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SOVIET TORT LAW: THE NEW PRINCIPLES ANNOTATED

BY WHITMORE GRAY*

INTRODUCTION

"AT 2:20 A.M. ON MAY 1, 1962, while riding his bicycle along the Simferopol' Highway in the company of Baturin, Pronin fell and injured his shoulder. Leaving his bicycle with Pronin, Baturin went on foot to a nearby village to summon medical aid. Pronin waited for him for awhile, and then decided to go back to the village of Volosovo in a passing car. Seeing the Tula-Moscow bus coming, he ran onto the road and waved. The driver, Markelov, seeing Pronin run onto the road 50 feet ahead of the bus, swerved to the left, went into the left lane, and struck a Volga automobile driven by Tabulin coming in the opposite direction.

"Auto experts established that the bus driver, Markelov, had violated Article 2 of the Traffic Rules for Streets and Roads of the USSR. His violation was caused by improper acts of the pedestrian, Pronin, who created the dangerous situation.

"Autobase No. 12 of the Autopark Administration, the owner of the Volga, sued Tabulin for 576 rubles, asserting that he had rented the car and damaged it.

"The People's Court of Krasnopresnensk Region gave judgment for 576 rubles in favor of Autobase No. 12 against Tabulin for the damage inflicted.

"Tabulin sued the owner of the bus, Motor Transport Unit 21 of the Tula Auto Trust, and Pronin, for reimbursement in this amount.

"The Tula District Court gave judgment in favor of Tabulin against Unit 21 for 576 rubles. [The Court does not mention any judgment against Pronin.]

"The Court College for Civil Matters of the Supreme Court of the RSFSR, in its decision of March 28, 1963, left the decision unchanged and rejected the appeal of Unit 21.

"In its decision, the Court pointed out the following.

"According to Article 90 of the Fundamental Principles of Civil Legislation of the USSR and the Union Republics, organizations and citizens whose activity is connected with a source of increased danger for those in the vicinity are obligated to compensate for injury caused by such source, unless they can show that the injury was caused by irresistible force or the intent of the injured party.

"The owner of the bus was Unit 21. Therefore, it is obligated to compensate for the injury caused by this source of increased danger.

"The fact that the collision occurred as a result of the creation of a dangerous situation by Pronin does not free Unit 21 from the obliga-

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tion to compensate for the injury, since such an obligation also arises under Article 90 of the above-mentioned Principles in those instances in which the culpable conduct of a third party has contributed to the causing of an injury." ¹

This recent Soviet case is a typical example of the role that contemporary tort law plays in the Soviet Union. Contrary to the expectations of the early Marxists, familiar concepts of civil liability continue to be used to work out compensation patterns for traffic accidents, industrial injuries and governmental torts, not to mention stones thrown by children through neighbors' windows.

We might expect, as the early Marxists did, that in a state which proclaims its intention to care for all its citizens in all ways, the various risks and duties reflected in our private law of tort would have been swallowed up in one grand scheme of state compensation from public funds, coupled, perhaps, with criminal or financial sanctions against those who cause harm by deviations from the established norms of conduct. Whatever the theoretical desirability of such a system might be, it has never been introduced in the Soviet Union. During the early years of the regime, the means to do so were lacking, and indications in recent years are that there is no desire to alter radically the more traditional system which has evolved.²

Certain broad social programs have had an influence on the scope of tort recovery.³ Medical care is provided free of charge for the whole population, though some fringe medical services are paid for by the individual. Broad pension programs and benefits for unemployment caused by sickness or injury are provided for most people with regular employment, but not for housewives, children, or some self-employed persons and farmers.⁴ Even those who are covered receive in benefits only a part of wages lost in the case of permanent injury, and must resort to a normal tort recovery to obtain full compensation.⁵ Property insurance is apparently common only in

