charge or questioning to the conduct or professional capacity, when the insured causes damages on the performance of an activity of such type.

Nevertheless, in some cases the existence of these collateral consequences of the insured liability may carry to insured to be interested, on the contrary, on reaching to a quick and discrete agreement with the third party injured. Over the base of the undisputed payment of the insurance, for such third party do not disclose his claims or do not claim on court a sentence against the insured, causing to this a prejudice to his reputation. On the contrary, in these same cases usually happens that the insured, with a more objective view or, if wanted, merely pecuniary over the consequences of the insured liability, will be on a position more likely to reach a quick agreement with the third party. But defining or reducing the compensation claims of this, while the insured, more interested on keeping safe his personal or professional reputation, will adopt the attitude or denying the third party claim at any cost.

All these are features of this insurance that influence on the determination and payment of the compensation. Which are the features we will analyze on this following work, after referring summarily, by certain, to the environment where such insurance performs, which is precisely of the civil liability.

Before finishing we want to emphasize that in this English version, each time that referring to continental or civil law, this paper uses the word "law", means "statute law", except otherwise expressed or implied.

Part One

Civil liability and the insurance that covers it.

1. - General considerations

The study of civil liability has to begin, necessarily, from the premise that by its own nature and denomination, in which two institutions of large importance and continuous evolution in the contemporary world link and fuse. The insurance and the civil liability converge for establishing the nature and effects of this insurance.

On his side, the civil liability and the damage are inseparable, since without the existence of a wrong damage someone suffers, does not raise the liability of compensating him.

At the same time, the civil liability insurance is justified by the existence of a latent liability, but exists without her to declare¹. Because what insurance covers is the risk and this is the eventuality that a fact carrying a consequence economically detrimental occurs, in this case of making effective the liability of the insured.

Civil liability insurance, every time it protects and guarantees the patrimony integrity of the insured before the materialization of risks that commit its liability before third parties is a type or "class" of the denominated estate damage insurances² being the other, property insurances.

It is a class of large importance and large practical relevance for society and insurance activity. Hence, its growth and development are tightly linked to the progress and economical development of human society, in terms that the greater the economy development grade and of the culture, the greater the insurance quantity of this type will be contracted, voluntarily or mandatory³.

On the other hand, despite of being a private insurance, complies a very important social function, if protects the estate integrity of the insured who contracts

¹ However, in some modalities of the civil liability insurance, issued according the system "claims made", the coverage is issued for including the claims presented by the third party affected, even when the cause of his claim (serious offense) has occurred previously. This is an exceptional situation in the insurance discipline which, by definition, covers the risks that may overcome in the future and the already occurred.

² In the own definition, the nature of the insurable nature that justifies its contracting is expressed. The insurable interest is exactly, "the pecuniary interest on the type that is object of the insurance raising from a relationship acknowledged by the law". MacGillivray on Insurance Law, Sweet and Maxwell, London, Eleventh Edition, 2008, page. 9. Let's add that even if understood the insurance assigns in benefit of third party damaged, from his part has also been said pecuniary interest.

³ Is in this class where the greater number of mandatory insurances in the legislation compared.

it, it serves for the effects of economically repair the damages and prejudices suffered by the third party damaged. Furthermore, as we already anticipated in the abstract, it is conceived for the compensation proceeds to be paid by the insurer to the third party damaged and not to the insured.

This insurance covers in principle and mainly the non-contractual (or extra contractual) civil liability, which is that born, using the terms of the Chilean Civil Code, "as a consequence of a fact that has caused injury or damage to another person" (Art 1,437). But also covers, in certain occasions⁴ the contractual liability when this is originated in acts committed with occasion of a contract performance, causing one of the parties damaged by negligence or incompetence with similar features to the occurred in the criminal or quasi-criminal liability. Particularly, when translating in damages exceeding the mere non-compliance of the contract obligations (as in case, for instance, of the medical civil liability) and in general in all situations where the contractual and non-contractual liability is present⁵.

The Supreme Court of Justice of Chile has stated: "as liability must be understood, in general, the obligation where a person is placed for adequately repair every damage or prejudice caused. This results being civil if origins from the infringement of a legal rule affecting the interest of a determined person. Or criminal if is the result of a serious offense that has a punitive sanction stated by the prejudice offending the affected and the society where he acts"⁶.

The civil liability can be contractual or non-contractual (or extra contractual)⁷.

The **non-contractual** can be defined as that caused by a tort fact committed by a person in prejudice of another. This does not constitute the violation of a mere

⁴ La responsabilidad contractual asegurable, se cubre normalmente por otro tipo de pólizas, como la que ampara el fiel cumplimiento de contratos, de algunos específicos, como el de construcción y la de garantía.

⁵ "La posición acertada parecería ser que una póliza de seguro de responsabilidad civil cubre responsabilidades contractuales si ellas acarrear paralelamente una responsabilidad extracontractual, y que una póliza de seguro de responsabilidad civil, en ausencia de un texto claro, no se extenderá a los casos de responsabilidad exclusivamente contractual" Robert Merkin, "Colinvaux on Insurance Law", Thomson, Londres, 8ª edición, 2006, pág. 687.

⁶ En un fallo de fecha 6 de Noviembre de 1972.

⁷ La tesis clásica, predominante en Chile, opta por la dualidad: en la responsabilidad contractual existe un vínculo obligatorio preexistente, que obliga a indemnizar; mientras que en la extracontractual no hay obligación previa entre partes, sino que el hecho ilícito genera la obligación de resarcir los perjuicios. fuera de Chile se impugna esta teoría, en pos de la unificación de ambas responsabilidades. Planiol señala que la responsabilidad extracontractual sí tiene una obligación anterior: no lesionar o perjudicar ilícitamente a otro; y la responsabilidad contractual crea una nueva obligación, que sustituye a la de cumplir el contrato, por lo que la diferencia entre ambas no se justifica. Existe, también, una teoría ecléctica, que sostiene que en ambas responsabilidades se observa que nace una obligación que produce efectos, no existiendo diferencias de naturaleza, pero sí de carácter práctico.

contractual duty in strict sense, but of the generic duty of not damaging another (*alterum non laedere*), which is the general principle of the law.

On his side, the **contractual** liability is defined as that which originates from the direct consequence of the violation of a mandatory legal link, generated from an existent contract between the parties. According to a distinguished French author: *"liability consists or originates **only** in the non-performance of one of the created obligations by the contract. It is non-contractual, but only contractual. On the contrary, the one that does not consist in such main contractual non-performance or accessory"..."it cannot be but originating of criminal liability (non-contractual), even if a contract links the damage author with to the victim"*⁸.

The liability is in itself and it demonstrates or expresses as an obligation, of compensating the damage caused to a third party, who as a counterparty has the personal right of demanding such compensation.

Some contemporary authors sustain that the existence of a third category or type of liability with independent appearance must be recognized: the **legal liability**.

The idea is not new. In the Civil Code of Austria in 1812, its Article § 859 stated: *"Personal rights over things, in whose virtue a person is obliged before another to provide anything, are founded **immediately in the law**, in the contract or in the damage suffered"*. Here, as quickly can be perceived, the tripartite character is reflected of the obligations sources: *"ex lege", "ex contractu", "ex delicto"*.⁹

In this regard, Rodríguez expresses that: *"if the default obligation is directly imposed on the law in explicit and formal terms, we will find ourselves before the legal liability"*. However, he clarifies that it cannot be confused this with such originating from the infringement to the legal rule supplementary of the contractual will of the parties. In effect, explains that: *..."when the law performs in the silence of the parties (supplementary laws of the will), we will find ourselves with legal obligations, but contractual. This is because assuming the law knowledge, the circumstance of executing an act or contract, keeping silence respecting some of its effects, implies early and tacitly accepting that in such matter fully rules the regulatory mandate. Every contract is executed on the legal system framework and for this reason, corresponds to this to fill the gaps and solve the imprecisions the parties incur by giving them life"*¹⁰.

In principle, the civil liability links two persons; the one that directly, and by himself, executes the serious offense and the victim, but the law extends the active and passive relationships to other persons.

Thus, according to the law, he may also ask the corresponding damages compensation, i.e., is actively legitimated for pursue the civil liability, not only the

⁸ Philippe Le Tourneau, *"Droit de la Responsabilité et des Contrats"*, Dalloz, Paris, 2005, page 270.

⁹ Guido Alpa, *"Nuevo Tratado de la Responsabilidad Civil"*, Editorial Jurista Editores, Lima, Peru, 2006, Page 85.

¹⁰ Rodríguez, *Op. Cit.*, page. 12

one who has suffered the damage, whether in person or in the things is owner or holder. But also, its heirs and all those who for having a direct interest on the thing or injured person, suffer a prejudice as a consequence of the fact causing damage, as the depositary, the third party assets and in general of mere holder and also the heirs of a person who deceased as a consequence of the serious offense.

On the other side, not only is mandatory to compensate the party who cause the damage, but also his heirs and in general all the persons who legally liable of third party offenses (vicarious civil liability). Thus, the passive legitimated of a liability action, the father and a lacking this, the mother, for facts their underage sons who live in his own house. The tutor or curator, for the facts of the mentee who is under his dependence or care; the directors of the educational establishments for the facts of the students while they are under their care; the entrepreneur and the artisan for the facts of their employees, workers or trainee and in general, of the dependents acting in the exercise of their respective functions, etc. The examples on the legislation, the doctrine and the case law are multiplied.

2. - Historical evolution of the liability, particularly on the scope of the private law of Roman roots or “continental”.

Before the legal development of the liability, the primitive reaction before an offense was (and at an instinctive level or primary, keeps being) the revenge, returning the offense or the damage with another offense or damage (Talion Law). Besides, the injustice of the offense was appreciated according its effects, without taking consideration its cause.

At the same time other law institutions, the liability has experimented an evolution whose starting point dates back to the times of the Roman law and continues, emphasizing, on the last two centuries until nowadays.

In the first stages of the Roman law evolution, did not exist distinction between the criminal and civil liability. In its origins, the damaging conducts only motivated the imposition of a sentence. “The Roman law distinguished two kinds of tort attacks; the *crimina* which were attacks against the State, repressed by the public authority with body punishments and fines in favor of the treasury and the *delicta*, where the theft, personal injuries and the damages on the things occurred”¹¹.

In the ancient Rome, within the private offenses were found, on one hand, the injury and theft (*furtum*) committed with purpose of lucre. On the hand, other offenses were not included in this concept, because these were offenses against the

¹¹ Corral Talciani, Hernán, “Lecciones de Responsabilidad Civil Extracontractual” (“Lectons on Non-Contractual Liability”), Editorial Jurídica de Chile, 2004, page 79.

assets that constituted an attack against the person. For repressing these damages (*damnum injuria datum*), the Praetor Aquilius passed a referendum (one form of law in those times). According to it, an action was established that intended obtaining that the author of tort conducts generating serious consequences, would be sentenced for paying to the victim the quantum of the prejudice calculated over the highest value the destroyed or deteriorated thing had had in that year, or in the month preceding the offense. This law was known as *lex aquilia*¹² and its application was carried out with the intervention of a Praetor, who was in charge of repressing the serious civil conducts.

But it is necessary precise that in the Roman law, the institution profiles nor the fundamental distinctions of the liability were recognized. In particular, the difference between criminal liability and civil liability were not recognized, neither the difference between the contractual and non-contractual liability. Neither the law nor the doctrine conceived in the Roman law general principles over the liability.

In the medieval law, under the influence of the Christianity, starts to outline a more moralistic conception of the liability, modeled on the idea of attributing it to the personal negligence. Thus, the justification of the obligation for compensating became an act or reprehensible omission of the plaintiff.

In Spain, the change of this conception of liability is observed in the Code of the "Las Siete Partidas" or "The Seven Stars" by Alfonso the Wise, where despite keeping the characteristic classification of the Roman law (*crimina* and *delicta*), a turn into the generalization of the individual liability by negligence is noticed.

The abandon of the Roman system looks consolidating as a result of the principles claimed by the Rationalist Natural Law whose Settlor was the Dutch Hugo Grotius. In his classical work "The Rights of War and Peace", it is already completely observed the statement: when damage has been caused by negligence, it is "naturally" mandatory to compensate it.

The lack of general principles over liability, originating from the ancient Roman law, became to change on the legal systems of Roman roots just from the doctrine elaborated from the XVIII century and forth. And became to obtain legal recognition in the civil codes elaborated from the early XIX century reflected in the Article 1382 of the French Civil Code; the Art. 859 of the Austria Civil Code (OBGB); the Art. 823 of the Germany Civil Code (BGB) or the article 2314 of the Chilean Civil Code. Since beforehand to that date, general principles did not exist over which the doctrine and legislation over the civil liability could be structured. The subject of its basis did not present or occupy important part of the Roman jurist reflection, nor the following who continued with the evolution and development of the Roman law.

¹² This is the origin of the expression "Aquilian liability". Used for designing the one that has an external origin to every contract or link between the parties, currently referred as "non-contractual".

Whereas, in the age previous to the codification, the jurist belonging to the tradition of the Napoleonic Code, developed a theory over the civil liability based on the negligence and kept on subsequently doing it in an evolving process that last until nowadays.

Therefore, in the “continental” law of Roman inspiration, the civil liability only found its autonomy as institution relatively recent, from early XIX century, distinguishing from great part of the other institutions of civil law, whose origin date back to the Roman law.

Like we moved forward, prior to the promulgation of the Civil Code, in France a review and deep reflection period respecting the rules of the civil law had started. An important example is the Jean Domat work, who was the first on presenting a general theory of the civil liability, which inspired closely, the writers of the Napoleonic Code. One of the most important features of Domat’s work was of clearly disassociating the civil liability from the criminal liability, therefore separating the historical precedents.

The doctrinarian reflection that anteceded and inspired the writing of the Napoleonic Code, pointed to the formulation of a general principle of civil liability based on the concept of civil negligence. Just like Domat states in his work, “The Civil Laws in its Natural Order”: *“Is a natural consequence of each type of particular agreement and of the general agreement of not tortuously cause damages to other persons. Everyone who causes damage, for having violated to his commitments, is obliged to compensate the damage caused”*¹³.

The Domat’s system the French Civil Code collected, is based on the principle that every damage as a consequence of a negligence, must be compensated by the perpetrator of such unlawful act, since ...*“every loss and every damage that may be caused by the fact that one person, whether by its imprudence, negligence or ignorance of such that must be known, or other similar acts, must be compensated by whom whose imprudence or another fault has caused it”*¹⁴.

Another French jurist, Robert Joseph Pothier¹⁵ is in charge of redefining and perfecting the regime designed by Domat, which definitively was expressed in the French Civil Code of 1804. Establishing the “principle of liability by fault”, expressed in the articles 1382 and 1383 of said code.

The quoted articles 1382 and 1383 of the Napoleonic Code, establish as general rule that every damage inflicted to another person, must be compensated if caused at “fact or fault” of the perpetrator. The article 1382 of such codification disposes: “Every fact of the man who causes damage to another, obligates to whom for its fault has produced to compensate it”. And the article 1383 adds: “Each one is responsible

¹³ Domat, Jean « Les lois civiles dans leur ordre naturel », 1er partie, Livre III, Titre V.

¹⁴ Ibidem, Livre II, Titre IV.

¹⁵ Robert Joseph Pothier, *Traité des Obligations* (Treaty on Obligations; 1761-64).

of the damages caused not only for its fact, but including for its negligence or for its imprudence”.

With all, the writers of the French Civil Code, like the ones of the Chilean Civil Code (and other Latin American codes), did not establish the liability in a special chapter. In fact, is very symptomatic that the word liability is not mentioned in the Napoleonic Code. Is only mentioned the “responsible”.

Lacking the establishment of the institution of the liability and of a system of rules organically governing, which nowadays is totally achieved in terms such the civil liability is in our times, one of the greatest and most important fields of the private law and the insurance covering it, one of with greater intensity has extended and evolved. In terms that can be assured without fear of failing, that the evolution of the civil liability is greatly a product of the expansion in the use of the insurance covering it and at the same time, this last evolves as consequence of the advances of this.

The construction of an organic system of the liability on the base of the negligence principle is common for all the Western law of civil or Roman roots. And seems, by certain in all the nineteenth legislations derived from the French Civil Code, amongst them, our¹⁶.

At establishing a general system of liability based on the negligence, the authors prior to the French revolution, led to the establishment of a new dimension of civil liability or an extension of its concept. In terms that looked inconceivable under the old traditions grounded on the Roman law. This is the first of the steps headed into the establishment and expansion of a general theory on the civil liability. Inaugurating a renewal, update and expansion process, whose culmination seems to be in our times, very far from been achieved.

Nowadays, is acknowledged the importance of its evolution and the scopes it has, oriented towards the damage compensation, making the civil liability the base of a “law of the civil liability” acknowledged or designated by others as “compensatory law”, grounding for it on the importance the damage concept has for the civil liability.

In effect, the economical, social, political and cultural transformations, generated from the second half of the XIX century and the early decades of the XX century, obliged to question the principle that only is responded for the personal fault appreciated concretely. In effect, the development started with the industrial revolution, whose effects started to feel at great scale by middle of the XIX century and translated in an uninterrupted succession of scientific and technical advances, “along with favoring the welfare, become in new sources of damage (railways, cars, planes, vaccines and pharmaceutical products)”¹⁷.

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¹⁷ Corral Talciani, Hernán, ob. cit., pág. 87.

Already in 1812, the Civil Code of Austria advanced in this sense. Within Chapter XXX of its Second Part, treating “From the Compensation and Reparation Law”, after the Article 1293 defines damage, the Article 1294 expresses which are the sources or ordinary origins damage may origin and the Article 1295 establishing the principle that *“every individual has right to demand from the prosecutor the reparation of the damage caused with fault, whether has been produced for having failed to a duty derived from the contract or independently from the same”*. Later the most innovative rule of this Code appears, for its anticipation to the future evolution of the objective liability Article 1299, expresses: *“The person that publically exercise a position, an art, traffic, work, or without necessity is voluntary in charge of a matter requiring an special skill or uncommon diligence, manifest with it to be obliged to the necessary diligence and attributes the demanded uncommon skill. And therefore is responsible for the lack of such quality”*¹⁸.

This way, raises the first background that gave origin to the development of the objective liability theory or by risk, according to which, the obligation of compensating must be configured at the margin of the considerations on the individual liability of the subject. Thus, precisely the “objective” qualification that opposes from the “subjective”. This objective theory was formulated by the first time, precisely in Austria by Victor Mataja (1888)¹⁹, in Italy by Orlando (1894) and in France by Saleilles and Josserand (1897). In the century XX, the issue was strongly resumed, being one of the most distinguished representatives, Calabressi. According to this theory, if a risk is created as cause of an activity which at the same time causes damage, these damages caused by such risk must be repaired. Regardless if there has

¹⁸ The Civil Code of Austria of 1812 directly owns its existence to the jurist Franz von Zeiler and indirectly to Karl Anton von Martini. This last, one of the most famous jurists of the XVIII century, is author of the Civil Code of Galicia, one of the Western provinces of Austria entering into force in the year 1796. Only for its limited application to a determined region and its short life, this is not considered as the first Civil Code of the history. Since it was replaced in less than 20 years later by the already mentioned Code of 1812 applied instead, to the entire Austrian Empire.

¹⁹ Victor Mataja. “Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie” (Liability for damages from an Economic viewpoint), 1888. The most ancient backgrounds on the economical analysis of law, are back to date by late XIX century and are in the German speaking countries, particularly Vienna. One of the pioneers was precisely Victor Mataja, political economy professor and subsequently member of the government in the position of Commercial Secretary. Mataja anticipated the main ideas of the movement originated in the United States in the decade of the 60’s of the XX century, emphasizing the relation between economy and law. Mataja held that under the concept of liability by fault, the incentives for preventing the damage were lower than the socially optimum, because the responsible would not exercise greater care than the one required by the law. On the contrary, the objective liability regime or strict, would establish optimal incentives, because the damages cost would internalize and the responsible would minimize such costs. In the case of the events of force majeure, he argued that the costs of the damages should not be bear by the owner, but by whom i son the best position for preventing the damages. Mataja did not only focus on the effect of the incentives, but also discussed other principles. He made notice that because of the marginal declination of the wealth, the cost of damages should be dispersed more than one person.

been deceit or fault from the agent who executes such activity. This liability is grounded “not on the act provoking the damage, but on the act generating the risk”²⁰

Additionally, the main idea that underlines in this theory is of preventing and socializing the liability is cheaper and has better effects for the society than the private compensation of damage. The first way for obtaining such finality is the voluntary private insurance and then the mandatory.

This theory has had a strong reception in the doctrine, when damages are produced by companies or organizations. Since it is very complex to individualize the guilty. Furthermore, maybe it is not his fault, as “*strictly, damage is statistically necessary for a determined productive activity*”²¹.

However, this objective liability doctrine or without fault, also brought much resistance. In France, for example, Marcel Planiol completely criticized it for several reasons: 1° Because it eliminates the moral element, which for him is essential in every liability; 2° Because paralyzes the private initiative and inhibits the particular acting and 3° Because tends to become in a liability that obligates to contract insurances, which would bring -in his concept- a greater negligence and greater accidents.

Others state this conception of the liability “*leads to establish a valoric criteria escaping from the properly legal and that at last instance, should solve the legislator*”²².

The current tendencies have provoked the doctrine is not pronounce on a unique system which argues the civil liability. In effect, the doctrine holds that both systems present advantages and disadvantages. On one hand, the objective liability facilitates the victims to obtain compensation payments for the prejudices suffered. On its side, the subjective, according Alessandri, must be kept as a general principle of liability, since “*relies on a human value, which is the agent conduct, and for a society like ours, which attributes the due importance to the spiritual values, this is a reason worthy to be considered*”²³.

From the cultural viewpoint, has been evolved, at least in the Western World, from a type of society in which the damage is accepted as the consequence of a sort of historical or natural fatalism that had to be accepted for a situation in which culturally damage is not accepted without a compensation, whether from the party who caused it, whether from the party of the society, whether from the party of some institutions that have the function of repairing or reduce the damage consequences.

²⁰ Rodríguez Grez, Pablo, op. cit., page 84.

²¹ Corral Talciani, Hernán, op. cit., page. 89.

²² Rodríguez Grez, Pablo, “Responsabilidad Extracontractual” (“Non-Contractual Liability”), Editorial Jurídica de Chile, 1999, page. 85.

²³ Alessandri Rodríguez, Arturo, “De la Responsabilidad Eextracontractual en el Derecho Civil Chileno” (“The Non-Contractual Liability on the Chilean Civil Law”), Ediar Editores, Santiago, 1983, page 120.

Cultural change has been also accompanied by a change on the prevailing social ethics. Nowadays, it is considered not only as a desired aspiration, but as an *imperative ethical* that the damaged must be repaired. That is accepted, practically without questionings and not only when treating of body damages, but also of economical and moral. The idea that every damages must be repaired and society must have a duty to comply regarding it, is acquiring every day more strength.

On another hand, it is evident the continuation of economical, technological and cultural changes is every time more accelerated, and that *economical and technological development*, has had an impact on the regimes of civil liability. The effect of the industrial revolution on the civil liability already results a common place on the literature and the last step of its evolution seems to be the emergence of the mandatory insurance proliferation.

3. - Civil liability on the Roman Civil Law system. General doctrine.

1.- Introduction.

From the point of view of civil law liability is called, in general, "the obligation imposed on a person to compensate the damage suffered by another." It refers to the obligation to repair damage and to account for the consequences civil, criminal or disciplinary of that damage, either with respect to the victim or society.

" Rightly emphasizes that "the liability appears essentially linked to damage to one or more persons being individualized, and the duty to repair or compensate someone with equivalent means"²⁴.

Focusing in contracts, Pablo Rodriguez said that the liability is "a legal duty to repair the damages that occur on the occasion of the breach of an obligation."²⁵

It must serve the purpose of exposing the issue of liability, within the limited framework of space provided, to make clear that the essential elements of liability are unfair damage suffered by a person and the obligation to civilly compensate that falls over another.

The rest of the elements, then examine, are secondary to the extent that can take various forms and different legal treatment.

Even though they may be born of the same event, the civil liability and criminal liability are governed by different rules that are geared too dissimilar.

²⁴ Corral Talciani, Hernán, *Lecciones de Responsabilidad Civil Extracontractual*, Editorial Jurídica de Chile, Santiago 2003, pág. 20.

²⁵ Rodríguez Grez, Pablo, *Responsabilidad Extracontractual*, Editorial Jurídica de Chile, Santiago, 1999, pág. 11.

Criminal liability is established punitive or repressive rule, contained in the Penal Code and special penal laws, which pursue the objective of restoring social peace shattered by a crime, in the general interest of society, rather than the victim same, even if she can find, at times, a degree of satisfaction or compensation for the wrongs suffered by the sentence imposed on the offender than a victim.

Pursues civil liability the author of the damage repair, reparation to the victim the damages suffered by it, whether such damages caused, in general, for breach of contract, or a crime or tort.

Several factors influence or play, in general, the establishment of liability, such as the fault or negligence and fraud, to excuse acts of God or force majeure, the causal relationship to the obligations of methods and results and responsibility in some cases provided by law objectively, without regard to the existence of fault on the obligation to repair.

Traditionally it has been said that civil liability, as well as obligations in general, begin in the law, the contract or damage (ex lege, ex contractu, ex damnum)²⁶.

However, we think it is important to clarify that in civil law systems of civil law or continental, all sources of liability are legally sanctioned (statute law) and without the penalty liability would not arise. When referred to legal liability, referring to the responsibility which arises directly in the law.

The fundamental feature of civil liability on the Roman civil law or continental liability systems, is of being a conceptual and structured system, relying on general principles elaborated for a doctrine developed through the centuries, finally culminating on a general theory on the liability that was collected by the legislator and incorporated to the Civil Codes. The law of the civil liability or damages law, it is not in this sector, a casuist law.

Such system contemplates as a primary source of liability, an action or omission executed with negligence or intentionally, as a result of what causes damages to a third party. If this action or negligent omission and damaging, consists or origins **only** on the nonperformance of one of the obligations created by the contract. It is of a contractual liability. If the damaging fact does not consist exclusively on a contractual breach, it is said that the liability is non-contractual, criminal or Aquilian.

Nevertheless, is fundamentally structured around the fault as primary element, the Roman system has recognized from the beginning the existence of the liability that have its origin exclusively on the law. As well as, has validated the

²⁶ El Código Civil de Austria de 1812 trata este tema y en general, el de la responsabilidad civil contractual y extracontractual con mucha claridad. Su Art. 859 expresa: *“Los derechos personales sobre las cosas, en virtud de los cuales una persona está obligada a dar ó prestar alguna cosa, se fundan en la ley, en el contrato o en el daño sufrido”*.

establishment of presumptions of guilt altering the weight of the evidence in favor of the victim and also from a long time ago, has been opening space the objective liability or without fault, particularly in the case of activities particularly risky.

The provisions governing liability in Chile, are in line with the guidance of European Codes (specially the French) that dominated in the early nineteenth century. This general scheme has been completed with a set of provisions for the specific cases mentioned in them that follow a different liability regime.

