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Марина Миколаївна Великанова

Відділ проблем приватного права
Науково-дослідний інститут приватного права і підприємництва
імені академіка Ф.Г. Бурчака
Національної академії правових наук України
Київ, Україна

РОЗПОДІЛ РИЗИКУ ЗАВДАННЯ ШКОДИ В ДЕЛІКТНИХ ЗОБОВ'ЯЗАННЯХ З ПОЗИЦІЙ ЕКОНОМІЧНОГО АНАЛІЗУ ПРАВА

Анотація. *Завдання шкоди майновим та (або) немайновим правам осіб трапляється досить часто. Право на відшкодування такої шкоди є беззаперечним. Втім, цивілістичною доктриною неоднозначно вирішуються питання розподілу ризику завдання шкоди в деліктних зобов'язаннях. Тому, метою цієї публікації є обговорення підходів до розподілу ризику завдання шкоди в деліктних зобов'язаннях та визначення їх ефективності з економіко-правових позицій. У статті на підставі економічного та системного аналізу з використанням діалектичного, порівняльного, логічно-догматичного та інших методів, в тому числі економічної науки, характеризуються підходи до визначення мети деліктного права та його можливості забезпечити ефективний розподіл ризику завдання шкоди. Доводиться, що деліктне право може мати прямі регуляторні наслідки шляхом стримування поведінки та розподілу ризиків. Робиться висновок, що завданням деліктного права є оптимальний розподіл ризику шкоди між заподіювачем і потерпілим та забезпечення здійснення ризикової діяльності лише за умови, що її соціальна цінність виправдовує створений ризик. На підставі економічного аналізу деліктного права обґрунтовується, що розподіл ризику завдання шкоди в деліктних зобов'язаннях здійснюється за допомогою інститутів страхування та відповідальності. Страхування є економічно ефективним, якщо йдеться про компенсацію завданої шкоди. Проте лише відповідальність поряд із функцією компенсації може також виконувати функцію стимулювання до запобігання шкоди. У зв'язку з цим ризик завдання шкоди у деліктних зобов'язаннях переважно покладається на особу, що таку шкоду завдала. У зобов'язаннях з відшкодування шкоди, завданої джерелом підвищеної небезпеки особа, яка на відповідній правовій підставі (право власності, інше речове право, договір підряду, оренди тощо) володіє транспортним засобом, механізмом, іншим об'єктом, використання, зберігання або утримання якого створює підвищену небезпеку, несе такий ризик навіть за відсутності її вини у завданні шкоди. Підставами для покладення на потерпілого такого ризику є його намір чи непереборна сила. Саме такий підхід до розподілу ризику завдання шкоди в деліктних зобов'язаннях є справедливим та економічно ефективним і сприяє суспільному добробуту.*

Ключові слова: делікт, відповідальність, цивільне право, страхування, ризик, зобов'язання.

Maryna M. Velykanova

Department of Private Law Issues
Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine
Kyiv, Ukraine

DISTRIBUTION OF RISK OF HARM IN DELICTUAL RESPONSIBILITY FROM THE STANDPOINT OF ECONOMIC ANALYSIS OF LAW

Abstract. *Damage to property and (or) non-property rights of persons occurs quite often. The right to compensation for such damage is indisputable. However, civil doctrine ambiguously addresses the issue of risk sharing in tort obligations. Therefore, the purpose of this paper is to discuss approaches to the distribution of risk of harm in delictual responsibility and to determine their effectiveness from an economic and legal standpoint. The paper, based on economic and systematic analysis using dialectical, comparative, logical-dogmatic and other methods, including economics, describes the approaches to determining the purpose of tort law and its ability to ensure effective distribution of risk of harm. It has been proven that tort law can have direct regulatory consequences by restraining behaviour and sharing risks. It is concluded that the task of tort law is the optimal distribution of risk of harm between the perpetrator and the victim and to ensure the implementation of risky activities only if its social value justifies the risk. Based on the economic analysis of tort law, it has been substantiated that the distribution of the risk of damage in tort liability is carried out through the institutions of insurance and liability. Insurance is cost-effective when it comes to compensation for damage. However, only liability, in addition to the function of compensation, can also perform the function of preliminary prevention of harm. Therefore, the risk of causing harm in tort liability is mainly borne by the person who caused the damage. In obligations to compensate for damage caused by a source of increased danger, a person who on the appropriate legal basis (property rights, other property rights, contracts, leases, etc.) owns a vehicle, mechanism, other object, the use, storage or maintenance of which creates an increased danger, bears such risk even in the absence of guilt in causing harm. The grounds for imposing such risk on the victim are his intention or force majeure. It is this approach to the distribution of harm risk in tort liability that is fair and cost-effective and contributes to public well-being.*