² The new Principles are based on concepts of liability common to most modern legal systems. E.g., articles 88 and 91 reemphasize the paramount role of civil fault, and article 89 significantly extends the area of application of tort law as a basis for redress against harm inflicted by official governmental acts. Regarding the role of strict liability, see under article 90 infra.
³ The impact of these programs on the personal injury recovery is set forth at length in 2 Ioffe, SOVETSKOYE GRAzHDANSKOYE PRAVO (SOVIET CIVIL LAW) 500 (Leningrad 1961) [hereinafter cited as Ioffe]. See also Hazard, Personal Injury and Soviet Socialism, 65 HARV. L. REV. 545 (1952).
⁴ Similar benefits are provided on many collective farms from special funds set up by the farm itself. 2 SOVETSKOYE GRazHDANSKOYE PRAVO (SOVIET CIVIL LAW) 390 (Orlovskiy ed. 1961) [hereinafter cited as ORLOVSKY].
⁵ For example, in a recent case a man who was injured in an industrial accident lost 80% of his capacity to perform his former work. He was awarded a pension of 150 rubles a month, while his former average salary had been 867 rubles a month. He sued for a supplementary recovery in tort and was successful. Valov, [1963] Byul. verkh. suda S.S.S.R. No. 1, p. 17 (Plenum U.S.S.R. Sup. Ct. 1962).
certain limited areas, and liability insurance is not available. In most cases of personal or property injury, therefore, full compensation is available only if applicable tort law will support a direct recovery from the person who caused the damage.

Over the past 40 years Soviet courts and legal writers have created a body of tort law, based, as is the rest of Soviet private law, on the civil codes adopted in the Twenties. The unsatisfactory nature of the tort provisions in those codes, caused by a combination of revolutionary zeal and poor draftsmanship, quickly led to a situation where a major portion of tort law was in the court rulings and the textbooks. Recodification was delayed for over 30 years, and the court decisions show that it was almost as difficult for the Soviet courts as for the outsider to spell out with accuracy even the general principles being applied.

In 1961, the federal legislature, the USSR Supreme Soviet, finally adopted a skeleton code of fundamental principles of civil law. This recodification, which incorporates 40 years of case law and doctrinal development as well as some major innovations, will be the basis for individual civil codes to be adopted in each of the 15 union republics. While there may be some slight modifications, and certainly some variety in the degree of additional detail included in the individual codes by each republic, these Principles present already a fairly comprehensive picture of the shape of the future law. They are about as detailed as the tort provisions in other modern civil codes, and cover the grounds of liability, the defenses which are to be recognized, and the scope of compensable injury. In addition, they include

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5a See note 86 infra.

6 Citations to pre-Principles law will be given from the most important of these republic codes, the R.S.F.S.R. Civil Code of 1922 (Kodeks grazhdanskogo prava R.S.F.S.R.) [hereinafter cited as Civil Code].

7 Soviet court rulings include case decisions like the one translated above, and also general directives to lower courts. As the case translated at note 1 supra shows, ordinary case decisions are disappointingly short on factual detail and careful analysis. More helpful as guides to future decisions, since they are more likely to be referred to by lawyers and cited by the courts, are the general rulings, which may treat a specific point such as procedure for cases under a new statute (note 102 infra), or a whole field of law such as tort (see, e.g., the 1943 ruling, note 8 infra).

8 Basic fault liability, comparative negligence, and respondeat superior doctrines were all worked out by the courts during the Twenties. The USSR Supreme Court in effect codified experience to date in a 1943 ruling, reprinted along with other basic tort material in DOZORTSEV, ISTOCHNIKI SOVETSKOGO GRAZHDANSKOGO PRAVA (SOURCES OF SOVIET CIVIL LAW) 806 (1961) [hereinafter cited as DOZORTSEV].

9 E.g., the confusion which arose over the standard for liability of organizations for injuries to their employees, discussed at length in note 98 infra.


provisions relating to workmen’s compensation claims, wrongful death actions, and rules governing governmental tort liability.

This article is an attempt to restate in the form of an annotation to these Principles the broad outlines of the contemporary Soviet law of tort.

"PRINCIPLES OF CIVIL LEGISLATION OF THE USSR AND THE UNION REPUBLICS

"PART III. LAW OF OBLIGATIONS

"CHAPTER XII. OBLIGATIONS ARISING FROM THE INFLICTION OF INJURY

"ARTICLE 88. GENERAL GROUNDS OF LIABILITY FOR THE INFLICTION OF INJURY

"Injury caused to the person or property of a citizen, as well as injury caused to an organization, is to be compensated for in full by the person who has caused the injury.

"The person who has caused the injury may free himself from having to compensate for it if he shows that the injury was not caused through his fault."

This article, together with article 90 which imposes a strict liability for damage caused by a source of increased danger, provides the general basis for tort liability in Soviet law. It is the basis upon which liability is predicated in damage cases ranging from trespassing cows to failure to come to the rescue of endangered persons or property.