In Chile all types or classes of liability have their origin in one source, Article 1437 of Civil Code, which states, "the obligations arise from the agreement between two or more persons, as in contracts (hence derive the rules governing contractual liability), as a voluntary act of the person who undertakes an obligation, like the acceptance of an inheritance or bequest and in all quasi-contracts, and as a result of an act that has caused injury or harm to another person, such as in crimes and torts (hence born the rules on non contractual liability), and by order of law, like between parents and children for whom parental rights (hence starting the basis of strict or legal liability). In other civil codes, similar standards exist, including those mentioned above, in paragraph 2.

In civil liability systems there are two types of liability based on fault, contractual and non contractual or tort liability.

2.- Contractual liability.

Contractual liability, which is the one that arises from the breach of contracts (non fulfillment, failure, defective or late performance of contractual obligations), it is established in Title XII, Articles 1545 and following of the Civil Code; the first one, Article 1545, states that the contract is a law for the contracting parties; Article 1546 establishes that it is mandatory to fulfill obligations that has been agreed in a contract, and to do so in good faith; Article 1547, that set the burden of proof of diligence in the fulfillment of obligations; Art 1551, which defines the time from which it is understood that the debtor is in default to fulfill them, and the Articles 1556, 1557, 1558 and 1559, that define the scope of the indemnity for damages for breach of contract. Also play an important role, Art 1489, that establish that non fulfillment of contract, gives to other party the alternatives rights to pursue mandatory fulfillment or termination of contract, in both cases, with the added right to claim for damages arising from non fulfillment. ²⁷.

This type of liability supposes prior existence of a contract between the wrong doer and the damaged party, and arises from the total or partial failure, defective

²⁷ Según esta norma, en los contratos bilaterales va envuelta la condición resolutoria tácita de no cumplirse por una de las partes lo pactado, la que otorga al contratante diligente la facultad de pedir a su arbitrio, la resolución o el cumplimiento del contrato, con indemnización de perjuicios.

performance or delay in fulfilling the obligations under that contract. Has been defined as one that "comes from the violation of a contract and creates the obligation to indemnify the other party the damages caused by his breach of contract or late or imperfect performance" (art. 1556 Civil Code)²⁸.

In these cases, in order to establish the existence of contractual liability, i.e. the obligation of a contractor to repair damage suffered unfairly by their counterparts, it requires the concurrence of the following conditions:

- a) The existence of a contract;
- b) That the contract was concluded between the victim and the person responsible, and
- c) The damage suffered by the victim is a consequence of the breach, imperfect or negligent performance of the contract (causality).

Has been said that whenever two or more people are bound by a contract, the liability arising necessarily will be contractual, but this is a rule that has several exceptions.

In fact in this matter is necessary to make two clarifications or comments: the first is that, while in a broad sense contractual liability is the result of a breach of contract, in a narrower sense is reduced to be that comes from the injury that one of the parties of a contract causes to its counterpart, that exceeds the ordinary consequences of a simple breach of contract.

The second issues to point out, closely related to the first is that in recent times has developed a tendency in French doctrine, according to which, nothing would have to justify the separate existence of the institution of civil liability contract, which cannot be resolved through legal treatment and doctrine of breach of obligations.

The first theme is simple, but not always is treated in that way. There is a traditional tendency to treat the contractual liability as the result of a breach of contractual obligations and the corresponding legal remedies. To this we shall call as the comprehensive approach to contractual liability.

A most narrower approach understand that contractual liability finds its origin in breach or imperfect fulfillment of a contract requires to go a step beyond that, and examine the purposes of the contract and if as a consequence of that breach, the other party is victim of a wrong harm or injury.

The difference is evident most clearly in professional liability. The surgeon who has accepted to make a surgery to a patient and makes a mistake during surgery, as a consequence of which the patient suffers, for example, a permanent partial disability, do not means that the surgeon has proceeded with negligence; on the contrary, can be almost certain that he worked in the exercise of his science, with the utmost rigor, with the sincere desire to give true and full compliance with their

²⁸ Alessandri Rodríguez, Arturo, *De La Responsabilidad Extracontractual en el Derecho Civil Chileno*, Imprenta Universitaria, Santiago, 1943, pág. 42.

professional obligation. But an error of one tenth of a millimeter, over the course of a surgery that is or becomes complicated, can result in a permanent injury to his patient that triggers his contractual liability, and the need to compensate damages.

What happens is that beyond his duty to fulfill contractual obligations, any part in a contract is responsible for paying the damages caused to his counterpart, taking into account that in contract cases, burden of proof of diligence or care is on the party that was obliged to use it, and to prove that an act of God has happened is an obligation that belongs to the ones who alleges that, as prescribed in Section 1547 of the Civil Code.

This rule is of great importance to the subject matter of this work, because in the field of insurance law, is an internationally recognized principle that liability insurance covers torts and, on the grounds of contractual liability, only under the limited terms stated above, and in no way the consequences of simple breach of contract or non fulfillment of contractual obligations.

3.- Extra or non contractual liability (Torts).

Non contractual or extra contractual liability is the name that receives Torts in Civil Liability systems. Liability for torts arises when someone causes an injury or damage to another person, independently of any previous contractual relation between them. It is that which comes from the damage caused by means of a wrongful act committed by a person to the detriment of another, which does not constitute a breach of a contractual duty. In this type of liability "the duty of repair arises from the wrongful act, not from an obligation but rather that of a generic duty that is not to damage to another, which is a general principle of any legal system"²⁹.

In Chile, as in other countries of Latin America, in a first approach, there is only civil liability under tort law when the one that has caused a damage, has performed an act or incurred in a omission, mediating intention or negligence on their part. Such action or omission, it should cause a damage, or a detriment, injury, impairment, or pain, to another person which is a third victim, in his person or his property.

Article 1437 of Chilean Civil Code establishes that constitute crimes and civilians torts, "the facts that have inferred injury or damage to another person". And article 2284 provides that "the obligations that are born without convention, are born from the law, or the voluntary act of one of the parties" and in the subparagraphs 3° and 4°, adds that: "If the fact is illegal, and committed with intention to damage constitutes a crime. If the fact is guilty, but committed without intention to harm, constitutes a delict".

²⁹ Corral Talciani, Hernán, ob. cit., pág. 24.

But the most important regulation related with this type of liability are in Title XXXV from Book IV of Civil Code, Articles 2314 and the followings.

Article 2314 rules that: "The one who has committed a crime or tort which has inflicted damage to another is liable for compensation, without prejudice to the penalties which the laws imposed for the crime or tort."

Requirements or conditions applicable to tort law are, according to the prevailing doctrine, the following

a) Existence of an act (action or omission) illegal, executed with malice (intentionally) or fault (negligent);

b) The author must have legal discernment about the possible harmful consequences of their acts or omissions;

c) Guilt, on the terms expressed, i.e., intent to harm or mere negligence (excluding, therefore, the facts arising out of force majeure or fortuitous event);

d) Existence of damage;

e) Causal link between the event (negligently or intentionally executed) and damage (this is a problem when several causes converge to produce it).

In essence, torts comes from an illegal, fraudulent or guilty event, causing damage to person or property of another. It is tort, also, because do not arises from the non performance or breach of a contract. There is also a liability that has the law for only basis, regardless of fault or intent from the person responsible. That liability is properly called objective (or strict) and we will examine it later.

As we have seen, the main difference between contract and tort liability lies in the nature of pre-existing obligation which binds two individuals. Indeed, the contractual liability is caused by the willful default or breach of an obligation under a contract by one of the parties in it. In contrast, tort liability arises from breach of a general and implied obligation consisting in not to harm another, arising from the commission of a crime or civil tort, or the execution of a voluntary non-conventional, or by law enforcement alone³⁰.

³⁰ Por motivos de extensión del presente trabajo nos limitaremos tan solo a señalar algunas otras diferencias, a saber: a) *Capacidad o imputabilidad del obligado*: En materia de responsabilidad contractual se supone en las partes la capacidad de contratar, esto es, 18 años de edad. En la extracontractual, al no haber vínculo jurídico contractual, el criterio para determinar la capacidad es el discernimiento. Al respecto, la plena capacidad se adquiere a los 16 años, pero el menor de 16 puede ser capaz si el tribunal determina que obró con discernimiento (art. 2319 del Código Civil). b) *En materia de culpa*: En la responsabilidad contractual la culpa admite grados: grave, leve y levísima (art. 44). Ello se explica porque al existir un contrato entre las partes, la ley les exige diversos grados de cuidado, según sea la naturaleza de este contrato. Así por tanto hay que distinguir: -Si en el contrato sólo se favorece al deudor, por ejemplo, el comodato, tendrá éste un mayor grado de responsabilidad debiendo actuar con aquella "esmerada diligencia que un hombre juicioso emplea en la administración de sus negocios importantes" (lo que significa que responderá de culpa levísima). -Si el contrato es de aquéllos en que sólo se favorece al acreedor, por ejemplo el depósito, la responsabilidad del deudor es menor, respondiendo únicamente si ha actuado sin el cuidado "que aun las personas negligentes y de poca

We next consider the main elements of tort, which is the primary source of liability insurance coverings.

4.- a) The wrongful act attributable to the author

In the area of tort, the wrongful act causing damage and the resulting liability, is an illicit act or omission³¹. This illegal act is classified as a crime or civil tort,

prudencia suelen emplear en sus negocios propios" (culpa grave). -Finalmente, si el contrato favorece a ambas partes (contratos onerosos, por ejemplo, el arrendamiento), el deudor sólo va a responder si actuó sin aquella diligencia o cuidado que los hombres emplean ordinariamente en sus negocios propios" (culpa leve). En cambio, en la responsabilidad extracontractual al no haber un vínculo jurídico previo que ligue a dos partes, como en el contrato, no puede haber diversos grados de cuidado. Por ello cualquier falta de diligencia, cualquier descuido o negligencia que cause perjuicios a otro genera la obligación de indemnizar. c) *Prueba de la culpa*: En la responsabilidad contractual, producido el incumplimiento, se presume la culpa del deudor, de modo que sobre éste corresponderá probar que actuó con la diligencia debida (Art. 1547 inciso tercero). En la responsabilidad extracontractual, en cambio, la culpa del deudor debe probarla el acreedor (la víctima). Sin embargo, como señala Corral no es tan absoluto este principio puesto que en la doctrina comparada se distinguen las obligaciones de medio y las de resultado. Al respecto Corral señala que sólo "respecto de las obligaciones contractuales de medio (cuando lo que se pactó es el desarrollo diligente de una cierta actividad sin que se garantizara un determinado resultado), es necesario probar la culpa (así, por ejemplo, en los contratos de prestación de servicios médicos)". En las obligaciones de resultado, la sola constatación del hecho atribuible al autor y la consecuencia dañosa, bastan para probar la culpa.

d) *Extensión de la reparación*: En la responsabilidad contractual, la regla es que el deudor responde de los perjuicios directos previstos, salvo que haya actuado con dolo, caso en que también responde de los perjuicios directos imprevistos según el Art. 1558. Debe también responder del daño moral siempre que por la naturaleza del contrato, su infracción sea capaz de producir ese tipo de daño. Esto se discute pero embargo cada vez es más aceptado en la jurisprudencia nacional. En la responsabilidad extracontractual, en cambio, se responde de todo daño sufrido por la víctima, por lo que no hay ninguna duda que la indemnización comprende el daño moral, pues el art. 2329 es muy claro al señalar que: "por regla general *todo* daño que pueda imputarse a malicia o negligencia de otra persona, debe ser reparado por ésta...". e) *En materia de prescripción*: La prescripción de las acciones para hacer efectiva la responsabilidad contractual se rige por la norma del artículo 2515 del Código Civil, es decir, que será por regla general de cinco años contados desde que la obligación se hizo exigible. En cambio, la acción para hacer efectiva la responsabilidad extracontractual prescribe en cuatro años contados desde la perpetración del hecho (art. 2332). f) *Necesidad de la mora*: Para que exista responsabilidad contractual, salvo que se trate de obligaciones de no hacer, es necesaria la constitución en mora del deudor (arts. 1557 y 1558). En la responsabilidad extracontractual la constitución en mora no es necesaria; se debe la indemnización desde la ocurrencia del hecho dañoso.

³¹ En el ámbito de la responsabilidad contractual, el hecho ilícito consiste en el incumplimiento de una obligación contractual. Existe incumplimiento en términos generales, cuando la prestación debida no es ejecutada, de conformidad a las reglas del pago. Recordemos que pago es la prestación de lo que se debe. El Código civil chileno, en el artículo 1556, que se refiere a la indemnización de perjuicios, señala las hipótesis de incumplimiento: a) no haberse cumplido la obligación (inejecución); b) cumplimiento imperfecto o cumplimiento impropio; y c) retraso en el cumplimiento.

pursuant to the provisions of Article 2284 of the Chilean Civil Code that distinguishes between "crime" (civil crime) and "tort".

In tort, the wrongful harmful act (action or omission), it runs without intent to injure, but for the mere fault of the agent.

In civil crime, however, the wrongful act is intentional, voluntary. Legally speaking, under continental civil law there is intent.

This distinction considering the subjective element of tort, it does not have practical importance, except in one respect. Indeed, under Article 2329, any damage that is attributable to malice or negligence of a person should be compensated by it. Consequently, the extent of damage in delict or quasi-delict is the same. The only difference is in relation to third parties. The second paragraph of art. 2316 attributes liability to others who profit from other's wrongdoing to get some benefit. In contrast, third parties who have taken advantage of others negligence are not liable.

In addition to the occurrence of a wrongful act, it is essential that the fact can be attributed by law to some particular person, which means, among other considerations, such person must be able to discern the possible harmful consequences of their acts or omissions.

5.- b) Negligence or intention.

From the foregoing it is clear that in Chilean law the fault or negligence are essential for the existence of liability types to which we referred above. Guilt is the main factor to attribute liability, which leads to doctrine to say liability is construed over negligence -the so-called subjective responsibility- under which a person only responds when a factor of liability allocation exists, essentially negligence or intention.

However, this type of subjective liability or guilt, coexists today with strict liability imposed by law, of an exceptional nature, which dispenses the guilt as a factor for allocation, substituting it by the wide concept of *consequences of a created risk*.

Concepts of negligence and intention are set forth in Article 44 of Civil Code. In this rule, the fault is conceived in the traditional tripartite division, which distinguishes between gross, slight and very slight negligence. However, it is clear that this distinction applies only to contracts and therefore to contractual liability, but does not conform to the nature of tort, so is not applicable to it. For that reason that rule cited above indicates that when using the notion of negligence without any qualification, has to be interpreted as referring to the notion of light negligence, which is opposed to the diligence or ordinary care.

As for intention or malice is defined by its fundamental attribute: the purpose to cause harm.

Article 44 text is as follows: "*The law distinguishes three kinds of negligence. Gross negligence, that is do not take care of another party business with care which even unwisely people use in their own businesses. This kind of negligence is in civil law equivalent to willful or intentional misconduct. Slight negligence is the lack of diligence and care that men ordinarily employ in their own businesses. The use of word "negligence" without qualification, means slight negligence. This kind of fault is opposed to the ordinary diligence or care The one who must manage a business as "a good parent" is responsible for this kind of fault. Slightest fault or negligence is the lack of that careful diligence that a wise man used in management of their important business. This kind of fault is opposed to the utmost diligence and care. The intent or malice is the purpose to cause injury to person or property of another.*"

Behaviors that generate negligence under law or "causes of the fault", either by action or omission, are the following:

a) Carelessness: is due to an omission. It is the passive form of guilt, by omitting what is advised to avoid damage.

b) Negligence: lack of care due to do a risky action. In this case, the fault is originated due an active behavior, since it runs an act without taking the necessary precautions; and

c) Lack of skill: the lack of care and diligence is due to the absence of knowledge, experience or skill in to perform an activity.³².

The precise way how to establish the existence of fault or negligence of agent, except in cases where the law presumes that negligence, has been discussed within the doctrine. However, it can be said that the key criterion is that predictability of the result is the logical and psychological measure must be taken into account in the analysis of whether or not there was the possibility of avoiding the damage.

This notion is compatible with the essence of guilt, which is not to foresee what could and should be foreseen, or the failure to adopt the necessary measures to avoid the damaging event.

Finally, note that in some cases legislator establishes presumptions of guilt in Civil Code, as in the case of damage caused to the environment when there has been violation of environmental standards (Art. 53 Law 19,300) and damage caused by

³² En el derecho español, los mismos conceptos están encerrados en las siguientes disposiciones: Art.1104 que establece: "*La culpa o negligencia del deudor consiste en la omisión de aquella diligencia que exija la naturaleza de la obligación y corresponda a las circunstancias de las personas, del tiempo y del lugar. Cuando la obligación no exprese la diligencia que ha de prestarse en su cumplimiento, se exigirá la que correspondería a un buen padre de familia*"; y el art. 1105 que dispone: "*Fuera de los casos expresamente mencionados en la ley, y de los en que así lo declare la obligación, nadie responderá de aquellos sucesos que no hubieran podido preverse, o que, previstos, fueran inevitables.*"

hazardous products officially declared by Consumer Protection Act (Art. 47, Law 19.496).

Civil Code establish the following presumptions:

a) Presumptions of guilt for own facts or conduct.

Article 2329 establishes the general rule of liability, "all damage must be compensated," adding that it is presumed the guilt of:

- The one who shoots a gun recklessly.
- The one who removes a ditch or pipe in street or road without the necessary precautions for not to fall the people who pass through there, day or night..
- The one who, in charge of to construct or repair a pipeline or bridge across a road, let it in situation to cause harm to those who pass through it.

b) Presumptions of vicarious liability.

The general rule is that persons are liable only for their own facts, and exceptionally for the acts of others who are in charge of them, because law estimates that has been negligent in to take care of that others(art. 2320 inc. 1 °).

This responsibility is general, applicable to all persons who are in charge to take care of another.

6.- c) Damage

The damage is essential for the existence of liability. So big is its importance that now draws a tendency in civil law system to designate the law that deals with civil liability as the "Tort Law", instead of Civil Liability.

Damage is any injury, impairment or deterioration, material or moral, that a person experiences, whether in life, physical integrity or health, or its assets and rights.

As defined by German author Karl Larenz, damage is an unfavorable alteration of the circumstances as a result of a specific event occurs against the will of a person, and that affects the legal rights belonging to it, whether with respect to its personality, freedom, honor or wealth.

Damage does not hit only in one direction, causing a single type of economic consequences. If a person is damaged in a crash of vehicles, he may need to pay the hospital fees, buy medicines, pay the ambulance, psychiatric treatment, may have to undergo a costly rehabilitation or hospitalization, and due to forced inactivity, may lose an important business, and even also may be unable to work and therefore, to work and keep him and his family, etc.

The damage must be real, direct and foreseeable, and has to affect an own interest.

a. Being *real*, means that cannot be eventual but actual; necessarily has to occur, should not be subject to condition, but may well be a future harm, as in the case of lost of profits.

b. Being *direct and predictable* means that no damages could be compensated if they are not a direct consequences of the negligence or wrongful act, or to be so remote and reasonably connected with the harmful event, that is not reasonable that the tortfeasor has specifically take it in consideration.

c. Being *own* means It concerns not only to the ownership of damaged property, but more generally to the ownership of interest affected interest.

7.- d) Causality relation

As assumption of general liability regime, and in particular the one governed by Articles 2314 and following of Chilean Civil Code, is also required, there is a causal link between injury and wrong and unjust conduct of the agent who is charged with liability.

The problem arises when damage, instead of coming from one single cause, comes from several.

Chilean jurisprudence has held that *cause* is the link between action and harm, that is, the necessary existence of a link between the behaviors of the subject to which is requested or required to compensate and damage. In order to determine what damages are those that can be requested to compensate to liable in liability regime, doctrine has to use a system called legal system of liability allocation through an operation known as the doctrine, "causation"³³.

Several theories have been proposed to solve this problem, such as the "equivalence of conditions doctrine", "proximate cause", "prevailing condition", "efficient cause" and "adequate cause".

It is beyond the scope of this work, explain each in detail. However, we will say that each of these theories has, as in all aspects, advantages and disadvantages, and has been demonstrated by jurisprudence of Chile, that to decide in each particular case, it is necessary to analyze the facts and its circumstances and contrasting with the principles of each theory for determining the causal link, applying the doctrine most relevant to the way in which these events occurred. Thus, in this way for example, has been used in some cases the doctrine of equivalence of the conditions, that hold that all conditions are equivalent in the causation and as to its existence in the generation of an harmful outcome, which tends to extend significantly the allocation of liabilities.

However, majority in doctrine and jurisprudence have tended to use the so-called theory of adequate causation, but without enough regard to delimit it with

³³ Sentencia del Tribunal Supremo de España, de 2 de enero de 2006.

theory of efficient cause. Chilean doctrine says, as a result of numerous rulings of the Supreme Court, that the harmful result must be a natural consequence, adequate and sufficient, being understood by natural, which required between the initial act and the result a relationship of necessity under to generally accepted knowledge, and must be weighed in each case whether the act is presented as the cause, is sufficiently proficient to be derived thereof, as a necessary consequence, the damaging effect that is thrown as a result.

The theory of "adequate cause" was proposed by Von Kries in 1888 and holds that cause of an outcome is one that would produce ordinary and properly so. This theory starts by distinguishing between the cause of a result, and simple conditions. It is not cause, any condition of the event, but one that is suitable to determine or produce it ³⁴.

8.- Tendencies in the evolution of civil liability under the civil law systems.

In contemporary times, the following tendencies are observed in the development of civil liability doctrine³⁵, with the consequential gradual changes on the legislation and the jurisprudence:

1. Tendency to the unification of the civil liability.

One of the aspects in which has been a significant modification is the tendency to unification of the civil liability that traditionally has been divided in two stagnated compartments, the contractual liability and the non-contractual liability.

In effect, a strong modern tendency is heading to the recognition of a general theory of the civil liability.

According such doctrine, exist common elements for both types of liability and as a consequence is convenient to abandon the arbitrary distinctions. Like for example, for common elements are referred:

- a) The action or breaching omission of the contract or producing of the tort act.
- b) The unlawfulness of this and causes excluding it
- c) The guilty of the agent (attribution factor).
- d) The production of damage
- e) Casual relation between the action or omission and the damage³⁶.

³⁴ Johannes Adolf von Kries, fisiólogo y psicólogo alemán, (6 de Octubre 1853–30 Diciembre 1928).

³⁵ Evolution of doctrine on common liability. Special cases of liability that are analyzed forward in this paper, follow the evolution of common liability and, in some cases, have developed as a consequence of this evolution.

³⁶ Without prejudice of this unifying tendency, also appears special statutes of civil liability reflecting certain fields of the damages law. For example, the treatment that had been given to the aviation accidents, nuclear accidents, liability for work-related accident, liability for products, liability for

The tendency to unification of the liability has defenders and detractors.

In Chile and given the form in our legislator has ruled the civil liability, in two diverse titles of the Book IV, the defenders of the doctrine of duality of liabilities or dualist thesis, holds that non-contractual liability is external to every pre-existing legal link and precisely origins to such link. Instead, the contractual supposes the existence of a previous obligation whose breach origins the liability.

In fact, the dualist thesis is welcome by the majority of the doctrine and by the Chilean jurisprudence which has followed in this aspect of opinion of Professor Arturo Alessandri Rodriguez.

By its side, within the supporters of the doctrine proposing the unit of the liabilities or monist thesis, there are some who estimate that every liability is criminal, as non-performing a contract is equally a tort act, due to the fact that the contract is a law for the parties (Josserand). Others understand that both in the contractual liability and the non-contractual, there is a violation of a pre-existing obligation (Planiol and Ripert, Mazeaud brothers and within the Chilean doctrine, Professor Luis Claro Solar).

Planiol and Ripert hold that both liabilities create an obligation, which is of repairing the caused damage, that both suppose one previous obligation, that the contractual would origin from the contract and the non-contractual from the law and in both the guilty is established by a same fact, the violation of this obligation.

Alessandri, dissident holds that in the non-contractual liability, there is no previous obligation, as before existing an tort act is not possible of talking about creditor and debtor neither of legal relationship between the determined persons³⁷.

environmental damages, etc., all of these examples that have been collected in special laws.

³⁷ Planiol suggest the reduction of the obligations sources, in two unique and complete: the contract and the law. According this theory, *in the case of the contracts*, the obligations are created by will of the parties, these determine the object of the obligation object and its extension. The will of the parties, has a preponderant role and the law is only sanctions what the parties wanted. *In case of the obligations that derived from the law*, the debtor has not wanted to be obliged, it is the law which imposes such obligation, whether in virtue of the tort fact or the tort debtor, in other terms, imposed directly the obligation without necessity of the debtor fact. Synthesizing, only the will of the party who sanction or accept the fact, could serve as base for a person restricts his liberty and therefore, be obliged. All of the rest cases the legal obligations would matter, this is, if someone committed a crime or negligent, the source of its obligation is not its fact, but attributing by the party of the law, legal consequences to this fact. Definitely and using Planiol words: "obligation exists because the legislator wants to ". On its side, brothers Mazeaud hold that like the contract is a source of obligations, the breach of the contract, i.e., the contractual liability also is. Since, if there is a total non-performance or partial of the contract, a new law link origins, a new obligation; the obligation of repairing the prejudice suffered, which is different than the originally agreed obligation and has as a source, not the will of the parties, but the law. Alessandri dissident of this, stating is not effective that the breach of a contractual obligation origins another in its replacement. The obligation is the same and what occurs is that produces one of the effects that the law

2. *Emphasis on the damage reparation.*

Modern tendencies in civil liability matter are fundamentally interested on the victim, trying to repair the damage suffered by her. The tendency is changing the axis of the legal concern, leaving as central axis of the legal concern on the liable and rather concerning on the damage to be compensated.

This is what leads the objective factors of attribution of liability, forgetting the old aphorism that there is no civil liability without fault. Which really matters is that there is no civil liability without damage.

In consequence, this tendency leads us to an attribution system of liabilities, where man is liable for the risks he has created, system that has majorly developed on the doctrine and compared law, in matter of company liability.

3. *Objective criteria of attribution. The objective liability or strict law*

As consequence of the preponderance attributed to the concert on the victim of the damage, objective factors of attribution have been incorporated, including the burden of proof investment on liability matter, such as occurs on the contractual liability³⁸.

If the burden of proof is one the elements that difficult the reparation obtaining, the legislator has treated of mitigating it, establishing presumptions of guilt. Some presumption is contemplated on the vicarious liability for the external fact (of the entrepreneurs for the facts of their dependents, of the parents for the tort facts of their under-age sons) and the existing in the case of the damages caused by a fierce animal.

This for certain opposes to the traditional conception in matter of civil liability which only obliges to compensate the damages caused with guilty properly proved.

4. *Extension of damages to be compensated. The collective or diffuse damages*

Another important feature in the change of conception of the civil liability manifest on the extension of the compensatory damages, including the called

attributes to the mandatory force of the contracts: the one of repairing the prejudices caused by the breach.

³⁸ Enneccerus states that constitutes an inspiration on the modern law evolution, that in general, man responds to every damage, including of not being guilty, despise he has executed an act with prudence and without possibility of preventing the damaging result, particularly in the field of the activities which are risky by its own nature.

collective damages or diffuse interest damages, which influence in one collectivity and whose members bear it as part of the group.

