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Andrius Verikas

LEGAL ASPECTS OF THE COMPENSATION FOR THE DAMAGE CAUSED TO EMPLOYEE'S HEALTH

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LEGAL ASPECTS OF THE COMPENSATION FOR THE DAMAGE CAUSED TO EMPLOYEE'S HEALTH

Andrius Verikas

Summary of Doctoral Thesis

The problematics and relevance of the topic discussed. The protection of Human health as one of the basic human rights invites a comprehensive research. The importance of the proper protection for this right is especially underlined in labour relations. State Labour Inspectorate of the Republic of Lithuania provides compulsive statistics: there are 250 million people injured at work and 160 million of employees who suffer occupational diseases every single year all over the world. Moreover, in year 2006 there were 3419 accidents at work and 1019 cases of occupational diseases were established in Lithuania. To put it in other words, the level of accidents at work reaches 267 cases for 100 thousand of inhabitants[1]. Paying a considerable regard to the fact that accidents at work and occupational diseases comprise a massive expression, specific legal regulation which provides for the compensation for the damage derived from legal labour relations is required.

It is evident that actual guarantees for the compensation of the damaged caused as a result of injury to employee's health are related not only to the duty of employer to provide health and safety at work but to the interest of whole society to ensure social security for the people injured. Needs of each injured person are different and individual, obviously, the interests of injured and the person who is liable for the injured vary too. Moreover, there is no uniform attitude in the society what level of social security is sufficient when the damage is caused as a result of injury. Fair and full compensation for the damage caused to the employee is an outcome of complex adjustment of all these different interests and attitudes. Therefore, it is necessary to have a look, in a complex manner, at the compensation for the damage caused as a result of injury employee's health and its peculiarities of legal regulation in Lithuania, especially underlining the interaction of various compensation methods.

The relevance of the chosen topic is marked by the following:

– the compensation for the damage caused as a result of accidents at work and occupational diseases by the way of social insurance is applied in West Europe for over a decade, however, it is a new institute (2000) in Lithuania and its application in the legal system

[1] Situation of safety and health at work in Lithuania. The Supreme State Labour Inspector of Republic of Lithuania V.Pluktas. 25 of April, 2007 // http://www3.lrs.lt/docs2/XZZIIJVP.PPT [time of accession 12 September, 2007].

of Lithuania has no theoretical background and no studies were carried out;

– as the Civil Code 2001 determines employer's liability for the damage caused as a result of injury to employee, the specific legal provisions which provided for the strict employer's liability derived on the basis of occupational risk are no more valid. Therefore, it is necessary to remove legal gaps by providing clarifications on the preconditions of employer's liability which invites for further research (which is now not given proper attention);

– the social insurance of accidents at work and occupational diseases is often seen as the insurance for the employer's liability for the damage caused to employee's health. However, legal regulation and the case law reveals that this kind of social insurance in Lithuania does not ensure this function and can not compare to the scope (extent) of pecuniary employer's liability;

– the damaged caused to the health of employee may be compensated by applying the social insurance of (for) pecuniary employer's liability and accidents at work and occupational diseases. However, Lithuania has no conception for interaction of the means of the compensation for damages. Therefore the definition of criterions for just and complete compensation of damages is relevant academic and legislative problem which invites for further development.

The object of the research. The compensation for the damage caused to employee's health by applying the pecuniary employer's liability and social insurance against accidents at work and occupational diseases.

The thesis does not examine the issues of accidents at work and occupational diseases in essence or execution of the duty to compensate the damages. The compensation for the damage caused to employee's health by applying of social insurance of lost work capacity (disability) and insurance of civil liability are also excluded. The research performed does not examine the system for compensation of damages for civil servants and other peculiar groups of employees (e.g. seamen). The legal aspects of the compensation for the damage caused as a result of death of employee are not discussed.

The objective of the thesis. To reveal systematical - functional relations between employer's liability and compensation for the damage to employee's health by social insurance against accidents at work and occupational diseases and to define the interaction of the various means for damage compensation in Lithuania.

Tasks of the thesis:

– to examine, in a complex manner, the legal relations derived from the compensation of the damage caused to employee's health and to define the pecuniary employer's liability and rally criterions for social insurance against accidents at work and occupational diseases;

– to investigate preconditions of the pecuniary employer's liability for the damage caused to employee's health while evaluating their significance to the scope of compensation for damage;

– to define the purpose and functions of the social insurance against accidents at work and occupational diseases in the system of compensation for damage caused;

– to reveal the process of the transformation of pecuniary employer's liability into social insurance against accidents at work and occupational diseases and to define preconditions necessary for implementing the optimal limitations of pecuniary employer's liability.

The defended theses (statements):

– the pecuniary employer's liability and social insurance against accidents at work and occupational diseases needs to be evaluated as subsystems of the compensations for the damage caused to employee's health system. These types of compensation are connected by functional relations and the main purpose of this system is fair compensation for the damage caused;

– the concrete experienced damage (loss) caused by injury to employee is an objective criterion which indicates the limits of the compensation for the damage caused to employee's health system;

– the relation of the damage caused to employee's health with the work is the main precondition that ensures the stability of the compensation system for the damage caused to employee's health independent of transformations occurring in the system.

The scientific novelty of the thesis. The novelty of the scientific thesis is grounded by comprehensive investigation of the pecuniary employer's liability and social insurance against accidents at work and occupational diseases. There are no academic researches aiming to investigate the system of the compensation for the damage caused to employee's health in Lithuania. These issues were considered in isolation either as pecuniary employer's liability or as various aspects of civil liability or social insurance. It is possible to mention these Lithuanian and foreign scholars who in separate aspects have considered issues linked with the compensation for the damage caused to employee's health: V.Nekrašas, M.Gruodis, T.Bagdanskis, T.Davulis, V.Mikelėnas, R.Macijauskienė, V.Tiažkijus, J.Maculevičius, P.Grėbliauskas, L.A.Maidanik, N.J.Sergejeva, R.S.Azimov, M.I.Nikitina, M.J.Marinina, J.N.Korsunov, D.Schwab, J.Spier, H.Koziol, B.Markesinis, M.Coester, G.Alpa, A.Ullstein and P.Cane. The legal aspects of the compensation for the damage caused to employee's health by applying the social insurance were examined by A.Guogis, J.Tartilas, A.S.Goldenveizer, S.M.Kovalevski, S.N.Sinkov, E.I.Astrachan, V.D.Roik, J.A.Kosariov, E.E.Maciulskaja and Ch.Rolfs.

Practical significance of the thesis. Conclusions and recommendations provided by the thesis could be significant for legislature while developing the legal regulation for relations of pecuniary employer's liability and certain aspects of social insurance against accidents at work and occupational diseases. The research could be helpful while evolving a comprehensive attitude of the courts of general competence and administrative courts to the compensations for the damage caused to employee's health as complex institute. Moreover, practical general

conclusions could be of significant importance to employees while implementing the right to compensation of damages as well as for employers while defending their own interests.

Methods of the research. The main method applied is empirical methods, i.e. the method of document analysis. It is equally important to mention other theoretical methods of systemic analysis, statistics analysis, comparative, historical, teleological, analogue and generalization method, which were applied while performing the research.

Sources of the research. In the course of preparation of the thesis, works conducted by Lithuanian and foreign representatives of the doctrine of social security law were quoted. Considerable regard was paid to positive sources of law; international as well as national legal acts were analyzed while revealing the problematics of the topic. Lithuanian draft legal acts, explanatory notes, official explanations and announcements of ministries and other state institutions were considered. The examination of the case-law of the Constitutional Court of the Republic of Lithuania, the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania was carried out. It was referred the case-law of the Court of Appeal of Lithuania too.

Approbation of the research results. The thesis has been discussed at the Department of Labour Law and Social Security of the Faculty of Law of Mykolas Romeris University (11 October 2007) and at the sitting of the Doctoral Studies Commission of Mykolas Romeris University (12 October 2007). The Commission recommended the thesis for public defending.

Structure of the doctoral thesis. The thesis is composed of an introduction, review of the research, the methodology of the thesis, three parts of presentation-research, conclusions, proposals *da lege ferenda* and a list of literature. At the end of the thesis a list of scientific articles related with the topic of the thesis which have been published by the author is presented.

* * *

The First Part of the thesis titled „Theoretical aspects of the compensation for the damage caused to employee's health" is designed to reveal the interaction of various types of compensation for the damage caused to employee's health and to develop a conception of the compensation system for the damage caused to employee's health. The part is composed of four chapters.

The First Chapter titled „The conception of the compensation for the damage caused to employee's health" deals with the problematics of definition and assessment of the damage caused to employee's health.

The chapter underlines that in Lithuania as well as foreign countries health harm in the legal meaning is divided into non-pecuniary losses (damages) and pecuniary loss. Pecuniary loss is composed of victim's past losses and future pecuniary losses. Nevertheless, health is

immaterial value and the assessment of health harm cannot be understood in uniform - social, moral, medical and economical elements of the health conception have different weight. Criterions for assessment of non-pecuniary losses is designed to guarantee that the compensation for health harm would be neither too little nor excessive. In addition, compensation of losses has to ensure optimal life quality for the victim. It is outlined that the lost working capacity due to health harm is one of the criterions to assess the future pecuniary losses. In all cases full compensation for health harm is pursued, however, assessment of health harm comprises of many compromises and is linked with future perspectives. The conception of damage is depended on prevailing attitude to the victim's needs in the society too. It is noted that health harm means quantitative characteristics of the legal relations derived from compensation for the damage, however, the health harm cannot be expressed into abstract value and depends on individual circumstances of every single case.

Even though the damage caused to the employee's health may be interpreted differently, the compensation of it has its own peculiarities compared to other cases of compensation for health harm. Social compromise in the legal labour relations determines that compensation for the damage to employee's health does not coincide with the regular conception of the health harm: the limits for employer's liability can be restricted or expanded and social insurance for compensations of lost working capacity might not be linked to concrete loss experienced at all. Therefore, conception of health harm as quantitative characteristics is not a single background for codifying legal relations derived from compensation for the damage caused to employee's health. Preconditions for damage compensation also determine the conception of the damage caused to employee's health and its assessment.

The Second Chapter titled „The Compensation System for the Damage Caused to Employee's Health" reveals the need to systemize legal relations derived from compensation of the damage caused to employee's health and the content of the system.

Having summarized different conceptions which determine the variety of compensation types, two main theories are distinguished: *theory of damage partition*, which historically developed into social insurance and *particular justice or theory of compensation for accidental damage* which is linked to the need to compensate the damage caused to the special social values, inter alia health, independent of guilt. Chapter Two challenges the position of Lithuanian and foreign authors that the damage could be compensated by various types of compensation schemes: legal doctrine provides ranging from three to seven compensation schemes; however, interaction of those schemes is not revealed which leaves it ambiguous if those systems are alternative or operating independently. It is suggested to assess the compensation for the damage caused to employee's health as an entire system. The aim of this system - compensation for damage - is implemented by different compensation types, which in all cases compose

subsystems of the system, i.e. structural elements of the system which implement only certain functions of the system. It is concluded that pecuniary employer's liability and social insurance against accidents at work and occupational diseases are subsystems of the compensation for the damage caused to employee's health system.

The Third Chapter titled „Transformation Processes of the Compensation for the Damage Caused to Employee's Health" assesses the background in Europe and Lithuania for the development of contemporary compensation for the damage caused to employee's health system by historical method. Having examined the historical sources, it is determined that the start of compensation system for the damage caused to employee's health is associated with the industrial development in 19th century: the technologies used in working process became not only potentially but actually hazard to employees' safety and health. Compensation for the health harm, based on tortious liability, could not meet the changing social relations. It was necessary to recognize that the liability for the damage caused to employee's health is derived not from the delict (*injuria*), but employment contract (*locatio conductio*) in order to transfer the guilt proof to employee. However, this transformation of employer's liability was not sufficient as in many cases the damage caused to employee's health was accidental. Thus, the need for the doctrine of a strict employer's liability to substantiate the compensation for the damage emerged out of professional occupation arose (*Theorie des Tätigkeitsrisikos*). The employer's liability based on the theory of occupational risk was developed by enacting specialized laws (Germany) or by case law (France). However, the latter theory did not guarantee the legal certainty and definiteness for the subjects, employee and employer, of legal relations derived from compensation for the damage caused. This situation forced to look for the compensation type which would ensure the alternative to employer's liability and guarantee social security to the employee even in the case of accidental damage. The implementation of this function was delegated to social insurance: this model was developed following the principle of insurance of civil employer's liability on behalf of the third person.