Soviet writers say that the provision of the Principles to the effect that a person is liable for damage caused by his act, unless he shows it did not occur by his fault, states a general principle of liability based on fault. While we might feel that the burden of proof of lack of fault imposed by the section could lead to causation-based liability in practice, the experience under prior law tends to support the Soviets’ position.

Article 403 of the RSFSR Civil Code of 1922 provides: "One who injures the person or property of another is liable for the injury caused. He"

12 Articles 91 and 92 can also be read as establishing the general basis for tort recovery for death or personal injury, but they simply incorporate by reference the standards of articles 88 and 90. There was a doctrinal controversy on this point under the old law which may continue, however. 2 ORLOVSKY 387. See the general discussion under arts. 91 and 92 infra.

13 The development of Soviet tort law after the revolution, from the first cases involving injury to crops by straying cattle down to the adoption of the Principles, is described in the excellent introduction to the chapter on tort law in HAZARD & SHAPIRO, THE SOVIET LEGAL SYSTEM pt. 3, at 72 (1962) [hereinafter cited as HAZARD & SHAPIRO]. While none of the translated cases in that chapter involved direct application of the 1961 Principles, they illustrate for the most part fundamental principles or problems which continue to be of significance under the new Principles. Since they constitute the most readily available source of Soviet materials in English translation, citations will be given to them in the material which follows wherever possible.

14 2 ORLOVSKY 397. See discussion at note 130, infra.

15 E.g., Maleyn, Pravovoe regulirovaniye obyazatelets'v po vozmeskhchenii vreda (The Legal Regulation of Compulsory Compensations for Damage), Sov. gos. i pravo No. 10, p. 68 (1962).
is not liable if he proves that he could not prevent the injury." The absence of any "fault" requirement was a departure from the French and German models which were followed by the Soviet drafters in many other respects.\(^\text{16}\) It is likely that they meant to lay down a different principle, for some early Marxists advocated liability based on causation.\(^\text{17}\) In any case, whatever revolutionary element may have existed was lost in the court practice which developed under the section. By 1926, the RSFSR Supreme Court held that liability should be based on a finding of fault, and pointed out that "Section 403 is by no means peculiar to soviet law, as the courts have often indicated in their decisions, but has been borrowed from the civil law of capitalist codes (e.g., the French Code)." \(^\text{18}\)

In other words, whatever the original intent of the drafters of section 403 was, the Supreme Court, and subsequently the writers, read into the phrase "could not prevent the injury" a general "fault" basis for liability, thus bringing Soviet law into line with other modern systems.\(^\text{19}\) The use of the word "fault" in the Principles, therefore, simply continues prior practice.

The interesting thing is that the drafters of the new Principles continued the burden-of-proof pattern of the prior law, under which the defendant must prove that he was not at fault in causing the injury.\(^\text{20}\) The repetition of the old formula with simply the addition of the word "fault" in the generally conservative draft was understandable, but its retention in the final form adopted is surprising, for there was very free and detailed criticism of the draft for an extended period. The most forceful suggestion made on this point was that the section should read, "unless an absence of fault on his part is established," \(^\text{21}\) thereby avoiding the imposition of any specific burden of proof, but even this compromise was not adopted.

\(^{16}\) For a short description of the French and German provisions, see Ryan, Introduction to the Civil Law 111 (1962).

\(^{17}\) The views of the drafters are discussed in 1 Gsovski, Soviet Civil Law 496 (1948) [hereinafter cited as Gsovski]. Gsovski points out that the formulation of the general principle in Tsarist law, also different from the continental models, was similar to the one adopted by the Soviets in that it did not specifically mention "fault," and this may have influenced their choice of language. Id. at 494-95. Both provisions were interpreted by the courts, however, to imply a fault basis of liability.

\(^{18}\) Quoted in 1 Gsovski 485.

\(^{19}\) Of course this refers only to the general basis of liability. Through devices such as res ipsa loquitur shifts can be made in this basic pattern, and modern systems commonly have special areas in which liability without fault is imposed. See the description of French and German law in Ryan, op. cit. supra note 16, at 120. The Soviet provisions are discussed under art. 90 infra.

\(^{20}\) The burden of proving that the defendant "caused" the injury is clearly on the plaintiff.