Keywords: delict, amenability, civil law, insurance, risk, obligations.

INTRODUCTION

Recently, significant attention has been paid by both scholars and practitioners to the problem of compensation for damage caused to a person or property by wrongful acts not related to breach of contract. In particular, the issues of approaches and basic principles of compensation for injuries suffered are raised in order to prevent it. It is believed that the reduction of the role of tort law to compensation for accidental wrongful damage seems relatively limited and the purpose of tort law should be much broader [1]. According to Michael Faure, there is a significant difference between how lawyers see the system of liability and its essence in terms of economic efficiency [2]. Lawyers believe that the system of liability for tortious act is aimed at compensating for the damage caused, in this regard, the protection and subsequent compensation of victims is the main purpose of the law. Therefore, the rules of liability are clearly aimed at compensating the victims, and the

benchmark against which the liability system is evaluated is whether it is able to provide this compensation. The economic analysis of tort law takes a different position. Economists emphasise that bringing a potential offender to justice should help prevent accidents. The basic idea is that the subjects respond to the potential danger of effectively developed liability by taking optimal precautions. In this perspective, the purpose of the tort liability system is not ex post compensation, but rather preliminary prevention [2]. That is, from the standpoint of economic analysis of the right to responsibility is entrusted not only (and not so much) compensatory function, but also the function of providing appropriate incentives to minimise risks. Accordingly, the study of tort liability, as well as the establishment of effective incentives to prevent harm is possible through economic analysis of law [3].

Economic analysis of law, as noted by L. Kaplow and S. Shavell, seeks to answer two main questions about legal norms: what are the consequences of legal norms on the behaviour of the subjects and whether such consequences are socially desirable. This makes it possible to describe the behaviour of individual subjects, based on the assumption that it is promising and rational, and in terms of welfare – socially desirable [4]. The basic principle of economic analysis of law is the category of efficiency. This category, having an economic meaning, can become an important criterion in the creation of legal norms aimed at minimising risks. However, no less important is the basic value for law – justice. According to Bruce Chapman, the tools of economic analysis of law (in particular, efficiency) are informative for age-old debates about the adequacy of public consensus and morality for law [5]. Therefore, the study of tortious liability should be based on the methodology of economic analysis of law along with traditional methods of legal science, and the distribution of risk of harm should be based on equity, taking into account the concept of economic efficiency. The purpose of this paper is to discuss approaches to the distribution of harm risk in tort liability and to determine their effectiveness from both a legal and economic standpoint.

1. MATERIALS AND METHODS

The main challenge facing the law is not only to reflect economic relations, but also to stimulate and develop them. Therefore, the understanding of law should be based on the recognition of law as the dominant form of organisation and existence of economic relations, as the law reflects the relations that have actually developed and exist (including economic). Given that the main task of tort law should be to minimise the risk of harm, the effectiveness of which depends on the chosen approaches in the construction of legal norms, respectively, the study of minimising the risks of harm, the basic principles of distribution of such risks should be based on integrated methods of scientific research. cognition in their unity and interaction. This will allow to optimally distribute the risk of harm between the perpetrator and the victim and to ensure the implementation of risky activities only if its social value justifies the risk.

In the study of the distribution of risk of harm in tort liability, it seems appropriate to expand the scope of scientific research and use new methods for private law, inherent in other branches of science, including economics. Accordingly, the justification of the distribution of damage risk and the development of proposals should be carried out on a functional basis with the borrowing of the methodological apparatus from the economy.