Chapter Two outlines that similar processes in the area of regulation for the damage compensation for the employee's health were implemented in Lithuania after restoration of Independence. The issues concerning the compensation for the damage caused to employee's health were regulated by the Civil Code which was adapted in 1964 and The Provisional Law on Compensation of Damage Caused as a Result of Accidents at Work and Occupational Diseases of Republic of Lithuania (hereafter - Provisional Law) valid since the year 1997 which was replaced by the Law on Social Insurance against Accidents at Work and Occupational Diseases of Republic of Lithuania valid since January 1st, 2000. However, this transformation process in Lithuania is not marked by continuity for which social insurance against accidents at work and occupational diseases did not overtake the functions typical for this kind of social insurance.

Moreover, the implementation of Provisional Law is still relevant in practice as this law has a retroactive validity. It is concluded that social insurance against accidents at work and occupational diseases is unable to ensure the limits of employer's liability after the Civil Code valid since July 1st, 2001 and Labour Code valid since January 1st, 2003 came into force and deficiency of entire compensation of damage caused to employee's health occurred.

Chapter Four titled „Functional Relations of the Compensation System for the Damage Caused to Employee's Health" reviews significant to Lithuania principles of the compensation system for the damage caused to employee's health in Lithuania.

Legal provisions regulating the compensation of damage caused to employee's health are of more or less public as well as private nature. Thus, it is impossible to resolve the problematics of interaction of different compensation types with reference only to competition of general and specialized legal provisions. Having regard to the case law and normative legal resources, it is suggested to base systematical relations between different compensation types on three main principles: 1) *Constitutional* principle of fair damage compensation performs a function of integration of various compensation types and connects them into integral system of the damage compensation. 2) *Subsidiarity* in the system of compensation for employee's health harm is applied by defining the relation between the employer's liability and social insurance against accidents at work and occupational diseases. 3) *Competition* in the compensation for health harm to employee system as a principle of functional interaction regularly means the competition of legal provisions at the scope of the same type of damage compensation. Accordingly, it is concluded that special rules for compensation of damage caused to employee's health can not be less beneficial than the other rules of tortious liability.

The Second Part titled „The Scope of Employer's Liability for the Damage Caused to Employee's Health" examines the relation between pecuniary employer's liability and civil liability, the preconditions of the liability and other peculiarities of the subject-matter. The part is composed of six chapters.

The First Chapter titled „The Position of Pecuniary Employer's Liability in the Damage Compensation System" defines the origin of the pecuniary employer's liability as derived from civil liability and the factors which determine the peculiarities of preconditions for this liability.

Having examinined various legal doctrines concerning the imputation of employer's liability for the damage caused to employee's health to labour or civil branch of law, the validity of such assessment is challenged: civil liability and pecuniary employer's liability are designed to ensure function of compensation in the legal system. Namely, general functional purpose enables these compensation types to be understood as complementing but not delimiting each other. It is concluded that preconditions of civil liability in the transformation process of labour

legal relations were complemented by specific aspects (contractual nature of legal labour relations and peculiarities of causal relation) and they gained a new quality, yet without loosing the direct functional relations with civil liability. The particularity of employer's liability for the damage caused to employee's health is determined by special protection attributed to human health in the labour process.

It is suggested to classify the preconditions of employer's liability for the damage caused to employee's health according to the classification of preconditions for civil liability into following groups: 1) the subjects of liability are connected by labour legal relations; 2) a damage is caused to employee's health; 3) unlawful employer's act harmed the employee's health; 4) health harm is linked to unlawful employer's act or working act; 5) health harm occurred at the fault of employer. It is emphasized that in the transformation process of civil liability the content of civil liability preconditions has changed, however, emergence of special circumstances (e.g. intoxicated employee) does not mean development of new, not typical for civil liability preconditions: these circumstances may be assessed in the context of aforementioned classification of liability preconditions.

Chapter Two titled „Identification of subjects of Pecuniary Employer's Liability" defines the subjects of pecuniary employer's liability and assesses the significance of labour legal relations in the application of this liability.

Subjects of pecuniary employer's liability are employee and employer. Determination of legal labour relations between the person responsible and the victim is significant while applying pecuniary employer's liability. Labour relations developed by legal doctrines and case-law let to presume that application of pecuniary employer's liability is possible when labour relations are not executed by employment contract (in a case of illegal work). The compensation for damage caused to employee's health is examined given factual labour relations. Employment contract is one of the descriptive features of labour relations, however, in the sense of pecuniary employer's liability for the damage caused to employee's health, the following features are considered to be significant to labour relations: employer is under a duty to provide safe and healthy working conditions and employee has a duty to meet the requirements of the working rules set by employer.

It is emphasized that Article 4 Paragraph 2 of the Provisional Law determines the employer's liability in some cases based only on the recognition of labour relations, i.e. when the damage caused to employee's health which occurred en route to or from work concrete person who caused the damage is liable. It is supposed that this kind of employer's liability for „others fault" is understood as not the compensation for the damage but as guarantee of social security for the employee who experienced health harm. However, this function is not typical to either civil or pecuniary employer's liability.

The Third Chapter titled „The scope of the Compensation for the Damage as a Precondition of Pecuniary Employer's Liability" examines the damage precondition in pecuniary employer's liability by historical and comparison methods.

Having examined Lithuanian legal acts, it is considered that estimating future pecuniary losses in accordance with the criterias of legitimacy and certainty of the loss set by the Civil Code of 2001 enables to implement full loss compensation in the most precise manner and to achieve the right balance of interests between the victim and the person responsible for the damage. In accordance with Article 6.283 of the Civil Code of 2001 future pecuniary losses of employee as a result of health harm are determined by concrete loss value and its connection with health injury. Full and fair future pecuniary losses compensation is impossible to ensure while assessing those losses according the percentage of lost working capacity (set by the Provisional Law). It is outlined that the courts award future pecuniary losses for the employee's health harm by periodic benefits (even though the Civil Code sets lump sum benefit as alternative) and while counting it refer only to percentage of lost working capacity.

It is stated that the compensation for losses caused as a result of employee's health harm should rationally ensure not only the basic needs but quality. The compensation for losses by applying the employer's liability is crucial to recover the victim's infringed rights. Lithuanian case-law which deals with the issues of compensation for losses are decided without paying regard to concrete victim's needs (e.g. stating that the victim is entitled to treatment without cost) is not accepted.

The damage caused to employee's health may be compensated by applying pecuniary employer's liability. This compensation for the health harm in Lithuania is set by the Civil Code of 2001 since it entered into force on 1st of July, 2001. Compensation for non-pecuniary losses in a case of injury to employee's health is a constituent part of the principle of full damage compensation.

It is concluded that the damage precondition in the pecuniary employer's liability is related to full damage compensation for the health harm. In the system fair damage compensation is depended on the interpretation of the aforementioned conception of damages as a precondition for pecuniary employer's liability.

Chapter Four titled „Aspects of Conception of Employer's Unlawful Act" examines the employer's unlawful act as a precondition for pecuniary liability.

Having reviewed the conception of unlawful act by examining legal acts of foreign countries as well as Lithuanian legal acts and legal doctrine, it is concluded that pecuniary employer's liability for unlawful act can be based not only on the infringement of specific legal provision but on the breach of general duty to be attentive and careful. This conception of unlawful acts enables to determine peculiarities of employer's unlawful act when the damage is

caused to employee's health.

It is noted that employer's unlawful act is linked to the breach of employer's duty to provide employees with safe and healthy working conditions as well as failure to perform employer's duties or inadequate implementation of duties while organizing the work process. Health and safety requirements are set by European Union and international and national legal acts. However, unlawful employer's act can be determined on the basis of principles of rationality and fairness even when the health harm to employee occurred as a result of unforeseen circumstances (Article 46 Paragraph 2 of the Law on Employee's Safety and Health).

Legal doctrine recognizes the employer's liability for the damage caused by employees (indirect liability). It is considered that the injury to employee experienced as a result of an act of another employee should be recognized as relating to the breach of employer's duty to organize the work process.

It is noted that the conception of employer's unlawful act based on ambiguous features reveals the drawbacks of pecuniary employer's liability and stresses additionally the need to compensate the damage caused to employee's health.

Chapter Five is titled „Peculiarities of Causal Relation of Employer's Liability" is composed of two sections, whose distinction is based on duality of causal relation concerning the issues of employer's liability for the damage caused to employee's health.

First Section titled „Causal Relation between the Employee's Health Harm and Work" analyses primary link of the causal relation.

Having analyzed this link of causal relation it is distinguished: 1) causal relation between employer's unlawful act and injury to employee; 2) causal relation between injury to employee and work. These parts of causal relation is closely linked to each other and is examined together, however, different circumstances are assessed while determining relation between health harm and unlawful employer's act. Absence of any of those parts of the causal relation withdraws the employer's liability. On numerous occasions it is possible to determine if the injury to employee is a result of employer's unlawful act by special knowledge (expertise). It is outlined that the relation of injury to employee with work is a broader precondition of employer's liability: it depends on the definition of the terms „accident at work", „accident on the way to and from work" and „occupational disease". Injury to employee experienced at working place and during the working hours by itself (*per se*) does not confirm the relation of health harm either with work or employer's unlawful act. Causal relation is determined having regard to all circumstances and principles of fairness and rationality.

The Second Section „Causal Relation between Employee's Health Harm and Damage" examines the secondary link of the causal relation.

While examining this link of causal relation it is stated that causal link enables to

determine the concrete loss the employee experienced as a result of health harm. In this regard it is necessary to assess future pecuniary losses as a result of health harm and they are influenced by lost working capacity as well as by other circumstances (employee's transfer to less paid work position, redundancy and its reasons, the victim's perspective to find another job as well as general health status, age and other factors). The attitude that the victim's future pecuniary losses are composed of average remuneration part, counted according the percentage of lost working capacity, is challenged. Thus, it is suggested to correct legal provisions of the Civil Code in order to design a chance to review the periodical benefits as compensation when the scope of lost working capacity changes.

Employee's past and future pecuniary losses as a result of injury are assessed according their relation with health harm too. Causal relation determines the value of non-pecuniary losses.

While determining the victim's losses in the meaning of employer's liability it is necessary to include other gaining's and damage compensations assigned to the victim. Therefore, it is concluded that causal relation determines the scope of employer's liability.

Chapter Six titled „The Problematics of Determining the Employer's Fault" examines the guilt as a precondition of pecuniary employer's liability.

The chapter outlines the need to compensate the damage caused to employee's health independent of employer's guilt. Having examined the conception of guilt provided by legal doctrine and national legal acts it is concluded that guilt precondition has twofold importance to employer's liability: 1) the guilt is a background to apply the employer's liability; 2) mixed employer's and employee's guilt is a background to reduce the damage compensation.

It is noted that in Lithuania and foreign countries the guilt is assessed by higher standards when the issue of employer's liability is considered. Employer's guilt in a case of injury to employee is determined by the way how the employer was performing his/her duty to provide employees with proper, safe and healthy working conditions. This duty in a sense of employer's guilt is almost absolute - only extraordinary and unforeseen circumstances which could not be controlled by employer or cases when all required means were used can withdraw employer's guilt. The proof of guilt is assigned to employer.

It is stated that employer's pecuniary liability does not ensure the compensation for the damage which is a result of accidental employee's health harm. The employer without guilt is liable as manager of excessive hazard source if maintenance of this source was not included into employee's duties. Therefore, the need to compensate accidental damage by applying different compensation types is emphasized.