\(^{21}\) Ioffe, et al., O proyekte osnov grazhdanskogo zakonodatel'stva Soyuza SSR i Soyuznykh Respublik (Concerning the Draft for the Foundations of Civil Legislation of the Soviet Union and Union Republics), Sov. gos. i pravo No. 2, pp. 93, 100 (1961).
Perhaps familiarity with the practice under the old rule made it clear to those concerned that the change was not of real importance. The general civilian principle of very free evaluation of the evidence by the trial judges which is followed, coupled with the duty imposed on the Soviet judge to pursue an active role in ascertaining all the facts of the matter before him, creates an atmosphere in which technical burden-of-proof formulations do not have the importance which we might attach to them.

The application of the present rule in practice is described in the standard civil law textbook as follows:

"Under this article, the victim is not required to prove that the injury arose through the fault of the inflictor. The inflictor, provided he wants to be relieved of liability, must himself prove that he was not at fault in inflicting the injury. Thus, a person who has inflicted injury is presumed to have been at fault until he rebuts this presumption. The position of the victim in the civil trial is thereby made easier. The presumption of fault on the part of the inflictor may not correspond to reality, yet he may not be in a position to rebut it. In such a case, the court itself must take steps to clarify the actual nature of the interrelationships of the parties (Article 5 of the Code of Civil Procedure). Because of this, the distribution of the burden of proof provided for in Article 403 is of only relative importance."  

In view of the fact that the provision mentioned above imposing on the trial judge a duty to investigate all aspects of the case is continued in article 16 of the new Principles of Civil Procedure, the position seems to remain basically the same as under prior law.

The ordinary basis of tort liability in Soviet law seems to be, therefore, (1) an injury to a person or property, coupled with (2) a finding of the cause in fact thereof, and (3) a finding of "fault" on the part of the person.

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22 It is also possible that real pressure for reformulation on this was felt to constitute unnecessary criticism of the draft, and that it was best to concentrate on changes where basic principles were involved, e.g., art. 89.

23 Orlovskiy 375. The author would like to acknowledge the able assistance of Raymond Stults, M.A. in Russian Studies, Harvard, a second year student at the University of Michigan Law School, in the preparation of first drafts of the translation of this and some other text materials quoted in this article, as well as for assistance in final checking of the manuscript before publication. W.G.


25 Soviet cases tend to treat causation as a simple matter of fact, rather than to use it as an additional test for defining the scope of liability. Perhaps the development of useful causation theories has been inordinately hindered by the close connection with political and economic Marxian dialectic. It has at least made the Soviets extremely sensitive to any suggestion that their use of theories which look like cause in fact or adequate cause tests have any similarity to Western concepts. See in this regard the excellent discussion of the Soviet theory and practice in 2 Ioffe 447.
who caused the injury. The "fault" may consist in a violation of a criminal prohibition or in unjustified noncriminal intentional infliction of injury, or in failure to conform to a standard of reasonable care.\textsuperscript{26}

What is the nature and extent of the normal tort recovery? The Principles simply state in this general section that "injury . . . is subject to compensation in full," and no details are given concerning the intended scope of recovery or the nature of the obligation.\textsuperscript{27} It is likely, therefore, that the new republic codes will reflect the practice under prior law.

The standard civil law textbook says that under pre-Principles law, "compensation for injury takes the form of restoration to the former condition. . . . The law gives a favored position to compensation for injury in the form of restoration to the former condition."\textsuperscript{28} This is based on article 410 of the RSFSR Civil Code, which provides that "reparation of injury shall consist in the restoration of the condition existing before the injury and, to the extent to which such restoration is impossible, in compensation for the damage caused." In other words, the Code establishes a primary obligation to repair or replace damaged or destroyed goods, etc., and a secondary obligation to pay damages.

This is probably not, however, in line with the actual practice which has developed. The other leading civil law treatise says that specific replacement or repair is very seldom applied in practice.\textsuperscript{29} In the case of personal injury it is not possible, and, in the case of property injury, because of the increase in the supply of goods for the people, "it is usually more convenient [for the plaintiff] to receive monetary compensation."\textsuperscript{30} Implying that a choice is sometimes open to the parties, the text says that the defendant sometimes chooses compensation in kind where the law imposes a rate for monetary compensation higher than the value of the article, but that plaintiffs seldom ask for specific relief.\textsuperscript{31} Sometimes the choice has been made by

\textsuperscript{26} Conduct which results in liability is generally also characterized as "illegal" or "unlawful." In practice this usually amounts to finding of "fault" or a basis for strict liability, and does not constitute an independent criterion. The standard text says that "in those cases in which the appropriate rules of conduct are not established by law, the norms of liability for the infliction of injury are themselves the rules of proper conduct." 2 ORLOVSKY 369. In other words, whether or not liability is found is the test of "illegality," and not vice versa. See the discussion under art. 88, para. 3 infra.