In other words, in some cases, the damage has lost its individual character, whether in its abstract or subjective sense (criteria fundamentally based on the difference between property of the injured, before and after of the prejudice to compensate) or concrete (attending the prejudice the injured has really suffered) and has become social. Social damage is translated in the influence of the damaging success over third parties that have not participated in the successes or have not been parties in the contraction, which gives certain character supra-individual. Always there will be social damage when existing collective interests or supra-individuals prejudiced. Typical examples of these interests are the environment protection (like when a petrol ship spills) and the protection of the consumers right, which without a doubt are consequence of the evolution as for the intensity or magnitude of the damages that may be caused, as a result of facts extremely risky, such as contamination, especially nuclear.

5. *Development of the State liability.*

Another of the current tendencies of civil liability has relation with the development and expansion of the State liability. It is intended to make extensive the State liability, even acting within its competence, if in the damage caused exists a cause of attribution legitimate and established in the law. Like for example, if the State, even within its tort act causes a damage the current tendency demands that damage must be equally compensated. As example of a case which materializes this tendency, may be quoted in Chile, the case of confiscation and destruction of sea products when in the sea have been observed, contaminating agents or damaging for the health (red tide), situations in where the State, acting inside its attribution and competence sector, sacrifices a private or collective property interest in function of a social interest which estimates preponderant, which is the health and physical integrity of people and environment. The existence of a preponderant interest, like in the states of necessity, may justify the sacrifice of the interest in dispute, but that does not eliminates the existence of damage and the necessity of reparation.

Besides the above, it worth quoting the development the State liability doctrine has had for lack of service, last case in which the liability attribution relies, instead, on a lack of duty of care by part of the State agents, at the style of the traditional doctrine.

6. *Emphasis on the risks prevention.*

Another interest modern tendency is the prevention function attributed to the liability. In the classical system, it was estimated that prevention through the sanction

to the guilty was the most efficient form of prevention. But as we have said before, the defenders of the called "Economical Analysis of Law" have studied in details the preventive function of the civil liability, inside the purposes attributed to it. Especially Calabresi, at studying the accidents costs, includes them inside the function of the civil liability, concluding guilty is not as efficient as it was thought to be. For the effects of reducing damages or preventing accidents, there are multiple other forms of making it, like for example the fire arms carriage, or becoming more expensive the exercise of these acts (like for example, taxing with high taxes to contaminating industries) and promoting the liability, voluntary or mandatory insurances contracting.

7. *Social safety and the establishment of mandatory insurances.*

Like we have already highlighted, due to the advance of science and technology, every time there are more risks to avoid and affect not only certain people or entities directly injured, but also indirectly to the entire society, which has led to a progressive expansion of the obligation, legally established of contracting liability insurances or equivalents. For covering damages caused from risky events of collective importance. Tendency observed worldwide, but with major intensity in certain countries, such as: Spain, France, Portugal and Belgium³⁹.

In Chile, such insurances are the established by the following legal rules:

1) The DFL 251 regulating the commercial insurance, in its Article 58, letter d) establishes that insurance brokers have the obligation of "constituting a guarantee, through bank form or the contracting of an insurance policy"; this policy is of guarantee until certain amount and of civil liability from certain amount.

2) Article 62 letter b) of the same DFL establishes a similar obligation to the insurance adjusters but only treats about a civil liability policy.

3) The Stock Market Law 18,045 in its Article 30, also disposes the obligation of the stock brokers of constituting, prior to the performance of their positions, and for securing the right and complete compliance of all their obligations as value intermediates, a guarantee in benefit of the present or future creditors who have or would have in reason of their brokerage operations. Such guarantee may be constituted in cash, bank guarantee, insurance policy or pledge on shares ..."

The policy complying such object, despise is enunciated as one of guarantee, in the facts is of civil liability.

4) Article 100 of the Rule of the Environmental Basis Law 19,300, establishes an option of taking a policy (whose nature does not clarifies) for covering damages to

³⁹ The topic was matter of particular analysis in the World Congress of AIDA, held in Paris in May 2010.

third parties, for executing preliminary works while the approval of a project by the environmental authority is obtained.

5) The customs agents and forwarding agents also have the option of insurance, this form as for the requirement contemplated in the Exempted Resolution N° 2750 of the 28th March 2008, issued by the National Service of Customs, grounded on the articles 24, paragraph second and 202 of the Ordinance of Customs. Such rules establish that such functionaries must present guarantee before the National Service of Customs, which will consist in Insurance Policy or Bank Guarantee, both valid for one year, of global type and yearly renewable for the same period. For the amount determined by the National Service of Customs, according the property and movement estimated to be made by the Cargo or Forwarding Agent and will assure the payment of fines and of every cargo that may result against him, with the purpose of the exercise of his activity before the Customs.

6) The Civil Liability (CL) insurance for sea contamination contemplated in the Article 146 of the Navigation Law.

7) The insurance must contact the air transporters according as established by the Civil Aeronautics Board, according the disposed in the Article 1st of the Law Decree N° 2,654 of 1979, adjusting in everything to the liabilities stated in the Aeronautical Code, and

8) The Law 19,357 on Real Estate Co-ownership, established in its Article 36 that..."Unless the co-ownership rule provides the contrary, every units of the condominium shall be insured against fire risk, including in the insurance the common ownership assets in the proportion corresponding the respective unit. Each co-owner shall contract this insurance and in case of not doing it, the administrator will contract it on his own and in charge of it, formulating the charge of the corresponding payment jointly with the shared expenses, indicating its amounts in the breakdown of these. On the payment of the owed by this concept, the same rules governing the shared expenses will be applied".

Summing up, modern tendencies place the axis of the civil liability on the damage reparation and particularly of the unfair damage, introducing objective criteria of attribution and responsibility, expanding the damage extension to be compensated, whether through the acknowledgement of the collective interest existence and the destructive potentiality of certain acts in modern society. Lastly, a treatment tendency of the traditional civil liability types is observed, contractual and non-contractual, on the base of the common elements.

4.- Types of liability subjected to special rules.

This liability may come from the ruin of a building, from something that falls, or

from animals, as provided in Article 2323 of Chilean Civil Code.

a) *Liability for the ruin of a building.*

In this case, damage must come or arise from ruin, collapse or destruction of a building, without having the owner executed the necessary works to prevent or avoid it.

If there is a plurality of owners, compensation should be in proportion to their rights in property, what is an important exception to the principle of solidarity given by Article 2317.

It should be mentioned that if damage has harmed to a neighbor, this one can only allege liability in the case of Article 932 of Civil Code, which provides the action known as "ruinous construction complaint."

When the damage from a construction defect, applies the rule applies provided by Nr. 3 in article 2003, which regulates contracts for a construction work (Art. 2324).

b) *Liability for things which falls*

In this second case, we are referring to liability for things which falls or is thrown from the top of a building, being the classic example the pot falling from a balcony on someone who is passing on the sidewalk of the street. This matter is governed by Article 2328 which establishes liability for all people living in the same part of the building, except if can be proved from which exact part of the building the thing has fallen. In this case In case cannot be proved that, liability contemplated in the rule is simply a joint liability, which also makes exception to the principle of Article 2317. The law gives a "class action", public, to anyone who can file an action to avoid damages caused for things that threatens to ruin or fall.

c) *Responsabilidad por el hecho de los animales. Liability for damages caused by animals*

Under Chilean law, liability for animal's facts regulation provides two different situations:

1) Damage caused by an animal that is domestic and provides utility to a property. In this case, the animal's owner is liable for damage it causes if it has escaped or released, unless this occurs without his fault (Art. 2326).

2) The harm caused by an animal that is not domestic and do not provides utility, such as a lion or a tiger, the owner is liable in any case, and even in the case that animal has escaped from an iron cage by accident. This is a case of strict liability

that arises merely for the creation of risk (Art. 2327).

2.- Liability for acts of dependents

The general rule is that persons are liable only for their own acts and only by exception for the acts of others. Liability is attributed to people who are obliged of caring for others in accordance with Art. 2320-1 Civil Code. Usually is said in these cases, of "liability for others acts", but really it's the own responsibility of someone, consisting precisely in the lack of care to prevent others persons from which there is an obligation to take care, for causing injury to another. This liability is general, meaning liability for all persons who someone is obliged take care.

Are requirements to produce vicarious liability, the following:

a) Existence of a dependency relationship, as is the case of parents who are in charge of their child, employer for their employees, etc.

b) The tortfeasor who is under care of another must be legally capable of discernment. If he is not (in Chile the child under seven years old or insane), Article 2319 Civil Code is applicable, that makes directly liable to their parents and/or representatives in care of them.

c) Negligence of the person in charge of care, which in the Chilean legal system is assumed, and

d) To prove the guilt of dependent or subordinate.

As the employee is capable, liability can be claimed from both, him or its employer, that is against the subordinate and against the employer that is legally liable for their acts executed in the frame of their activities as employee, assuming the law that the person in legal care was not sufficiently diligent in the fulfillment of his duty. However, usually the employee will be insolvent, so that the victim will want to direct their action against the liable third, the employer.

This presumption of guilt from others act is "simply legal" so can be rebutted by contrary evidence (final paragraph Art. 2320).

Pursuant Art.2325, for its lack of effective care, the party in care of them is obliged to assume the obligation to compensate third parties affected for wrongful acts of people who depend on him or is under his care, but is entitled to pursue the reimbursement against the person that actually caused the damage (Art. 2325). Two requirements are needed:

- The harmful act cannot have been made by order of the person from whom it depends.

- That dependent be capable to be attributed for the crime or tort, because if not, apply the rule in Art 2319, and in that case the only liable would be the representative and he could not seek reimbursement.

Are cases of liability for the act of a third party, the following:

1. Parental responsibility (Art. 2320 inc. 2 °) for the acts of their children in their care, provided that minor is capable of crime or tort, because if it's not, the rule of Art. 2319 applies, and the child lives in the same house as their parents.

It is important to emphasize that parents should be in charge of child's personal care, and personal care is limited within legal standards and normal use. There is, however, given a presumption of law in Art 2321 regarding this care, which refers to the bad habits that have left parents their children acquire. In this case, is not needed they reside in the same house.

2. Liability of guardians and curators by the acts of persons who live or are under their dependence and/or care (Art. 2320-3).

3. Liability of school directors for the conduct of the pupils under their care, even as adults (Art. 2320-4).

4. Liability of artisans and entrepreneurs because of their trainees and dependents while under his care (2320-5).

5. Masters liability for the conduct of their servants (Art. 2322), provided those:

a) They are working in exercise of their functions. No liability for acts committed outside the course of their duties.

b) That employee does not exercise its functions in an improper way, could have been unpredictable wrong. There is no liability if the master had no way to prevent wrong dependent exercise of their using all his authority (Art. 2322-2).

In comparative law, legal standards under numbers 4 and 5 above, are known under the generic name of "Vicarious Liability of principal by the acts of his employees or dependents". Under this concept are grouped all practical cases in which damage is caused by an agent on exercise of the functions entrusted by an employer or principal. Therefore, in all these cases above can be distinguished the following three common elements:

a) An agent's direct and material damage, agent called either "dependent", "manager", "commissioner", "agent" and so on.

b) A relation or direct link between this agent and the employer liable, commonly called "relationship of subordination and dependency", and

c) Damage was caused in or in connection with the functions assigned to the first.

In comparative law there are three major theories regarding the basis and structure of the principal's liability on behalf of your dependents:

1. *In eligendo vel vigilando doctrine.*

This doctrine postulates that employer is liable only if can be proved that has committed a fault in selecting, monitoring, directing or controlling employee who directly or immediately caused the damage. It is understood that the employer, from the moment he hired the employee and is under his orders and instructions, is

required to monitor their behavior to perform safely and efficiently in order to avoid damages to third parties. Therefore, if dependent causes damage, this should be more the fault of the employer than employee's own fault.

In all jurisdictions that use or accept this system, the fault of the employer is presumed, that is, the victim need not to bear the burden of proving negligence of defendant employer. For this reason is always granted to the latter (the defendant employer) the possibility of proving that even with his authority and care, he could not prevent the act (the so-called liberatory test).

Consequently, employer's liability is direct and not subsidiary. The victim can sue the employer directly without first suing, or jointly at least, to the material and directly dependent who caused damage. Liability of employer and the one of dependent direct agent of damage are autonomous and independent. Also, is not needed guilt in the dependent direct agent of harm, and even is not needed the latter be capable of committing crimes and civil torts. It is possible just to blame directly the defendant employer; but this defendant employer may be exempted from liability using the so called liberatory test, i.e., proving that with his authority and care has failed to prevent the damage. The employer who has compensated the victim cannot claim against their dependent the reimbursement of compensation payment as basically he has paid an own debt. He could proceed against his dependent only if he can prove that dependent caused damage with negligence or intentionally, and just for the part that corresponds to employee's guilty in the liability who ends in paying compensation.

This way of conceiving and structuring employer's liability is consistent with the doctrine of liability at the time of European and Latin American coding, in which there is no liability without fault.

2. Vicarious liability (reflex or substitute) doctrine.

Under this doctrine the employer is strictly liable for damage willfully or negligently caused by their dependents in exercise of their functions. In other words, once dependent proven is guilty in operating, the employer cannot avoid liability claiming to have used due diligence in selecting, monitoring, management and control of their dependents. The entrepreneur is a guarantor of his dependents faults and must compensate victims in solidarity.

Employer's vicarious liability is essentially characterized by the following:

a) It is not necessary to prove guilty of in the defendant employer and he cannot be waived proving exercised all diligence and care to prevent damage. His liability is strict or no-fault, since it is not allowed to present evidence to be liberated. His liability is to guarantee the faults of their dependents.

b) The victim must only prove dependent's guilty in causing damage (negligence in operation). Once accredited these circumstances, personal liability of dependent to "spread" to the entrepreneur.

c) Therefore, it is essential that direct agent of harm be capable of committing torts because, otherwise, cannot be personally liable to compensate victim or force on impact or guarantee its principal.

d) Under this perspective, as determined by each respective legislation, the employer's liability may be direct or subsidiary. In the first case, the victim will have a direct action against the principal. In the second case, the victim is obliged to demand - first or at least together - the employee, direct agent of harm.

e) The employer who pays the victim can repeat the appropriate compensation for the total against the guilty employee, as this is the one and only responsible for all damage caused to victim ⁴⁰.

3. Employer's liability for business risk

This doctrine is the latest explanation for origin and extent of employer's liability and is a modern application to goods and services production, of old principle of *created risk*, in which is founded strict liability that we will examine in its general scope of application and not only to employer's civil liability.

3. - Strict (or objective) liability.

How we have said in previous paragraph, because of preponderance that law

⁴⁰ En Chile, múltiples preceptos que aplican supuestos legales que responden, en su estructura y aplicación práctica, a un régimen de responsabilidad indirecta, refleja o sustituta. Así, por ejemplo, el art. 886 del Código de Comercio establece la responsabilidad civil del naviero por los daños causados por su capitán, oficiales y tripulación. El art. 162 del Código Aeronáutico (Ley N° 18.916 de 19 de enero de 1990) establece la responsabilidad civil de explotador de aeronaves por los daños causados a las personas o cosas a bordo de ellas, con ocasión de un abordaje aéreo imputable a culpa o dolo del piloto de la aeronave. El art. 174 inciso 2, de la Ley sobre Accidentes del Tránsito (Ley N° 18.290 de 7 de febrero de 1984), establece la responsabilidad solidaria del dueño de vehículos por los daños causados por el conductor, sea éste dependiente o no del dueño/titular civilmente responsable. Asimismo, el art. 145 de la de Navegación Marítima (DL N° 2.222 de 31 de mayo de 1978) estableció que el dueño, armador u operador de un barco o artefacto naval es civilmente responsable de las faltas, imprudencias o negligencias de sus dependientes o de la dotación respectiva y no podrán éstas ser alegadas como causales de exención de responsabilidad. Por último, podemos señalar que la responsabilidad civil del Estado/Administrador y de las Municipalidades puede obedecer a un esquema de responsabilidad indirecta o sustituta si el daño ha sido causado por la actividad material de algún funcionario, empleado o dependiente.

attributes to concern for the injured, objective factors of attribution were incorporated, adding a reversal of burden of proof in regard to liability, as in Chile are regulated in the field of contractual liability.

Are allocation of liability criteria proposed by objective or strict liability doctrine, the following:

a) Theory of risk-benefit.

Liability is based and justified by the economic evaluation of risks able to cause damage. So who is the one that reports benefits from an activity is liable for risk created and the harmful outcome.

This theory has been well received in support of legislation that regards on occupational accidents and other risky productive activities, but does not reach those cases in which the accident occurs as a result of an activity that does not report profit.

b) Theory of risk created or exacerbated risk.

For this doctrine, liability is based on the simple fact of someone having created a particular risk or have aggravated an existing risk. It is assumed that whoever creates a risk is because get a profit from it. The problem is that all human activity is potentially risky, so widespread acceptance of this doctrine would lead to an inhibition of economic activity that would restrict the freedom and would mean an obstacle to development of activities that still being dangerous, need to be promoted for benefit of society.

c) Other theories.

There are other theories that are based generally on the idea of social liability and/or the better allocation of the burden of risk. All victims should be in a position to claim compensation for damage suffered to who is best placed to bear the cost of accidents.

The doctrine more widely accepted is that subjective liability based on negligence must remain as the basic foundation of general liability, but not an exclusive one, so that for certain cases is fair and equitable a strict liability based on risk, as in the cases of environmental damage, products liability, traffic accidents, air and sea navigation, etc.. It is further argued that strict liability should be limited or regulated in some way, for example, by regulation of the amounts of compensation, excluding compensation for moral damages, compulsory insurances, etc.

In Chilean law we find cases of strict liability, which covers both, cases where only acts of god or of others free from liability, and situations in which even that do

not relieve the agent of compensation duty. Some significant cases are:

a) Liability for Damage Caused by Aircraft (Articles 142 et seq. and Art. 155 et seq., Aviation Code). Imposes on carrier's, obligation to compensate for death or injury to passengers during their stay on board the aircraft or during embarking or disembarking operations, with fixed by law compensation limits. Carrier may be exempted from liability only when damage is caused by an act or fault of own victim, or is a consequence of a crime attributable to another than a crew member or dependent.

b) Liability for Nuclear Damage (Act 18,302, on Nuclear Safety), whereby the operator of a nuclear installation or facility will always bears liability for damage, even those that come from unforeseeable circumstances and force majeure, limiting the grounds for exemption only to cases where the nuclear incident that caused damage is due directly to hostilities in armed conflict with a foreign power, insurrection or civil war.

c) Liability for labor accidents. Law 16,744 of 1968 regulates an hybrid system of social security and liability compulsory insurance, under which compensation is payable regardless of whether employer was guilty or not, excluding only accidents due to force majeure, absolutely unconnected with work, and those intentionally caused for the victim (Article 5).

d) Liability for damage caused by wild animals (art. 2327 CC).

e) Liability of owner for damage caused by motor vehicles (section 174 Law 18 290). Establishes liability of vehicle owner for damage caused by driver, whether dependent or not the owner/operator liable

f) Liability buildings damage. Article 18 of General Law of Urban Planning and Construction, makes liable to owner first vendor of a building, for any damage arising from faulty or defective construction.

g) Liability for oil spills, which are sanctioned by Article 144 of Navigation Act (DL 2222, 1978).

4.- State's liability due lack of service and for wrongful prosecution or conviction of someone.

As we have said above, one of current trends in liability law is related to development and expansion of State's liability. The idea is to extend its liability even to cases where State's agencies have acted acting within its jurisdiction, if there is legal grounds to attribute them liability.

Article 41 of Organic Constitutional Act states: "The State shall be liable for any damage caused by the administrative bodies in the exercise of their duties, without prejudice to the liability of the official who caused it".

Article 42 of this Act states: "The government bodies are liable for damage they cause by lack of service."⁴¹

Typically, this tort of the State is called "liability for lack of service", although the concept includes not only the omission of a service, but neglect, imperfect or poor compliance of public functions entrusted by law to state bodies.

Peculiarity that has the notion of "lack of service", in relation to classical subjective liability is that do not attend to the fault of someone in particular, but fault or negligence in organization, "being enough that public behavior of the Public Service be different from that imposed by the rules governing its operation"⁴².

La responsabilidad por falta de servicio es directa u orgánica, pues importa un defecto imputable a la organización administrativa, en la que el funcionario que concreta la falta es un engranaje del sistema. Por lo mismo, no es necesario, para los efectos de la imputación de responsabilidad, echar mano a las construcciones dogmáticas de la culpa anónima o de la culpa difusa, muy recurrentes en materia de responsabilidad civil del empresario por el hecho del dependiente⁴³.

Se entiende por falta de servicio "*cuando la Administración no cumple con su deber de prestar servicio en la forma exigida por el legislador no obstante disponer de los recursos para ello y no concurrir ninguna causal eximente*"

Liability for lack of service is a direct or organic matter, as a defect attributable to the administrative organization, in which the officer who do not give the service is a particular gear of the all system. Therefore, it is not necessary for the purposes of attribution of liability, to elaborate dogmatic constructions of anonymous or a diffuse liability very common in civil liability of employer for their employees acts.

Lack of service appears "when the administration fails in its duty to serve in the manner required by the legislature yet have the resources to do so and not go any causal defense."⁴⁴.

A special type of liability is set forth directly on the Constitution of Chile and is intended to compensate people who are convicted of a crime and subsequently is

⁴¹ Vid. "Antecedentes y alcances del sistema de responsabilidad por falta de servicio de la administración del estado. Análisis crítico de su recepción en la jurisprudencia nacional". María Alejandra Aguad Deik. Fuente. Microjuris

⁴² Vid. "Antecedentes y alcances del sistema de responsabilidad por falta de servicio de la administración del estado. Análisis crítico de su recepción en la jurisprudencia nacional". María Alejandra Aguad Deik. Fuente. Microjuris

⁴³ Awad. Op. Cit

⁴⁴ Informe de la Comisión de Estudios de las Leyes Orgánicas Constitucionales, de fecha 6 de diciembre de 1983, dirigido al Presidente de la República, que cita Pedro Pierry Arrau en su trabajo "Algunos aspectos de la responsabilidad extracontractual del estado por falta de servicio", pág. 10. Fuente: Microjuris.

established that the convicted person is innocent. This liability for miscarriages of justice in criminal matters is regulated specifically in art. 19 No. 7 letter i) of the Constitution, which states: "Once is established in a criminal case that the one which has been prosecuted or convicted, and Supreme Court of Justice by resolution declare that prosecution or conviction was unreasonably erroneous or arbitrary, will entitled to be indemnified by the state, for economic and moral damage suffered. Compensation will be judicially determined, in a brief and summary process, and in which the evidence shall be analyzed in equity."

5.- Defenses against imputation of liability.

Apart formal defenses based on time limits, invalidity, court incompetence and other procedural exceptions, one against who is addressed a claim for liability have several justification grounds for to plead not guilty, that exclude wrongfulness of the conduct. We will examine below:

A) State of necessity.

State of necessity is essentially an execution of a wrongful act in a state of extreme distress, which prevents normal behavior, in order to avoid a greater evil. Is the collision of two or more rights or legitimate interests, which is resolved by the sacrifice of one for the other. For example, self defense, or the case of a ship captain ordered to release the sea all or part of the merchandise that is carried in order to save the ship of imminent shipwreck.

The necessity cannot be confused with a fortuitous event because the latter implies that damage comes from a completely external cause not imputable to the accused.

The problem here is whether or not compensating damage. Some authors hold that although state of necessity, in principle removes the wrongfulness of the conduct to the entire legal system, but the third party injured would be entitled to compensation, because otherwise we would face an unfair situation, and therefore contrary to law (equity as a factor of attribution), as long as a result of such conduct, the one who execute the act be completely free of damage and, on the contrary, the affected by that act be the only person affected by such conduct⁴⁵.

⁴⁵ El Código penal español contempla una norma que dispone que de los daños causados en estado de necesidad son responsables civiles directos las personas en cuyo favor se haya precavido el mal, en proporción al perjuicio que se les haya evitado, si fuera estimable o, en otro caso, en la proporción que el Juez o Tribunal establezca según su prudente criterio. Lo que esta norma está diciendo es que si alguien resulta favorecido por una acción dañosa causada en estado de necesidad (porque se le ha evitado un mal), debe a la víctima de tal conducta dañosa, el beneficio que ha experimentado.

B) Disruption of causal link.

It may be that in the causation of damage other foreign factor interfere, so that the damage cannot be attributed solely to the action of the agent itself because its action is not proportionate to damage effectively caused (the so-called "contributory causes"). These elements that interfere with the causal link may be fortuitous, the fact of a third party or the action of the own victim. When causation is completely eradicated, we address the phenomenon of interruption of causation. When only a decrease in the intensity of the causal force, as the only strange thing is to collaborate in producing the damage, we are faced with a joint cause. The total or partial absence of causation causes as a result, partial or total lack of liability and if there are contributory causes, the judge must allocate liability. Interruption of causal link is given in the assumptions discussed in the numbers that follow.

C) Own victim's guilt.

There is victim's guilt, when it acts in a negligent, careless or reckless way with respect to his own person or property, exposing to danger of harm. It can be said that the fault of the victim is a vicarious interrupting causation and excuse the author's liability. Indeed, although there is a fault of the latter (or creation of a risk), damage had not occurred to the victim if she had not voluntarily exposed himself to potential harm, in fact interfering with the causal process and determining their own damage. However, the real problem lies, not in saying that in this case causal link do not exists, as is evident, but whether it is justified that only the victim support all harm. The assumptions are:

3.1) Only the victim is guilty. Total exemption from liability.

If damage has occurred solely because of victim's interference or guilty, there is no liability to the defendant, as there is not causal linking its activities with damage. Therefore, no question of compensation reduction in terms of art. 2330 Chilean Civil Code, but the absence of liability, which determines total exemption.

Not every and all the victim's act are an outside factor. Pursuant to Article 2330, the fact must be guilt, in other words, negligent. Only we can speak about victim's fault in an improper or figurative sense, as he does not violate any duty of conduct imposed in other's interest, but only violates a rule of conduct, in order to take care of their own interests. Therefore, the victim must be attributable. However, if the fact is not attributable, for example the victim is an incapable child, an insane person, and so on, we would be in presence of a fortuitous act or an act of force majeure, unforeseeable or unavoidable which also excludes the defendant's liability.

3.2) Victim's guilt concurring with defendant's guilt or created risk. Partial exemption of liability.

We have said that causal link must be established between damage as a result of concurrence of a factor of legal attribution of liability. That is, is not enough to establish the facts or circumstances involved in to produce the loss, but mainly if the guilty or risk (as appropriate), has been able to produce the harmful result. That is why although there are several possible causes of damage, it is necessary to determine what cause is legally relevant to impose liability. It frequently happens that an injury is caused by the concurrence of different factors that lead to establish the guilt of the defendant and also the concurrence of victim's fault.

If in the harmful result there is no other's relevant fault than the defendant, is unnecessary and irrelevant to plead and prove the own victim's fault in a fact that is not a cause. Within this group are cases where even if the victim has committed a regulatory offense, there is no causal relationship between "reckless exposure to harm" and the final result, as is the case of a victim who leaves his car parked in a prohibited place, and rammed another vehicle in broad daylight because of their excessive speed or a bad maneuver; or when the victim was driving with expired license and is hit by another vehicle that failed to comply with road signs.