For the systematic study of these issues it is necessary to use system analysis, the methodological basis of which is dialectics. The use of these techniques provides a systematic understanding of approaches to the distribution of risk of harm in tort liability and decision-making in certain situations where their effectiveness is ambiguous. Based on the system analysis, tort liability is considered as a separate system that has its own structure, within which there is a problem of risk sharing. The development of an adequate theory for solving this problem is the task facing the doctrine of civil law. The solution of this problem depends on the right goal and adequately chosen means, which, in turn, is due to the complexity of the system and the correctness of its description. Therefore, within the framework of the systematic analysis of tort liability and the distribution of the risk of harm, a structural analysis is chosen, which allows to understand the relationships between the components of such obligations and their impact on the environment – general well-being. The comparative method was used to establish the essence of the terms "non-contractual obligations", "delictual obligations" and "indemnity obligations" and revealed differences between them. This made it possible to distinguish between liability for compensation of harm and tort liability, and to treat the latter as liability for compensation arising from wrongful acts. In addition, the distribution of risk of harm through the institution of legal liability and the institution of insurance was analysed using a comparative method. This allowed us to determine that only the institution of legal liability is able to provide adequate incentives for the parties to reduce the risk of harm. This approach will ensure the implementation of risky activities only if its social value justifies the risk.

The use of logical-dogmatic method along with the method of hermeneutics made it possible to establish the essence of the concept of "source of increased danger" and approaches to the distribution of risk of harm by a source of increased danger through the prism of its perception by lawmakers and researchers. In particular, with the help of such methods the concept of "source of increased danger" was interpreted through the analysis of the signs of the source of increased danger given in the decision of the Plenum of the Supreme Court of Ukraine and the scientific literature. Also, these methods allowed to identify the distribution of risk of damage by a source of increased danger in the current legislation of Ukraine. The method of using judicial or arbitration practice has helped to establish the position of judicial practice on the distribution of risk of harm by a source of increased danger. It has been established that courts, in adjudicating cases of compensation for damage caused by a source of increased danger, take the position that a person carrying out activities that are a source of increased danger is liable for the damage if he does not prove that the damage was caused by force majeure or intent of the victim. Therefore, in all other cases, even in the absence of the fault of the owner of the source of increased danger, the courts decide in favour of the victim.

The methods of economic science, in particular, alternative analysis and boundary analysis, allowed to investigate the distribution of risk of harm in tort liability in the context of choosing the most effective behaviour and the need to abandon such choice and identify the best ways to minimise the negative consequences of the risks. Along with the comparative method, this made it possible to consider legal liability as an effective system of incentives for individuals to reduce or avoid the risk of harm in tort liability, which can contribute to public good.

2. RESULTS AND DISCUSSION

2.1 Approaches to determining the purpose of tort law and the content of certain concepts in the field of non-contractual obligations

Foreign scholars are quite active in discussing economic approaches to the analysis of tort law, while the main task is to achieve optimal cost reduction for damages. In their view, in order to create optimal incentives, liability rules should encourage the parties to minimise the overall social value of harmful acts. Relevant variables for this are the cost of accidents, the costs of avoiding harm (precautionary measures) and the administrative costs of the justice system [3]. However, the classical dual structure of tort law creates difficulties from a regulatory standpoint, as it provides a poor episteme that is suitable for a modern understanding of risk [1]. It is important to generally understand that the tort system is an integral part of risk management, and vice versa. The idea of tort law as a regulator allows a new look at risk management and court participation, along with common tools such as private and public regulation. This is explained by the fact that the practice of tort law and most scholars traditionally understand the system of tort jurisdiction as a mechanism for resolving individual disputes with its very important principle of ensuring justice in bipolar relations between plaintiff and defendant. According to this concept, tort law gives the victim the opportunity to bring the offender to justice for his wrongful conduct, and when such lawsuit is filed, the court distributes responsibilities for risk-taking. The court determines the extent to which the plaintiff or defendant is responsible for risk management, and whether the ex post defendant must reimburse the victim for the costs associated with the negative consequences of the risk. Accordingly, litigation may have implications for setting certain standards: filing a lawsuit may indicate that the issue is being challenged, which in turn may affect perceptions of what behaviour is considered "reasonable", what social norms and evidence are taken into account by the court in a process that can inform the general public and contribute to the development of certain policies [6].