While examining the precondition of guilt in the sense of pecuniary employer's liability it is outlined that the reduction of the damage compensation is determined by victim's gross negligence.

The Third Part titled „The Purpose of Social Insurance against Accidents at Work and Occupational Diseases in the Compensation System of the Injury to Employee" reviews this compensation type for the damage caused to employee's health and the interaction of it with the employer's pecuniary liability. The part is composed of four chapters.

The First Chapter titled „Functions of Social Insurance against Accidents at Work and Occupational Diseases" analyses the relevant issues of this type of insurance in the aspects of social security and insurance of liability.

Having examined all relevant theories of social insurance (human inherent rights, subsidiary support, human personal responsibility for their own future, solidarity and social justice), tasks of social insurance developed by International Labour Organization, it is stated that priority to social insurance against accidents at work and occupational diseases is a guarantee of employees' social security.

Relation of social insurance against accidents at work and occupational diseases with insurance of civil liability is being examined. It is emphasized that the function of social security is implemented by applying social insurance to compensate the damage caused to employee's health. However, the result of implementation of this function is the protection of employer's pecuniary interests related to his/her pecuniary liability too. Insurance of liability and social insurance against accidents at work and occupational diseases are sharing a common functional purpose. As follows, this type of social insurance is a consequence of civil insurance and employer's pecuniary liability transformation. However, interests insured by social insurance of liability are different as well as insurable occurrences and the circle of insured persons. Therefore, it is suggested to assess social insurance against accidents at work and occupational diseases not as a insurance of employer's liability but as an institute concerning the restrictions of employer's liability. It is concluded that this type of social insurance which guarantees compensation for the damage caused to employee's health and social security should be linked to the pecuniary employer's liability: only in this way it is possible to determine full and fair compensation for damage caused to employee's health.

Chapter Two titled „Subjects of Social Insurance against Accidents at Work and Occupational Diseases" reviews the legal statuses of participants in social insurance relations.

It is noted that mandatory social insurance against accidents at work and occupational diseases according insurer legal status can be of fixed and flexible model. Fixed model means that monopoly of state insurer exists whereas flexible model provides for the competition of insurers. Flexible model of social insurance against accidents at work and occupational diseases operates in many European countries. However, decentralization of insurers is determined by historical circumstances of social insurance development. It is assessed that pluralism of insurers in Lithuania could not guarantee an effective implementation of social function.

Having analyzed Lithuanian legal acts, it is stated that insurer is defined by two criterias: 1) insurance duty needs to be set by law; 2) insurers are obliged to pay insurance contributions for concrete insured (employees) or to inform insurer of their insurance.

This chapter outlines the conception of insured. The circle of insured subjects is determined by the display level of social solidarity. The fact of insurance and social insurance length are assigned to the features which describe the legal status of insured.

It is stated that dependently on the definition of the subjects of social insurance against accidents and occupational diseases, this insurance with a different scope implements two functions: limitations of employer's pecuniary liability and guarantee of social security to employees. The extension of the circle of insured persons is significant while implementing state social security politics which concerns the social guarantees designed to persons who experienced health harm; however, it has no impact on limitation of employer's pecuniary liability.

Chapter Three titled „Preconditions of Compensation for the Damage Caused to Employee's Health by Applying Social Insurance against Accidents at Work and Occupational Diseases" deals with the preconditions of the damage compensation and their link to preconditions of employer's pecuniary liability. However, having regard to the fact that social insurance performs not only a function of limiting the employer's liability but guarantees social security to the employee's who experienced health harm, *ipso facto* compensates accidental health harm, it is concluded that social insurance in the transformation does not overtake all preconditions of employer's liability but those of guilt and causal relation. On this basis two sections of the chapter are distinguished.

First section titled „Causal Relation of Social Insurance against Accidents at Work and Occupational Diseases" examines the precondition of causal relation. In Lithuania precondition of causal relation has peculiarities while recognizing the health harm experienced during insurable occurrence as well as while determining non-insurable occurrence. On this basis two subsections are distinguished.

The First Subsection titled „Causal Relation at Determination of Insurable Occurrrence" examines the cases of determining the definition of insurance risk and causal relation between insurance risk and injury to employee.

Having regarded to practice of foreign countries, it is emphasized that insurance risk is understood as employee's health related to work. Relation with work is defined by giving the conceptions of „accident at work", „accident on the way to or from work" and „occupational disease" (Germany, Federation of Russia) or is left to interpret by case law (France). With regard to beneficent practice of foreign countries it is suggested to withdraw the regulations of insurable occurences and define by law insurance risk as employee's health harm related to work.

It is stated that in the sense of social insurance against accidents at work and occupational diseases in Lithuania three groups of accidents are distinguished according the relation with work: 1) the ones occurred at the working process; 2) related to professional occupation; 3) conditionally recognized as related with work. With regard to case law it is stated that definition of insurable occurrences by law not always provides the courts with the chance to evaluate relation of employee's health harm with work and take a fair decision. It is noted that causal relation can be determined only if all concrete circumstances of acts are assessed paying a considerable regard to the principles of fairness and rationality.

Moreover, it is noted that the relation of damage occurred with professional occupation is one of the preconditions for employer's pecuniary liability (Article 246 Paragraph 6 of the Labour Code). It is presumed that these preconditions should be interpreted uniformly while compensating the damage for employee's health by applying social insurance.

The Second Subsection titled „Causal Relation at Determination of Non-Insurable Occurrences" reviews circumstances that withdraw causal relation between health harm and work.

In Lithuania circumstances determining that employee's health harm is non-insurable occurrences is set by law. It is presumed that part of those circumstances can be understood as meaning victim's guilt. However, they do not withdraw relation between the employee's health harm and professional occupation in all cases. In a sense of causal relation conditions set by law are examined: 1) insured was in-sober or intoxicated and this did not have any connection with the technological qualities of the work assigned by the employer; 2) insured was suffering a disease not related to work; 3) insured self willed (without knowledge of employer) was working on his/her own behalf; 4) violence was used against insured if circumstances of violence and motives were not related to work, except cases when accident occurs on the way to or from work.

With regard to case law it is stated that aforementioned circumstances in many cases reveals that health harm experienced by employee will not be related with professional occupation. However, it is outlined that definition of insurable occurrences or non-insurable occurrences implies the determination of causal relation between health harm and work and providing by law the circumstances occurring in practice most often, which withdraw causal relation, is inexpedient.

Equally it is stated that proper interpretation of preconditions of causal relation which depends on concrete circumstances, proper implementation of principles of fairness and rationality and understanding of purposes of social security, may guarantee fair compensation of the damage caused to employee's health by applying the system of compensation for the damage caused to employee's health. Inadequate legal regulation of causal relation or its

misinterpretation and improper application are revealed by the cases when compensation for the damage caused to employee's health by applying the social insurance is not awarded, even so still employer's pecuniary liability can be applied.

The Second Section titled „Guilt as a feature of a social insurance against Accidents at Work and Occupational Diseases" reviews the peculiarities of this precondition.

In Lithuania precondition of guilt is not distinguished while talking of social insurance against accidents at work and occupational diseases. It is presumed that part of the conditions set by law which determine that employee's health harm is non insurable occurrence not in most of the cases denies the health harm relation with work; moreover, it reveals that health harm is a fault of the victim. The following conditions are distinguished and examined: 1) insured did deliberately (intentionally) aim for the accident; 2) insured was in-sober or intoxicated and this did not have any connection with the technological qualities of the work assigned by the employer; 3) insurer, insured or beneficiary (recipient of insurance premium) caused a substantial breach of insurance rules; 4) the insured experienced the damage because of his own actions and these unlawful acts were determined by pre-trial institutions or national courts as criminal acts or administrative offences, except the infringements of normative legal acts of safety or occupational hygiene regulations. In compliance with the case-law it is stated that when the health harm of employee is a result of his/her own fault, failure to compensate the damage by application of social insurance is incompatible with purposes of social insurance.

Having considered the condition of guilt applied as an element of social insurance in foreign countries it is emphasized that the guilt of insurer and insured may give rise to different consequences. It is recognized that guilt of insured is a background to reduce the insurance premium (Germany, Federation of Russia. At the same time the employer's guilt has no influence for determining an insurable occurrence, even so, social insurance institution has a right of recourse to employer (Germany).

It is concluded that condition of guilt should guarantee the right balance of interests of participants in social insurance legal relations and ensure fair damage compensation in the following ways: 1) victim's guilt is a background to reduce the amount of insurance premium in proportion with the guilt (compromise insurance premium); 2) condition of guilt determines the social insurance institution's right of recourse to employer. For the aforementioned reasons it is suggested to incorporate the condition of guilt in Lithuanian legal labour relations.

Chapter Four titled „Conceptions of Damage Caused to Employee's Health and Its Compensation by Social Insurance against Accidents at Work and Occupational Diseases" deals with the legal aspects of full compensation for health harm by this type of social insurance.

It is emphasized that in Lithuania social insurance against accidents at work and occupational diseases encompass only the compensation of future pecuniary loss which occurred

as a result of employee's health harm. Compensation of losses for treatment, medical and professional rehabilitation is imputed to other types of social insurance (sickness and maternity insurance, health insurance). However, there is no priority set while choosing the type of social insurance for compensating the damage caused to employee's health.

Chapter Four also reviews the system of compensations by social insurance against accidents at work and occupational diseases: sickness benefit, lump sum benefits and periodic benefits. It is outlined that formulas which determine amount of lump sum benefits and periodic benefits are based on the amount of future pecuniary losses counted according the degree of lost working capacity as well as on coefficients regulating the value of compensations. It is presumed that coefficient of „0,5" that is used while counting periodic benefits is designed to balance the benefit of this type pf social insurance with other similar social benefits belonging to persons in a case of lost working capacity (work disablement (disability) or old-age pension). It is assessed that this kind of balance of social insurance compensations when no regard is taken to appointed similar social benefits is unacceptable.

The amount of lump sum benefits and periodic compensation, it is emphasized, is counted differently. Having considered the practice of foreign countries and recommendations of International Labour Organization it is stated that those benefits should be determined by the same principles despite the fact if insurance premium is paid as a lump sum benefit or periodical benefits. Thus, it is suggested to unify the principles for determination of benefits.

It is stated that while compensating the damage by social insurance against accidents at work and occupational diseases, full compensation for the damage caused to employee's health and full limitation of employer's liability are not pursued. Supplementary application of employer's pecuniary liability for the damage caused to employee's health is relevant not only while compensating the victim's past losses and non-pecuniary losses but future pecuniary losses are also taken into consideration if they at a concrete circumstances are not fully compensated by social insurance.

Therefore, it is suggested to revise Article 6.283 Paragraph 4 of the Civil Code (2001) which determines that compensation for the damage caused to health provided by this code cannot be claimed by persons insured with social insurance against accidents at work and occupational diseases.

Conclusions and Proposals

Conclusions

1. As human health is immaterial value, the damage caused to it cannot be expressed in abstract number and always depends on concrete circumstances. Therefore, only those criterions

can be defined which at the maximum enable to take into account health as quality of particular human personality and social value and to choose proper pecuniary equivalent which guarantees satisfaction and optimal restitution of health and property status to the person injured. Despite complex and individual assessment for the damaged caused to person's health, only realistic damage can draw objective limits when a person is entitled to full compensation of damage.

2. Human health as a value of society, recognition of realistic background to execute human rights and freedoms, contemporary objectives of solidarity, social justice and social constitutional state determine the need to guarantee compensation for the damage caused to person's health not only at the level of the victim and person liable for the damage but also at the level of global liability of the society for its members. Functions of the compensation for the damage caused to employee's health and social security are implemented by applying the employer's pecuniary liability and social insurance against accidents at work and occupational diseases.

3. Systematical attitude to the compensation for the damage to employee's health allows to state that there is no independent damage compensation system and the compensation for the damage caused to employee's health is a single system and complex legal institute. Employer's pecuniary liability and social insurance against accidents at work and occupational diseases constitute subsystems of compensation for the damage caused to employee's health system.