Para que el hecho culpable de la víctima conduzca a que se determine una reducción de la responsabilidad del autor se requiere el cumplimiento de los siguientes requisitos:

For the guilty of the victim should lead to a reduction in the author's liability it must meet the following requirements:

- A negligent act of the victim that exposed him recklessly to damage.
- Once again, capability of the victim, to be valid to blame him.
- Causality relation.

When concurs the guilt of defendant and the victim, the court must apply Art. 2330 Chilean Civil Code that reduces the valuation of damage the author has to compensate. However, the standard does not give clues to make this reduction. Some have argued that this event should divide the liability equally. This solution is critiqued since suppresses discretion granted by law to judge, and because it presupposes a criterion that is reconciled with the outline of the theory of the equivalence of conditions (not accepted in Chilean law), because all the facts of harm could be considered causes of it, with equal importance.

French case law has tended to divide the liability between the agent and the victim by the severity of their faults, or intensity in the causal course, thereby serving the degree of causal influence⁴⁶.

⁴⁶ El profesor Ramón Domínguez Aguila señala que esta tesis se aviene más con la esencia misma de la responsabilidad civil, ya que con ella se trata de reparar el daño que se ha *causado* y en la medida que se *causó*".

D) Fault of a third party

If in the causal course intervene an act of a third party that determines or influences the extent of damage, that act constitutes a foreign cause beyond the liability of defendant to whom the victim has blamed. Is thus interrupted the causal link and liability lies beyond the defendant's orbit of action, or the risky situation created by him, so that the liability lies entirely on third party's side. For these purposes, is meant by third party who does not have any legal relationship with the alleged perpetrator, that is, it must be not a person for whom the defendant is liable. The intervention of a third party could be a case of fortuitous act if qualify to be unforeseeable and irresistible.

In tort field⁴⁷, persons are liable of acts of those who are in their care and is called "liability for another's act", although in truth, as we have said above, it is a liability for act from himself, which is the lack of care for people that depend from him. This liability is general, fall over all persons who take care of another.

The guilt of a third party may have been the only cause of damage, or may have concurred with the guilt of the accused. In the first case, it is necessary that the third party be capable to be attributable of fault. If this is not the case, the act of the third party can only be a cause for disqualification if meet the characters of a fortuitous event. In the second case, we are in presence of an unlawful act committed by several individuals, that could only act to split liability of participants. The liability is in any hypothesis solidarity among all authors or participants.

E) Fortuitous event or force majeure.

In the traditional notion of liability based on fault, could lead to exempt or reduce liability, the intervention of a fortuitous or force majeure event.

⁴⁷ En materia contractual, el hecho del tercero por el cual es civilmente responsable el deudor, se considera hecho suyo de conformidad con el artículo 1679 C. Civil. Pero sólo si se trata de personas por quienes fuere responsable. Por el contrario, si la cosa perece por culpa de un tercero, del cual el deudor no es responsable civilmente, habrá fuerza mayor y se extinguirá la obligación, pero el acreedor puede exigir que el deudor le ceda las acciones o derechos que tenga contra aquellos que por su hecho o culpa haya perecido la cosa. (Art. 1677). En el caso del Art. 1679, nos encontramos frente a un caso de responsabilidad indirecta por el hecho ajeno. Pero el legislador, excepto en casos particulares, no señaló quienes son estas terceras personas de quienes el deudor es civilmente responsable Por ej. En los artículos 1925, 1926, 1929 y 1941. Frente a esta situación se han dado algunas soluciones, como sostener que se responde por el hecho del tercero sólo en los casos en que la Ley expresamente lo dispone; la aplicación por analogía del art. 2320 o generalizar los casos particulares, al punto de determinar que el deudor responde por las personas a quienes se emplea, o que lo ayudan al cumplimiento de la obligación.

In this respect Article 45 of Civil Code states: "*It's called force majeure the sudden event that it is not possible to resist, as a shipwreck, an earthquake, the capture of enemies, acts of authority exercised by a public official, etc.*"

The existence of a fortuitous or force majeure event excludes negligence (not intention), unless the accused has contributed with his negligence to the advent of force majeure.

4.- Civil liability in legal systems based on the "common law". Introduction.

However in a formal approach, its characteristics are very different from the systems of civil liability law or continental, the regime of liability governed by the common law or case law, it is very similar to those in the substance and tends to arrive to very similar solutions, in similar cases.

The main and most ostensible difference lies in that civil liability in the common law is structured on a common or ordinary regime, which relies on the lack of care or negligence when it is required (when it is established that there is a "duty of care", duty of care towards the injured party) and special regimes for cases or special types such as the "Trespass", or the "Nuisance" (see them below), being one of strict liability, called "Strict Liability", all of them developed from real and concrete cases were brought to the decision of the courts and the sentences passed on them (the case law), taking the laws or "statute law" one lower relevance. Instead, as we saw in the previous Sub-paragraph, in countries governed by the civil law of civil or continental inspiration, civil liability is divided into a general theory of responsibility, elaborate with abstraction of specific cases, that translates into a conceptual and professional system of standards, and is expressed mainly in the written law sanctioned by the legislature, still subordinate to it, the doctrine and jurisprudence when its wording or interpretation are clear.

5. - General outline of doctrine

A person who suffers a tortious injury is entitled to receive "damages", usually monetary compensation, from the person or people responsible — or liable — for those injuries. Tort law defines what a legal injury is and, therefore, whether a person may be held liable for an injury they have caused. Legal injuries are not limited to physical injuries. They may also include emotional, economic, or reputational injuries as well as violations of privacy, property, or constitutional rights. The burden of proof lies with the claimant and the judicial decision (there are no juries in English

civil law except for claims in defamation and civil fraud) rests on the balance of probabilities test.

In English, if the injured party can prove that the person believed to have caused the injury acted negligently – that is, without taking reasonable care to avoid injuring others – tort law will allow compensation.

However, English tort law also recognizes intentional torts, where a person has intentionally acted in a way that harms another, and "strict liability", which allows recovery under certain circumstances without the need to demonstrate negligence.

The etymology of the word Tort can be found, on his origin, in the word *tortum*, neuter of *tortus* twisted, from past participle of *torquēre*. Also, can be found in the French word "tort", which mean injury or wrong. Its first known use comes from 1586. The word torture shares the same linguistic origin, though its present meaning diverged in a very different direction.

The English system has long been based on a closed system of nominate torts, such as trespass, battery and conversion. This is in contrast to the Continental legal systems, which have since adopted structured systems of tortious liability established by statute law. There are various categories of tort, which lead back to the system of separate causes of action. The tort of negligence is however increasing in importance over other types of tort, providing a wide scope of protection. For liability under negligence the claimant must be owed a duty; there must have been a breach of duty; the breach of duty must have caused damage to the claimant, and the damage suffered by the claimant must not have been too remote. If a claimant can establish liability in this way the defendant will be found negligent. Although there are established duty situations Lord MacMillan famously noted, "the categories of negligence are never closed". This gives the law of negligence a progressive aspect.

6. - The Tort of Negligence

a) Definition.

Negligence is a tort which links claimant and defendant through a breach of a duty owed. Prior to 1932 there were numerous incidents involving liability for negligence but there was no connecting principle formulated which could be regarded as the basis of all of them. These were referred to as 'duty situations'. After some early attempts the most important formulation of a general principle is that of Lord Atkin in *Donoghue v. Stevenson* [1932]. This is known as the 'neighbour principle'. The claimant, Mrs Donoghue, was with her friend in the Wellmeadow Café, Paisley, Scotland on 26 August 1928. Her friend bought a bottle of ginger beer and an ice cream. The bottle was made of opaque glass and the Café owner poured part of the contents into a tumbler containing the ice cream. Mrs Donoghue drank some of this and the friend then poured the remainder of the ginger beer into a glass.

It was said that a decomposed snail floated out of the bottle and Mrs Donoghue claimed that she suffered shock and gastroenteritis. She asked for £500 from the manufacturer of the ginger, David Stevenson of Paisley. The question before the court was, therefore, did the manufacturer of a product owe a duty of care in negligence to the end-user of the product which had been put into the marketplace?

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee are likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.'

The case retains its importance as the starting point of an attempt to frame a general principle for establishing the existence of a duty of care between the parties and marks the move away from the discrete areas existing prior to 1932.

b) Duty of care

Donoghue v. Stevenson laid the groundwork for subsequent developments. This general principle was adopted but it must be remembered that litigation was an infrequent event during the early part of the 20th century. One area of difficulty was liability for omissions. This continues to pose problems for the English courts (for a discussion see *Home Office v Dorset Yacht Co Ltd* [1970]). The establishment of a duty of care is, like negligence itself, broken up into further elements, a three step test (or in some cases more). *Donoghue v Stevenson* laid the groundwork for subsequent developments, and from the words of Lord Atkin's speech, he can be seen to refer to, firstly, the concept of reasonable foreseeability of harm; secondly, the claimant and the defendant being in a relationship of proximity and thirdly, and more loosely, it being fair, just and reasonable to impose liability on the defendant for his careless actions.

Lord Wilberforce further refined the test announced by Lord Atkin in *Donoghue*, in the case of *Anns v Merton London Borough Council* [1970]. This became known as the 'two-stage test' and the presumption was that a duty arose unless there was some justification or valid explanation for its exclusion.

First, one has to ask whether there is a sufficient relationship of proximity in which case a prima facie duty arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any policy considerations which ought to negative, or to reduce or limit the scope of the duty.

As can be seen from this 'two-stage test' the judiciary became involved in denying the existence of a duty of care on the basis of accepted policy consideration. There is no doubt that establishing a duty of care today is a difficult task because of the continuing existence of policy considerations which will refute its existence.

Subsequently, and because of the need for the judiciary to overtly express their policy consideration (a role which did not sit comfortably with them), the law moved towards a new general principle, 'the three-stage test'. Although this can be traced through a number of cases it was *Caparo v Dickman* [1990] which established firmly the new test for establishing the duty which continues in English law today. (It should be noted that this is not the case in other common law jurisdictions).

The appellants had undertaken the annual audit of a public company following the regulations laid out in the *Companies Act* 1985. The respondents were members of the company and had relied on the accounts to make a successful bid to take over the company. The respondents alleged that the accounts had been prepared negligently and their reliance on them had caused them a loss as a result. The House of Lords had to decide if the appellants owed the respondents a duty of care in the preparation of the accounts. The House of Lords concluded that no duty of care arose and determined that when assessing whether a duty of care was owed the courts will take into account the following criteria i) reasonable foreseeability of harm; ii) proximity of relationship; iii) whether it would be fair, just and reasonable to impose a duty.

Following *Caparo* the courts consider policy impliedly and merge it in to other considerations such as 'proximity' and whether it is 'fair, just and reasonable' to impose a duty. Prevailing issues of policy include the floodgates argument; and whether the imposition of a duty would prevent a public body such as the police or social services doing their jobs effectively for the whole population. The general principle applicable today arises, therefore, from the decision in *Caparo v Dickman* and an incremental approach.

c) Breach of duty

Once a duty of care has been established, it must be shown that a duty has been breached. The question the courts ask is whether the behaviour exhibited by the defendant fell below the threshold of a "reasonable man" (the objective test) and this is a question of fact in the individual case - see *Qualcast (Wolverhampton) Ltd. v Haynes* [1959]. Factors to be taken into consideration in determining the breach will be i) reasonable assessment of the risk (*Bolton v Stone* [1951]); ii) the object to be achieved (*Watt v Hertfordshire County Council* [1954]); iii) practicality of precautions; iv) general and approved practice. So, in those cases where the defendant holds himself out as having specialist knowledge, the objective test applies this question to the reasonable doctor *Bolam v Friern Hospital Management Committee* [1957]. Allowance is usually

made for the defendant's age and a lower standard of a "reasonable child of a certain age" is applied to children *Mullins v Richards* [1998]. On the other hand, no allowance is made for other personal circumstances, such as the fact that the defendant was inexperienced in the task he set out to perform. He is expected to perform this task as a reasonably skilled and competent person – *Nettleship v Weston* [1971].

d) Causation

Causation is complex, and is usually discussed in two parts. Simple causation is the answer to the question of whether "but for" the action by the defendant harm would have resulted – *Barnett v Chelsea and Kensington Hospital Management Committee* [1968]. There has been some deal of discussion over whether a contributory cause is enough – *Bonnington Castings Ltd. v Wardlaw* [1956]. Most recently the difficulties arising from the risk of suffering harm from exposure to asbestos dust by multiple defendants has exercised the courts, culminating in the House of Lords decision of *Fairchild v Glenhaven Funeral Services Ltd* [2002]. The House of Lords found in favour of the claimants even though they were unable to prove which of the defendants had, in fact, caused the harm.

After the complexities under the "but for" test have been addressed, the courts may still deny compensation if the harm was too remote a consequence of the initial wrong. So long as a type of damage is foreseeable, however, the manner in which it occurred, and the extent of the harm – however unexpected – is of no concern to the courts and full recovery is available.

7.- Special Duty Situations.

Although it is suggested above that there is an overarching set of general principles arising from the case of *Caparo v Dickman* which applies when deciding if a duty of care arises between claimant and defendant, this is by no means the complete story. There remain areas of difficulty in English law and different sets of principles which come into play. There is not space here to detail all the nuances. Areas of special consideration arise when the harm suffered is psychiatric harm or pure economic loss. Liability of public authorities has also proved difficult and special rules apply when the claimant and defendant are employee/employer or lawful visitor/occupier of premises (a separate set of rules apply if a trespasser is injured when on the occupier's premises). This is a brief overview of these areas. Liability for defective products remains within the domain of the English common law except for harm caused to consumers – this is now covered by the Consumer Protection Act 1987 (Council Directive (EEC) 85/374) and is considered to be a strict liability tort (within certain limited circumstances).

1) Psychiatric Harm

When the harm suffered is a recognized psychiatric injury (nervous shock) the dynamics of the negligent incident is the place to start. If the claimant was the direct victim of the negligent event English law classifies him as a **primary victim**. A primary victim is someone who could have suffered a physical injury because they were in the path of the negligent event, but instead have suffered a psychiatric harm. To establish if a primary victim can recover, the general principles noted above and arising from *Caparo* will apply (*Page v Smith* 1995). Greater difficulties arise when the claimant was not directly involved in the negligent event but has suffered psychiatric harm from witnessing the negligent harm caused to another (*Alcock v Chief Constable of South Yorkshire Police* [1991]). It is understandable that the issues of reasonable foreseeability of harm and proximity between claimant and defendant become more difficult to establish as the claimant is effectively at 'arms-length' from the negligent event which has caused the proven physical harm to another. The English courts have developed a set of (often criticized) rules to determine when a duty arises in such situations based around the following cumulative requirements - with the burden of proof with the claimant:

- Proximity in terms of relationship - the claimant must have close ties of love and affection with the accident victim;
- Proximity in time and space - the claimant must be at the scene of the accident, in the vicinity of the accident or come across the 'immediate aftermath' of the accident;
- Reasonable foreseeability - the claimant's injuries must have been reasonable foreseeable;
- There must have been a direct perception of the accident by the claimant with his own 'unaided senses'.

A recognition that the application of these additional requirements has led to confusion prompted a Law Commission Report *Liability for Psychiatric Illness*, in 1998. However, the Report's conclusion that there should be a statutory duty of care have not been implemented. It is to be noted here that those who suffer consequential psychiatric illness following a negligent event which causes physical harm have always been able to recover the additional loss under general principles of negligence. See, for example, *Pigney v Pointer's Transport Services Ltd* [1957]. Non-professional rescuers are another group of claimants for whom special rules apply as these are perceived by the law as deserving claimants, see, *Chadwick v British Transport Commission* [1967].

2) Pure Economic Loss

Similarly, for reasons associated with policy (financial losses can be protected by other means), and, in order to protect the defendant from indeterminate liability, English law has adopted a presumption against the recovery of pure economic loss in the law of negligence with some notable exceptions which arise when the defendant is shown to have voluntarily assumed responsibility for his statements or services in relation to the claimant suffering the loss. *Caparo v Dickman* was a case involving a purely economic loss suffered by the claimant and no duty of care existed. The exceptions apply mainly to misstatements made to the claimant by a professional when the latter is aware that the former is relying on the statement made to alter his position financially. Claims may be made in contract and tort should such a statement be shown to have been negligent. This is an over-simplification of the current legal position and further complexities have arisen with the House of Lords seemingly combining the voluntary assumption of responsibility approach with the general duty principles arising from *Caparo*. This, perhaps broader principle, was attempted in the case of *HM Customs & Excise Commissioners v Barclays Bank* [2006]. The defendant bank was served with a freezing injunction, instructing it not to allow one of its clients to remove any assets from his account. The bank failed to comply with this order, meaning that the client, with whom customs were engaged in litigation, had no assets to satisfy judgment against him in their favour. Customs sued the bank for this loss, in negligence. The bank argued that this being a case of pure economic loss, it could be liable only in the exceptional event of a voluntary assumption of responsibility to the claimant. There was no such assumption because the bank had not undertaken anything of its own volition – rather it had been ordered to take the relevant action by the court order. The bank simply had no choice. The House of Lords (overturning the Court of Appeal decision that the bank did owe a duty to customs), held that no duty of care existed between the bank and customs. A non-consensual court order, without more, did not give rise to a duty of care owed to the party obtaining the order. The question whether in all the circumstances it was fair, just and reasonable to impose a duty of care on the defendant was determinative. The House of Lords held that in the instant case it was unjust and unreasonable that the bank should, on being notified of an order which it had no opportunity to resist, become exposed to a liability which could amount to millions of pounds. Long before recover was possible for negligence misstatements the only remedy available was the *tort of deceit*. The burden of proof on the claimant in these cases is very high. He has to prove that at the time the statement was made the defendant knew that it was false (or having no belief in its truth and being reckless as to whether it is true) and intending it to be relied on by the recipient, and the recipient acts to his or her detriment in reliance on it (*Derry v Peek* (1880)). The main difference between suing in deceit and in negligence is the caps on remoteness of damages. Today, the Misrepresentation Act 1967 offers protection when the claimant relies on the

statement when deciding if to enter into a contract with the defendant. In deceit, to mark the law's disapproval of fraud, the defendant is liable for all losses flowing directly from the tort, whether they were foreseeable or not. Baron Denning remarked, "it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen." However, s.2 (1) of the Misrepresentation Act 1967 offers those who have entered a contract on the basis of a negligent misstatement also to recover this quantum of damages. So, where there is a sudden downturn in the property market, a person guilty of deceitful (or, possibly negligent) misrepresentation is liable for all the claimants losses, even if they have been increased by such an unanticipated event. This is subject to a duty to mitigate the potential losses. Contributory negligence is no defence in an action for deceit. Moreover, under the Limitation Act 1980, s. 32, the time clock in which to sue does not start running until the claimant discovers the deceit or could, with reasonable diligence, have discovered it.

3) Liability of Public Authorities

The question here is whether public authorities exercising statutory powers, owe any duty to a private individual, suffering loss or injury resulting from the authority's negligence. Briefly, English law notes three problems in this area:

- Many statutory powers confer a discretion as to how and whether the relevant power should be exercised;
- Where the alleged negligence is a failure to exercise statutory power, the question of liability for omissions is raised in its most obvious form;
- Recent case law requires the individual to pursue a remedy in the form of judicial review as opposed to tort;
- The impact of the Human Rights Act 1998 - bringing into the English courts directly enforceable rights by individuals, as indicated in the European Convention on Human Rights and which apply particularly to functions of the state.

Again, the outcomes of cases are not always easy to reconcile. Some examples are *Barrett v Enfield* [1999] - it was held that a local authority arguable owed a duty to properly bring up a child whom it had taken into care at a young age. *Phelf v Hillingdon London Borough Council* [2000] - a local authority was held liable when its educational psychologists failed to diagnose the claimant's dyslexia, with the result that they were not classified as having special educational needs. *JD v East Berkshire NHS Trust* [2005] - an authority investigating (unfounded) allegations of child abuse did not owe a duty to the parents involved, because this might interfere with the fearless discharge of the primary duty to the children. In spite of some exceptions

(often involving children), public authorities are not normally liable for pure omissions.

4) Employers' Liability

At common law, every employer is under a non-delegable duty to take reasonable care to ensure the safety of his employees. This was said to have four different elements in *Wilson and Clyde Coal Co Ltd v English* [1937] – a duty to provide safe premises and a safe place of work, a duty to provide safe plant, equipment and materials, a duty to provide a safe system of work and safe working practices, and, a duty to provide competent staff as colleagues. As one would expect, the common law duty is now supplemented by a whole raft of statutory provisions some of which are general, others specific to types of work. If the claimant can show that his harm was caused by the failure of the employer to meet any of the requirements set out in *Wilson*, then normal negligence principles will apply to satisfy his claim.

5) Occupiers' Liability

The duty of care between occupiers and visitors is found in the Occupiers' Liability Acts 1957 and 1984. The 1957 Act was passed because of the state of confusion in English common law as to the different category of person who might be a visitor. The 1984 Act applies to offer very limited protection (a level described as 'common humanity') towards a trespasser on an occupier's land. In essence the 1957 Act exists to ensure that an occupier's land is not dangerous to those who are lawful visitors. The 1957 Act s.1(1) states that it replaces the common law to 'regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them'. The burden on the claimant is to prove that he comes within the category of lawful visitor for the purposes of the Act and then this sets out the standard required of the occupier and any opportunities to shift fault to another party or offer an effective defence. As would be expected, the rules of causation apply. This area of liability has, therefore, been largely removed from the English common law. Likewise, the Occupiers' Liability Act 1984 replaces the common law to determine whether an occupier owes a duty to persons other than visitors.

6) Products liability

Donoghue v Stevenson was a product liability claim. The common law duty arising from *Donoghue* continues to apply to those cases outside the ambit of the Consumer Protection Act 1987. *Donoghue* applies to a defect in the manufacture of the product which causes harm, not the design and this became very apparent in the

1960s with the Thalidomide tragedy in the UK. As the claimants were unable to prove any fault with the manufacture of the pharmaceutical they were unable to succeed in their claims. Clearly for persons who purchase the product which causes harm, the most obvious action will be in contract law where other statutes apply concerning the fitness for purpose of goods put up for sale, etc. (Sale of Goods Act 1979). A common law claim is, therefore, not a strict liability claim, but based on the claimant proving fault in the normal way. The Consumer Protection Act 1987 makes the manufacturer of a product (and others dealing with it along the supply chain), liable *without proof of fault* for personal injury and some property damage caused wholly or in part by a defect in the product concerned. Manufacturers are granted a number of specific defences under the Act. These defences are problematic. One of the defences has proved especially contentious as the manufacturer can claim:

that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.

This has become known as the 'development risks defence' and continues to offer an effective defence to large pharmaceutical companies operating from the UK. A legal challenge to the defence on the basis that the UK had failed properly to implement the EC Directive failed (*Commission of the EC v UK* [1997] ECJ). It introduces a subjective approach to the assessment based on general practice within an industry rather than promoting best practice and offering protection to potentially vulnerable consumers. English common law is ingrained with the notion of fault-based liability. Cases using the Consumer Protection Act 1987 have been few (a notable high-profile exception was *A and others v National Blood Authority* [2001] to clarify if 'blood' was a product which came within the ambit of the statute, it was?).

Liability for defective products is strict in most jurisdictions. The theory of risk spreading provides support for this approach. Since manufacturers are the 'cheapest cost avoiders', because they have a greater chance to seek out problems, it makes sense to give them the incentive to guard against product defects⁴⁸.

8.- Defences to Negligence

⁴⁸ It must be remembered that this discussion reflects English law and other jurisdictions. Australia in particular, have moved some distance away from the English position as stated.

Finding a successful defence, absolves the defendant from full or partial liability for damages, which makes them valuable commodities in the court. There are three main defences to negligence, although each is applicable to other torts and are put into statutory form in, for example, the Occupiers' Liability Act 1957 referred above.

1.- Contributory negligence

Contributory negligence is the most commonly successful defence. Following the passing of the Law Reform (Contributory Negligence) Act 1945 (the 1945 Act), if the claimant's own fault has contributed to the damage suffered, then the court is required to reduce damages on the basis of relative responsibility for the harm. A closer look at s1(1) of the 1945 Act reveals that it is damage, not the accident that must be partly the fault of the claimant. A claimant who fails to wear a seatbelt will have damages reduced if his injuries are rendered more severe by that failure, even though failure to wear the seatbelt does nothing the cause of the accident itself (*Froom v Butcher* [1976]). Where injuries would have been avoided altogether by wearing a seatbelt, there should be reduction of 25%. In the more usual case, whether injuries would have been less severe had a belt been worn, the reduction in damages would be 15%. This, of course, raises several interesting questions: first, wearing a seatbelt is (usually) a legal requirement in English law, and, secondly, if the injury would have been avoided altogether why only a 25% reduction? The same issue has arisen with respect to motorcycle helmets (again, a legal requirement in the UK). In *Smith v Finch* [2009] the seatbelt reductions were considered by analogy. It has been suggested that motor insurers have been working towards a standard reduction of 20% if a helmet is not worn, but the decisions do not seem to support this. Fairness and justice are the guiding principles encapsulated within the 1945 Act. Where compulsory insurance applies in the UK (motoring and employment), and bearing in mind that first party insurance is rare, any reduction in damages to, say, a pedestrian, will result in uncompensated loss that is not covered by insurance. There have been some tragic cases of suicide and self-harming behaviour which have come within the contributory negligence spotlight *Corr v IBC* [2008] and *St Goerge v Home Office* [2008]. There is judicial doubt as to whether it is possible to say that a person has been 100% contributory negligent (see *Pitts v Hunt* [1991], *Reeves v Commissioner of Police* [1998]).

2.- Volenti non fit injuria - willing assumption of the risk

This is Latin for "to the willing, no injury is done". This defence is a complete defence and requires an agreement to waive the legal consequences of risk, or at least close and active participation in its creation. A broader application of the defence has

been rejected in English law. This agreement can be express or implied. The narrow ambit of the defence was adopted by Lord Denning in *Nettleship v Weston* [1971]:

Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant.

In English law the *volenti* defence is now excluded from driver and passenger claims by the Road Traffic Act 1988 s.149.

The narrowness of the applicability of this defence can be illustrated by injuries caused during participation in sporting events. In *Smolden v Whitworth* [1996] a rugby player was injured when an amateur referee breached his duty of care and failed to enforce a rule of the game against collapsing scrums. It was accepted that rugby was 'a tough, highly physical game', but held that the *volenti* defence did not apply. The player did not consent to being injured by negligence. An example of its successful application is *Morris v Murray* [1991] which concerned a crash in a light aircraft where both pilot and passenger had been together drinking vast quantities of whisky. The pilot was killed and the passenger seriously injured.

3.- Ex turpi causa non oritur actio: 'illegality':

Ex turpi causa non oritur actio ("from a dishonorable cause an action does not arise") is a legal doctrine which states that a claimant will be unable to pursue a cause of action if it arises in connection with his own illegal act. Particularly relevant in the law of contracts, *ex turpi causa* is also known as the "illegality defence", since a defendant may plead that even though, for instance, he broke a contract, conducted himself negligently or broke an equitable duty, nevertheless a claimant by reason of her own illegality cannot sue.