According to L. Kaplow and S. Shavell, tort law is a means by which society can reduce the risk of harm by establishing the obligation of potential perpetrators to pay for the harm they cause [4]. After all, in most legal systems, tort law imposes a duty of care (custody) on one party, which, if violated, becomes liable for the damage caused to the other party (victim) as a result of this violation [7]. Accordingly, tort law can have direct regulatory consequences by restraining behaviour and sharing risks. In general, tort law promotes social welfare, while implementing the goal of resolving individual disputes. Its legitimacy as a risk management mechanism is based on the ability to promote "optimal" risk management, when business risks are regulated to ensure a socially optimal level of activity [6]. The neoclassical model of tort law, according to Michael Faure, assumes that the perpetrators and victims are rational individuals who will respond to the rules of tort law, seeking to maximise their usefulness and self-interest [8]. The purpose of tort law is rational decision-making that maximises the efficient use of resources. Efficiency becomes the standard for all proposed solutions and is measured by the maximum value, which, in turn, is manifested in the willingness to pay [9]. However, maximising one's own usefulness is not always the dominant factor. Subjects are willing to limit their selfish interests and treat others fairly if such behaviour is mutual [8]. Therefore, the analysis of

tort law should be based on the principles of combining economic efficiency and fairness. In this regard, it is advisable to consider the distribution of risk of harm in tort liability in accordance with these approaches. However, before proceeding to the actual distribution of risks, it is advisable to clarify the meaning of certain concepts in the field of non-contractual obligations and to determine the place of tort among them.

In the scientific literature, tort liabilities are a group of non-contractual obligations aimed at compensating for damage caused to a person or property as a result of a wrongful act not related to breach of contract [10]. According to I. V. Plakhina, the obligation to cause harm in all legal systems is considered as one of the institutions of civil law and is called non-contractual obligations, or tortious. However, in her opinion, the concept of "non-contractual obligations", in particular in continental law, has a broader meaning, as it covers, along with tort, obligations for unjust enrichment and some others [11]. S.D. Grinko (Rusu) believes that it is impossible to talk about the similarity of the concepts of "indemnity obligation" and "liability for damage" and their identity with the concept of "tort liability". Accordingly, it would be erroneous to equate any "indemnity obligation" with "liability for damages". Delictual obligations, as obligations to compensate for damage caused by wrongful decisions, acts or omissions, arise from the fact of an offense. This gives a reason to conclude that liability for damage is the content of the obligation to commit an offense in the obligation to compensate for the damage. Hence the admissibility of using the term "tortious liability for harm caused" in the sense of tort liability [12].

Instead, K.V. Manuilova notes that the content of the tort liability (the author identifies the concept of "liability for damages" and "tort liability") includes not only the obligation of the person responsible for causing damage, to compensate for the damage (delictual obligations), but also the right of the creditor (victim) to demand restoration of his property sphere to the condition in which it was before offense. Thus, tort liability does not exhaust the content of the liability for damage, but is only one of its elements. Also, not every obligation to compensate for the damage caused can be considered as a measure of liability, as there may be cases where liability is not included in the content of a particular delictual obligation [13]. According to O.O. Soroka, such a mixture of "liability for damages" and "tort liability" is a legacy of the Soviet era, due to the very structure of the Central Committee of the USSR in 1963, Chapter 40[1] of which was entitled "Obligations arising from infliction of harm" and in many articles it regulated the prosecution for damages, including cases of compensation for damage caused by lawful acts, cases of imposition of the obligation to compensate the damage to the person specified in the law, regardless of his guilt. The change in the concept of liability for damages has led to a distinction between the concept of "liability for damages" and "tort liability" [14]. However, unfortunately, the author does not provide arguments in favour of this distinction, and the obligation to compensate damages analyses from the standpoint of civil liability. It seems appropriate to support the position of T. S. Kivalova and in the analysis of civil non-contractual legal relations to talk not about "offense" but about "harm" as the basis and defining feature of such legal relations, and civil protective relations should be considered in the context of civil liability and remedies [15]. A similar opinion is expressed by S. D.