4. Transformations typical to compensation for the damage caused to employee's health system are justified if:

4.1. quantitative characteristics typical to the system is retained at the dimension of whole system - compensation for the damage caused to employee's health in practice;

4.2. continuity of the quantitative characteristics of the system - preconditions and content of the compensation - at the dimension of whole system is guaranteed.

5. Employer's pecuniary liability in the system of compensation for the damage caused to employee's health has to ensure succession of preconditions of liability and application of their content in the labour legal relations derived from compensation for the damage of employee's health. This is achieved by retaining four preconditions of liability: 1) the subjects of liability are connected by labour legal relations; 2) damage is caused to employee's health; 3) unlawful employer's act harmed the employee's health; 4) health harm is linked to unlawful employer's act or working act; 5) health harm occurred at the fault of employer.

6. Principle of full compensation is implemented in the employer's pecuniary liability (quantitative characteristics of the system are retained). Compensation for the damage caused is a constituent part of this principle. While applying employer's liability, balance of the interests of victim and the person liable for the damage should be struck. Thus, implementation of the social security function should not be attributed to employer's pecuniary liability in the case of the

compensation for the damage caused to employee's health.

7. Social insurance against accidents at work and occupational diseases in the compensation for the damage caused to employee's health guarantees twofold functions: limits the employer's liability and implements social security of employees. The optimal implementation of the functions depends on the continuity of the preconditions of employer's pecuniary liability - causal relation and guilt.

7.1. Continuity of the preconditions of causal relation and its content (relation of the harm to employee's health with work) ensures optimal restrictions on employer's liability (employer's liability in social insurance is also impossible when this relations is not determined);

7.2. Continuity of the guilt precondition guarantees implementation of the social security function (if the precondition of causal relation is retained, the guilt of the employee injured can be a background to reduce the social insurance premium („compromise benefits"), yet it does not deny the right to social security) and restricts the employer's liability.

8. Full compensation for the damaged caused is not the characteristics of the social insurance against accidents at work and occupational diseases. Therefore, in the interactions of various compensation types - employer's pecuniary liability and social insurance against accidents at work and occupational diseases, backgrounds for full compensation for the damage should be formulated at the systematical dimension. To this end, interaction between subsystems of the system should be justified by constitutional principles of fair compensation for the damage, competition of various compensation types and subsidiarity.

9. In Lithuania legal regulation for the compensation for the damage of the employee's health is marked by inconsistency of transformation processes:

9.1. The Provisional law while determining the employer's liability and by setting the assessment of the damage caused to employee's health according the formulas, did not overtake, comparing to the conception of the damage to health set by Civil Code of 1964, the compensation for the actual damage. Thus, the legal regulation of the compensation for the damage caused to employee's health legalized not only the deficiency of the principle of the full compensation for the damage but also the breach of the constitutional principal of fair compensation for the damage;

9.2. The Provisional Law did not ensure the continuity of the preconditions of the compensation for the damage either comparing to the preconditions of civil liability set by the Civil Code of 1964. Application of the overtaken preconditions to the compensation for the damage derived form legal labour relations exceeded the functions assigned to employer's liability and implied the delegation of the social security functions to the employer (Article 4 Paragraph 2 of the Provisional law related the employer's liability with the determination of legal labour relations)

9.3. When social insurance against accidents at work and occupational diseases overtook the compensation for future pecuniary loss and preconditions of compensation for these losses set by the Provisional Law (while defining insurable and non-insurable occurrences) but not the insurance against the injury to employee related to work (i.e. causal relation and guilt condition), the social insurance premiums in the system of the damage caused to employee's health does not ensure either limits to employer's liability or implementation of the social security function.

9.4. Social insurance against accidents at work and occupational diseases did not overtake the preconditions of the employer's liability (the guilt and causal relation) and its content, thus, it is not capable to adjust content of the preconditions of employer's liability which has changed since the Civil Code of 2001 and the Labour Code of 2003 came into force.

Proposals *de lege ferenda*

Having regarded the interaction of social insurance against accidents at work and occupational diseases and employer's pecuniary liability examined during the research, following proposals can be provided for the improvement of legal regulation of compensation for the damage caused to ***employee's*** health.

It can be state that the damage caused to employee's health may not be interpreted differently than the damage done to other person, only the compensation for the damage may be variant; employer's pecuniary liability is determined by the specific rules derived from the compensation in labour relations comparing to civil law; social insurance against accidents at work and occupational diseases is not an universal compensation type for the damage caused to person's health but designed to compensate the damage caused to employee's health derived from labour relations; thus it is suggested to implement the regulation of compensation caused to employee's health by the following rules:

1. The rule which determines the peculiarities of the compensation for the damage caused to employee's health should be regulated by normative legal acts which are applied to subjects of labour relations, e.g. the Labour Code and the Law on Social Insurance against Accidents at Work and Occupational Diseases. Thus, it is suggested to decline the provision of Article 6.823 Paragraph 4 of the Civil Code of 2001 which regulates the compensation for the damage caused to person's health, i.e. „*this article is applied only in those cases when the victim is not insured by social insurance against accidents at work and occupational diseases in the cases prescribed by law*";

2. It is recommended in the Law on Social Insurance against Accidents at Work and Occupational Diseases to define clearly that this type of compensation is applied while compensating the damage due to labour relations and the relations should be interpreted in uniform in the issues of social insurance as well as labour law (Article 246 Paragraph 5 of the

Labour Code). Thus, it is suggested to distinguish in Article 4 of the Law on the Social Insurance against Accidents at Work and Occupational Diseases the groups off insured persons whose work can be considered to be labour relations (i.e. work is recognized when it meets features of employment contract set by the Article 93 of the Labour Code) given the damage caused to ***employee's*** health is compensated by applying this social insurance when it derives from labour relations.

3. It is suggested to define clearly in the Law on Social Insurance against Accidents at Work and Occupational Diseases and in the Labour Code that this type of social insurance is ***mandatory*** and the guarantees are applied to insured persons since the moment the labour relation starts. Therefore, it is recommended:

– to specify Article 1 of the Law on Social Insurance against Accidents at Work and Occupational Diseases „The insured – a person who is mandatory insured by social insurance against the accidents at work, the note of his/hers insurance was provided by the insurer to territory division of the State Social Insurance Fund Board or for which he paid or had to pay contributions of social insurance against accidents at work" and to note that:

a) *„the **employee** is considered to be insured since the moment the labour relation starts"*

*b) „the guarantees of the damage compensation set by this law prescribed to **employees** given factual labour relations and in this case when the accident at work or occupational diseases are recognized as insurable occurrences, the institution of social security is entitled to the right of recourse to employer"*;

– From Point 1 of the Article 248 of the Labour Code which states that *„The employer's liability shall be incurred where:1) an employee is injured or dies or contracts an occupational disease unless he was covered by social insurance against accidents at work and occupational diseases" and from Article 249 of the Labour Code which provides that „The employer, pursuant to the requirements of the Civil Code, must compensate for damage due to injury or any other health impairment of an employee, or, in the event of his death or because of an occupational disease he contracted unless he was covered by social insurance against accidents at work and occupational diseases, also due to damage to, destruction or loss of the property of the employee or violation of his property interests or property interests of other persons"* to delete the words *„unless he was covered by social insurance against accidents at work and occupational diseases",* to reject the provision set by Article 283 Point 2 *„If the injured employee has not been covered by social insurance against accidents at work or occupational diseases, the income lost due to loss of functional capacity and medical aid and treatment costs as well as the expenses related to the victim's social, medical and professional rehabilitation shall be compensated by the employer in accordance with the procedure established by the Civil Code."* and Article 8 Point 2 to of the Law on Social Insurance against Accidents at Work and

Occupational Diseases *„If having examined the accident at work, on the way to or from work or occupational disease it is not recognized as insurable occurrence, the damage to the injured person or the one who suffers occupational disease and (or) the members of his family is compensated with the procedure established by the Civil Code"* and to set in the Labour Code the rules which define the subsidiarity of the employer's pecuniary liability:

a) „the employer who is liable for the injury to employee's health compensates the difference between the social insurance against accidents at work and occupational diseases premium and actual amount of the damage if the insurance premium is not enough for full compensation" and

b) „if having examined the accident at work, on the way to or from work or occupational diseases, it is not recognized as insurable occurrence, the ***employer's*** *pecuniary liability does not emerge"*.

4. Having regarded that the only precondition for the determination of the insurable occurrence is causal relation of injury of employee with the work performed, it is suggested to refuse the preconditions which define the insurable occurrence (set by Article 6 Point 1 of the Law of Social Insurance against Accidents at Work and Occupational Diseases) such as *„working hours, „working hours set by the employer" „while doing the job set in the employment contract"; „while performing the duties prescribed by insurer"; „while performing the functions of public administration"; „while doing a job which is paid by remuneration"* and to refuse the circumstances which determine the insurable occurrence in the Article 7 Paragraph 2 of the Law on Social Insurance against Accidents and Occupational Diseases (*1) insured was in-sober or intoxicated and this did not have any connection with the technological qualities of the work assigned by the employer; 2) the insured experienced the damage because of his own actions and these unlawful acts were determined by pre-trial institutions or national courts as criminal acts or administrative offences, except the infringements of normative legal acts of safety or occupational hygiene regulations; 3) insured did deliberately (intentionally) aim for the accident; 4) insured was suffering a disease not related to work; 5) insured self willed (without knowledge of employer) was working on his/her own behalf; 6) violence was used against insured if circumstances of violence and motives were not related to work, except cases when accident occurs on the way to or from work*). Thus, instead it is suggested to define the insured risk of the social insurance as accident at work and occupational disease. Accidents to and from work should be equaled to accidents at work.

5. In order to ensure optimal transformation of guilt precondition in social insurance against accidents at work and occupational diseases, it is also suggested to remove the circumstances which define the insurable occurrence in the Article 7 Paragraph 2 of the Law on

Social Insurance against Accidents at work and Occupational Diseases and to provide these rules:

- *insurance premium can be refused or reduced if the accident at work occurred as a result of employee's gross negligence or intent;*

- *Institution of social insurance acquires the right of restoration to employer if the injury to employee was caused by careless execution of the requirements for the employee's health an safety set by legal acts or the employer did not examine or was interfering while examining the circumstances of the accident.*

6. In order to define the validity and application of the Provisional Law in the cases of compensation for the damage caused to employee's health system and to ensure the stability of the legal relations derived on the basis of the Provisional Law, it is recommended to provide the following rule in the Provisional Law:

„If a person claims the compensation for the damage the first time after the Civil Code of 2001 came into force, the issue of the compensation for the damage caused to employee's health should be dealt in accordance with the Law on Social Insurance against Accidents at Work and Occupational Diseases and the Civil Code of 2001, without having regard that the victim was insured by the social insurance against accidents at work and occupational diseases and the damage occurred till the validity of the Civil Code of 2001".

7. It is suggested to connect the principles for counting the lump sum set by Article 19 of the Law on Social Insurance against Accidents at Work and Occupational Diseases with the principles designed to count periodical benefits (especially, refusing the raise of lump sum by three times if the working capacity is lost for undefined term). It is also recommended to recognize one only difference of theses benefits – the type of compensation (lump sum or periodical benefits).

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1. Verikas A. The Responsibility of Employer for the Health Damage of Employee. Law university of Lithuania, research papers: *Jurisprudence*, 2004, Nr. 56(48), ISSN 1392-6195, P. 61-68.

2. Verikas A. The System of Compensation of Damage Done to the Health of the Employee. M.Romeris university, research papers: *Jurisprudence*, 2006, Nr. 11(89), ISSN 1392-6195, P. 63-69.

DISERTACIJOS TEMA PUBLIKUOTŲ MOKSLINIŲ STRAIPSNIŲ SĄRAŠAS

3. Verikas A. Darbdavio atsakomybė padarius žalą darbuotojo sveikatai. Lietuvos teisės universiteto mokslo darbai: *Jurisprudencija*, 2004, Nr. 56(48), ISSN 1392-6195, P. 61-68.