\textsuperscript{27} The special rules given in articles 91 and 92 in connection with recovery for personal injury are discussed below and under those articles.

\textsuperscript{28} 2 ORLOVSKY 389.

\textsuperscript{29} 2 IOFFE 492.

\textsuperscript{30} Ibid. The result in practice under the German provision, BGB \textsection 249, which also provides for specific relief, is usually also a money recovery. 1 MOLITOR, SCHULDRECHT (LAW OF OBLIGATIONS) 43 (1959).

\textsuperscript{31} 2 IOFFE 492.
the court, as in the case of a recent ruling regarding damage to crops of a kolkhoz, and sometimes the law has limited the plaintiff to money damages.

It seems clear that the secondary form of relief in article 410, money damages, "has acquired fundamental significance in Soviet court practice." In view of this, it is unlikely that the new codes will continue the old formulation. It is more difficult to say what will be substituted for it. One commentary states simply that "the choice of one form or the other (specific replacement or repair or damages) depends on the particular characteristics of the case in question, and it is therefore inexpedient for such a choice to be made ahead of time by the law." The problem has not been discussed in articles dealing with the new draft civil codes, so this may be a question which will be left to case law and doctrinal development.

The amount of money damages in the case of injury to property generally is described in the standard text as being equal to the actual decrease in value or the replacement value in case of destruction. While the text recognizes that there also may be lost profits from loss of the use of the thing, it takes the view that under recent USSR Supreme Court rulings, these may not be included in the recovery.

In the case of personal injury, recovery always takes the form of money damages, and includes all expenses of caring for the injured party not provided directly under the public health program, as well as lost

33 Ibid.
34 Ibid.
35 Ioffe & Tolstoy, OSNOVY SOVETSKOGO GRAZHDANSKOGO ZAKONODATEL'STVA (PRINCIPLES OF SOVIET CIVIL LEGISLATION) 164 (Leningrad 1962) [hereinafter cited as Ioffe & Tolstoy].
36 2 Orlovskiy 381.
37 Ibid.
38 The Ioffe-Tolstoy commentary says, "The tortfeasor is required to compensate for all expenditures, losses or damage to property, as well as for all income not received by the victim because of the infraction" (Ioffe & Tolstoy 164), leaving an ambiguity on this point. There are a few exceptional cases of liability for more than the actual amount of harm inflicted as an increased deterrent for certain kinds of conduct. 2 Ioffe 493. There is also an important restriction on the amount of recovery by an employer against his employee to one-third of the employee's salary, unless his acts constituted a crime. Labor Code art. 83. The broader provisions for equitable reduction of the amount of recovery by the court available in all cases are discussed in 2 Ioffe 493 with respect to prior law, and under article 93 of the Principles infra.
39 For general background, see the comprehensive article by Hazard, Personal Injury and Soviet Socialism, 65 Harv. L. Rev. 545 (1952).
earnings attributable to the injury. Recovery for pain and suffering is not allowed.

The recovery of lost wages may be either for the loss during a temporary disability, which can be quite accurately computed in most cases, or may also include the more speculative item of impairment of future earning capacity. This latter portion of the recovery must be awarded in the form of a monthly payment. Periodic re-examinations of the victim re-establish his right to continued receipt of such payment, and either party has in addition a right to petition the court for a change in the amount of compensation in case of a subsequent change in the party's ability to work.

Two kinds of capacity are generally recognized—general capacity to work, i.e., to do manual labor, and ability to do the work for which a person has been specially trained, i.e., his professional capacity. If an injured party is found to have lost 30% of his professional capacity, then his monthly damage payments will be a proportionate sum of his prior average wage. If he has lost all of his professional capacity, then his recovery will be the full amount of his former average wage, less whatever his probable earning power will be from whatever general capacity he has retained.

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41 IoFFE 501.

42 This is theoretically justified on the ground that there should only be recovery for "property" losses, or loss of income which can be equated thereto. For the extent of this "property" orientation, see the introduction to the whole law of obligations in 1 IoFFE 368. Perhaps the fact that Tsarist law also refused recovery for other than property damage influenced the formation of the Soviet position. 1 Gosovskiy 539.


46 The ramifications of the formulae used for computing the monthly recovery have been one of the most troublesome points in Soviet tort practice and are beyond the scope of this article. The basic problems are summarized in a clear exposition of recent practice in 2 IoFFE 502-12.