[1] Civil Code of the Ukrainian SSR. (1963, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1540-06#Text.

Grinko, pointing out that it is wrong to assume that any obligations arising from damages are tortious. The institution of compensation solves and should solve a more global task – to ensure the elimination of the consequences of harm, restoration of violated rights of victims through obligations to compensate for damage, which may be the result not only of illegal but also lawful actions [16]. Accordingly, in this paper, we will assume that the grounds for liability for damages can be both wrongful and lawful acts. Tort liabilities are obligations to compensate for damage arising from wrongful acts.

2.2 Distribution of risk of harm by a source of increased danger

A special type of tort liability is an obligation arising from the infliction of harm by a source of increased danger. The Supreme Court of Ukraine in its ruling[1] noted that Art. 1187[2], 1188[3] of the Civil Code of Ukraine refer to special torts, which provide for the peculiarities of the subjective composition of responsible individuals (when the obligation to compensate the damage is not imposed on the direct perpetrator, but on another person specified in the law – the owner of the source of increased danger) and establish liability for infliction of damage regardless of the fault of the perpetrator. According to Art. 1187 of the Civil Code of Ukraine, the source of increased danger is the activity associated with the use, storage or maintenance of vehicles, machinery and equipment, use, storage of chemical, radioactive, explosive and flammable and other substances, keeping wild animals, service dogs and fighting dogs breeds, etc., which creates an increased danger for the person carrying out this activity and other persons.

A special feature of such activities in accordance with paragraph 5 of the resolution of the Plenum of the High Specialised Court of Ukraine for Civil and Criminal Cases "On some issues of application by courts in resolving disputes about compensation of harm caused by a source of increased danger"[4] from 01.03.2013 No. 4 increased likelihood of harm due to the inability to fully control them. Civil liability for damage caused by activities that are a source of increased danger occurs in the case of its purposefulness (for example, the use of vehicles for their intended purpose), as well as the involuntary manifestation of harmful properties of objects used in this activity (for example, in the case of damage due to involuntary movement of the car). Scientists identify the following signs of a source of increased danger, which are interrelated and should be assessed together: 1) the impossibility of full control by a person; 2) the presence of harmful properties; 3) high probability of harm [13; 17], pointing out that the increased probability of accidental harm to others occurs only in the presence of uncontrollability of the source of increased danger. Randomness explains the reason for uncontrollability, as it indicates its occurrence against the will of the person, which is due to objective reasons – the insufficient level of development of science and technology [17]. How should the risk of harm be distributed as a source of increased danger?

[1] Resolution of the Supreme Court of Ukraine No. 6-108tss13. (2013, November). Retrieved from http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/C667B49AAB191957C2257C92003A6DC5.

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.

[3] Civil Code of Ukraine, *op. cit.*

[4] Resolution No. 4 of the Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases. (2013, March). Retrieved from http://zakon2.rada.gov.ua/laws/show/v0004740-13.