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ANNOUNCEMENT IN INTERNATIONAL SCIENTIFIC CONFERENCES ON THE THEME OF DISSERTATION

Verikas A. The Responsibility of Employer for the Health Damage of Employee // International Scientific Conference „Labour Law in United Europe / Arbeitsrecht im vereinigten Europa“, Law Faculty of Vilnius University, Ministry of Social Security and Labour of the Republic of Lithuania, Ministry of Justice of the Republic of Lithuania, Vilnius, 18nd October 2003.

PRANEŠIMAS TARPTAUTINĖJE MOKSLINĖJE KONFERENCIJOJE DISERTACIJOS TEMA

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DARBUOTOJO SVEIKATAI PADARYTOS ŽALOS ATLYGINIMAS: TEISINIAI ASPEKTAI

Disertacijos reziumė

Darbo problematika ir nagrinėjamos temos aktualumas. Žmogaus sveikata – viena pagrindinių žmogaus teisių, kurios apsaugai turi būti skiriamas deramas dėmesys, o šios teisės apsaugos svarba ypatingai akcentuojama darbo teisiniuose santykiuose. Lietuvos Respublikos valstybinė darbo inspekcija skelbia, kad pasaulyje kasmet darbe sužalojama apie 250 mln. žmonių, apie 160 mln. suserga profesinėmis ligomis, Lietuvoje 2006 m. įvyko 3419 nelaimingi atsitikimai darbe, nustatyti 1019 profesinių ligų atvejų, nelaimingų atsitikimų darbe lygis siekia 267 atvejus, tenkančius 100 tūkst. gyventojų[2]. Atsižvelgiant į tai, kad nelaimingi atsitikimai darbe ir profesinės ligos sudaro masinį reiškinį, būtinas specifinis teisinis reglamentavimas, numatantis iš darbo teisinių santykių atsiradusios žalos atlyginimą.

Akivaizdu, kad realios darbuotojo sveikatai padarytos žalos atlyginimo garantijos yra susijusios ne tik su darbdavio pareigos sudaryti tinkamas, saugias ir sveikas darbo sąlygas pažeidimu ir jo materialine atsakomybe už tai, bet ir visuomenės interesu užtikrinti žalą sveikatai patyrusių asmenų socialinio saugumo poreikius. Žalą sveikatai patyrusio asmens poreikiai yra skirtingi ir individualūs, skiriasi žalą patyrusio ir atsakingo už žalą asmens interesai, taip pat nėra vienodas visuomenės požiūris į socialinės saugos lygio pakankamumą, kai sveikatos sužalojimas yra susijęs su darbu. Teisingas ir visiškas darbuotojo sveikatai padarytos žalos atlyginimas – tai šių skirtingų interesų ir požiūrių suderinimas. Dėl to būtina kompleksiškai pažvelgti į darbuotojo sveikatai padarytos žalos atlyginimą, tokios žalos atlyginimo teisinio reglamentavimo ypatumus Lietuvoje, ypač akcentuojant skirtingų žalos kompensavimo būdų sąveiką.

Pasirinkta tema šiuo metu yra aktuali tuo, kad:

– darbuotojo sveikatai padarytos žalos kompensavimas nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo būdu, kuris Vakarų Europos valstybėse yra taikomas daugiau nei šimtmetį, Lietuvoje yra pakankamai naujas institutas (2000 m.), o jo pritaikymas Lietuvos teisės sistemoje neturi mokslinio pagrindimo ir iki šiol nėra tirtas;

– darbdavio atsakomybę už žalą darbuotojo sveikatai reglamentuojant 2001 m. Civiliniame kodekse (toliau – CK), neliko iki tol galiojusių specialių teisės normų dėl darbdavio griežtos atsakomybės taisyklių už žalą, atsiradusią profesinės rizikos pagrindu, tokiu būdu yra

[2] Saugos ir sveikatos darbe situacija Lietuvoje. Lietuvos Respublikos vyriausiasis valstybinis darbo inspektorius V.Pluktas. 2007 m. balandžio 25 d. // http://www3.lrs.lt/docs2/XZZIIJVP.PPT [prisijungimo laikas 2007 m. rugsėjo 12 d.]

poreikis pašalinti šias spragas teisės doktrinoje pateikiant darbdavio atsakomybės sąlygų turinio išaiškinimus, bet tam yra skiriamas nepakankamas dėmesys;

– nelaimingų atsitikimų darbe ir profesinių ligų socialinis draudimas neretai vertinamas kaip darbdavio atsakomybės už žalą darbuotojo sveikatai draudimas, tačiau teisinis reglamentavimas ir teismų praktika rodo, kad ši socialinio draudimo rūšis Lietuvoje tokios funkcijos neužtikrina ir neprilygsta darbdavio materialinės atsakomybės apimčiai;

– darbuotojo sveikatai padaryta žala gali būti atlyginama taikant darbdavio materialinę atsakomybę ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo kompensacijas, tačiau Lietuva iki šiol neturi šių žalos kompensavimo būdų sąveikos koncepcijos, todėl visiško ir teisingo darbuotojo sveikatai padarytos žalos atlyginimo kriterijų apibrėžimas yra aktuali teisės mokslo ir teisėkūros tobulinimo problema.

Tyrimo objektas. Darbuotojo sveikatai padarytos žalos atlyginimas darbdavio materialinės atsakomybės ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo būdu.

Darbe nėra nagrinėjami nelaimingų atsitikimų darbe ir profesinių ligų tyrimo klausimai, žalos atlyginimo prievolės vykdymo problemos, sveikatai padarytos žalos kompensavimas netekto darbingumo (invalidumo) socialinio draudimo išmokomis bei civiliniu atsakomybės draudimu. Atliktas tyrimas taip pat neapima valstybės pareigūnams bei kitoms specifinėms darbuotojų grupėms (jūrininkams) taikomos sveikatai padarytos žalos atlyginimo sistemos. Netiriami darbuotojo gyvybės atėmimu padarytos žalos atlyginimo teisiniai aspektai.

Darbo tikslas. Atskleisti sisteminius - funkcinius ryšius tarp darbdavio atsakomybės ir darbuotojo sveikatai padarytos žalos kompensavimo nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo būdu ir apibrėžti šių žalos kompensavimo būdų sąveiką Lietuvoje.

Darbo uždaviniai:

– kompleksiškai išanalizuoti teisinius santykius dėl darbuotojo sveikatai padarytos žalos atlyginimo ir apibrėžti darbdavio materialinę atsakomybę bei nelaimingų atsitikimų darbe ir profesinių ligų socialinį draudimą vienijančius kriterijus;

– ištirti darbdavio materialinės atsakomybės už darbuotojo sveikatai padarytą žalą sąlygų turinį, įvertinant jų reikšmę žalos kompensavimo apimčiai;

– apibrėžti nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo paskirtį ir funkcijas žalos atlyginimo sistemoje;

– atskleisti darbdavio materialinės atsakomybės transformacijos į nelaimingų atsitikimų darbe ir profesinių ligų socialinį draudimą procesą ir apibrėžti sąlygas, būtinas optimaliam darbdavio materialinės atsakomybės apribojimo funkcijos įgyvendinimui.

Ginamieji disertacijos teiginiai:

– darbdavio materialinę atsakomybę ir nelaimingų atsitikimų darbe ir profesinių ligų socialinį draudimą reikia vertinti kaip darbuotojo sveikatai padarytos žalos atlyginimo sistemos posistemes. Šiuos žalos kompensavimo būdus jungia funkciniai ryšiai, o pagrindinė šios sistemos paskirtis – teisingas žalos atlyginimas;

– realiai patirta žala (nuostoliai) dėl sveikatos sužalojimo yra objektyvus kriterijus, apibrėžiantis darbuotojo sveikatai padarytos žalos atlyginimo sistemos ribas;

– darbuotojo sveikatai padarytos žalos ryšys su darbu yra pagrindinė sąlyga, užtikrinanti darbuotojo sveikatai padarytos žalos atlyginimo sistemos stabilumą, nepriklausomai nuo sistemoje vykstančių transformacijų.

Mokslinis darbo naujumas. Mokslinį tyrimo naujumą apsprendžia pasirinktas kompleksinis darbdavio materialinės atsakomybės ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo tyrimas. Lietuvoje nėra atlikta mokslinių tyrimų, skirtų darbuotojo sveikatai padarytos žalos atlyginimo sistemos analizei, šie klausimai buvo atskirai nagrinėti darbdavio materialinės atsakomybės, civilinės atsakomybės ir socialinio draudimo aspektu. Galima paminėti šiuos Lietuvos ir užsienio valstybių mokslininkus, atskirais aspektais nagrinėjusius klausimus, susijusius su darbuotojo sveikatai padarytos žalos atlyginimu: V.Nekrašas, M.Gruodis, T.Bagdanskis, T.Davulis, V.Mikelėnas, R.Macijauskienė, V.Tiažkijus, J.Maculevičius, P.Grėbliauskas, L.A.Maidanikas, N.J.Sergejeva, R.S.Ažimovas, M.I.Nikitina, M.J.Marinina, J.N.Koršunovas, D.Schwab, J.Spier, H.Koziol, B.Markesinis, M.Coester, G.Alpa, A.Ullstein, P.Cane. Darbuotojo sveikatai padarytos žalos kompensavimo socialinio draudimo būdu teisinius aspektus nagrinėjo A.Guogis, J.Tartilas, A.S.Goldenveizeris, S.M.Kovalevskis, S.N.Sinkovas, E.I.Astrachan, V.D.Roikas, J.A.Kosariovas, E.E.Mačiulskaja, Ch.Rolfs.

Praktinė darbo reikšmė. Disertacijoje pateikiamos išvados ir pasiūlymai galėtų pasitarnauti įstatymų leidėjui tobulinant darbdavio materialinės atsakomybės ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo teisinių santykių reglamentavimą. Atliktas tyrimas galėtų padėti formuoti bendrosios kompetencijos ir administracinių teismų požiūrį į darbuotojo sveikatai padarytos žalos atlyginimą kaip kompleksinį institutą. Pateikiami teoriniai apibendrinimai taip pat galėtų tapti svariais argumentais darbuotojams - įgyvendinant teisę į žalos atlyginimą, darbdaviams - ginant savo interesus.

Tyrimo metodai. Pagrindinis tyrimo metu naudotas empirinis metodas – dokumentų analizės metodas. Tarp teorinių metodų paminėtini sisteminės analizės, lyginamasis, istorinis, teleologinis, loginis, analoginis, apibendrinimo, statistinių duomenų analizės metodai.

Tyrimo šaltiniai. Rengiant darbą remtasi Lietuvos bei užsienio darbo teisės, civilinės teisės, socialinės saugos teisės doktrinos atstovų darbais. Atskleidžiant tyrimo problematiką, daug dėmesio skiriama pozityviųjų teisės šaltinių – tiek tarptautinių, tiek nacionalinių teisės aktų analizei. Naudojamasi Lietuvos teisės aktų projektais, aiškinamaisiais raštais, ministerijų ir kitų

valstybės institucijų oficialiais išaiškinimais ir pranešimais. Darbe analizuojama Lietuvos Respublikos Konstitucinio Teismo, Lietuvos Aukščiausiojo Teismo, Lietuvos vyriausiojo administracinio teismo praktika, remiamasi Lietuvos apeliacinio teismo sprendimais.

Tyrimo rezultatų aprobavimas. Darbas apsvarstytas Mykolo Romerio universiteto Teisės fakulteto Darbo teisės ir socialinės saugos katedroje 2007 m. spalio 11 d. ir Mykolo Romerio universiteto Doktorantūros komisijos 2007 m. spalio 12 d. posėdyje. Komisija rekomendavo disertaciją viešai ginti.

Disertacijos struktūra. Disertaciją sudaro įvadas, tyrimų apžvalga, darbo metodologija, trys dėstomosios – tiriamosios dalys, išvados ir pasiūlymai, literatūros sąrašas. Darbo pabaigoje pateikiamas autoriaus disertacijos tema publikuotų mokslinių straipsnių sąrašas.