47 A good recent example of how this works out in practice is Valov, [1963] Byul. verkh. suda S.S.S.R. No. 1, p. 17 (Plenum U.S.S.R. Sup. Ct. 1962). The formula applied there is the formalized estimate of future earning power through the use of the percent of capacity lost and the prior average wage. The court goes on to say, however, at 18, that if the guess is wrong, i.e., if it turns out that he is able to earn more than the amount predicted, there will be applied to his total income, i.e., salary plus pension plus this recovery, a de facto limitation to his average prior wage, and that this limitation can be invoked by the defendant in the light of subsequent evidence at the time of execution. This unfortunately seems to overlook the possibility of inflation, effect of increased skill, etc., which could justify higher total income.
Articles 91 and 92 contain a special provision which makes it clear that assistance and pensions actually being received by the plaintiff because of the injury sued upon are to be deducted from any recovery against the person with tort liability, but that benefits from other sources, e.g., veterans' benefits, are to be disregarded. In the past there had been some difference of opinion on this point, based on the idea that a person's full income expectation from labor should be the upper limit of his recovery. It is interesting that the Principles have reaffirmed the more favorable position for the individual, i.e., that he may have his full work income, and in addition any other benefits to which he is entitled. 48

Some Soviet writers seem to favor a more comprehensive personal injury recovery. There has been criticism, for example, of the rule that loss of general capacity to work is not compensated under existing law if a part of professional capacity is retained. 49 The suggestion has been made that actual income loss is not the only economic injury sustained, and that the loss of ability to do housework or care for relatives, as well as loss of mobility, etc., should be compensated in the future. 50

It is still too early to say whether the theoretical limitation to recovery of "economic" losses, or the practical consideration of avoiding large recoveries which might unduly burden the production units, will keep the scope of recovery within the more narrow limits of present rules. If the scope of recovery is expanded, however, it will mean that even claims for temporary disability would not be fully covered by the social insurance salary payments, and so would require a tort claim to secure full compensation.

"An organization must compensate for injury caused through the fault of its employees in the performance of their duties."


49 As applied, e.g., in the Likhachev case, supra note 48.

50 Maleynin, Prawovoye regulirovanie obyazatel'nosti po vozmeschenii vreda, (The Legal Regulation of Obligations for Compensation of Injury) Sov. gos. i. pravo No. 10, pp. 68, 74 (1962).
This provision resolves a problem which has been a source of controversy in Soviet law. A clear provision on the point was lacking in the 1922 Code,\(^1\) and several views were advanced as to the liability of juridical persons for the acts of their employees.

Some authors rejected the possibility of respondeat liability for the acts of employees, and said that liability could be found only on the basis of independent fault of the organization, e.g., an improper selection or supervision of the employee.\(^2\) Most writers and many decisions, however, took the view that fault should be attributed.\(^3\) Some courts even held the organization liable when the acts in question were outside the scope of the person's employment.\(^4\)

The Principles clearly establish liability on the part of the juridical person for injury caused by the fault of its employees, and at the same time place a scope of employment limitation on such liability.

Nothing is said as to the right of the organization to reimbursement from the employee who caused the injury, but such a right will certainly be recognized as it was under prior law,\(^5\) subject to the general limitation of article 83 of the Labor Code limiting recovery against a worker for harm inflicted by him on his employer to one-third of his salary,\(^6\) unless his acts constituted a crime. It would also be available only in cases of "fault" liability, and not in cases where the worker by his act incurs strict liability only for the organization.\(^7\)

\(^{51}\) The only explicit provision in the 1922 R.S.F.S.R. Civil Code (art. 407) stated that government institutions were liable for harm caused by improper acts of their officials in cases specially provided for by law. Re this specific question under the Principles, see under article 89 infra.

\(^{52}\) E.g., the standard civil law text rejects the idea that fault of the worker is to be attributed to the organization. 2 Ovlovskiv 384. Compare the German provision in BGB § 831 which allows the organization to relieve itself of liability by showing proper care in the selection and supervision of its personnel.

\(^{53}\) 2 Ioffe 474. See also Flyshits, Obyazatel'stva iz prichineniya vreda (Obligations [Arising] Out of the Causing of Injury) 110 (1951), and the review of authorities in Savitskaya, Otvetstvennost' gosudarstvennykh uchrezhdeniy za vred, prichinenyy deystviyami ikh dolzhnostnymy lits (The Responsibility of Government Institutions for Damage Caused by Actions of Their Officials), Sov. gos. i pravo No. 8, pp. 48, 52 n.8 (1962).