In English law the exact parameters of the defence to a tort action remain disputed. It is a complete defence. It is a defence which is rarely used and has been the subject of consultation by the Law Commission⁴⁹ in two stages: *Consultation on the Illegality Defence in Tort* [2001], and *The Illegality Defence: A consultative Report* [2009]. The more recent Report is not confined to tort law as the defence arises in other common law actions. For the purposes of this paper one recent case example of the application of the defence is given: *Gray v Thomas Trains* [2009]. The claimant had been involved in a major rail crash, caused through the negligence of the defendants.

⁴⁹ The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.

He suffered minor physical injuries, and more significant psychiatric injury in the form of post-traumatic stress disorder (PTSD). Subsequently, he suffered reduced earnings. As a consequence of his PTSD he obtained a knife and repeatedly stabbed a drunken pedestrian with whom he had had an argument. The pedestrian died as a consequence, and the claimant was detained in hospital indefinitely. He pursued a claim against the train company for the additional consequential losses arising from their initial negligence. The House of Lords gave strong support to the consistency, or integrity arguments (developed in Canada and New South Wales). Perhaps it is difficult to ascertain a general principle for the application of the defence but in this case to fail to apply the defence would have been inconsistent with the criminal law. *Pitt v Hunt* [1991] also saw the successful application of the defence in the Court of Appeal.

9.- Other English Common Law Torts

As indicated at the beginning of the paragraph 4, the tort of negligence is by far the most important tort in English common law today. In order to present a more complete picture, however, it is necessary to consider in brief some other important common law torts.

1.- Nuisance

The tort of nuisance is divided into claims for public nuisance, in which the injury, loss or damage is suffered by the local community as a whole rather than by individual victims, and private nuisance. We will also consider the rule in *Rylands v Fletcher*.

A private nuisance may be defined as an unreasonable interference with the use and enjoyment of land or some right over, or in connection with it. A public nuisance extends to a far wider range of interests than private nuisance – *Corby Group Litigation* [2008]. As with negligence, the Human Rights Act 1998 has had an impact on litigation in this area. For more detail see, *Marcic v Thames Water Utilities* [2004], *Dennis v Ministry of Defence* [2003] and *McKenna v British Aluminium Ltd* [2002]. When establishing a private nuisance the court will balance the interests of the claimant and the defendant to assess whether the actions of the defendant are an unreasonable interference. Harm suffered can be physical (for example, flooding, noxious fumes or vibrations); interference with amenity interests (for example, smells, dust or noise); and encroachment (for example, by tree roots or overhanging branches). In order to bring an action the claimant must have a legal interest in land *Hunter v Canary Wharf* [1997] and the remedy for a successful claim will be an injunction to stop the interference plus any damages for harm suffered which impacted on the use or

enjoyment of the land. There are some specific defences to a nuisance action including statutory authority (*Allen v Gulf Oil Refining Ltd* [1981]). The use of injunctive relief is of particular importance (*Shelfer v City of London Electric Lighting Co* [1894]) because an award of damages alone might enable the defendant to buy the right to commit a nuisance. It is also possible for the claimant to be compensated under the Human Rights Act 1998 (for example if a breach of Article 8 – the right to respect for the home and private life – is violated).

A strict liability tort which also focuses on the reasonable use of land is an action under the rule in *Rylands v Fletcher* [1868]. There have been two additional key cases in this narrow area of tort law – *Cambridge Water Co v Eastern Counties Leather plc* [1994] (which introduced a foreseeability requirement into the strict liability test), and *Transco v Stockport MBC* [2004] (which considered the definition of non-natural use). The rule in *Rylands v Fletcher* holds that where there has been an escape of a dangerous thing in the course of a non-natural use of land, the occupier of that land is liable for the damage caused as a result of the escape, irrespective of whether they were at fault. It is a rarely used tort in English law and has been a disappointment to environmental lawyers who hoped to strengthen its impact to meet modern day pollution events. Although considered strict liability there are defences such as fault of the claimant, escape caused by the unforeseeable act of a stranger and escape caused by an ‘act of God’ (*Nichols v Marsland* [1876]). As will be evident from this brief discussion, there will be inevitable overlap between negligence, nuisance and an action using *Rylands v Fletcher* and often claimants will attempt all three.

2.- Defamation

Defamation (whether in the written form of libel, or the verbal form of slander) is an ancient English tort. There is now the Defamation Act 1996 and more reform is scheduled with a draft Defamation Bill and consultation document published in 2011. At its heart defamation law attempts to offer protection when a person’s reputation is ‘lowered in the eyes of right-thinking people generally’ *Sim v Stretch* [1936]. An action must be brought in the High Court to start and will be heard before a judge and a jury. The judge will decide whether the statement complained of, is capable of having a defamatory meaning and the jury will be left to decide the extent to which this has lowered the claimant’s reputation in monetary terms. Following some high profile cases where huge amounts of damages were awarded by the jury the Court of Appeal is now able to review the award and bring it in line with personal injury damages. In the main the defendants in defamation actions are the press. The issue then becomes one of balancing the right of the individual against the right of press freedom. As would be expected the Human Rights Act 1998 has highlighted this aspect, which has always existed within the common law, with its focus on Articles 8 and 10 ECHR. It is suggested that claims for defamation are not accessible by the

majority of people – they are very costly and there is no legal aid available – and that it is protection only for the rich. Apart from an award of damages a remedy of an injunction to stop further publications is usually given although of late courts have been awarding super-injunctions where the press are forbidden to publish the fact that the case has been heard, been successful, and an injunction granted! New forms of communication, e.g. social networking site, twitter etc. have all presented challenges to the law of defamation and it will be interesting to see how these are reflected in the reforms.

3.- Intentional Torts

These are divided here into i) intentional torts to the person, and, ii) intentional torts to land.

i) Intentional torts to the person. These common law torts are assault, battery, false imprisonment and intentional infliction of mental shock, ruled in *Wilkinson v Downton*. The first three were defined by Goff LJ in *Collins v Wilcock* [1984] as follows. An assault is ‘an act which causes another person to apprehend the infliction of immediate unlawful force on his person’; a battery is ‘the actual infliction of unlawful force on another person’, and false imprisonment is ‘the unlawful imposition of constraint on another’s freedom of movement from a particular place’. *Wilkinson v Downton* [1897] fell outside these three as the claimant suffered psychiatric harm as a result of the defendant’s intentional conduct. Persons are also now protected under statute for unwanted interference by the Protection for Harassment Act 1997 which offers both civil and criminal remedies. As will be seen from the definition of these common law torts, there is a significant overlap with the criminal law in all cases, but, of course, here the claimant is seeking compensation which might not be available elsewhere. The intentional torts are strict liability torts and are actionable without proof of damage. They must (obviously) be committed intentionally, and not negligently, and they must cause direct and immediate harm. The three common law torts of assault, battery and false imprisonment are used frequently and in a myriad of different fact situations. A recent example is *Austin & Other v Commissioner of Police of the Metropolis* [2009] when, in an attempt to control a demonstration, the police adopted a method now known as ‘kettling’ to confine people for many hours in a small space. In addition to the common law tort of false imprisonment, the claimant used Article 5 ECHR to argue an infringement of her right to free movement. The case was unsuccessful as the police were held to have acted proportionately in response to a public safety concern. As always there are justifications which have the effect of nullifying the action – for example consent – which means that there is no unlawful touching capable of being a battery. In addition, necessity is a defence

when applied to emergency medicine and self-defence (which must be both honest and reasonable *Ashley v Chief Constable of West Sussex Police* [2008]).

ii) Trespass to Land This tort is concerned also with direct, intentional harm and the tort's primary importance is the protection of property rights. It is actionable *per se* without proof of damage. The harm suffered is not limited to actual damage to the land but to the unjustifiable interference by one party by another. Examples include – walking across a field or garden without permission, not leaving property when asked to do so by the owner, going beyond permission granted and deliberately putting or placing objects on someone's land. In the same manner as the trespass to the person this ancient tort can be used in a variety of contexts and for a variety of underlying purposes. A recent example is *Monsanto plc v Tilly* [2000] when protesters entered land which was being used for the development of genetically modified crops. Tilly argued unsuccessfully that the action was necessary to prevent greater harms to the environment and public health. Unlike trespass to the person, necessity is not a defence to an action in trespass to land. The remedies of injunction (to stop the interference) and damages are available.

4.- Economic Torts

Economic torts protect people from interference with their trade or business. The area includes the doctrine of restraint of trade and has largely been submerged in the twentieth century by statutory interventions on collective labour law and modern competition law. The "absence of any unifying principle", drawing together the different heads of economic tort liability, has often been remarked upon.

The English doctrine of restraint of trade was the catalyst for much of what is now called "competition laws" (or sometimes "antitrust"). These laws are a way of restraining those who would restrain "free competition" in the market economy, through monopolising production, setting up cartels, imposing unfair trading conditions, prices and so on. The English approach has traditionally been very flexible and liberal in its scope, but draconian when it did deem certain behaviour to be in restraint of trade. Aside from the common law, legislation was introduced shortly after the World War II to put policy on a statutory basis: the Monopolies and Restrictive Practices Act 1948, followed later by the Restrictive Trade Practices Act 1956 and the Monopolies and Mergers Act 1965.

Since 1972 however, the U.K. fell under the cross-border competition law regime of the European Community, which is found primarily in Articles 81 and 82 of the Treaty of Rome. Companies who form a cartel or collude to disrupt competition or abuse a dominant position on the market, for instance through a monopoly face fines from the public enforcement authorities, and in some cases a cause of action in tort, for the purposes of private enforcement may arise. A huge issue in the E.U. is

whether to follow the U.S. approach of private damages actions to prevent anti-competitive conduct. In other words, the question is what should be seen as a private wrong and what should be seen as a public wrong, where only public enforcers are competent to impose penalties. In 1998 the United Kingdom brought its legislation up to date, with the Competition Act 1998 followed by the Enterprise Act 2002, a regime mirroring that of the European Union. The domestic enforcers are the Office of Fair Trading and the Competition Commission.

Other economic torts are collectively referred to as the wrongful interference with goods. The Torts (Interference with Goods) Act 1977, collects the various torts under this generic heading but, in fact, the substantive rules of trespass to goods and conversion remain much as they were in the past. Trespass to goods deals with any direct interference with the person's possession, whereas conversion deals with the more serious invasion of property rights, so as, in effect to deprive the claimant of the benefits of ownership. It was held in *OBG Ltd v Allan* [2008] that 'goods', s.14 of the Act, does not apply to intangible property but this is the subject of ongoing academic debate. Conversion is more difficult to define and is discussed in *Kuwait Airways Corporation v Iraqi Airways Company (Nos. 4 & 5)* [2002] where the actions of IAC were held to be a conversion. Other issues which arise in connection with the tort of conversion are withholding possession from the lawful owner, wrongful disposition and finders versus occupiers (*Parker v British Airways* [1982]).

10.- Vicarious Liability

Vicarious liability means that, for example, an employer is held liable for torts committed by their employees. This liability also extends to other individuals or entities that have a duty and the right to control the actions of others (parents for their children, school masters and tutors for their pupils). In the Canadian case *Bazley v Curry* [1999] McLachlin J., referring to the work of John Fleming, *Law of Torts* 1998 (pp 409-410), adopted his two key justifications: fair compensation and deterrence. The word "vicarious" derives from the Latin, for 'change' or 'alternation' and the old Latin, for the doctrine is respondeat superior. If an employer is to be vicariously liable the courts must find first that there exists a relationship of employee and employer. The torts of independent contractors generally do not impose vicarious liability on employers; however, this principle does not apply where particularly hazardous activities are contracted for, or a non-delegable duty is owed. Secondly, the tort must have been committed 'in the course of employment'; or while an employee is going about the business of their employer. As the employer will be liable only for torts that are committed in the course of employment it is important to decide when that might be. The traditional starting point in English law has been '*the Salmond test*' (Sir John Salmond, *Torts* 1st edition, 1907): 'A master is not responsible

for a wrongful act done by his servant unless it is done in the course of employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master. This has recently been called into question in the House of Lords in the case of *Lister v Hesley Hall* [2002]. The 'new' test places more emphasis on the idea of 'close connection' with the employment and less on the 'unauthorised modes of performing a duty'.

Lister was an important case and the brief facts are worth mentioning. The claimants had been resident in a boarding house attached to a school owned and managed by the defendants. The warden of the boarding house, who was employed by the defendants, systematically abused children within his care. At this time the lower courts - including the Court of Appeal - were bound by the earlier decision in *Trotman v North Yorkshire County Council* which, on similar facts, held that there was no vicarious liability. The House of Lords in *Lister* overruled *Trotman* and held the defendants vicariously liable. Although the decision was unanimous there were some differences between the reasoning of the judges which will no doubt be developed and referred to in subsequent cases. *Lister* is interesting because the wrongful act was an intentional criminal act and a tortious trespass to the person. It was most certainly not authorised by the employer. However, they employed him and put him in a position where he could commit the abuse and they were liable. The question of whether this was a negligent act or a trespass had legal repercussions because of the Limitation Act 1980. However, these were removed by the decision in *A v Hoare* [2008]. The *Lister* 'close connection' test has been subsequently developed in *Dubai Aluminium v Salaam* [2003], *Mattis v Pollock* [2003] and *Gravil v Carroll and Redruth Rugby Football Club* [2008] among others.

Part Two

Coverage of the claim and out-of-court determination of the compensation.

11.- The civil liability originating a claim for compensation constitutive of a claim, examined from the insurance that covers it viewpoint.

The civil liability which covers the insurance we are referring in this work, is solely non-contractual liability, also called criminal or quasi-criminal, or Aquilian, like has been said, is such that origins when a person, with independence of a

previous link between them (even when there is). Is such that comes from the damage caused through a tort fact committed by a person in prejudice of another, which does not constitute the violation of a contractual duty. In this type of liability, the duty of repairing origins from the transgression, not from a contractual obligation in itself, but from the generic duty of not damaging another which is the general principle of each legal regulation⁵⁰.

As such, distinguishes from the contractual civil liability, which is that originating from the breach of obligations originated from contractual relations between the liable and the injured, which in this case never is an absolute third party, as can happen in the field of the non-contractual liability, but a person or entity linked to the liable for such contract, whose transgression gives origin to the liability.

Very succinctly, says an author that: "if the obligation generated on the convention is breached by the subject called for satisfying, we will be in presence of the contractual liability"⁵¹.

In the countries of Latin America, and in general on the countries governed by the civil law system of Roman origin, also known as "continental law" (in opposition to the "common law" or "insular law"). In principle only exist non-contractual civil liability when the originator of the damage has carried out an act or incurred in an omission, through negligence or fault from his side. Such action or omission must cause damage, in other words, a detriment, prejudice, harm or pain, where the victim is a third party, to its person or to its assets.

The article 1437 of the Civil Code of Chile establishes that civil offences and negligent: "*facts that have inflicted injury or damage to another person*". On its side, the Article 2284 disposes that: "*obligations originated without convention, originated from the law, or from the voluntary fact of one of the parties*" and in the paragraphs 3° and 4° adds that: "*If the fact is tort and committed with intention of damaging, constitutes an offence. If the fact is guilty, but committed without intention of damaging, constitutes a negligent*".

However, the previous rules are important in the definition of the application field of the non-contractual liability, the specific regulation of the nature, sources and consequences of this type of liability are contained in the Title XXXV of the Book IV of the Civil Code, Articles 2314 and subsequently.

The referred Article 2314 expresses that: "*The person who has committed an offence or negligent which has caused damage to another, is obliged to the compensation, without prejudice of the sentences the laws imposed for the offence or negligent*".

The requirements or conditions for the non-contractual liability proceeds are, according the predominant doctrine, the following:

⁵⁰ Corral Talciani, Hernán, op. cit., page. 24.

⁵¹ Pablo Rodríguez Grez, "De la Responsabilidad Contractual" ("Of the Contractual Liability"), Editorial Jurídica de Chile, 2003, page 11.

a) Existence of an tort (action or omission) fact, executed with deceit (intentionally) or with fault (negligently);

b) Responsibility of the fact to its perpetrator (this must have a capacity of discernment on the possible damaging consequences of his acts or omissions);

c) The guilty, in the terms already expressed, intention of damaging or mere negligence (the facts that derived from force majeure or the unforeseeable case are therefore excluded);

d) Existence of damage;

e) Causal relationship between the generator (guilty or voluntary) and the damage caused (here presents a problem when converge diverse causes for producing it).

The non-contractual civil liability comes from a tort fact, voluntary or guilty, causing damage to the person or property of another. Also is non-contractual, since it does not originate on purpose of the breach of a contract, the liability that has is only for based on the law, regardless the guilt or deceit of the liable, responsibility that is properly denominated objective.

This is the type of facts or events that cover the insurance policies of civil liability and constitute the reason of claim for compensation presented by the third party injured, who in the continental law is known as *the claim* of civil liability⁵².

The description of the specific source of the liability that covers every insurance in particular will be limited on the general and particular conditions of each policy. There are insurance policies that cover the following types of liability, without the enumeration would be restrictive:

a) General liability, of any company or individual, by own facts.

b) Vicarious civil liability, by facts of other, of which one responds.

c) Particularly, civil liability of the employer or entrepreneur by the facts of his dependents.

d) Civil liability of the employer by the accidents that affect his employees at work.

e) Civil liability of the manufacturer, by defective products.

f) Civil liability of the head of households by facts occurred in his home.

g) Civil liability of the drivers of vehicles.

h) Civil liability of the owners of vehicles.

i) Civil liability derived from construction works.

j) Professional civil liability.

k) Civil liability by risks related to people's health; CL of clinics and hospitals and medical civil liability in particular.

l) Civil liability for the possession and use of fire arms and in particular, for the derived of the hunting.

⁵² In the Common law is only talk about "damage", originating a "claim".

- m) Civil liability of the shipping
 - n) Civil liability for the use of aircrafts.
 - ñ) Environmental civil liability for pollution or earth, water or air contamination with toxic, dangerous or annoying substances.
 - o) Civil liability of directors and officers (D&O).
 - p) Civil liability for risks of the land, sea or air transportation.
 - q) Civil liability for lack of service, of the State, the Municipalities and of in general, all the institutions that have to provide a public service.
 - r) Civil liability for the use of radioactive substances and for the nuclear facilities (Nuclear CL).
 - s) Vicarious civil liability of the States for the acts of any of his agencies causing damages.
 - t) Civil liability for legal mistake.
 - u) Informatics civil liability, including of software providers, hackers, spam, Internet Service Providers, informatics data certification service providers, for data appropriation, for data violation and private images, etc.
 - v) Company civil liability of audits and risks classification.
- There are many others.

The liability insurance is a section of the insurances of property damage, classification within are also found the guarantee insurances, of credit, of loss of profit and functionary loyalty. Result useful the differences the liability insurance has with these other types of property damages. Even though all cover the property of the insured for the risks the policy indicates, have differences regarding to who is the producing agent of damage and which is the nature and origin of the liability and in one of them, regarding to the form in which the insurance contracting is made.

Like we have said, the civil liability insurance, basically of the non-contractual nature, covers the damages caused to third parties and the agent who provokes them and origins the claim for compensation formulated by the injured. Is the own insured, or the person who this responds civilly. Who contracts the policy is the own insured, by own initiative, or by imposition of the law, in the mandatory insurances.

In the credit and caution insurances, the liability is of origin exclusively contractual.

The guarantee or caution insurance, of much development in some countries, in Latin America particularly in Mexico, has the particularity the insured is not who contracts the policy, but his counterpart in a contract which results or becomes mandatory to be done or not one things. The obligations of giving, especially when they consist on paying an amount of money, are not object of the insurance of the guarantee insurance.

The agent who provokes the damage is the own insurance policy holder, and the damage comes from the breach of the contractual obligation of doing or not

guaranteed by the policy. The insured is his counterpart in the contract, named as beneficiary in the insurance policy.

Therefore, in the guarantee or caution insurance, contrary to what occurs with the civil liability insurance, what is covered is the liability issued by an external fact, the breach or the imperfect breach of the bonded party, who contracts the policy and pays the payment. Breach that affects the insured property.

Also in the credit insurance, the injured insured property is covered by an external fact and not owns, like is the case of the civil liability insurance and the origin of liability is, likewise, exclusively contractual. But in absolute comparison with the caution insurance, the contractual breach the insurance cover consists precisely in the obligation of paying an amount of money. Besides, normally the credit insurance is contracted by the eventual affected by the breach (es) of the payment obligations of an amount of money in which his debtors incur and the cost of a policy is under his charge.

The loss of profit insurance or loss of benefits, who contracts the insurance is the person exposed to as a consequence of any material damage suffers the insured thing, additionally suffers the loss of the benefits expecting from its exploitation. Usually, by general rule almost absolute, this type of insurance is contracted jointly with a fire policy or of all risk to material damages, amongst them, the insurance of all risk of construction and assembly, covering industrial establishments or commercial in process of construction.

In the loyalty insurance, also the property loss for the insured comes from a chargeable fact to a guilty act or voluntary of another person, but is not an absolute third party, but having a relation of employee of him. If the act is voluntary, along the civil liability of the employee for the economical losses suffered by his employer as cause of him, the unfaithful employee shall be liable to the sentence assigned by the law to the crime committed, if there is any. In this type of insurances, the contracting party is the own insured, as in the CL, the credit and of the loss of benefits, and in difference of the guarantee or caution insurance.

12.- The adjustment of the claim. Role of the adjuster in this type of insurance.

In every type of damages, denounced the occurrence of a claim is necessary proceeding to the adjustment of such claim, duty that may be performed by insurance company, directly through one of his functionaries performing the role of adjuster or internal or dependent adjuster, or alternatively by a adjuster or adjuster freelance, who the insurer, or this along with the insured designate for performing such adjust.

The adjustment of the claim in other damage insurances, different than the civil liability insurance, assumes a fundamental role, moreover when treats about a

adjustment which has been made by an adjuster freelance. In those cases, it would correspond for the adjuster to pronounce in quality of expert on the origin or inadmissibility of the claim for compensation of the claim, examining the facts and constitutive and concurrent circumstances of this and confronting them with the rules or general conditions of the corresponding insurance policy and legislation applicable to the case.

Of the above is followed that in the rest of the damage insurance, without being the adjuster a judge, his participation on the determination on the precedence and the amount of the corresponding compensation is of great importance.

This is not the case in the claims that affect the civil liability insurances, where the participation of the adjuster is very secondary and in the majority of the cases will be limited to the exam on the first of the matters mentioned above. This is the determination of if the denounced fact is understood or not in the coverage of the policy and in particular within the period of its validity. If this has been denounced on time, and if is not made applicable regarding to some of the clauses of exclusion or limitation of the liability of the insurer contemplated in it. Also should elaborate a previous report on the coverage of the claim in the policy and inform the insurer on the reserves to constitute. When the labor of the adjuster can more be extended, once clarified the previously expressed, by trying an out-of-court transaction with the third party injured and in fact is frequent to achieve in these clear, simple and or minor quantity cases, which logically tend to be less disputed. Sometimes the insured delegates in him, the power of designating the defense lawyer of the case, when has the right to do it.

In a great part of the cases and of course in all the most important, will be in-between complex legal features on the determination of the liability and on the amount of the compensatory damages, requiring to be settled with the participation of the parties and their respective legal advisor and in the last term, submitted to the decision of the corresponding court, if is not possible to reach to an out-of-court transaction between them.

13.- About the application of the rules on underinsurance.

In all the real damage insurances or of things, the determination of the compensation is subjected, amongst other factors to consider, to the question of if is applicable or not the denominated proportional rule in the cases of underinsurance. Which is defined as the situation where the amount of the insurance contracted is lower than the value of the *insured thing*, at the time of the claim.

As it is known, the proportional rule consists in the proposed event the compensation will be subjected to an apportionment between one and another sum,

i.e. between the value of the insured object and the lower amount in the insurance that was contracted⁵³.

This proportional rule or apportionment has general application, in all the real insurances or of real damage. Unless, in the cases of policies at agreed value or determined between the insured and the insured and in the insurances denominated at first loss or at first risk, where on virtue of expressed pact, the insurer resigns to the application of the rule and is obliged to compensate the damages without any apportionment, until concurrence of the amount insured.

In the insurances of property damage, whose is the case of the civil liability insurance, the proportional rule does not have general application. Every time that in this type of insurances do not exists an insured value, pre-established, since there is not a "real value" of "a thing" exposed to the risk of a loss to cover. The insured is the exposed property to loss, and its amount is undetermined. Therefore, the insured amount does not constitute but the limit of the liability the insurer accepts.

Said in other terms, in general the amount which civil liability of someone can reach is indeterminable with anticipation, and in last term will be set either by the legal or out-of court agreement the parties reach. And lacking this, will be established by the sentence the judge issues, knowing the trial where such liability is heard.

Such reasoning, which until recent time did not admit doubts in the doctrine, enters in collision with the reality in the cases where, instead, if the amount liability will ascend is pre-established, in case of generating, like is the case, for example of the pre-valued liability or pre-established by the legislator, as given in some countries. Particularly in the case of the liability that origins in the field of transportation and maritime and air tickets contracts.

There who estimate that if the insured contracts a lower insurance to such corresponding to the value of its liability pre-established in the law and definitely sets a compensation by an amount exceeding the contracted coverage, the proportional rule should be applied and determine that the insurer is only responsible for paying the proportion or the proportional amount of such liability set on the policy. The case is very debatable⁵⁴.

14.- Interpretation of the insurance contract. Applicable rules.

⁵³ The explication of the institution we comment, is given because: "there is a principle universally agreed that considers tghe own insurer for the value proportion exceeding the insured sum". In Meilij and Barbato, "Tratado de Derecho de Seguros" ("Treaty of Insurances Law"), Zeus Editora, Rosario, Argentina, page 257

⁵⁴ In principle, given the intrinsic features of the civil liability insurance, we pronounce by the negative. However, as is the general rule in the law, each concrete case that may present has to be studied for issuing a categorical declaration. Probably would have greater base holding that in such case there would be insurance at first loss.

In case of dispute on the coverage and its application on the denounced case, certain rules apply that the law contemplates expressly in matters of evidence, and in particular, on the burden of proof. These can be resumed in the as follows in the context of the Chilean legislation:

First rule: proof of the contract and its modifications.

According the Article 514 of the Commercial Code, both the contract, its conditions and terms, as well as the modifications the parties agree, are approved by written through the insurance policy or of the corresponding endorsements, which is the name given to the documents issued for assigning the modifications of a contract previously existing. This rule makes exception to the Article 1173 on the maritime insurance, according we saw in the N° 84, which in the practice does not modify the general rule in the substantive.

Second rule: proof of the claim. Legal presumption on its nature.

According to the disposed on the paragraphs 5° and 7° of the Article 556 of the Commercial Code, the occurrence of the claim constitute a burden the insured must comply.

The claim is supposed to have occurred by unforeseeable case and is protected by the policy coverage⁵⁵. Therefore, correspond to the insurer accrediting the claim “has been caused by an accident⁵⁶ which does not constitute the liable of his consequences, according the convention or the law”. Such is established by the Article 539 of the Commercial Code for the overland insurances. In the maritime insurance governs the rule contained in the Article 1185, written in general terms.

Third rule: exclusions proof. Legal presumption of coverage.

The Article 536 of the Code states the insurer may take over if all or some of the risks which the insured object may be affected and the coverage not being limited, responds to all those who may be exposed, unless the legal exceptions.