Pirmoji dalis **„Darbuotojo sveikatai padarytos žalos atlyginimo sampratos teoriniai pagrindai“** skirta atskleisti ir suformuoti darbuotojo sveikatai padarytos žalos atlyginimo sistemos sampratą. Ši dalis sudaryta iš keturių skyrių.

Pirmame skyriuje **„Darbuotojo sveikatai padarytos žalos ir jos atlyginimo samprata“** tiriama sveikatai padarytos žalos apibrėžimo ir įvertinimo problema. Akcentuojama, jog teisine prasme Lietuvoje ir užsienio šalyse žala sveikatai išskiriama į neturtinę žalą (*angl. non-pecuniary losses*) ir turtinius nuostolius. Turtinius nuostolius sudaro nukentėjusiojo turėtos išlaidos (*angl. past losses*) ir negautos pajamos (*angl. future pecuniary losses*). Visada yra siekiama visiško sveikatai padarytos žalos atlyginimo, tačiau šios žalos įvertinimas turi nemažai socialinio kompromiso elementų, yra susijęs su ateities įvykių prognozavimu, žalos samprata priklauso ir nuo visuomenėje vyraujančio požiūrio į žalą sveikatai patyrusio asmens poreikius. Pažymima, kad žala sveikatai reiškia kiekybinę dėl žalos atlyginimo atsirandančių teisinių santykių charakteristiką, tačiau ji negali būti išreikšta abstrakčiu dydžiu, o visuomet priklauso nuo konkretaus atvejo individualių aplinkybių. Nors iš darbo teisinių santykių atsiradusi žala darbuotojo sveikatai negali būti suprantama skirtingai, tačiau jos atlyginimas turi ypatumų.

Antrame skyriuje **„Darbuotojo sveikatai padarytos žalos atlyginimo sistema“** akcentuojamas teisinių santykių dėl darbuotojo sveikatai padarytos žalos atlyginimo sisteminimo poreikis. Apibendrinus skirtingas koncepcijas, sąlygojusias žalos kompensavimo būdų įvairovę, išskiriamos dvi pagrindinės teorijos: *žalos padalinimo teorija*, kuri istoriškai išsivystė į civilinį draudimą, ir *konkretaus teisingumo arba atsitiktinės žalos kompensavimo teorija*, kuri siejama su poreikiu ypatingą visuomeninę reikšmę turinčioms vertybėms (tarp jų – ir sveikatai) atsiradusią žalą kompensuoti, nesant kaltės. Oponuojama Lietuvos ir užsienio autorių požiūriui, jog žala gali būti kompensuojama skirtingomis žalos kompensavimo sistemomis: teisės doktrinoje išskiriama nuo trijų iki septynių žalos kompensavimo sistemų, tačiau neatskleidžiamas jų tarpusavio santykis. Darbuotojo sveikatai padarytos žalos atlyginimą siūloma vertinti kaip sistemą, o

darbdavio materialinę atsakomybę ir nelaimingų atsitikimų darbe ir profesinių ligų socialinį draudimą – kaip šios sistemos posistemes.

Trečiame skyriuje **„Darbuotojo sveikatai padarytos žalos atlyginimo transformacijos procesai“** istoriniu aspektu įvertinamos šiuolaikinės darbuotojo sveikatai padarytos žalos atlyginimo sistemos susiformavimo prielaidos Vakarų Europoje ir Lietuvoje. Pažymima, kad darbuotojo sveikatai padarytos žalos atlyginimo sistemos formavimosi pradžia siejama su XIX a. išsivysčiusia pramonine gamyba. Tokios žalos atlyginimas, pagrįstas civiline deliktine atsakomybe, nebeatitiko pasikeitusių visuomeninių santykių. Kaltės įrodinėjimo pareigos perkėlimo darbdaviui tikslu reikėjo pripažinti, kad atsakomybė už žalą darbuotojo sveikatai atsiranda ne iš delikto (lot. *injuria*), o iš darbo sutarties (lot. *locatio conductio*). Tačiau daugeliu atveju iš darbo santykių atsiradusi žala darbuotojo sveikatai buvo atsitiktinė, o tai lėmė griežtos darbdavio atsakomybės doktrinos (vok. *Theorie des Tätigkeitsrisikos*) susiformavimą ir poreikį įtvirtinti kitą žalos kompensavimo būdą, kuris apribotų darbdavio atsakomybę ir garantuotų socialinę saugą darbuotojams. Šių funkcijų įgyvendinimas pavestas socialiniam draudimui, formuojamam pagal darbdavio civilinės atsakomybės draudimo trečiojo asmens naudai principus. Atkreipiamas dėmesys, kad panašūs procesai įgyvendinti Lietuvoje po Nepriklausomybės atkūrimo. Darbuotojo sveikatai padarytos žalos atlyginimo klausimus reglamentavo 1964 m. CK, nuo 1997 m. rugsėjo 1 d. įsigaliojęs Žalos atlyginimo dėl nelaimingų atsitikimų darbe ar susirgimų profesine liga laikinasis įstatymas (toliau - Laikinasis įstatymas), šį įstatymą pakeitęs Nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo įstatymas (nuo 2000 m. sausio 1 d.). Teigiama, kad šis transformacijos procesas Lietuvoje pasižymi nenuoseklumu. 2001 m. liepos 1 d. įsigaliojus CK ir 2003 m. sausio 1 d. įsigaliojus Darbo kodeksui (toliau – DK), nelaimingų atsitikimų darbe ir profesinių ligų socialinis draudimas tapo nepajėgus užtikrinti darbdavio atsakomybės apribojimo funkcijos, ir darbuotojo sveikatai padarytos žalos atlyginimo sistemoje atsirado visiško žalos atlyginimo deficitas. Be to, praktikoje vis dar aktualus Laikinojo įstatymo taikymas.

Ketvirtame skyriuje **„Darbuotojo sveikatai padarytos žalos atlyginimo sistemos funkciniai ryšiai“** analizuojami Lietuvai reikšmingi darbuotojo sveikatai padarytos žalos atlyginimo sistemos sąveikos principai. Įvertinus teismų praktiką ir norminius teisės šaltinius, siūloma sisteminius ryšius tarp skirtingų žalos kompensavimo būdų grįsti trimis pagrindiniais principais: 1) k*onstitucinis teisingo žalos atlyginimo principas* atlieka integracinę skirtingų žalos atlyginimo būdų funkciją ir jungia juos į vientisą žalos atlyginimo sistemą; 2) s*ubsidiarumas* darbuotojo sveikatai padarytos žalos atlyginimo sistemoje taikytinas apibrėžiant santykį tarp darbdavio atsakomybės ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo; 3) k*onkurencija* darbuotojo sveikatai padarytos žalos atlyginimo sistemoje, kaip funkcinės sąveikos principas, reiškia žalos kompensavimą nustatančių teisės normų konkurenciją to paties žalos

kompensavimo būdo ribose. Daroma išvada, kad darbuotojo sveikatai padarytos žalos atlyginimo taisyklės negali būti mažiau palankios už bendrąsias civilinės deliktinės atsakomybės taisykles.

Antroje darbo dalyje **„Darbdavio atsakomybės už darbuotojo sveikatai padarytą žalą apimtis“** analizuojamos darbdavio materialinės atsakomybės santykis su civiline atsakomybe, šios atsakomybės sąlygos ir turinio ypatumai. Ši dalis susideda iš šešių skyrių.

Pirmame skyriuje **„Darbdavio materialinės atsakomybės vieta žalos atlyginimo sistemoje“** apibrėžiamas darbdavio materialinės atsakomybės ryšys su civiline atsakomybe ir tokios atsakomybės salygų specifiką lemiantys veiksniai. Pažymima, kad tiek civilinė atsakomybė, tiek darbdavio materialinė atsakomybė yra skirtos užtikrinti žalos atlyginimo funkciją teisės sistemoje. Konstatuojama, kad darbo santykių transformacijos procese darbdavio atsakomybės sąlygos buvo papildytos specifiniais aspektais (sutartiniu darbo teisinių santykių pobūdžiu, priežastinio ryšio ypatumais) ir įgijo naują kokybę, bet neprarado tiesioginių funkcinių ryšių su civiline atsakomybe. Darbdavio atsakomybės sąlygas, kai žala padaryta darbuotojo sveikatai, remiantis civilinės atsakomybės sąlygų klasifikacija, siūloma klasifikuoti taip: 1) atsakomybės subjektai susiję darbo teisiniais santykiais; 2) darbuotojo sveikatai padaryta žala; 3) darbuotojo sveikatai pakenkta neteisėta darbdavio veika; 4) sveikatos sužalojimas yra susijęs su neteisėta darbdavio veika ir su darbine veikla; 5) darbuotojo sveikatai pakenkta dėl darbdavio kaltės. Pažymima, kad specifinių aplinkybių (pavyzdžiui, darbuotojo neblaivumo) išskyrimas darbdavio atsakomybėje, nereiškia naujų, civilinei atsakomybei nebūdingų sąlygų nustatymo.

Antrame skyriuje **„Darbdavio materialinės atsakomybės subjektų identifikavimas“** apibrėžiami darbdavio materialinės atsakomybės subjektai ir įvertinama darbo teisinių santykių reikšmė šios atsakomybės taikymui. Darbdavio materialinės atsakomybės subjektai – darbuotojas ir darbdavys. Darbdavio materialinės atsakomybės taikymui reikšmingas tarp atsakingo asmens ir nukentėjusiojo susiklosčiusių darbo santykių konstatavimas. Teisės doktrinos ir teismų praktikos formuluojami darbo santykių požymiai leidžia teigti, kad darbdavio materialinės atsakomybės taikymas yra įmanomas darbo santykių neįforminus darbo sutartimi. Darbo sutartis yra vienas iš darbo santykius apibūdinančių požymių, tačiau darbdavio atsakomybės už žalą darbuotojo sveikatai prasme, reikšmingais darbo santykių požymiais laikytini: darbdavio pareiga sudaryti darbuotojui saugias ir sveikatai nekenksmingas darbo sąlygas ir darbuotojo pareiga paklusti darbdavio nustatytai darbo tvarkai.

Trečiame skyriuje **„Atlygintinos žalos, kaip darbdavio materialinės atsakomybės sąlygos, ribos“** istoriniu ir lyginamuoju aspektu analizuojama žalos sąlyga darbdavio materialinėje atsakomybėje. Išanalizavus Lietuvos teisės aktus, vertinama, kad 2001 m. CK įtvirtintas dėl sveikatos sužalojimo negautų pajamų nustatymas, remiantis šių nuostolių pagrįstumo ir realumo kriterijais, leidžia tiksliausiai realizuoti visišką tokių nuostolių atlyginimą ir pasiekti balansą tarp nukentėjusiojo ir atsakingo už žalą asmens interesų. Visiško ir teisingo

negautų pajamų kompensavimo neįmanoma užtikrinti, šiuos nuostolius nustatant tik pagal netekto darbingumo procentus. Konstatuojama, kad dėl sveikatos sužalojimo patirtų išlaidų kompensavimas nukentėjusiajam turėtų garantuoti ne tik pagrindinių poreikių patenkinimą, bet užtikrinti protingumo kriterijus atitinkančią tolimesnio gyvenimo kokybę. Žalą sveikatai patyrusiam darbuotojui neturtinė žala gali būti kompensuojama tik taikant darbdavio materialinę atsakomybę. Šios žalos kompensavimas sveikatos sužalojimo atveju Lietuvoje numatytas nuo 2001 m. CK įsigaliojimo (2001 m. liepos 1 d.). Neturtinės žalos kompensavimas sveikatos sužalojimo atveju yra visiško žalos atlyginimo principo sudėtinė dalis. Daroma išvada, kad žalos sąlyga darbdavio materialinėje atsakomybėje siejama su visišku darbuotojo sveikatai padarytos žalos atlyginimu, o tai reikšminga apibrėžiant teisingą žalos atlyginimą sistemoje.