\(^{54}\) Ioffe & Tolstoy 161.


\(^{56}\) The limitation was not available under prior law in the case of government officials sued for reimbursement in connection with governmental liability under Civil Code art. 407. There is an additional limiting aspect of this recovery scheme against employees, viz. that the employer may be subjected to long term monthly payment obligations, whereas recovery from the employee has to be in a lump sum. See Timoshkin, supra note 55. The possibility of a limitation on recovery even where the acts constituted a crime is discussed at note 119 infra.

\(^{57}\) Some of the strict liability cases have contributed to the confusion over whose liability is used as a basis for recovery. E.g., in a case where a drunken employee not
"Injury caused through lawful acts is to be compensated for only in cases provided for by law."

This provision might seem to create an additional basic test of "illegality" for the imposition of liability. One of the leading Soviet writers says in a commentary on the Principles that this clause means just that, i.e., that "liability for injury arises only when that injury is brought about by unlawful conduct." If "unlawful" is taken to describe any conduct which results in liability under the circumstances, then this is obviously true. His statement is misleading, however, if it implies that there is liability only in cases where the conduct constitutes a crime or contravenes some general regulation.

What is intended in this section is expressed perhaps more clearly in the old RSFSR Civil Code provision, "The person who inflicts the injury frees himself from liability if he shows...that he was legally entitled to inflict the injury." This is designed, in other words, to take care of the situation

employed as a driver took a company car and had an accident, the court held that the company had strict liability as owner. It went on to show, however, how the company had been at fault (by an employee's fault attributed to it) in leaving the keys in the ignition of the vehicle and in letting him get out of the yard with it. Lomov, [1962] Byul. verkh. suda R.S.F.S.R. No. 3, p. 1 (Civ. Coll. R.S.F.S.R. Sup. Ct. 1961). It would be easy for a court in a subsequent case to interpret the holding as requiring a finding of independent fault on the part of the company, or as attributing fault on the part of the other employees to the company as a basis for liability, even though the court must have actually decided the case only on strict liability grounds, i.e., liability without fault, since only that code section was cited. For a discussion of the rule the court may have been laying down, as well as of the precise question as to what interrupts "possession" for purposes of the imposition of strict liability, see note 91 infra.

The mere infliction of injury by an extra-hazardous source is described as "unlawful." One leading Soviet writer has objected to this. "It is impossible to characterize as illegal the activities of Soviet industrial enterprises, railroads and construction organization carried out in conformity with all the requirements of the law." Fleyshts, Obshchye nachala otvetstvennosti po osnovan grazhdanskogo zakonodatel'stva Soyuza SSR i Soyuznykh Respublik, (The General Principles of Responsibility on the Bases of Civil Legislation of the Soviet Union and Union Republics), Sov. gos. i pravo No. 3, p. 34, at 39 (1962). He goes on to say, however, that the new Principles, in order to promote maximum safety precautions, make the mere infliction of injury by an extra-hazardous source "unlawful." Ibid.

There is no need to show a violation of any criminal statute or other regulation. One leading Soviet writer has objected to this. "It is impossible to characterize as illegal the activities of Soviet industrial enterprises, railroads and construction organization carried out in conformity with all the requirements of the law." Fleyshts, Obshchye nachala otvetstvennosti po osnovan grazhdanskogo zakonodatel'stva Soyuza SSR i Soyuznykh Respublik, (The General Principles of Responsibility on the Bases of Civil Legislation of the Soviet Union and Union Republics), Sov. gos. i pravo No. 3, p. 34, at 39 (1962). He goes on to say, however, that the new Principles, in order to promote maximum safety precautions, make the mere infliction of injury by an extra-hazardous source "unlawful." Ibid.


CIVIL CODE art. 403.
where cattle infected with a contagious disease are destroyed by order of the appropriate authority, or where firemen inflict damage in the course of their work.”

In discussing this provision of the Principles, one Soviet author used the two examples of injury inflicted in self-defense and destruction by an individual of property in cases of extreme necessity.

The section suggests a related question which, while it has not received much attention in Soviet literature, has become an important facet of tort law in other civil law jurisdictions. Even in a case where a defendant can show that he had a “right” to do the act which inflicted injury, can he be said to have abused that right, misused it, in such a way that he may be held liable for the injury? For example, is there a limitation through some more basic norm on the property “right” of a home owner to build a spite fence, or does the above clause allow him to inflict injury in that way without incurring liability?