The distribution of risk of harm through the institutions of legal liability and insurance is common. Based on the economic analysis of tort law and its fulfilment of the function of compensation to victims, insurance is a more cost-effective system than liability. However, legal liability performs another social function – creating incentives to prevent harm [4]. This is due to the fact that, knowing about the costs enshrined in the rules of liability, the parties will be properly motivated to take optimal care to prevent accidents, respectively, as a result, should reduce the overall social costs of accidents [8]. There are three types of costs that result from the damage: 1) costs associated with the damage to the injured party (the cost of medical care and lost ability to work); 2) social costs arising from accidents (costs to avoid accidents); 3) costs associated with the administration of the tort system (administrative costs of the justice system) [18]. If the purpose of tort law is to consider such a distribution of risk of harm between the perpetrator and the victim, which will ensure the implementation of risky activities only if its social value justifies the risk, the insurance institution is not able to create conditions for this goal, as it can cover only the first type of expenses [19]. The current legislation of Ukraine, in particular the Law of Ukraine "On compulsory insurance of civil liability of owners of land vehicles"[1], in order to ensure compensation for damage caused to life, health and/or property of road accident victims, provides for civil insurance – legal liability. That is, there is a distribution of the risk of civil liability. However, can such insurance contribute to public welfare, because there are concerns in the papers on the subject that the sale of such insurance policies may lead to an increase in the number of road accidents or compensation for damage will be less than the damage caused. Accordingly, in this case, liability insurance is not socially desirable [4], although from the point of view of economic analysis of the law, insurance is a more cost-effective system of compensation, as both victims and perpetrators can significantly protect themselves from risk by passing this risk to a third party. And if the main task of society was to compensate for the damage, the insurance system would be better than the system of tort liability [19].

However, society requires effective incentives to reduce the risk of harm, which only the institution of liability can provide. According to Michael Faure, the purpose of the liability system is not ex post compensation, but rather preliminary prevention. However, this starting point has two important consequences. First, if the entities are not affected by the financial consequences used as a means of liability, then such an incentive is unsuccessful if other legal norms (regulations) do not offer an alternative. Second, bringing ex-prosecutors to justice ex post (after an accident), provided that its purpose is clearly defined, can be a preliminary incentive for optimal prudence. Thus, from an economic point of view, the system of responsibility performs an important social function to eliminate dangers [2]. Accordingly, the purpose of allocation of risk in harm-doing is to achieve a reasonable balance between the public interest and the rights and interests of individuals protected by law.

The current legislation of Ukraine the risk of causing damage by a source of increased danger is laid upon a person who on the appropriate legal basis (property rights, other right to thing, contracts, leases, etc.) owns a vehicle, mechanism, other object, the

[1] Law of Ukraine No. 1961-IV. (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1961-15#Text.

use, storage or maintenance of which creates increased danger (Part 2 of Article 1187 of the Civil Code of Ukraine). It is also possible to distribute such risk between several entities: in cases of misappropriation of a vehicle, mechanism, other object and due to the interaction of several sources of increased danger (Part 4 of Article 1187, Article 1188 of the Civil Code of Ukraine)[1]. It should be noted that such division is a rather debatable issue, which is discussed in legal doctrine. Complicating the problem is the situation when the victim is also guilty of causing harm. According to the Principles of European Tort Law[2], there are two approaches to dividing the risk of harm between several perpetrators. Thus, according to Article 3:102[3], if each offender was harmed at the same time, the activities of each of them are considered to be the cause of the victim's harm. That is, in this case we can talk about joint and several liability. And the determining factor must be the task of harm at the same time. Compensation in this case must be carried out by all offenders in full. But in the case of interaction of harmful activities, when each of them could be sufficient to cause harm, but it remains unclear which of the subjects actually caused such damage, each activity is considered as a probable reason that it could cause harm to the victim. Then compensation for damage is made in proportion to its alleged infliction. According to the current civil legislation of Ukraine, damage caused by the interaction of several sources of increased danger is reimbursed on general grounds, namely: 1) damage caused to one person through the fault of another person is reimbursed by the guilty person; 2) in the presence of guilt only of the person who was harmed, it is not reimbursed to him; 3) in the presence of fault of all persons whose activities have caused harm, the amount of compensation is determined in the appropriate proportion depending on the significant circumstances. If other persons have been harmed as a result of the interaction of sources of increased danger, the persons who jointly caused the damage are obliged to compensate it regardless of their fault (Article 1188 of the Civil Code of Ukraine). As can be seen from this article, compensation for damage on the basis of fault occurs only when it comes to inflicting damage to the owners of sources of increased danger as a result of their interaction. If the victims are third parties, the distribution of the risk of harm is carried out in the ways described above. The only feature here is only that the risk in such cases is imposed on the owners of sources of increased danger in solidarity [20].