Ketvirtame skyriuje **„Darbdavio veikos neteisėtumo sampratos aspektai“** tiriama darbdavio neteisėtos veikos sąlyga materialinės atsakomybės aspektu. Pažymima, kad darbdavio veikos neteisėtumas siejamas su darbdavio pareigos sudaryti darbuotojams saugias ir sveikatai nekenksmingas darbo sąlygas pažeidimu, darbdavio pareigų nevykdymu arba netinkamu vykdymu organizuojant darbo procesą. Teisės doktrinoje pripažįstama darbdavio atsakomybė už darbuotojų padarytą žalą (netiesioginė atsakomybė). Daroma išvada, kad darbdavio veikos neteisėtumo samprata, grindžiama vertinamaisias požymiais, parodo darbdavio atsakomybės trūkumus, o tuo pačiu pagrindžia poreikį įtvirtinti kitą žalos kompensavimo būdą.

Penktas skyrius **„Priežastinio ryšio ypatumai darbdavio atsakomybėje“** sudarytas iš dviejų poskyrių, kurių išskyrimas grindžiamas priežastinio ryšio dualumu darbdavio atsakomybėje už žalą darbuotojo sveikatai.

Pirmame poskyryje **„Priežastinis ryšys tarp darbuotojo sveikatos sužalojimo ir darbo“** analizuojama pirminė priežastinio ryšio grandis. Analizuojant šią priežastinio ryšio grandį išskiriamas: 1) priežastinis ryšys tarp darbdavio neteisėtos veikos ir darbuotojo sveikatos sužalojimo; 2) priežastinis ryšys tarp darbuotojo sveikatos sužalojimo ir darbo veiklos. Šios priežastinio ryšio dalys yra susijusios ir tiriamos kartu, tačiau konstatuojant sveikatos sužalojimo ryšį su neteisėta darbdavio veika ir ryšį su darbu, yra vertinamos skirtingos aplinkybės. Bet kurios iš šių priežastinio ryšio dalių nebuvimas pašalina darbdavio atsakomybę. Akcentuojama, kad darbuotojo sveikatos sužalojimo ryšys su darbu yra platesnė darbdavio atsakomybės sąlyga: ji priklauso nuo to, kaip apibrėžiamas „nelaimingas atsitikimas darbe“, „nelaimingas atsitikimas pakeliui į darbą ar iš darbo“ bei „profesinė liga“. Priežastinis ryšys konstatuojamas atsižvelgiant į visas įvykio aplinkybes ir įvertinus jas teisingumo ir protingumo aspektu.

Antrame poskyryje **„Priežastinis ryšys tarp darbuotojo sveikatos sužalojimo ir nuostolių“** analizuojama antrinė priežastinio ryšio sąlygos grandis. Analizuojant šią priežastinio ryšio grandį, konstatuojama, kad priežastinis ryšys leidžia nustatyti darbuotojo realiai patirtus nuostolius dėl sveikatos sužalojimo. Šiuo aspektu būtina įvertinti nukentėjusiojo negautas

pajamas dėl sveikatos sužalojimo, o jas lemia tiek netektas darbingumas, tiek ir kitos aplinkybės (darbuotojo atleidimas iš darbo ir to priežastys, nukentėjusiojo galimybės susirasti kitą darbą, bendra sveikatos būklė, amžius ir kt.). Oponuojama nuomonei, jog nukentėjusiojo nuostolius (negautas pajamas) sudaro vidutinio darbo užmokesčio dalis, apskaičiuota pagal netekto darbingumo procentą. Žalą sveikatai patyrusio darbuotojo turėtos ar numatomos patirti išlaidos taip pat vertinamos pagal jų ryšį su sveikatos sužalojimu. Priežastinis ryšys lemia neturtinės žalos dydį. Nustatant nukentėjusiojo nuostolius turi būti įskaitomos kitos nukentėjusiojo gaunamos pajamos ar žalos kompensacijos, todėl konstatuojama, kad priežastinio ryšio sąlyga apsprendžia darbdavio atsakomybės apimtį.

Šeštame skyriuje **„Darbdavio kaltės nustatymo problemos“** akcentuojamas darbuotojo sveikatai padarytos žalos atlyginimo poreikis, nesant darbdavio kaltės. Daroma išvada, kad kaltės sąlyga darbdavio atsakomybei už žalą darbuotojo sveikatai turi dvejopą reikšmę: 1) kaltė yra pagrindas taikyti darbdavio atsakomybę; 2) mišri darbuotojo ir darbdavio kaltė yra pagrindas sumažinti žalos atlyginimą. Pažymima, kad Lietuvoje ir užsienio valstybėse kaltė vertinama pagal aukštesnius standartus, kai sprendžiamas darbdavio atsakomybės klausimas. Konstatuojama, kad šiuo metu Lietuvoje darbdavio materialinė atsakomybė neužtikrina atsitiktinai iš darbo teisinių santykių darbuotojo sveikatai atsiradusios žalos kompensavimo. Nesant kaltės darbdavys atsako tik kaip padidinto pavojingumo šaltinio valdytojas, jei šio šaltinio aptarnavimas neįėjo į nukentėjusio darbuotojo pareigas. Todėl pabrėžiamas poreikis kompensuoti atsitiktinę žalą kitu žalos kompensavimo būdu. Taip pat pažymima, kad žalos atlyginimo dydžio sumažinimą lemia paties nukentėjusiojo didelis neatsargumas.

Trečioji darbo dalis **„Nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo paskirtis darbuotojo sveikatai padarytos žalos atlyginimo sistemoje“** sudaryta iš keturių skyrių.

Pirmame skyriuje **„Nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo funkcijos“** vertinama ši socialinio draudimo rūšis socialinės saugos ir atsakomybės draudimo aspektais. Išanalizavus socialiniam draudimui reikšmingas teorijas (žmogaus prigimtinių teisių, subsidiarios paramos, žmogaus asmeninės atsakomybės už savo ateitį ir solidarumo, socialinio teisingumo), taip pat Tarptautinės darbo organizacijos formuojamus uždavinius socialiniam draudimui, konstatuojama, kad nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo prioritetas yra socialinės saugos užtikrinimas darbuotojams. Pažymima, kad kompensuojant darbuotojo sveikatai padarytą žalą šiuo socialiniu draudimu, yra realizuojama ir darbdavio turtinių interesų, susijusių su jo materialine atsakomybe, apsaugos funkcija. Daroma išvada, kad ši socialinio draudimo rūšis, užtikrindama darbuotojo sveikatai padarytos žalos kompensavimą ir socialinę saugą, turi būti siejama su darbdavio materialine atsakomybe: tokiu būdu galima apibrėžti visišką ir teisingą žalos atlyginimą.

Antrame skyriuje **„Nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo dalyviai“** analizuojamas šios rūšies socialinio draudimo dalyvių teisinis statusas: išskiriamos trys socialinio draudimo dalyvių grupės: draudikas, draudėjai ir apdraustieji (naudos gavėjai). Pažymima, kad pagal draudiko teisinį statusą privalomasis nelaimingų atsitikimų darbe ir profesinių ligų socialinis draudimas gali būti griežto (draudiko monopolija) arba lankstaus (draudikų konkurencija) modelio. Lietuvos teisės aktų analizės pagrindu konstatuojama, kad draudėjus apibrėžia du kriterijai: 1) draudimo pareiga jiems turi būti nustatyta įstatyme; 2) jie turi mokėti draudimo įmokas už konkrečius apdraustuosius (darbuotojus) arba pranešti draudikui apie jų apdraudimą. Šiame skyriuje ypač akcentuojamas apdraustųjų apibrėžimas. Apdraustųjų subjektų ratą lemia socialinio solidarumo pasireiškimo laipsnis. Prie apdraustųjų teisinį statusą apibūdinančių požymių priskiriamas apdraudimo faktas ir socialinio draudimo stažas. Konstatuojama, kad priklausomai nuo socialinio draudimo teisinių santykių dalyvių apibrėžimo, šiuo draudimu skirtinga apimtimi yra realizuojamos dvi funkcijos: darbdavio materialinės atsakomybės apribojimas ir socialinės saugos užtikrinimas darbuotojams.

Trečiame skyriuje **„Darbuotojo sveikatai padarytos žalos kompensavimo sąlygos nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo būdu“** daroma prielaida, kad socialinis draudimas, apribodamas darbdavio atsakomybę ir perimdamas darbdavio atsakomybei skirtas funkcijas, turi perimti ir darbdavio materialinės atsakomybės sąlygas. Tačiau įvertinus tai, jog socialinis draudimas atlieka ne tik darbdavio atsakomybės apribojimo funkciją, bet ir užtikrina socialinį saugumą žalą sveikatai patyrusiems darbuotojams, o tuo pačiu kompensuoja ir atsitiktinę žalą sveikatai, konstatuojama, kad socialinis draudimas darbdavio atsakomybės transformacijos procese perima tik priežastinio ryšio ir kaltės sąlygas. Tuo pagrindu trečiame skyriuje išskiriami du poskyriai.

Pirmame poskyryje **„Priežastinis ryšys nelaimingų atsitikimų darbe ir profesinių ligų socialiniame draudime“** analizuojama priežastinio ryšio sąlyga. Lietuvoje priežastinio ryšio sąlyga turi ypatumų, pripažįstant darbuotojo patirtą žalą sveikatai draudiminiu įvykiu bei konstatuojant nedraudiminį įvykį. Tuo pagrindu šiame poskyryje išskiriami du skirsniai. Pirmame skirsnyje **„Priežastinis ryšys draudiminio įvykio konstatavimo atveju“** tiriamas draudiminės rizikos apibrėžimas ir priežastinio ryšio tarp draudiminės rizikos bei darbuotojo sveikatos sužalojimo nustatymo atvejai. Remiantis užsienio valstybių praktika, pažymima, kad draudžiama rizika suprantama kaip darbuotojo sveikatos sužalojimas, susijęs su darbu. Ryšys su darbu apibrėžiamas pateikiant sąvokas „nelaimingas atsitikimas darbe“, „nelaimingas atsitikimas pakeliui į darbą ar iš darbo“, „profesinė liga“ (Vokietija, Rusijos Federacija), arba dėl tokio ryšio paliekama spręsti teismų praktikai (Prancūzija). Lietuvoje taip pat pateikiamos šios sąvokos, tačiau apibrėžiamas ir draudiminis įvykis, numatant papildomas aplinkybes, reikšmingas draudiminio įvykio konstatavimui (darbo laikas ir socialinio draudimo prasme jam prilyginti

laikotarpiai, darbo sutartyje sulygto darbo vykdymas, darbo užmokesčio mokėjimas). Remiantis užsienio valstybių gera praktika, siūloma atsisakyti draudiminių įvykių reglamentavimo, o įstatyme apibrėžti draudžiamą riziką kaip darbuotojo sveikatos sužalojimą, susijusį su darbu. Pažymima, kad žalos atsiradimo ryšys su darbo veikla yra viena iš darbdavio materialinės atsakomybės sąlygų (DK 246 str. 6 p.) ir šios sąlygos turinys turėtų būti suprantamas vienodai socialiniame draudime. Antrame skirsnyje **„Priežastinis ryšys nedraudiminio įvykio konstatavimo atveju“** tiriamos aplinkybės, kurios pašalina priežastinį ryšį tarp sveikatos sužalojimo ir darbo. Lietuvoje įstatymu yra pateikiamos aplinkybės, reiškiančios, kad darbuotojo sveikatos sužalojimas yra nedraudiminis įvykis. Daroma prielaida, kad dalis tokių aplinkybių reiškia nukentėjusiojo kaltę, bet ne visais atvejais paneigia darbuotojo sveikatos sužalojimo ryšį su darbo veikla. Priežastinio ryšio aspektu tiriamos šios įstatyme nurodytos aplinkybės: 1) apdraustasis buvo neblaivus ar apsvaigęs nuo narkotinių, toksinių ar psichotropinių medžiagų ir tai nebuvo susiję su jam draudėjo pavesto darbo technologijos ypatybėmis; 2) apdraustasis sirgo liga, nesusijusia su darbu; 3) apdraustasis savavališkai (be darbdavio žinios) dirbo sau (savo interesais); 4) prieš apdraustąjį buvo panaudotas smurtas, jeigu smurto aplinkybės ir motyvai nesusiję su darbu, išskyrus, kai nelaimingas atsitikimas įvyksta pakeliui į darbą ar iš darbo. Įvertinus teismų praktiką, konstatuojama, kad minėtos aplinkybės daugeliu atveju rodo, jog darbuotojo patirtas sveikatos sužalojimas nebus susijęs su darbo veikla, tačiau pažymima, kad tiek draudiminio įvykio, tiek ir nedraudiminio įvykio konstatavimas reiškia priežastinio ryšio nustatymą tarp sveikatos sužalojimo ir darbo veiklos, o įstatyme neturėtų būti pateikiamos tokios aplinkybės. Netinkamą priežastinio ryšio reglamentavimą, arba jo taikymą rodo atvejai, kai socialiniu draudimu žala darbuotojo sveikatai nekompensuojama, tačiau gali būti taikoma darbdavio atsakomybė.