In consequence corresponds to the insurer accrediting the claim is not under coverage in the policy, or is expressly excluded by it. The proof is submitted with the own policy, starting by the nature of the insurance, i.e. the type or section to this corresponds and following the merit of the terms and clauses it contains. Attended by the circumstance that the insurance is in Chile a special contract which is perfection

⁵⁵Under the supposition that because of its nature, is of those contemplated on the contracted coverage. Therefore, an insured could not be against the theft risk, claiming the loss of an asset as a consequence of fire, for unforeseeable this would have been.

⁵⁶The expression, more precise, that should have been used by the legislator in case of “accident”, is of an “event”.

and proof by written, precisely with the policy. In the majority of the modern legislations, the insurance has stopped being solemn.

Fourth rule: claim proof and of the damages caused by it.

The proof of the claim occurrence and of the damages caused by it, correspond to the insured, according the rule of N° 7 of the article 556 of the Commercial Code of Chile, where “the insured is obliged to probe the coexistence of all the necessary circumstances for establishing the insurer liability”.

This rule is in strict relation with the rule of the article 1698 of the Civil Code, where correspond the proof of the obligations or its extinction to which he delegates them or this.

Corresponding to the insured, in consequence, accrediting the occurrence of the claim and the damages caused.

15.- Negotiations with the third party prior to trial.

Once the third party injured presents his claim against the insured on the basis of the damages suffered are consequence of the liability of this last, generally starts an out-of-court negotiation stage between the insured on one side and the third party injured by another. As long as, such liability is covered by the policy, that there are no exclusion causes contemplated in this which may be applicable to the case and of course, that the facts appear backgrounds as for estimating the insured has the liability alleged to him⁵⁷.

The first that should be reflected is who carries or leads such negotiations on side of the insured.

In this, several factors appear.

Firstly, it has to be examined which is the role the insurer wants to perform. In many cases, as long as the third party is not aware yet of the existence of the liability insurance, the insurer prefers staying aside from these negotiations, participating in a second place, only in contact with the insured and his lawyers, in the understanding that only the fact this third party is aware of the insurance existence which is to lead their appetites increase for a more inflated compensation⁵⁸.

⁵⁷ “Consequently, the payments ex gracia made by the insured will not be recoverable under the civil liability policy without consideration of its prudence or commercial convenience. The insurers’ liability against the insured is triggered by the liability against the insured established or quantified by a sentence, arbitration resolution or mandatory transaction”. Robert Merkin, Colinvaux Law of Insurance 8th. Edition, Ed. Thomson, London (2006), page. 688

⁵⁸ The insurer participation in the negotiations with the third party injured has in the majority of the cases, legal consequences, every time that from starting from there will be difficult or straightly will be

In other cases when is or is evident the existence of the insurance and also in all the cases where the insured assumes a favorable position to reach an agreement with the third party, or even, when the insured is indifferent of the existence and the amount of the compensation, the insurer will be, on the contrary more disposed to be who assumes the role of conductor of the negotiations with the third party injured or intervened in them. In these cases, it will act on behalf of the insurer one of its functionaries who assumes as internal adjuster or as adjuster or freelance adjuster or the lawyer who handles the case.

We will be back to the points where this paragraph refers with greater extension in the Chapter III, where the defense situation in a liability trial is analyzed, in the framework of which such situation assumes greater relevance and is subjected to greater regulation, having the insurer the law, legal or contractual of assuming the direction of the process.

16.- Necessity of the insured approval for reaching to an out-of-court transaction with the third party injured.

Whichever the case is where the relation to who conducts the negotiations with the third party injured is given with views to reaching to an out-of-court transaction with this. It has to be into account that for reaching to this, the approval or consent is required, both from the insurer and the insured.

In effect, as consequence of that in principle external money are involved (of the insurer), the insured cannot trade out-of-court with the third party injured without the insurer agrees with the amount of the compensation agreed with him and also, evidently, the claim coverage by the policy and the insured liability in the facts is clear.

At the same time, and for a different reason, because the transaction with the third party injured suppose the acceptance of the liability existence, although nothing

forbidden to plead the claim is not covered. In the field of the English law, Robert Merkin says that in such cases: "is possible that may be estimated that the insurers have resign to their rights under the policy or they are impended from applying it, in reason of his conduct into the third party (that is what in the common law if known as "estoppel", or theory of the own acts, in our law)". Robert Merkin, op. cit., page 687. In the French law, from a law of the 31st December 1989, the direction of the process by the insurer (which starts from heading the negotiations with the third party), constitute a legal presumption of legal resign with the exceptions that may invoke against the insured, unless referred or derived from the circumstances not known or without prejudice expressly left his right to do it. Yvonne Lambert Faivre, "Droit des Assurances", Dalloz, Pariz, 1998, page 333. According to Sánchez Calero, Op. Cit., page 1666, would not apply the same in the Spanish legislation.

of that is said or denied in the transaction. The insurer cannot trade with him without the acceptance or approval of the insured⁵⁹.

The breach to the compliance of these very important previous conditions, carry consequences.

In the event the insurer reaches a transaction with the third party injured without the consent of the insured and with major reason, in the case this has manifested his opposition to such agreement claiming he disagrees on accepting the occurrence of the damaging fact is consequence of his liability, may take place that the insured renounce to such transaction and claim from the insurer the eventual prejudices that its execution may carry to him. Like for example, the discredit or deterioration of its professional or commercial image and/or the imposition of a legal sentence that has been issued against it, having as background which validates such liability, the agreement or transaction executed by the insurer with the third party injured.

Being an agreed transaction by the insured with the third party injured without the consent of the insurer, this last may claim that such transaction is completely unenforceable to him, or at least questioning the amount of the agreed compensation and in any case denying to pay it to the third party while such question are not settled. It has to be established that the third party injured cannot invoke such transaction for charging the insurer who has not participated in the subscription of such agreement, because this agreement is for them "*res inter alios acta*".

In such event, the insured will not have option of paying the same of the compensation agreed with the third party and following act trying to repeat against the insurer, who besides the above mentioned, has the right to argument, if precedent, the claim does not have coverage within the policy or applies a cause of exclusion preview in it.

17.- Transaction of the insured with the third party, materialized through the endorsement or transfer of the policy.

An interesting feature that has been presented sometimes in the practice, consist in that the insured reaches to a transaction with the third party injured by a determined sum, without the consent of the insurer or against the will of this and as

⁵⁹ It is curious verify that neither in the Spanish legislation nor in the French, the agreed transaction by the insurer without consent or against the will of the insured is treated. But instead is regulated the duty of the insured of not trading without consent of the insurer (Vid. Sánchez Calero, op. Cit., pages. 1664 and following and Lambert Favre, Op. Cit., pages 465 and following) It is not the case of the project of new law on Chilean insurance contract, which does handle both situation in terms above mentioned.

form of payment of the agreed compensation or of part of this, the insured transfer to such third party the rights the policy gives, through an assignment of nominative rights.

Despite Chilean doctrine and jurisprudence agree in considering that, at least in the national legislation, it does not result possible that the insured transfer by himself the policy to a third party, without the expressed and written consent of the insurer, reflected in an endorsement or in a new policy. Is different the situation when after produced a claim, the insured transfers to a third party his rights to charge the insurer the amount of the compensation. This third party may be any natural person or legal and of course may also be, precisely, the prejudiced by a claim of civil liability.

In this last case, we are in presence of the legal power that every contracting part of transferring to a third party the personal rights conferred by a contract for demanding the compliance of the obligation of his counterpart. In this case, we found ourselves in presence of a "assignment of rights" or "assignment of credits", particularly on the right to collect the compensation, which on the Chilean legislation is governed on the articles 1,901 and following of the Civil Code and being the mercantile assignment of rights (as normally will be the ones originating from the insurance contract), in the articles 162 and following of the Commercial Code.

According these rules of an assignment of personal credit, to whichever title is done, will not have effect between the assignor and the assignee, but in virtue of the title delivery and does not produce effects against the debtor, while this has not been notified by the assignee to the debtor or accepted by this. Notification that must be done with exhibition of the title (in the case we analyzed, the policy), which will carry annotated the assignment of the right with the assignee designation, under the signature of the assignor.

The article 163 of the Commercial Code of Chile, establishes a rule which indeed is general, i.e., is not only applied to assignment of commercial credits, but also to any other type of credits. This rule establishes that the debtor to whom is notified the assignment and has to oppose exceptions that do not result from the title assigned, will have to be alleged or asserted in the act of the notification or no later than within the third day. In spite of, later will not be admitted, as long as the exceptions appear at the view of the document or origin from the contract, may be opposed against the assignee in the same form that could have been opposed against the assignor.

The previous rules carry the following consequences:

1. The assignment of the right to collect compensation at the protection of an insurance contract made by the insured to a third party is valid⁶⁰;

⁶⁰ Tan válida como lo es, por ejemplo, el derecho del vendedor de un inmueble a ceder a un tercero el derecho que el contrato le confiere, a cobrar el precio de venta.

2. For producing effects regarding the debtor (insurer), have to meet the previous legal requirements mentioned;

3. The insurance company to whom is notified the assignment shall assert the exceptions which do not result from the assigned title, also called personal exceptions (for example, the compensation) in the act of the notification of the assignment, or no later than within the third day; and

4. The exceptions origin from the insurance contract or from the document (policy) where this consist, may opposed against the assignee in the same form in which they could have opposed against the assignor insured, amongst them, for example of the claim not being covered by the insurance contracted or the application of the coverage exclusion preview in the policy.

And what does occur with the possibility that the insurer may question the amount of the agreed sum for concept of liability?

To our mind, the insurer may oppose to the payment of a sum that exceeds the amount of the contracted coverage, of the maximum sum of liability pre-established in the law or exceeding the amount of the damages effectively caused, in the cases where these circumstances are given.

18.- Effects of the unjustified negative of one or another party to trade with the third party.

In general, in the majority of the legislations the effects of the unjustified negative of the legislations of the insured or of the insurer for reaching to a transaction with the third party injured are not governed.

In effect, the insured for not being convinced of his liability or for not estimating that accepting may carry unfavorable consequences to his image or his commercial or professional prestige. May hold that is inconvenient reaching to a transaction with the third party injured, since that could be understood, explicitly or implicitly, as recognition of acting with negligence.

On his side, the insurer may oppose to reaching a transaction with the third party, for estimating excessive the amount agreed or in the belief that accused liability does not exist or is questionable, many times believing that the insured prefers trading with the third party with the only purpose of avoiding to be public the accusation against a negligent conduct or erroneous, which may carry negative consequences to his prestige or commercial or professional image, or by last, suspecting one collusion between the insured and the third party

In both cases, if the negative translates in the transaction is not executed, later may be given the case of following forward with a legal process and this ends reporting the court that the insured liability existed and setting a compensation

whose amount is greater than of the transaction which in its opportunity was rejected by the insured or the insurer.

The Project on the new insurance contract law, currently in discussion at the Chilean Parliament establishes that in these cases, when there has been a negative from the insurer or from the insured to reaching to a transaction with the third party injured and demonstrate definitely that such negative was unfair and inconvenient, which will result in charge of who opposes. The greater amounts which in definite shall be paid to the third party as result of the legal sentence.

Part Three

Legal determination of the compensation.

19.- Introduction. Emergence of the duty of compensation.

In absence of the clause policy expresses in the contrary “the right of the insured for obtaining compensation at the protection of the civil liability insurance policy, will be considered that emerges once the insured liability into the third party that has been determined, established and quantified. This may occur in of three ways: the insured has been demanded in a trial before the lower courts ending with sentence. There is an agreed arbitration or mandatory, culminating with an award against the insured and this (with consent or participation of the insurer) has reached to an agreement with the third party”⁶¹.

In some situations, the insurer will reach to the conviction that the facts do not fall inside the coverage and denies them.

When conversations are not productive between the parties destined for reaching to an out-of-court transaction amongst them. Normally that translates in the third party injured interposes a legal claim against the insured or that the parties agree for deciding their differences through an arbitration. This applies both for the disputes between the insured and the insurer. Is more common the first⁶².

⁶¹ Merkin, op. Cit., page 694.

⁶² In the English law, an additional alternative is given for solving the controversies between the insurer and the insured on the coverage applicability. In effect, “the policies of professional compensation normally include a clause that requires the insurers paying any claim made against the insured, unless, the opinion of an expert advisor is obtained, expressing that in the balance of the probabilities, the claim will fail. This clause, usually denominated as QC (for Queen Counsel), is

Also can give the case that without or jointly with the out-of-court claim, the third party injured presents such claim.

In this case, except as always the possibility where the parties previously reach to a legal transaction for ending such plenary trial or arbitration, will correspond to the Court determining if exist or not the civil liability invoked and in affirmative case, the determination of the compensatory damages.

Another different court, lower or of arbitration, where corresponds, shall settle in its case, also the controversy of the insurance to the situation occurred. "The insurers shall face in this case, the liability for the expenses incurred by the insured on forcing the insurers to admit their liability on the policy" (In the event of being finally admitted the coverage)⁶³.

In relation with the relative disputes to this insurance, a point of law that assumes extraordinary importance, is if it does exist the legal possibility that the third party injured in knowledge of the existence of a civil liability insurance, also present a claim or direct action against the insurer or some other way (via the direct claim and other similar management contemplating the legislations)⁶⁴, directly involved on the trial in process to determine the existence of the insured liability on the facts and the amount of the damages in its case.

The form as the law faces this question affects to all the related aspects with the legal determination of the compensation we are going to analyze.

In the liability regimes where the third party injured coincides the third party injured direct action against the insurer, then he may present it validly, with the effect that the definitive sentence will also directly affect the insurer and not only the insured and the third party injured.

It is not this work matter discussing the convenience or inconvenience of the direct action or of the cases where its existence justifies, issue that has occupied great part of the specialist in insurance law attention worldwide. Yet, when the results of the historical evolution of the diverse legislations show a slow but inflexible advance of the tendency which accepts direct action.

Nowadays, in large terms, let`s say half of the legislations on the insurance in the world, contemplate the existence of the direct action in the civil liability insurance, as general applicable rule to all the modalities of this type of insurances. Another good part of the legislations, let`s say, in general, the other half, does not contemplates the existence of the direct action for all the types of civil liability. And lastly, it is verified that practically in all the cases of the mandatory insurance, of civil liability, if the direct action is contemplated in favor of the third party injured, even

introduced for avoiding the insured sees the necessity of defending before a claim and avoiding undesirable publicity" Merkin., op. Cit., page 699.

⁶³ Merkin, op. Cit, page 700.

⁶⁴ Is the case of the Italian of 1942 and the Argentinean of 1968.

when does not accept his existence or application for the case of the civil liability voluntary insurances⁶⁵.

20.- The legal defense of the insured. Duties and obligations of this and position of the insurer.

When the third party interpose against the insured (and against the insurer in case of existing the direct action), to a claim where is requested to the Judge to declares the existence of the liability and sets the amount of the compensatory damages, one important question is which is governed in the law and/or in the policies, keeps relation with whom will be in charge of the legal defense of the insured.

Before that, for information of the insurer for allowing to evaluate the existence of the liability and the eventual amount of the compensatory damages, the insured is obliged to notify him of the occurrence of the facts that may origin to its liability, sending him copy of the out-of-court claims and of the claim which against him presents the third party injured and also all the rest of the backgrounds that may be generating on purpose of the progress of such legal action⁶⁶.

These duties of the insured consisting legally in burdens that the law imposes and such as constitute a requirement that must comply as condition for being in position of claiming the payment of the compensation determined or agreed⁶⁷.

⁶⁵ In the United Kingdom, for jurisprudential interpretation, has extended the application of the Law of Third Parties of 1930 at every type of insurances, which originally was previewed only for mandatory auto insurance. According to such law, the third party injured may collect the compensation directly to the insurer, if the insured falls in insolvency, this way avoiding the compensation is absorbed by the rest of the debts of the insured in bankruptcy and benefits the mass of creditors. Subsequently this right has been confirmed by a new Law of Rights of Third Parties of 1999.

⁶⁶ It is necessary defining the expression "claim". Evidently the legal notification of a claim to the insured, or the reception of a letter announcing legal actions, is a claim despise when a payment request will be enough. In the case Robert Irving & Burns vs. Stone, judge Staughton defined the claim as "a communication made by a third party against the insured of certain disconformities resulting or may result in the expectative that the insured satisfy it or repair". Merkin., op. Cit. Page. 696. He adds: "Two main models of redaction are used in the English policies. Claims Made: the notification of the circumstances that "may" or "should" give place to a claim", Page 697.

⁶⁷ However, the form as these duties are expressed and the consequence carrying its breach or its late compliance is very varied in the compared legislation, from it could generate the effect of affecting the validity of the contract, until of conceding the insurer only the right to collect from the insured the prejudices that would have caused. The topic of these burdens is extensively treated by Osvaldo Lagos Villarroel in "Las cargas del acreedor en el seguro de responsabilidad civil" ("Burdens of the creditor in the civil liability"), Editorial Mapfre, Madrid, 2006, pages 402 and following.

Besides, for facilitating the defense of the insured position in the trial and difficult the action filed by the third party injured, the policies tend to contemplate, generally, duties the insured must comply in order of not recognizing its liability. Not disclosing major backgrounds on the existence of the insurance⁶⁸ and not reaching to an agreement or transaction with the plaintiff, without participation and consent of the insurer⁶⁹.

The existence and validity of these duties the policies impose to the insured, particularly the two first (not recognizing the liability and not disclosing the existence of the insurance), is limited by its sensible justification and the equity detaching from their terms. Like for example, could not be induced that the insured denies to response questions that formally are formulated on the facts occurred and neither hiding or lying regarding them for protecting the economical interests of the insurer.

In the majority of the legislations and of the civil liability insurances, is established that the insurer has the right but not the obligation of being in charge of the legal defense of the insured in the processes the third party injured follows against him, and in the sections following, we will examine the situation which produces when the insured who exercises and when the insurer assumes making use of such right.

21.- Exercise and conduction of the legal defense of the case.

Despite the majority of the legislations establish the right of the insurer for being in charge or conducting the process in which the civil liability of the insured is heard, this do not change the intrinsic situation making the insured principal party of the liability action which exercises the third party injured and only party in the cases where the right of the insurer is not recognized to be carried to trial. Hence, he always will be interested in the course his defense follows and naturally may also exercise it according its own criteria when the insurer is not responsible of it. When this has an incompatible interest which prevents him⁷⁰, or when his own interest are priority, which is the evident case, for example when the amount of the demanded exceeds substantially the amount of the coverage and when is accused of a negligent conduct of such magnitude which could affect his image and prestige or bringing with it the

⁶⁸ These duties also are governed in some legislation. Thus, the Article 74 of the Spanish law and the article 116 of the Argentinean.

⁶⁹ Also these obligations are governed in the different legislations, for example in the above mentioned Article 74 of the Spanish law and 116 of the Argentinean, article 124 of the French and established as general rule in the countries governed by the common law. Vid Lagos, op. Cit, pages 424 and following.

⁷⁰ As is the case where the insurer also, of the third party injured, in that same section of the insurance or in another commercial link making him losing Independence and objectivity.

risk of a criminal or minor sentence. However, his acting in the trial is not in this either, entirely free, because should ensure for not severely damage the rights of the insurer and in prevention of it, maintaining informed of the trial course and particularly of the managements in process to a transaction.

The insurer will exercise that defense when doing it does not prejudice his rights concerning the application or not of the civil liability insurance. If an insured is responsible for exercising the defense of the insured, would not have possibilities of later claiming, that the insurance coverage respective, does not protect the case or which is applied to that of any cause of exclusion, Unless the cases very special to we have already referred in the section N° 8.⁷¹

By general rule, also the own insurer declines of having for it the responsibility of exercising or direct the defense of the insured when the amount of the insurance involved is very lower than the pretentions of the third party reflected in the amount of the claim, unless is very evident that such pretentions are ridiculous and is practically sure that the amount which in definitive set by concept of the damages suffered for it is lower at the maximum limit of the policy coverage. Neither when the action exposes the insured to a criminal sentence or to one seriously affecting his prestige.

Likewise, for an imperative ethical character, cannot be responsible of the defense when an interest dispute exist, as for example, when both parties are their insured.

Before ending with this point, let's say the legal defense by the insurer is usually channelized under the form this is who choose and designs the lawyer responsible of attending such defense, keeping direct communication with him.

Since such lawyer will have as fundamental view taking care of the insured interests, which will not necessarily match with the ones of the insured, is logical this last always will have the right of looking own advice, right which may be exercised without possibility of opposition by the insurer when the insured is interested on safeguarding his situation in matters which do not derive in risks strictly monetary, like is the case already mentioned, that the claim affects the professional or commercial image of the insured or the determination of the existence of the liability may carry this, criminal or minor consequences.

22.- Existence of an additional coverage of legal defense.

In the case of existing a separate insurance, or additional coverage in the same policy of CL, which provides legal defense for the insured, this could with charge to this, designating to the lawyer who defends him in the trial where his liability is

⁷¹ Vid. Also, note endnote of page 26.

discussed and determines, in his case, the amount of the compensatory damages to the third party.

The existence of this insurance of additional coverage does not make disappear, however, the duty of the insured of keeping informed the insurer regarding the third party reclamations and of the advance of the legal conflict. Because this will allow the insurer evaluate the concerning to the insurance coverage of the civil liability, as well as the convenience or inconvenience of reaching to a transaction with the third party injured.

23.- Power of the insurer for exercising the defense of the insured. Collaboration that must be provided to the insured.

Like we have previously said, in the cases when legal and contractually corresponds to assume the legal direction of the defense to the insurer, this is usually materialized through the right of this to the designation of the lawyer responsible of attending the case. However, in the majority of the cases of a rights is treated, but not of an obligation of the insurer this may exercise or not⁷².

What he is will be obliged, unless of existing an special clause in the contrary is paying the expenses of the defense within the margins of the amount insured, being this the total amount of the civil liability insurance in itself, or the amount of the insurance or additional coverage of the legal defense.

As Merkin states, in the cases where is mandatory for the insurer being responsible of the defense, "if the context results clear that the claim is for a risk which is not insured, then without necessity of specific redactions (in the policies) the obligations of defending the insured shall not be applicable"⁷³.

24.- About the possibility the insurer pays the compensation to the own insured.

From the established under the Article 50 of the Law of Insurance Contract of France of 1930 (today subsumed in the Insurance Code of such Nation), it was forbidden paying the compensation to any person who would not be the third party injured. Deducing of this rule, a decision issued by the Court of Appeal of France on

⁷² This right is established in all the legislations. Like, under the Article 74 of the Spanish Law, article 74 (Sánchez Calero, op. Cit. Pages 1664 and following, the French (Lambert Faivre, op. Cit., pages 467 and following) and in the English (Mérkin., op cit. Page 697).

⁷³ Op. Cit., page 697.

1949 (a "*grand arret*"), reached the conclusion that as a logical consequence of it, the third party injured had direct action against the insurer⁷⁴.

Subsequently, has become firmly established in the doctrine, the jurisprudence and the legislation worldwide, the concept that the insured in any case can be the beneficiary or receptor of the compensation. Although it is a civil liability insurance which has been contracted voluntarily with the view of protecting its own property from the payments to may be obliged by a fact of his liability, with the only exception of the case where he has paid the compensation to the third party from his own private funds.

The civil liability insurance assigns in last term in exclusive benefit of the third party injured and therefore, is him who must pay the compensation to the insurer, in any of the forms possible recognized by the law, the custom or the contract and within the margins of the policy contracted.

It is hold when the amount of the civil liability coverage is very little in relation to the damages caused which demand the third parties injured, could be accepted because it would be logical and legitimate, that the insurer makes immediately the loss and once determined that the claim is covered by the policy, proceeds to pay the own insured the amount of the insurance.

We do not think acceptable this conduct and we estimate contrary to the nature and to the finality what the civil liability insurance has, pointed above. Of course, the reclamation of the third party may be abandoned or as consequence of a bad management of the plaintiff and/or a very good defense, may also be rejected. And in that case, such form of proceeding could give place to against the purpose of the insurance and the legal rules governing it, the insured obtains from the insurance an unlawful profit.

The situation changes when in the policies of the clause "pay to be paid" is established, which obliges the insured to paying first the third party affected for having right that the insurer compensates him over that base⁷⁵.

25.- Alternative of the insurer puts under disposition of the insured or third party the insurance funds.

⁷⁴ However, the first country which established the direct action for the third party injured was Mexico in its law of 1936, inspired in the project elaborated in Italy by Lorenzo Mossa, which never became a law in its own country.

⁷⁵ There is no necessity that the insured demonstrate that he has really made the payment to the third party. "Redactions that contain this principle, rarely are found in maritime or non-maritime policies, yet when rules of the P&I Clubs offer coverage of civil liability, containing frequently the clause "pay to be paid", under the terms of which the Club is not responsible before the member until this has completely paid to the third party". Merkin, op. Cit. Page 694.

In the same situation treated in the previous section, this is when the amount of the coverage contracted is very lower than the damages caused and compensatory. Instead, we estimate is completely valid the conduct of the insurer who disengaged from the case, putting the insured sum at disposition of the insured, keeping it in his power, but only for this could freely reach to a transaction with the third party or for counting with such funds at the time of such transaction or of the legal determination of its amount.

In every case, the insurer will have in the moment when precedent, paying the third party injured for account of the insured, being directly or through a legal payment in the respective trial.

26.- Legal settlement

Yet being a trial in process, evidently is possible that the parties early agreed before the judge's decision and agree in a settlement for ending previously, at least regarding the compensation of the damages caused.

The legal transaction in a liability trial is out of the field where is concreted and of the consequent legal formalities this is submitted. No difference with the out-of-court transaction we refer in Chapter II of this work.

According to the previously analyzed, will have to count with the acquiescence of the insurer and through it cannot commit more funds of the coverage of the policy contemplate and/or the insurer is willing or has been sentence to pay.

However, in absence of a clause that safeguard this right of the insurer, if the insured proceeds to agree a transaction with the third party, the English law is clear regarding the insured may charge to his insurers, only if he can prove he was legally responsible before the third party⁷⁶.

27.- Possibility the insurer may oppose against the claim from the third party injured, own exceptions of the contract.

In the case where the law confers the third party direct action against the insurer and this is carried to judge of liability, one important matter is determining if can or cannot this last, oppose to such claim the own exceptions of the insurance contract, i.e. those which enervate or limit the right of the insured to the compensation, despise this assigns in benefit the third party injured.

In this point again the international doctrine and legislation are divided. In some countries the law contemplates, in all or some cases, the possibility that the

⁷⁶ Vid. Merkin, ob. Cit. page 705.

insurer may oppose to the third party injured, the exceptions originated from the insurance contract. In other countries, instead, such possibility does not exist⁷⁷.

In the case that cannot oppose, unless legal rule expresses the contrary, the insurer who pays the compensation to the third party injured, will have the right of repeating against the insured for the amount paid when such exceptions exist. For example, in the cases the insured presented false or incomplete information about the risk, or aggravated prior to becoming effective the insurance, did not pay the payment, or whichever other of such causes which usually conduct to the inefficiency of the insurance contract⁷⁸.

28.- Justification and proof of the damages claimed. Scope of the powers of the court for setting the compensation.