Regarding the apportionment of the risk of harm in the event of the victim's fault, under Article 3:106 of the Principles of European Tort Law[4], such damage is laid on the victim to the extent appropriate to the likelihood that it could have been caused by activities, occurrence or other circumstances in his own sphere. According to Ukrainian national legislation, the risk of damage caused by a source of increased danger is transferred to the victim in the cases provided for in Part 5 of Art. 1187 of the Civil Code of Ukraine. The grounds for imposing such a risk on the victim are his intent or force majeure. This position is supported by judicial practice. Thus, the Shevchenkivsky District

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.
[2] Principles of European Tort Law. (2005, January). Retrieved from http://www.egtl.org/docs/PETL.pdf.
[3] Civil Code of Ukraine, *op. cit*.
[4] Principles of European Tort Law. (2005, January), op. cit.

Court of Lviv, ruling in the above-mentioned case No. 466/8841/13-ц[1] on the claim for recovery of material and compensation for non-pecuniary damage caused by a source of increased danger, noted that in accordance with Part 5 of Art. 1187 of the Civil Code of Ukraine, a person who carries out activities that are a source of increased danger, is responsible for the damage, unless he proves that the damage was caused by force majeure or intent of the victim.

Therefore, in all other cases, including in the absence of fault of the owner of the source of increased danger, the latter compensates the victim. However, it is necessary to take into account the rule of Art. 1193 of the Civil Code of Ukraine[2], according to which if the gross negligence of the victim contributed to the occurrence or increase of damage, then depending on the degree of guilt of the victim (and in case of guilt of the person who caused the damage – also depending on the degree of his guilt) the amount of compensation is reduced, unless otherwise provided by law. This approach is supported both by legal doctrine and in line with the principles of European law. In particular, in Art. VI. – 5:102 Principles, Definitions and Model Rules of European Private Law. The Draft Common Frame of Reference[3] states that if the fault of the victim contributed to the occurrence or extent of the damage, the compensation should be reduced according to the degree of such fault. However, account should not be taken of (a) the minor guilt of the victim, (b) the guilt which was insignificant in causing the harm; or (c) contributing to the victim's bodily injury caused by a motor vehicle in a road accident, unless such assistance did not mean disregarding such caution as was clearly required by the circumstances.

CONCLUSIONS

The economic analysis of tort law made it possible to determine that the task of tort law is the optimal distribution of risk of harm between the perpetrator and the victim and to ensure the implementation of risky activities only if its social value justifies the risk. The distribution of risks in tort liability can be carried out through the insurance system (transfer of risks to a third party) and the system of liability (imposition of risks on the perpetrator or victim). From the standpoint of economic analysis of law, insurance is a more cost-effective system than liability system. However, based on the functional effect of liability, i.e. its impact on the offender, legal liability performs another social function – preliminary prevention of harm. The function of encouraging individuals to reduce or avoid the risk of harm in tort liabilities is carried out by establishing as a general rule of transferring risk on the perpetrator. Leaving the risk on the victim can take place only in cases of force majeure or intent of the victim. This distribution is fair and cost-effective and aims to achieve social well-being. However, a more in-depth study of the distribution

[1] Case No. 466/8841/13-c. (2014, February). Retrieved from https://youcontrol.com.ua/ru/catalog/court-document/37065007/.

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15/page20#Text.

[3] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. (2010, January). Retrieved from https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EUROPEAN_PRIVATE_LAW/EN_EPL_20100107_Principles__definitions_and_model_rules_of_European_private_law_-_Draft_Common_Frame_of_Reference__ DCFR_.pdf.

of risk of harm by multiple individuals, in particular the principles, types and methods of such distribution, is of particular interest for further research.

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Maryna M. Velykanova

Candidate of Law, Associate Professor
PhD student of the Department of Private Law Issues
Academician F.H. Burchak Scientific Research Institute of Private
Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine
01042, 23-a Rayevsksy Str., Kyiv, Ukraine

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