Antrame poskyryje „**Kaltė nelaimingų atsitikimų darbe ir profesinių ligų socialiniame draudime“** analizuojama kaltės sąlyga. Lietuvoje nelaimingų atsitikimų darbe ir profesinių ligų socialiniame draudime kaltės sąlyga nėra išskiriama. Daroma prielaida, kad dalis įstatyme nurodytų aplinkybių, kurias nustačius laikoma, kad darbuotojo patirtas sveikatos sužalojimas yra nedraudiminis įvykis, ne visada paneigia sveikatos sužalojimo ryšį su darbu, bet rodo, kad dėl sveikatos sužalojimo yra nukentėjusiojo kaltė. Išskiriamos ir tiriamos šios aplinkybės: 1) apdraustasis sąmoningai (tyčia) siekė, kad įvyktų nelaimingas atsitikimas; 2) apdraustasis buvo neblaivus ar apsvaigęs nuo narkotinių, toksinių ar psichotropinių medžiagų ir tai nebuvo susiję su jam draudėjo pavesto darbo technologijos ypatybėmis; 3) draudėjas, apdraustasis ar naudos gavėjas (draudimo išmokos gavėjas) esmingai pažeidė draudimo taisykles; 4) apdraustasis nukentėjo dėl savo veikos, kurioje ikiteisminio tyrimo institucija arba teismas nustatė nusikalstamos veikos požymius arba kad ši veika yra susijusi su administraciniu teisės pažeidimu. Įvertinus teismų praktiką konstatuojama, kad darbuotojo sveikatai padarytos

žalos nekompensavimas socialinio draudimo būdu, atsižvelgiant į nukentėjusiojo kaltę, yra nesuderinamas su socialinės saugos tikslais. Atsižvelgiant į užsienio valstybių praktiką, pažymima, kad apdraustojo ir draudėjo kaltė gali sukelti skirtingas pasekmes: pripažįstama, kad apdraustojo kaltė yra pagrindas sumažinti draudimo išmoką (Vokietija, Rusijos Federacija), o darbdavio kaltė draudiminio įvykio konstatavimui reikšmės neturi, tačiau socialinio draudimo įstaigai suteikia regreso teisę į darbdavį (Vokietija). Siūloma Lietuvoje įteisinti kaltės sąlygą.

Ketvirtame skyriuje **„Darbuotojo sveikatai padarytos žalos ir jos atlyginimo samprata nelaimingų atsitikimų darbe ir profesinių ligų socialiniame draudime“** tiriamos šios rūšies socialinio draudimo kompensacijos visiško sveikatai padarytos žalos atlyginimo kontekste. Pažymima, kad Lietuvoje nelaimingų atsitikimų darbe ir profesinių ligų socialinis draudimas apima tik dėl sveikatos sužalojimo darbuotojo negautų pajamų kompensavimą. Išlaidų gydymui, medicininei ir profesinei reabilitacijai kompensavimas priskirtas kitoms socialinio draudimo rūšims (ligos ir motinystės draudimas, sveikatos draudimas). Analizuojama nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo kompensacijų sistema: ligos pašalpa, vienkartinės išmokos ir periodinės išmokos. Pažymima, kad vienkartinių ir periodinių kompensacijų apskaičiavimui naudojamos formulės, kuriomis negautų pajamų dydis nustatomas pagal netekto darbingumo laipsnį, taip pat naudojami kompensacijų dydį reguliuojantys koeficientai. Pažymima, kad skirtingai yra apskaičiuojamas vienkartinių ir periodinių kompensacijų dydis. Atsižvelgiant į užsienio valstybių praktiką ir Tarptautinės darbo organizacijos rekomendacijas, konstatuojama, kad šios išmokos turėtų būti apskaičiuojamos pagal tuos pačius principus, nepaisant to, ar draudimo išmoka yra mokama vienkartine suma ar periodiniais mokėjimais. Dėl to siūloma suvienodinti šių išmokų apskaičiavimo principus. Konstatuojama, kad nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo kompensacijomis nesiekiama visiško darbuotojo sveikatai padarytos žalos atlyginimo ir pilno darbdavio atsakomybės apribojimo. Todėl subsidiarus darbdavio materialinės atsakomybės taikymas darbuotojo sveikatai padarytos žalos atlyginimo sistemoje yra aktualus ne tik kompensuojant nukentėjusiojo turėtas išlaidas, neturtinę žalą, bet ir negautas pajamas, jeigu jos konkrečiu atveju nėra visiškai kompensuojamos socialinio draudimo būdu.

Apibendrinant atliktą tyrimą formuluojamos šios pagrindinės **išvados**:

1. Atsižvelgiant į tai, kad sveikata yra nematerialiai vertybė, dėl sveikatos sužalojimo atsiradusi žala, įskaitant neturtinę žalą, negali būti išreikšta abstrakčiu dydžiu, o visuomet priklauso nuo individualių konkretaus atvejo aplinkybių. Dėl to gali būti apibrėžiami tiktai kriterijai, kuriais remiantis įmanoma maksimaliai atsižvelgti į sveikatos, kaip konkretaus žmogaus asmenybės kokybės bei visuomenės vertybės pobūdį, ir parinkti tinkamą piniginį ekvivalentą, garantuojantį optimalią sveikatos ir žalą sveikatai patyrusio asmens turtinės padėties restituciją ir satisfakciją. Nepaisant sudėtingo ir individualaus sveikatai padarytos žalos

įvertinimo, būtent reali žala leidžia apibrėžti objektyvias ribas, kuriose žala sveikatai laikytina visiškai atlyginta.

2. Žmogaus sveikatos, kaip visuomenės vertybės, visų žmogaus laisvių ir teisių realaus įgyvendinimo pagrindo pripažinimas, o taip pat šiuolaikiniai solidarumo, socialinio teisingumo ir socialinės teisinės valstybės tikslai lemia poreikį užtikrinti žmogaus sveikatai padarytos žalos kompensavimą ne tik nukentėjusiojo ir atsakingo už žalą asmens teisinių santykių lygmenyje, bet ir globaliame visuomenės atsakomybės už savo narius lygmenyje. Darbuotojo sveikatai padarytos žalos atlyginime žalos kompensavimo ir socialinės saugos funkcijos realizuojamos darbdavio materialinės atsakomybės ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo pagalba.

3. Sisteminis požiūris į darbuotojo sveikatai padarytos žalos atlyginimą leidžia teigti, jog neegzistuoja savarankiškos žalos atlyginimo sistemos, o darbuotojo sveikatai padarytos žalos atlyginimas yra viena sistema ir kompleksinis teisinis institutas. Darbdavio materialinė atsakomybė ir nelaimingų atsitikimų darbe ir profesinių ligų socialinis draudimas sudaro darbuotojo sveikatai padarytos žalos atlyginimo sistemos posistemes.

4. Darbuotojo sveikatai padarytos žalos atlyginimo sistemai ir jos posistemėms būdingos transformacijos, kurios yra pateisinamos tuo atveju, jeigu:

4.1. sistemos mastu yra išlaikoma kiekybinė charakteristika - realiai darbuotojo sveikatai padarytos žalos atlyginimas;

4.2. sistemos mastu garantuojamas kokybinių sistemos charakteristikų - žalos kompensavimo sąlygų ir jų turinio – tęstinumas.

5. Darbdavio materialinė atsakomybė darbuotojo sveikatai padarytos žalos atlyginimo sistemoje turi užtikrinti civilinės atsakomybės sąlygų perėmimą ir jų turinio pritaikymą iš darbo teisinių santykių atsiradusios žalos darbuotojo sveikatai kompensavimui. Tai pasiekiama taikant šias atsakomybės sąlygas: 1) atsakomybės subjektai yra susiję darbo teisiniais santykiais; 2) darbuotojo sveikatai yra padaryta žala; 3) darbuotojo sveikatai pakenkta neteisėta darbdavio veika; 4) sveikatos sužalojimas yra susijęs su neteisėta darbdavio veika ir su darbine veikla; 5) darbuotojo sveikatai pakenkta dėl darbdavio kaltės.

6. Taikant darbdavio materialinę atsakomybę įgyvendinamas visiško žalos atlyginimo principas (išlaikoma kiekybinė sistemos charakteristika), kurio sudėtine dalimi yra ir darbuotojo sveikatai padarytos neturtinės žalos kompensavimas. Be to, taikant darbdavio atsakomybę konkrečiu atveju, turi būti pasiekiamas atsakingo už žalą ir nukentėjusiojo interesų balansas, todėl darbdavio materialinei atsakomybei, kaip žalos darbuotojo sveikatai kompensavimo būdui, neturėtų būti pavedamas socialinės saugos funkcijos realizavimas.

7. Nelaimingų atsitikimų darbe ir profesinių ligų socialinis draudimas darbuotojo sveikatai padarytos žalos atlyginimo sistemoje draudimo išmokų dydžiu užtikrina darbdavio

atsakomybės apribojimo ir darbuotojų socialinės saugos funkcijas. Šių funkcijų optimalus realizavimas priklauso nuo darbdavio materialinės atsakomybės sąlygų – priežastinio ryšio ir kaltės – tęstinumo:

7.1. Priežastinio ryšio sąlygos ir šios sąlygos turinio (darbuotojo sveikatos sužalojimo ryšio su darbu) tęstinumas garantuoja darbdavio atsakomybės tinkamą taikymą (nenustačius šio ryšio socialiniame draudime, darbdavio atsakomybė taip pat negalima);

7.2. Kaltės sąlygos tęstinumas užtikrina optimalų socialinės saugos funkcijos realizavimą (nukentėjusio darbuotojo kaltė yra pagrindas sumažinti socialinio draudimo išmokos dydį („kompromisinės išmokos“), bet neturėtų paneigti darbuotojo teisės į socialinę saugą), o tuo pačiu gali apriboti darbdavio atsakomybę.

8. Kadangi nelaimingų atsitikimų darbe ir profesinių ligų socialiniu draudimu neužtikrinamas visiškas darbuotojo sveikatai padarytos žalos atlyginimas, visiško žalos atlyginimo pagrindai turi būti formuluojami sistemos mastu, t.y. žalos kompensavimo būdų (nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo ir darbdavio materialinės atsakomybės) sąveikoje. Tuo tikslu sąveiką tarp sistemos posistemių turi būti grindžiama konstituciniu teisingo žalos atlyginimo principu, žalos kompensavimo būdų konkurencija ir subsidiarumu.

9. Lietuvoje darbuotojo sveikatai padarytos žalos atlyginimo teisinis reglamentavimas pasižymi transformacijos procesų nenuoseklumu:

Atsižvelgiant į šias išvadas darbe yra pateikiami konkretūs *de lege ferenda* siūlymai, kaip Lietuvoje tobulinti darbuotojo sveikatai padarytos žalos atlyginimą darbdavio materialinės atsakomybės ir nelaimingų atsitikimų darbe ir profesinių ligų socialinio draudimo būdu.