Besides accrediting the alleged liability, the third party who claims the compensation of prejudices which are covered by the policy, has to credit such damages derive from an event attributable to the insured liability.

In the out-of-court field, the proof of the prejudices is exempted from formalities and in general it may be said that the third party affected must present before the insured, the insurance company or the adjuster in his case, the backgrounds allowing to accredited or justify them without major formalities.

⁷⁷ Who are for denying the possibility of opposing them, argue their position saying that in these cases the true insured is the third party and the insured is who contracts the policy in his benefit. To us we think results impossible holding this thesis, because the insured contracts the policy in his direct benefit, by covering his own property would result diminished in case of having to face a debt of liability. However, we recognized that in the majority of the mandatory insurances, the law have created them with the purpose of benefiting the third parties, thus in them, the above justification quoted, acquires greater base. In the French Law, for example, Article L. 112-6 of the Code des Assurances, establishes: "the insurer may oppose to the policy holder or to the third party invoking the benefit, the opposable exceptions to the original subscriber". Yvonne Lambert Faivre states that these are of two types: "the ones based in the existence of the same of the insurance contract and which determine by the guarantee extension originated in the contract". Nevertheless, are not opposable to the third party: "the exceptions subsequently originated on the day when the damaged produced". Lambert Faivre, Op. Cit., pages 490 to 492. In Spain, on the contrary, the Article 76 of the Law 50-1980, on Insurance Contract, excludes expressly the possibility that the insurer may oppose such exceptions: "The direct action is immune to the exceptions that may correspond to the insurer against the insured".

⁷⁸ In the case of Spain, like we saw in the previous note, the possibility the insurer may oppose to the third party exercising the direct action is not admitted, the exceptions which origin from the insured to repeat against the insured in the case of his obligation has caused to negligent conduct of the insured. Sánchez Calero questions if the same repetition right exist in other cases, pronouncing by the affirmative. Sánchez Calero, op. Cit., page 1785.

In the legal field, instead, the accreditation of the damages is subjected to the rules of the procedure the law contemplates in relation to the different admissible means of proof, to the opportunity and form where such means of proof must be presented, to the objections that may formulate at his respect and to the value that may be provided in themselves and compared one with others.

Nevertheless, as general rule, within the legal regulations framework governing the proofs that may be reported, his appreciation and his evaluation by the court, this always has a liberty range, greater or minor, according the established in different jurisdictions for regulating the amount of the compensation that should satisfy the insured in favor of the third party injured, when his liability in the facts has irrefutably established.

Instead, unless the case of exception we have pointed, the court has not the same liberty for sentencing the insurer, unless the law contemplates direct action and the third party has already exercised. In no case, under none circumstance, may oblige this last to pay a sum exceeding the amount of the contracted coverage, unless the legal exceptions or contractual.

The liberty of the judge for determining the compensation is particularly wired when it is about setting a compensation for concept of moral damage or title of the punitive damages that certain legislations admit. To these and the rest types of damages that may be claimed, we will refer in the fourth part of this work.

That liberty is limited, in every case, by the institution of the *ultra petita* and also when the legislation contemplates the existence and application of ranges.

As is known, the *ultra petita* constitutes a serious procedure defect, consisting that the judge assigns the plaintiff more than has asked for this⁷⁹. Thus, the judge cannot without incur in it, determining or setting compensation greater than the requested by the affected in his claim. The setting by the judge of a compensation incurring in *ultra petita*, defects the sentence, which may be cancelled by the corresponding Supreme Court.

As for the *ranges of damages or injuries*, these are lists that contemplate the physical damages, injuries, that people may suffer as a consequence of a claim and affecting his life, his body integrity or produce them incapacities, total or partial, provisional or permanent and of the amount in Money which correspond to provide as compensation for each one of the situations contemplated in such list.

For the ranges may remove the liberty of the Judge for determining the amount of the compensations for the concepts included in them, it is necessary that are recognized and/or compulsory imposed by the law.

⁷⁹ Also constitute *ultrapetita* the case where the sentence extents to points that were never object of the discussion.

As we previously have said, also is given on the legislations cases of legal determination, preset or limited, of the compensatory amount in the liability derived from the transportation (particularly maritime and air) and in the ticket contract.

In all the cases where the legislation contemplates a predetermined evaluation of the damages, subsist the doubt about if that forbid the affected requesting and probing greater damages to the predetermined and to the judge accepting the claim and assign an additional compensation in such situations.

The matter has to be examined with care according to the respective legal dispositions, but in general, conceptually, we think that the affected could exercise the right to request greater amount than the regulated if derived from different circumstances than the preview in the legal limitation and that in such cases, of being probed, the court could recognize such request.

Part Four

Compensatory damages

29.- General exposition

Whichever the nature of the civil liability is, this is translated into the obligation of compensating or repairing the damage caused.

Like we already said, if an element exists that unifies the institution of the civil liability in all its types of sections, to all the legal rules and the doctrine referring to it, is the damage existence which legitimates the right of who demands the reparation.

Without damage, there is no civil liability, because repairing or compensating means leaving a person in a situation such at least financially speaking, may be understood that stays without consequences of such damages, *indemne* (etymologically means precisely that: without damage). Since there if the affected with the fact has not experimented any damage, despise having guilty in the occurrence of such fact, no compensation may ask nor assign him.

If for this that part of the authors do not already talk of the civil liability law, but of the damages law.

According the law (Article 2329 of the Chilean Civil Code and 1382 of the French Civil Code, for example), the damage reparation must be integrate, in other word, equivalent to the damage caused and covering in its totality⁸⁰.

⁸⁰ The general principle is that the reparation must be complete, all the damages as direct consequence of the tort fact must be compensated. Corral, op.cit., page. 336.

Like we said, it is about replacing the property situation of the victim or third party affected, to the same situation that had before producing the fact that generates the liability.

In this part we refer to the different types of damages recognized in the doctrine and of the compared law, for determining which of them may be covered by a civil liability insurance (and therefore admitted in a transaction or governed by a sentence), anticipating that in the field of a non-contractual liability, Article 2314 of the Chilean Civil Code, expresses in general the one who caused the damage (liable), "is obliged for compensation", not being object of discussion in the Chilean doctrine the types of damage may be object of regulation are those referred in the Articles 1556 to 1559 of the same legal entity.

The determination of the compensatory damages requires concepts, precisions and previous distinctions we will following board.

30.- Concept of damage

In the Chilean legal doctrine is assured that in general, in wide terms, damage is all detriment, prejudice, undermining, pain or discomfort carry or suppose the destruction or decrease, by insignificant this may be, of the assets, advantages or pecuniary or non pecuniary benefits one individual has⁸¹.

In this same wide sense is expressed that is about "detriment, prejudice or undermining received by fault of another in the treasury or the person"⁸².

Abiding to the signification of the term, it could be said that prejudice is the result of all the forbidden invasion in the liberty sphere of a person that categorized a tort act, being by action or omission of a third party and provoking a detriment, alteration or prejudice in his person and/or property, in his mood and his intimate affections, in his reputation, image or honor, or causing pain or physical punishments, provisional or permanent.

This way, the definition matters a great quantity of hypothesis, recognizing from now, without distinguishing if it is about of a contractual or non-contractual branch, the detriment caused may affect both the pecuniary sphere and the non pecuniary of the prejudiced.

The damage metes a very important function in the doctrine of the civil liability. It is about an inexcusable budget for admitting the precedence of the compensation of prejudices, since like we said, if there is no damage can be said that such liability exists. Yet, when out of the case the action or reprehensible omission is

⁸¹ Alessandri, Arturo (1983) p. 210.

⁸² Escriche, Joaquín "Diccionario Razonado de Legislación y Jurisprudencia", Madrid, (1852) p. 528

the result of a conduct intentioned directed to damaging the other, which is different in the case of the criminal liability, where tentative is sanctioned.

In other words, the obligation of compensating origins precisely because someone has suffered damage.

This is found recognized jurisprudentially, since it has been repeatedly judged in all the jurisdictions that for a damaging fact gives place to the civil liability, is indispensable this fact causes damage. This conclusion is evident hence, on the contrary, if an amount of money is assigned, such who is receiving it would be enriching without cause.

This way, damage constitute, without any doubt, an essential requirement for proceeding the compensation without prejudices, along the action and omission, the causal relation, the attribution factor and, being of the liability derived from the contractual breach, the default constitution.

Relacionado con lo anterior, esto es, la amplitud de la noción del daño como requisito o elemento de la responsabilidad civil, cabe preguntarse si todo daño puede da lugar a la indemnización, o si, por el contrario es un requisito que el daño sea idóneo para solicitar el resarcimiento.

Se ha entendido que basta que se lesione un interés para que se genere un daño indemnizable, no siendo exigido, en el ámbito de la responsabilidad extracontractual, la existencia de un derecho subjetivo propiamente tal para demandar su reparación⁸³.

In other word, just this prejudice undermines or injuries a pecuniary or non pecuniary interest for being admissible demanding the compensation, i.e. the reparation of such detriment experimented by the victim.

Said leads us to state is the main requirement of damage to be compensatory, that injuries a right or legitimate interest. However, it is not the only requirement, since it is also necessary this damage is true and it has not already been compensated.

Let's see what type or specie may these damages in other terms, how many types of damage exist in the field of the civil law of Roman roots or "continental". Subsequently, we will see the types of damages which are compensatory in the law of the "common law".

31.- Direct and indirect damages

⁸³ The notion of interest is different than the one of a right. In this last exist a relation or recognized and sanctioned link by the law, being this between two persons (personal rights) or between one person and a thing (real rights), which all the rest of the persons are obliged to respect. The notion of interest, in the field we are analyzing, alludes to any utility, advantage or consideration or economical or moral, pecuniary or non pecuniary order concerning, attracting or worrying a person. From this, moral damage is compensatory of a person suffers by the death or suffering of a beloved person.

The first distinction or classification of the damages which is necessary to do, is that recognizing the existence of direct or indirect damages (Article 1558 of the Chilean Civil Code).

Direct damages are those when the fact immediate and directly causes (or the contractual breach, in the case of the contractual liability), as long as they are indirect, such which are not a consequence or immediate relation, but remote or in whose generation concur other causes of major importance⁸⁴.

This way, direct damages have been defined as those the judge must have consideration at the time of calculation the reparation (compensation) in reason of the nexus narrow enough linking them with the original prejudice fact of the liability⁸⁵.

Instead, indirect damages are the damaging consequences of a fact, which are too far from being kept in mind by the judge at the time of calculating the reparation.

32.-Foreseen Damages (or predictable) and unforeseen (or unpredictable).

Very related regarding to its signification at the classification mentioned in the previous section, is the one that distinguishes between unforeseen or predictable and unpredictable damages.

Are foreseen damages, those which have reasonably can be predictable which is feasible to be produce, at the time of the execution of the fact or omission (or to the contract execution in the contractual liability field), whereas unforeseen are those which not result reasonable accepting that would have been predicted in such moment.

We think this classification establishes major importance and is more realistic applying it in the contractual liability field, regarding it distinguishes between direct and indirect damages is more appropriated for using it within the non-contractual liability field.

However, both find their source of original inspiration in the example given by Pothier, of a farmer who sells to another an ill cow that contagious the other animals of the buyer, occasioning them the death. As a consequence of this last, he impoverish, not being possible for him to pay and losses his workers, the attention of his field is abandoned, losses his crops, falling later into bankruptcy and not being able to resist the discredit this provokes him, he commits suicide.

⁸⁴ The same Article 1558 refers to this classification.

⁸⁵ In the field of the insurances law could be said that are those which are immediate consequence of the denominated "next cause".

In this example, evidently the predictable prejudices are the death of the ill cow and of the persons who died because they acquired its illness, but result unpredictable the rest of the prejudices derived from that.

The difference in the contractual and non-contractual liability field is given because in the last, we estimate that it is not possible, by general rule, talking about the predictability or unpredictability of certain prejudices, because at executing or omitting doing something causing prejudices to a third party, the liable has not predicted in the sense of having in consideration that of this no damaging result could derived, unless he has acted fully aware, i.e. with deceit⁸⁶. But the seller contracts of providing the buyer assets of good quality, exempted of defects, certainly that may prevent the detrimental results his conduct carries if not complied, unless the detrimental effects are directly linked to the immediate cause.

33.- Material or moral damages. The “physical” damages.

A very important clarification in the continental law field, is such distinguished between material or moral damages. The material damages comprehend the emerging damages and the loss of profit (Article 1556 of the Civil Code of Chile). These last we refer in the following paragraph.

The material damage (in French, *dommage matériel*), is that which attempts and reaches the property of a person, for example the damages caused in a crash originated in a traffic infringement to the vehicle of another person, let's suppose, the vehicle of a taxi driver. Said of another form, it is denominated material damage to that which translates in a loss or physical failure and tangible of a thing or a prejudice or detriment of economical type or pecuniary derived from the fact originating the liability.

The moral damage (in French, *dommage moral*), is not mentioned in any of the precepts contemplated in the Chilean Civil Code and the jurisprudence agree, both in the existence of the category or concept, as in the precedence of its compensation. Unanimously in the non-contractual liability at these times, for a great majority of the doctrine and national jurisprudence, in the contractual liability sector. The discrepancy subsist only around him, proceeds to compensate the moral damage to the artificial persons⁸⁷.

⁸⁶ This principle has exceptions, like is the case of the damages caused by professional and technicians, which by the general rule, and is in situation of preventing very well the consequence of their acts. When have been executed with negligence.

⁸⁷ Abeliuk examines the topic of the moral damage with much clarity and contemporary in his work “Las obligaciones” (“The obligations”), 4ª edición, Editorial Jurídica de Chile, 2001, under pages 231 and following. We refered to his lecture.

The moral damage has been defined as the estimation or compensation in money, of the suffering, anxiety or moral undermining and/or psychological, derived from the damaging fact for the victim and/or their immediate family members (*pretium doloris*)⁸⁸.

More than in the legal sector, tends to dispense with totally using it, in the practice of the insurances also exist, the concept of *physical damage*, in the sense of body or tangible (death or injuries of a person; the destruction of a property for the fire), in opposition to the prejudices are direct and specifically economical (loss of a predictable profit in an agreed business where is not possible carrying out as cause of the claim), or which belong to the sphere of what we have denominated prejudices merely moral.

34.- Emerging damage and loss of profit

Like we have said, the material damages are sub classified in emerging damage and loss of profit.

Emerging damage is the loss or material undermining, pecuniary, current and effective, causing the fact originated in the liability. In the example given in the previous paragraph, the damages caused to the vehicle of the taxi driver as a cause of the crash. While loss of profits is the loss of the profits or economical benefits expected for a determined activity, also economical, whose performing is unable or delayed by such fact. In the quoted example, the loss of profits the taxi driver would have obtained from the exploitation of the car, which he will be private during the time its reparation or replace last.

We will be back on all of these damages further on, analyzing them in the own sphere of the civil liability insurance.

35.- The “punitive damages”.

In certain legislations or legal system, particularly in some of the orbit of the “common law” (USA), the figure of the “punitive” damages or exemplary is used⁸⁹.

These are those the court orders to pay to the author of the damage to the victim, as a sort of social sanction, a fine which is payable not to the State, but to the victim or his relatives, with the purpose of punishing him for the fact which was estimated as liable, particularly when his conduct has been specially reprehensible,

⁸⁸ En el derecho del “Common Law” se utiliza para designarlo, la expresión “emotional distress”.

⁸⁹ Instead, “in the English law, there is little margin for a sentence that obliges top ay punitive damages or examplificary against the defendant” Merkin, Op. Cit., page 689.

either for the type of damage cause, the extreme negligence or intentionality or his indifference attitude before the pernicious results he caused.

In last term, the finality of the compensation of these damages, like we have said, is translated in the payment of an amount of money in favor of the victim. Additional to the mere reparation of the damage cause, constitute truly an exemplary sanction. It is destined to obtain the sentenced liable to pay them and the society in general, perceive that fact or unfair omission deserve the public sentence and have a particularly serious punishment for in some reason, influence or lead to the result of discouraging or warning the potential offenders to not commit the facts again or decreasing the frequency these happen.

We will back on this point further on.

36.- Compensatory and moratorium compensations.

The compensation the liable is sentenced, has compensatory character, when its specific object is the reparation of the damages suffered by the victim.

The compensation has the moratorium character when has as finality the reparation in favor of the victim for the delay on receiving the compensation during the gap of time passed between the occurrence of the damaging event and the time in which is receiving it. Usually is translated in the obligation of paying adjustments and/or interests and the process costs in which the existence of the liability was discussed and established the value and amount of the prejudices, even when these last are applicable and may be decreed by the Court also, in the case of sentences that give place to the payment of compensations purely compensatory.

37.- Compensation for damages in the common law system.

In the system of common law "remedies" that can get the injured person for an act that causes prejudice are two: compensation of damages or "damages" and mandates or preventive judicial measures of damage, called "injunctions". We analyze them below, starting with the first one.

1. "Damages". General outline.

Damages are the monetary compensation that is awarded by a court to an individual who has been injured through the wrongful conduct of another party. Along with the injunction this is the most common remedy in tort cases.

Damages attempt to measure in financial terms the extent of harm a claimant has suffered because of a defendant's actions. Damages are distinguishable from costs, which are the expenses incurred as a result of bringing a lawsuit and which the court may order the losing party to pay. Damages that the claimant is entitled to collect are awarded by a court or by the final decision issued by a jury in jurisdiction where they exist.

The purpose of damages is to restore an injured party to the position the party was in before being harmed. As a result, damages are generally regarded as remedial rather than preventive or punitive. However, punitive damages may be awarded for particular types of wrongful conduct. Before an individual can recover damages, the injury suffered must be one recognized by law as warranting redress and must have actually been sustained by the individual.

2. Categories

Three major categories of damages are recognized: compensatory, which are intended to restore what a plaintiff has lost as a result of a defendant's wrongful conduct; nominal, which consist of a small sum awarded to a plaintiff who has suffered no substantial loss or injury but has nevertheless experienced an invasion of rights, or to prevent the defendant from acquiring prescriptive rights, and carry part of the costs of the action; and punitive, which are awarded not to compensate a plaintiff for injury suffered but to penalize a defendant for particularly egregious, wrongful conduct. In specific situations, two other forms of damages may be awarded: treble and liquidated.

3. Compensatory Damages.

With respect to compensatory damages, a defendant is liable to a claimant for all the natural and direct consequences of the defendant's wrongful act. As a general rule, remote consequences of a defendant's act or omission cannot form the basis for an award of compensatory damages (see above).

Consequential damages are a type of compensatory damages, may be awarded where the loss suffered by a claimant is not caused directly or immediately by the wrongful conduct of a defendant, but instead results from the defendant's act. For example, if the defendant carried a ladder and negligently walked into the claimant, a model, injuring the claimant's face, the claimant could recover for the loss of income resulting from the injury. These consequential damages are based on the resulting harm to the claimant's career. They are not based on the injury itself, which was the direct result of the defendant's conduct.

The measure of compensatory damages must be real and tangible, although it can be difficult to fix the amount with certainty, especially in cases involving claims such as pain and suffering or emotional distress. In assessing the amount of compensatory damages to be awarded, the judge or the jury must exercise good judgment and common sense, based on general experience and knowledge of the economic and social affairs of life. Within these broad guidelines, the jury or judge has wide discretion to award damages in whatever amount is deemed appropriate, so long as the amount is supported by the evidence in the case.

A claimant can recover for a number of different injuries suffered as a result of another person's wrongful conduct. First, the claimant can seek compensation for reasonable medical expenses in the case of personal injuries.

The claimant can recover also for a physical impairment if it results directly from a harm caused by the defendant. In determining damages the court considers the present as well as long-range effects of the disease or injury on the physical well-being of the claimant, who must demonstrate the disability with reasonable certainty. Compensatory damages can be awarded for mental impairment, such as a loss of memory or a reduction in intellectual capacity suffered as a result of a defendant's wrongful conduct.

A claimant may recover compensatory damages for both present and future physical pain and suffering. Compensation for future pain is permitted when there is a reasonable likelihood that the claimant will experience it; the claimant is not permitted to recover for future pain and suffering that is speculative. The court (or the jury) has broad discretion to award damages for pain and suffering, and its judgment will be overturned only if it appears that the jury abused its discretion in reaching the award.

Mental pain, suffering and mental anguish (the equivalent of *moral damnum* in civil law jurisdictions) can be considered in assessing compensatory damages. Included in mental pain and suffering are fright, nervousness, grief, emotional trauma, anxiety, humiliation, and indignity. Historically, a claimant could not recover damages for mental pain and suffering without an accompanying physical injury; today, most jurisdictions all over the world have modified this rule, allowing recovery for mental anguish alone where the act precipitating the anguish was willful or intentional or done with extreme carelessness or recklessness. Ordinarily, mental distress brought on by sympathy for the injury of another will not warrant an award of damages, although some jurisdictions may allow recovery if the injury was caused by the willful or malicious conduct of the defendant. For instance, if an individual wrongfully and intentionally injures a child in the presence of the child's mother, and as a result, the mother suffers psychological trauma, the defendant can be liable for the mother's mental suffering. In some jurisdictions, a bystander can recover damages for mental distress caused by observing an event in which another negligently, but not intentionally, causes harm to a family member.

In certain cases of personal injuries, a large award for future medical expenses is justified, and for permanent disability and disfigurement. More controversial and generally not accepted are the damages for reduced life expectancy.

Compensatory damages of a more economic nature may also be recovered by an injured party. A claimant may recover for loss of earnings resulting from an injury. The measure of past lost earnings is the amount of money that the claimant might reasonably have earned by working in her or his profession during the time the claimant was incapacitated because of the injury. In the case of future losses due to temporary or permanent disability, this amount can be determined by calculating the earnings the injured party actually lost and multiplying that figure out to the age of retirement – with adjustments. If the amount of earnings actually lost cannot be determined with certainty, as in the case of a salesperson paid by commission, the claimant's average earnings or general qualities and qualifications for the occupation in which she or he has been employed are considered. Evidence of past earnings can also be used to determine loss of future earnings. As a general rule, lost earnings that are speculative are not recoverable, although each case must be examined individually to determine if damages can be established with reasonable certainty. For example, a claimant who bought a restaurant for the first time immediately before suffering an injury could not recover damages for the profits he might have made running it, because such profits would be speculative. A claimant unable to accept a promotion to another job because of an injury would stand a better chance of recovering damages for loss of earnings, because the amount of lost could be established with more certainty.

Individuals injured by the wrongful conduct of another party may also recover damages for impairment of earning capacity, so long as that impairment is a direct and foreseeable consequence of a disabling injury of a permanent or lingering nature. The amount of damages is determined by calculating the difference between the amount of money the injured person had the capacity to earn prior to the injury and the amount he or she is capable of earning after the injury, in view of his or her life expectancy.

All the above referred are actual losses directly produced by the tortious act or omission (*damnum emergens*). In civil law systems, future loss of earnings are not considered “*damnum emergens*”, but “*lucrum cessam*” instead.

Loss of profits (*lucrum cessam*) is yet another element of compensatory damages, allowing an individual to recover if such a loss can be established with sufficient certainty and is a direct and probable result of the defendant's wrongful actions⁹⁰. Expected profits that are uncertain or are contingent upon fluctuating

⁹⁰ The owner of a taxi that suffers substantial damage from the crash with another vehicle, can seek for *lucrum cessam*, being that the money that he would have earned during the time the taxi was out of service.

conditions would not be recoverable, nor would they be awarded if no evidence existed from which they could be reasonably determined.

A claimant can recover all reasonable and necessary expenses brought about by an injury caused by the wrongful acts of a defendant. In a contract action, for example, the party who has been injured by another's breach can recover compensatory damages that include the reasonable expenses that result from reliance on the contract, such as the cost of transporting perishable goods wrongfully refused by the other contracting party. In other actions, expenses awarded as part of compensatory damages may include medical, nursing, and prescription drug costs; the costs of future medical treatment, if necessary; or the costs of restoring a damaged vehicle and of renting another vehicle while repairs are performed.

Interest and compensation for inflation can be awarded to the claimant in cases of torts and also in cases of losses arising from defaults on an obligation to fulfill contractual obligations, including money owed under a contract. It is controversial the starting date of interest and inflation calculation, choosing from the date of tort or default, the date a demand for payment is made; the date the lawsuit alleging the tort or the breach of the contract is initiated and the date of final judgment.

When calculating a lump payment to compensate future losses for medical expenses, impairment or earning capacity, the question of determining the present value of these future losses arises.

Litigation expenses and lawyers fees are not damages but are closely related with them. Their regulation and calculation, are another controversial issue in comparative law. In some jurisdiction, like the UK, the claimant normally recovers his expenses including attorney's fees. In others, like the US, the contingent fees are common, so that, usually there are no awards for litigation expenses and lawyer's fees. Finally, in others jurisdictions the courts decide on to award them or not, based upon the characteristics and peculiarities of the case.

4. Nominal Damages

They consist of a small sum awarded to a claimant: a) when he has suffered no substantial loss or injury but has nevertheless experienced an invasion of rights; b) to prevent the defendant could acquire prescriptive rights; or c) when the claimant has successfully establishes that he or she has suffered a loss caused by the wrongful conduct of a defendant, but cannot offer proof of a loss that can be compensated. For example, an injured claimant who proves that a defendant's actions caused the injury but fails to submit medical records to show the extent of the injury may be awarded only nominal damages. The amount awarded is generally a small, symbolic sum, such as one pound or one dollar, although in some jurisdictions, it may equal the costs of bringing the lawsuit.

5. Punitive Damages

Also known as exemplary damages, can be awarded in some jurisdictions to a claimant in addition to compensatory damages where a defendant's conduct is particularly willful, malicious, vindictive, or oppressive and in certain cases, with extreme negligence. Punitive damages are awarded not as compensation, but to punish the wrongdoer and to act as a deterrent to others who might engage in similar conduct.

The amount of punitive damages to be awarded lies within the discretion of the court (or jury), which must consider the nature of the wrongdoer's behavior, the extent of the claimant's loss or injury, and the degree to which the defendant's conduct is repugnant to a societal sense of justice and decency. An award of punitive damages will usually not be disturbed on the ground that it is excessive, unless it can be shown that the jury or judge was influenced by prejudice, bias, passion, partiality, or corruption.

In a jury proceeding, although the amount of damages to be awarded is an issue for the jury to decide, the court may review the award. If the court determines that the verdict is excessive in view of the particular circumstances of the case, it can order to reduce the jury verdict. In English law this applies only to cases of defamation. The opposite process (known as *additur*), occurs when the court deems the jury's award of damages to be inadequate and orders the defendant to pay a greater sum. Both *remittitur* and *additur* are employed at the discretion of the trial judge, and are designed to remedy a clearly inaccurate damages award by the jury without the necessity of a new trial or an appeal. As there are no juries in almost all English law cases this will not apply but an award can be challenged on appeal. Punitive damages are not awarded under most of jurisdiction governed by common law but are widely used in the United States⁹¹. In other jurisdictions, such as Canada, are admitted only in cases of conspiracy, defamation and intentional torts.

⁹¹ In the late twentieth century, the constitutionality of punitive damages was considered in several U.S. Supreme Court decisions. In 1989, the Court held that large punitive damages awards did not violate the Eight Amendment prohibition against the imposition of excessive fines (*Browning-Ferris Industries of Vermont v. Kelco Disposal*, 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219). Later, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), the Court held that unlimited jury discretion in awarding punitive damages is not "so inherently unfair" as to be unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. And in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), the Court ruled that a punitive damages award that was 526 times the compensatory award did not violate due process. Both *Haslip* and *TXO Production* disappointed observers who hoped that the Court would place limits on large and increasingly common punitive damages awards. In a 1994 decision, the Court did strike down an amendment to the Oregon Constitution that prohibited judicial

6. Injunctions

As a remedy to tort, injunctions are most commonly used in cases of nuisance, trespass to the person, trespass to land and defamation. The court may impose an injunction on a tortfeasor. This legally obliges the tortfeasor to stop or reduce the activity causing the tort and its breach could, potentially, be a criminal offence. Injunctions may be used instead of or as well as the awarding of damages. As mentioned above the injunction is the primary remedy in cases of private nuisance and reinforce the underlying purpose of the tort.

38.- Compensatory damages under “Continental” or civil law liability systems.

The specification of the limits of damages covered by the insurance policies, is defined both by the branch or specialty that each one of them is destined (and nowadays comprehends a vast variety of risks) and then, more precisely, for by the specific clauses of each contract, defining both the protected risks and by the risk exclusions of specific conducts⁹².

Within a general conceptual term, the compensation or reparation of the material damages caused to the victim, comprehends the emerging damage, i.e., the loss or effective decrease of the third party affected, as well as the loss of profit, in other words, what the third party stopped perceiving or earning as consequence of the act or damaging omission.

At the same time, may comprehend the moral damage, i.e. the compensation which compensates the pain or suffering caused to the victim of the damage and/or their immediate family members, in the case of treating of a fact that may have generated such prejudices.

Regarding the other classifications, we have analyzes **in the contractual liability sector**, by general rule is possible demanding the reparation of the direct and predictable damages, and also of the unpredictable, but only in the case the fact originates the liability has been caused maliciously. However, is cleared that in this liability sector, will never be possible to sentence the liable to pay the indirect

review of punitive damages awards, on the ground that it violated due process (*Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336).

⁹² Other limitations are given. Merkin states that “The civil liability insurances policies limit the insured liability in one of two forms: through requiring the insured facing a first quantity of the amount of the claim, or limiting the insured liability to the maximum of money for each one of the claims”. Op. Cit. Page 692.

damages, those which may be a collateral consequence, secondary or remote from the casual fact, to the extent when weakens or disappear the indispensable link of causality, all in accordance with Article 1558 Chilean Civil Code.

In the context of the rule governing the **non contractual liability**, in principle would seem this is wider than the contractual, every time the Article 2329 of the quoted code says that: "every damage that may be imposed to malicious or negligence of another person, must be repaired by this"⁹³. This is how the Chilean doctrine recognized it⁹⁴.

Nevertheless, this way of understanding the width of the non-contractual civil liability is changing nowadays. The doctrine denies in Chile that the expression "every damage" also includes the indirect prejudices⁹⁵, because it does not comply in the case of them, with the necessary nexus of causality that must be between the tort fact and the damage. Neither is accepted that covers the facts absolutely unpredictable⁹⁶. The topic keeps being discussable.

In the international sector, the doctrine is not pacific in this point either.

In effect, in France, brothers Henri and Leon Mazeaud, authors of the classical treaty on civil liability expressed that in the French law sector: "*in criminal matter, the principle of the entire reparation, whichever the seriousness of the guilty is, is stated always in the articles 1382 and 1383 of the French civil Code*".

And add: "*The article 1,382 obliges the liable to "repair" the damage caused by his fault, which cannot be understood but as a complete reparation and the article 1,383 has the care of pointing out that keeps being the same despise the liable has not committed but a negligence or an imprudence*"⁹⁷.

⁹³ Nevertheless, such major width is darkened by the necessity that the generating conduct of the non-contractual liability must be credited. Whereas, under the Article 1547, in the contractual liability sector, the diligence proof or care incumbents to whom must have employed it.

⁹⁴ For example, Abeluk, op. Cit., page 230.

⁹⁵ Pablo Rodríguez Grez, "Responsabilidad Extracontractual" ("Non-contractual Liability"), Editorial Jurídica de Chile, 1999, page 269. Enrique Barros Bourie, "Tratado de Responsabilidad Extracontractual" ("Treaty of Non-contractual Liability"), Editorial Jurídica de Chile, 2006, page 235. Abeliuk, op. Cit., page 230.

⁹⁶ Barros Bourie, Op. Cit., under Page. 236.

⁹⁷ Henri and Leon Mazeaud; "Tratado teórico práctico de la responsabilidad civil delictual y contractual" ("Theoretical and practical treaty of tort and contract"), Ediciones Jurídicas Eurapa America, 1977, Volume 5, pages 556 and following. There add: "The most minor guilty obligated its autor to repair all their damaging consequences, for considerable these may be. When is about setting the importance of the reparation, it has not be taking into consideration the liable, but the victim. It is not about fault, but of the prejudice. The victim has right to claim to be repaired in the situation previous to the damaged, or if that is impossible to be compensated his prejudice through an equivalent advantage. Little cares him the seriousness of the guilty. Being serious guilty or minor imprudence, only counts the result for the reparation. The author of a serious guilt, intentional for example, may not have caused but a little prejudice; is very guilty and little liable. And inversely, the author of a minor guilt may have cause and enormous damage; is little guilty and widely liable"

However, this way of understanding the civil liability width, also has changed in the French law. Already in the time of writing its Treaty, Mazeaud brothers denounced that: *"The principle is true. Nevertheless, judges do not tend to assure it, but for infringing it better. In effect, they are sovereigns for value the prejudice. For example, appreciating the value of a destroyed object is pure question of the fact. In spite of evaluating the prejudice, they have the tendency to inflate or restricting it according the seriousness of the guilt"*.

Nowadays, in France is cleared that "indirect prejudices are not object of compensation for lack of the causality requirement and neither for the unforeseen and unpredictable"⁹⁸.

With the expressed limitations, under the civil law system, Roman or continental, damages may be claimed and are subject to be sustained and determined by the justice, may be stated group and differentiated as follows:

Material damages: Impoverishment, loss or decrease of the property, current or future. These subdivide in:

- Emerging damage: Real impoverishment, current and/or future, derived from the destruction or privation of the economical benefits of an asset that forms part of the victim property, including the Money itself spent as consequence of the damaging fact, as the medical expenses, of hospitalization, of burial, of substitution or permanent or temporary replacement of the asset affected.

In resume, the emerging damage is the difference produced in the asset of the property of a person as a consequence of the civil tort, between its original value, prior the fact which is reprehended and the current value, after the same fact.

- Loss of profit: is the privation of the benefits that the victim could reasonable obtained is the tort fact would have not been produced, independently from the influencing of the subsequent variables. This may affect the productive capacity of a person or a thing.

Moral damages (pretium doloris): Affliction originating as consequence of the privation or decrease of those immaterial assets of great importance in a man's life, like is the happiness instead of pain and/or sadness; peace instead of disquiet; love instead of loneliness; liberty, the physical integrity, the honor and all the other affect of similar nature. Because of its origin, moral damages may be subdivided as follows:

Moral damage by derivation of material damages: Are the afflictive consequences derived from a material fact that affects such values, like falling in

"Undoubtedly, it is not responsible without having committed a guilt. But for the seriousness of this, does not condition the importance of the civil sentence".

⁹⁸ Phillipe Le Tourneau, "Droit de la responsabilite et des contrats", Dloz, Paris, 2005, Page 568: "The author of a damage is subjected to the proper reparation of damage, unless the unforeseen and unpredictable..."

insolvency, not being able to attend the economical necessities or straightly bankruptcy, prejudices to the family life, like not properly attend the necessities to the family, spouse and/or sons and other deriving from the previous facts.

By derivation of the damage to the persons: We may refer the following:

- Privation of life: evidently who may claim, are the third parties affected for such death;

- Total or partial incompetence. Like its name indicates, is about the impossibility of being responsible for himself and/or performing activities the person affected tend to performed before the causal fact. May be claimed both by the affected himself and the rest of the persons linked to him for affective purposes and/or economical;

- Injuries. Is about the injuries or traumatism derived from the fact, either bringing or not permanent compensatory consequences as another concept;

- Damage to health: is the affection to health of the person, considered in general, despise has not provoked injuries or the death or incompetence, though it may be link to these subsequently;

- Aesthetic damage. Are the consequences the fact carries in the integrity or harmony physical-aesthetic of the person. Like for example, the disfigurations caused with major if affect body zones at the view, like in the face, hands or legs, or translate in evident incompetence, like the ones causing a limp or loss of the extremities;

- Psychic damage. Is that consisting in a deterioration of the mental faculties or in the attitude of a person before life and to the relation with the social mean, like is the case of anxiety, the fright or the depression.

- Sexual damage. Is about the loss of the possibility of sexually relating or damaged the capacity of enjoyment;

- Damage to the "life project". Is the case of the loss of possibilities certain of carrying the aspirations the person had formed and constituted their future projection goals. Generally, is closely related to other damages here mentioned;

- Damage to the relationship life. It is the deterioration or the impossibility of normally maintaining the social relationship life, like the caused by the blindness, deaf and the incompetence we have previously mentioned;

- Damage to the honor, "image" and credit. The damage of such values not only affect the self-esteem, but also the economical and social consideration of the rest of the persons and may reach to also be translated in losses of economical type.

39.- Legal determination of the maximum limit or the precise amount of damages.

There are some types of liability where in principle, there is no place for a determination or legal setting of the amount of the compensation, because they are

subjected to a legal predetermination or which are subjected to a maximum limit amount of money, the Judge cannot exceed.

This is the case of the liability for loss, damages or delay on the delivery of the burden in the contract of maritime and air transportations.

At the same system the death events, injuries or baggage loss are subjected in the contracts of maritime and air contracts.

The above is, without prejudice for the continuous width in the sector of application of rules on liability and also because in some cases the principle has expressly established, like is the case governed under the Article 1101 of the Commercial Code of Chile (relative to the maritime transportation), if proof the loss, damage of delay on the delivery, origins from an action or intentional omission of the carrier, or recklessly in circumstances that may be presumed that has knowledge of probably would occur the loss, damage or delay, the carrier losses the power of opposing the liability limitation.

40.- Prevention expenses coverage and the trial costs in the civil liability insurance policy.

Lastly, it is worth to treat in this part the topic if, by one party, the prevention expenses of the liability and for another, the trial expenses and lawyer payments, own and external, are included or not in the liability insurance coverage.

Regarding the claim prevention expenses, in the majority of the Roman legislation, the most common solution seems to be that of said expenses covered by the insurance. This is the Chilean case, which expressly contemplates under the Article 556 N°s 3 and 4 of the Commercial Code. On the contrary, such expenses do are not covered in the law of the United Kingdom⁹⁹.

Outside what the law prevents, is necessary to find out in first term, if the policy states or not a special coverage for these concepts, since the result that

⁹⁹ "In the case *Yorkshire Water vs. Sunalliance*, the insured incurred in expenses for preventing the flooding or the surrounding properties and searched recuperating such expenses from the civil liability insurers who had provided coverage by the liability caused by an event or occurrence. The policy required that the insured "at his owns cost" would take reasonable precautions for preventing a claim. The Court of Appeal held that this clause excluded the possibility of sub-understanding the policy obliged the insurer to compensate the insured for such expenses. The Court also held that in absence of an special clause: a) the insured has not the right to take reasonable rights for avoiding or decreasing a loss; and b) that if the insured incurs in expenses for taking measures for avoiding or decreasing a loss, the insurer is not responsible of compensation the insured for such expenses". Instead, if the expenses are "incurred by the third party in investigating if the conduct of the insured has caused damage to his property". Merkin, Op. Cit., page 689.

contemplates it, carries the consequence for one side, that there will not be possibility of discussing such expenses are protected by it, but also, that the amount for such chapter contemplated in the policy, will be the maximum compensatory which will be obliged the insurer for such concept.

In the event the civil liability insurance policy does not contemplate a coverage and special amount for such concepts, we estimate indisputable that, unless expressed exclusion, the insured will have right to be covered with the amount of the liability insurance contracted, which in this case with the same maximum total amount will protect both the responsibility itself and the prevention expenses and/or the trial costs of such liability heard.

It is stated in these cases the doubt on if corresponds that insurer paying the defense expenses, when exceed the amount of such coverage, on which, in the Chilean legislation sector, we lean by the negative, because being specified a policy amount, this constitutes the maximum which the insurer is obliged. The above unless the expenses excess has been produced as consequence of not having accepted the insurer on time, a transaction with the third party injured, resulting in definitive a sentence major than the predicted, according the rule we previously have referred.

Nevertheless, we think that despise in the event the policy expressly excludes such expenses, the insured would have the right to request the payment with burden to the coverage in the event such expenses would be useful, i.e., if with them is obtained that the amount collected by the injured is rejected or decreased.

In the sector of the English law, the legal solution regarding this point is different. In effect, "when defense expenses must be paid, guarantee is in principle entirely separated of the obligation of compensating the insured for the claims of indemnity regarding the liability. It is often estimated that the defense expenses must be treated as additional to the common limits of indemnity (insured amount) instead of being considered as a part of them. However, normally, the maximum liability of the insurers in the policy is set by an aggregate to the sum of the sentence against the insured plus the defense expense. The contractual clauses vary"¹⁰⁰.

If are covered by the policy, the doubt is stated if is precedent his payment in case of not being clear is the claim of the third party against the insured is one that really falls into the policy coverage sector, or if it is enough that potentially the claim may be comprehended in the insurance or simply originates the insured activities in the form described in the policy. With regards to this, in the English law, has been sustained that "is obligation of the insurer compensate the insured regarding the defense expenses incurred for the claims that origin from facts that potentially fall into the terms of the primary coverage guaranteed by the insurance"¹⁰¹. Surprisingly in such legal system has reached to the conclusion, on the contrary, that: " if the action

¹⁰⁰ Merkin, op. Cit., page 700

¹⁰¹ Merkin, op. Cit., page 701.

interposed against the insured by the third party fails, the insured has no right to collect the expenses at the protection of the insurance, in absence of an expressed term"¹⁰² .

On the other hand, the event the amount claimed by the third party with burden to the liability attributed to the insured, exceeds manifest and justifiably the amount of coverage, affecting in consequence the insured's property and the insured pro rata of its interest on the results of the controversy with the third party. In this aspect coincides the solutions provided in the "continental law" and the "common law".

V.- Compensation payment

41.- The origin of the debt. Distinction between the origin of the liability and the origin of the obligation for paying the corresponding compensation.

In relation to this topic, it is necessary to make a precision. It has to be distinguished between the origin of the obligation of responding, which origins in the fact generating the liability and the origin the consistent debt in paying the compensation already determined for the concept of a liability that has been established by the justice or accepted by the liable, and the insurer in his case in a legal or out-of-court transaction.

The important precision, from distinguished specialists, like Professor Fernando Sánchez Calero, for referring to another different topic, which is the moment where it must be understood occurred the claim, state that such moment coincides with the verification and occurrence of the event generating the damage, since in that moment, they assure, origins the "liability debt", in the sense of such liability which origins, born the obligation to compensate the injured, even when this liability may be controversial, inclusively, not claimed.

That situation is different. Here, in this paragraph, we refer to the debt of paying the obligation, not already controversial, of compensating the injured.

That situation or state, of not being controversial the liability may origin, legally from two origins:

a) of being accepted the liability, explicit or implied by the originator of the facts which generated them, or by whom responses for this in virtue of the law, like the father for the facts of the son of the family, or the entrepreneur for the facts of his

¹⁰² Merkin, Ibid.

dependents (vicarious civil liability), in a legal transaction where a compensation payment is agreed; or

b) having been declared the existence of the liability for firm legal sentence.

When Professor Sánchez Calero talks about "liability debt"¹⁰³, is actually referring to the origin of itself, but not to such obligation that may be executively demanded, since before that must be legally declared by definitive sentence or accepted in a transaction whose effects are similar, since both bring entailed the possibility of being requested its execution by the recognized law in them.

Therefore, for demanding the payment of compensation, the obligation of paying it must have been legal or transactional established.

42.- The compensation form of payment. Payment in Money, reparation, reconstruction. Other forms.

The common form of making effective the compensation is liquidating its amount in Money and paying it to the victim, whether the own liable or his insurer.

From the insurer perspective as recognized by the Article 550 of the Commercial Code of Chile: "The insurer mainly contracts the obligation of paying the insured the insured sum or part of it".

But "not the entire reparation must be necessarily be made in money."¹⁰⁴

There are cases where the reparation is in values, which occurs for example in the case of a person is sentenced:

1) to restitute a thing he took improperly;

2) to destroy a work (building) like is the predicted case in the section two of the article 1,555 of the Civil Code of Chile which establishes that in case of a breach of an obligation of not doing, "being able to destroy the thing done and this necessary, will be the responsible obliged to it or authorized the creditor for taking into effect the expenses of the debtor";

3) to publish to his cost a legal sentence, like in the cases of when somebody is sentenced for publicity abuses; or

4) to the destruction or confiscation of the offensive material, these two last cases, which also governs Chilean Law on Publicity Abuses.

¹⁰³ "The origin of the compensation debt is produced immediately when the damaging fact is verified (action or omission, or breach of the contract) derived from that debt, such the damaging fact is the claim cause precisely found in the origin of the liability debt". Fernando Sánchez Calero, "Ley de Contrato de Seguro" ("Insurance Contract Law"), 4ª Edición, Editorial Aranzadi, Pamplona, 2010, page 1632.

¹⁰⁴ Pablo Rodríguez Grez, Op. Cit., page 343.

Like Pablo Rodriguez say, "the reparation in value consist in the removal of the damaging facts and the re-establishment of the altered situation by the tort, in terms of eliminating every vestige of possible damage"¹⁰⁵.

Also occurs with frequency that the reparation is partially possible in value, having to be completed with payment of the amount of money for making it integrate, like for example for compensating the victim of the loss of profit which produced to him for being private of the value, or for the expenses he must did for temporarily replace it.

Also is possible that the liable is sentence, or this agrees with the victim, the reparation or reconstruction of the damaged thing, or its replacement for another thing of equal or similar characteristics and value. These alternatives are frequently used through an insurer and the damages affecting a thing, furniture or property in the first case (reparation), or exclusively to a furniture in the second (replacement).

43.- Compensation form of payment regarding its opportunity.

The payment in cash rule keeps being the alternative most used when the forms of reparation or reconstruction previously referred are not possible or acceptable and in the majority of the cases, is such to which appeal the sentences issue by the courts, yet when for regulating the amount to pay, is necessary calculating the present value of the sums which may established periodically along many years. Like is the case of the remunerations which would have perceived the victim during the rest of his labor life, of the ones was private as a consequence of the claim, for having resulted, for example, disable of continuing working.

However, in some case, either for parties agreement or in other, for decision of the courts, it is established that the compensation will be payable in terms, in payments, or in the form of a pension.

In some cases, very exceptional in the Chilean practice, but with certain frequency in other jurisdictions, is agreed or assign a compensation consisting in all or part of providing a determined service in favor of the victim, for example, of sanitary assistance, or of provides that relief his disability.

In such cases, results possible to agree or the Judge establishes, forms of future adjustment of the quantum of periodical payments or of the set pension, in the suppose, for example, that the condition of the victim varies in the future, either this recovers or on the contrary, worsen.

Regarding the payment of the trial expenses, when corresponding, the policy covers it, whether for reaching the amount of the insurance and is not discarded its application on such effects, or for existing an additional coverage of legal defense.

¹⁰⁵ Rodriguez, op.cit., page 344

Generally, the insurer pays them as they generate. In the English law sector, is precised that: "the moment when the insurers must make the payments depend of the policy redaction. In a time was common that the policies established the insurers would compensate the insured after the termination of the procedures against him then requiring the insured would finance the costs from his own funds until that date. Modern policies commonly state that the insurers are obliged to pay for the expenses as they are incurred, or at least have liberty of judgment on if paying on such base. In this last case, the insurers are in the obligation of good will, of making a decision if on they will provide or not the financing subsequently"¹⁰⁶.

44.- Payment recipient or receiver.

Not only the victim may be the recipient or the receiver of the compensation payment, but also his heirs, other dependent persons from him and the denominated victims for repercussion or for bounce.

When the victim survives to the attributable accident to the insured liability, which is common this is the victim himself, directly, whoever is recipient of the compensation payment.

When that does not occur, instead, the compensation recipients will be the third parties who sued invoke a title enough for crediting its interest, as the case above mentioned of the heirs and exceptionally other persons which the death of the victim causes material and/or moral prejudices. Like are the cases of the victims for repercussion or bounce and of the third parties who the victim provided of an economical income.

In the majority of the cases, the compensation payment is effective by the liable or his insurer, directly to the victim or to whom, by any type of valid interest, claimed the compensation.

However, in some opportunities where the liability and the compensation amount were discussed and decided before a Court, the liable or his insurer may pay through legal consignation, alternative that may be used and the Courts accept, only in the mean of treating of a payment cash of a unique compensation and total set in the sentence (a lump sum).

45.- Other concepts increasing or adding to the compensation. Interests, adjustments (indexation) and costs.

At the time of regulating the compensation, both the Judge in his sentence, and the parties, when discussing the terms of a transaction, have to place in a determined

¹⁰⁶ Merkin, op. cit., page 700

moment in time for evaluating the damages, being several alternatives that may be given, which carry different calculation modalities.

Results evident in that moment, both the judge evaluating or determining the material prejudices in the sentence, or the parties, when agree the amount to pay in a transaction, must determine in which moment is placed the compensation calculation. Moment that may be the present time (of the sentence or of the transaction), and other alternatives, being in the past, and of the commitment of the tort fact, of the effective performance of damage (if this has previously materialized), of the date of the claim, or of the interposition of the claim by the injured, or also in a future time, in this case, when expecting to verify a future damage¹⁰⁷.

Other alternatives may be, the moment when the sentence of first or second instance is issued, the moment when the sentence is executed, or such when the credit is liquidated.

All of these are valid alternatives, but has to be reflection about which is the most appropriate in law. In this point, we estimate the parties discussing the terms of a transaction are free to be agreed as seems them the most adequate, but the Judge, at determining the compensation regulating, must place in the moment when the tort is committed, which is the cause both of the damages and the liability. Every time this is the point that marks the evaluation start of the damages which have to be compensated and allows determining both the present damage and projecting the moral or future damage.

In every case, the point we treat in this paragraph has special significance for the effects of appreciating the referred future damage, as well as the interests and the readjustments (indexation) that must be applied to the sum regulated as compensation.

Regarding the interest, these are no other thing than the pecuniary reparation proceeding as consequence of one person has been private of a right or of an interest the normative ordinance legitimates, but delays on filing to its property as a result of the duration of the trial. As for the readjustment (or indexation), these do not represent but the update of an amount of Money when its purchasing power is deteriorated as cause of the inflation. Hence must be applied, or from the used moment for regulating the compensation or, at least, from the notification of the claim, in this last case, in Chile for application of the rule of the Article 1551 of the Civil Code¹⁰⁸.

Besides the future damages, which is that having present today, but will occurred in the future, it can also be given what has been called "intrinsic variation of

¹⁰⁷ This is given when to a seriously injured person, requires of a series of future operations.

¹⁰⁸ Nevertheless, in many cases, wrongly in our concept, courts set the application of the interests and adjustments from "the date when the sentence is executed", despise being calculated the compensation at the time of the fact perpetration originating the liability.

the material damage"¹⁰⁹, concept which refers to the increase or decrease of the damage originally considered by the victim, for unforeseen events that may be carried in the future. This is the case for example, of a person wounded in an accident where dies for subsequent complications derived from the injuries received in the tort fact, or contrary, the case of who would seem disable definitively, obtain recovering his dysfunction with subsequently.

In the Chilean law this pacific question is not found, having those who sustain that in these cases is possible the affected claims for the payment of the later prejudices not collected in the claim but are as consequence of the facts that originated the liability. On the base of arguing that in fact, are new prejudices. Other authors think, instead, that procedurally, these prejudices cannot be claimed after the opportunity the law has contemplated for introducing variations to the claim ends. Because, they reasoned, the loss thing is the same, understanding for such legal benefit in the new trial is being claimed, prejudices, which will be the same that was claimed on the previous trial.

Lastly, we refer to the topic of the origin of including in the sentence, the payment of the procedure and personal costs, i.e., the trial expenses and payments of the lawyers who attended the claimant party, the third injured, in the trial where the liability was heard.

In this point, there is a great variety of positions in the different legal systems. In some legal systems sentencing the defeated party to the payment of the costs is mandatory, in others, is optional for the Judge, in others the Judge may release the losing litigant if at his judgment this had "feasible" reasons for litigating, and lastly, in other jurisdictions simply such sentence does not proceed, thus in these last the existence of agreements of *cuota litis* between the claimants and the lawyers representing them favors.

In the case of being admissible, the Court accept the claim with costs, the insured is obliged to pay them. The problem will present is only the case of the amount insured does not reach for paying the prejudices plus the costs, because in principle, according the general rule, the insurer liability is limited by the amount of the insurance contracted, unless the following exceptions:

- a) has agreed the costs will be object of an additional coverage to the insurance covering the liability, which does not tend to occur; and
- b) if the deficit was produced as consequence of having opposed the insurer previously, to a compromise or transaction for a sum to pay the quantity insured was enough.

¹⁰⁹ José Luis Diez Schwerter, op.cit., pages 184 and 185.

In the sector of the English law, section 51 of the Ruling Agreement of the Supreme Court of 1981, confers absolute discretion to the courts for sentencing the payment of the costs and the House Of Lords has sustained that in exceptional circumstances, may sentence in costs to a person who is not part in a legal processing, but is related closely with it, which in the situation we analyzed, may be translated in sentencing in costs the own insurer, which in such case will have to assume them from its own funds. All of the above, always if, according a judgment of the Court of Appeals in the case *TGA Chapman Ltd v. Christopher*, the following conditions are agreed:

- 1° The insurers have made the decision of defending the claim.
- 2° The defense of the claim has been founded by the insurers
- 3° The insurers have directed the litigation.
- 4° The insurers have disputed the claim exclusively for defending their own interests;
- 5° Defense has failed in its integrity.

It was emphasized in the judgment, that is the defense would have had success the insurers would have recovered their cost of the third party. Hence the reciprocity was adequate. The Court of Appeals for this reason, did not take into account the argument that a sentence in costs against the insurers exposed them at an aggregated level of liability, beyond the specified in the policy¹¹⁰.

Oswaldo Contreras Strauch
Santiago, April 2012

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COMPENSATORY DAMAGES ON THE CIVIL LIABILITY INSURANCE

Abstract

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- 1.- General considerations
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- 6.- The adjustment of the claim. Role of the adjuster or adjuster in this type of insurance.
- 7.- About the application of the rules on underinsurance.
- 8.- Interpretation of the insurance contract. Applicable rules.
- 9.- Negotiations with the third party prior to trial.
- 10.- Necessity of the insured approval for reaching to an out-of-court transaction with the third party injured.
- 11.- Transaction of the insured with the third party, materialized through the endorsement or transfer of the policy.
- 12.- Effects of the unjustified negative of one or another party to trade with the third party.

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