The Soviets will certainly reject any such protection of absolute private rights under this provision, and it is likely that either the right itself will be said to be relative, or a general clause of the Principles will be brought into play. Article 5 provides:

“Civil rights are protected by law, except in cases where they are exercised in a manner which contradicts the purpose of these rights in a socialist society in the period of the building of communism.

“In exercising their rights and fulfilling their obligations, citizens and organizations must comply with the law, and respect the rules of socialist communal life and the moral principles of a society which is building communism.”

This is a continuation and broadening of article 1 of the RSFSR Civil Code, which was inserted to provide a safety valve if attempts were made to misuse the technical provisions of the Code during the limited return to capitalism in the early Twenties. After a period of disuse, there has been some revival of interest in it on the part of the courts in recent years.

62 ORLOVSKY 372. In Makagon v. Ministry of Agriculture, [1960] Sov. yus. No. 5, p. 85, Case No. 2 (Civ. Coll. R.S.F.S.R. Sup. Ct. 1959), HAZARD & SHAPIRO pt. 3, at 82, bees were destroyed as a result of spraying of crops. Held, no liability since proper methods were used by the Ministry of Agriculture and Civil Air Fleet, and all regulations were complied with by the collective farm for which the spraying was done.

63 The same two examples are cited in a common law treatise as cases in which “on supervening grounds of public policy a special privilege is recognized.” FLEMING, TORTS 6 (1961).

64 For a concise discussion of the development and application of the doctrine of abuse of rights in French and German law, see RYAN, INTRODUCTION TO CIVIL LAW 128 (1962).

1 IOFFE 20-22. There have also been indications of concern about possible misuse of rights in discussions of the new Principles. E.g., Fleyshits & Makovskiy, Teoreticheskiye voprosy kodifikatsiiy respublikanskogo grazhdanskogo zakonodatel’sva (Theoretical Questions of the Codification of Republic Civil Legislation), Sov. gos. i pravo No. 1, p. 79, at 90 (1963).
Whether or not this doctrine will be used generally under the new law to work out a balance between public and private interests remains to be seen.

"ARTICLE 89. LIABILITY OF GOVERNMENT INSTITUTIONS FOR INJURY CAUSED BY ACTS OF THEIR OFFICIALS"

"Government institutions are liable for injury caused to citizens by improper official acts of their officials in the area of administration in accordance with the general grounds of liability (Article 88 of these Principles), unless otherwise specially provided for by law. For injury caused to organizations by such acts of officials, government institutions are liable in the manner established by law.

"For injury caused by improper official acts of officials of the organs of inquest and preliminary investigation, the procuracy, and the courts, the government institutions in question are financially liable in those cases and within the limits specially provided for by law."

General tort liability on the part of the government was recognized under prior Soviet law for injuries caused in performing economic and technical functions. Injuries from hospital negligence or from being run over by a car of the police administration were compensated for on general tort grounds. These claims were treated in the same way as those against production units "owned" by the government, where questions of liability to citizens for defective products, workmen's compensation claims, and tort claims for accidents involving delivery trucks, were all considered to be free of any claim of sovereign immunity.

A concept like sovereign immunity was only brought into play in connection with official "governmental" acts. Article 407 of the RSFSR Civil Code provided for liability in such instances only in cases specially provided for by law. While some special provisions were later enacted, these few isolated cases remained an insignificant exception to what became a well-established principle of immunity for injury inflicted by governmental acts.

Soon after the de-Stalinization go-ahead given by the Twentieth Party Congress, a leading Soviet criminologist, Strogovich, said that the time had come "to decide by legislative action the question of compensating the...

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66 Ruling of the USSR Supreme Court Plenum of June 10, 1943, para. 4, reprinted in DOZORTSEV. For a text discussion, see 2 ORLOVSKY 384.

67 2 IOFFE 483.

68 There has been considerable controversy, however, over what acts should be considered economic and technical, and what considered "official" or "acts of authority." See, e.g., the discussion re hospitals in Savitskaya, supra note 53, at 53.

69 The original draft contained a provision for general liability in such cases, but it was modified prior to adoption. Savitskaya, supra note 53, at 49.

70 The four principal exceptions provide for liability in connection with illegal confiscation of property, certain injuries to collective farms, harm inflicted by the fault of government harbor pilots, and liability of organs of the legal system for property deposited with them. See the list with commentary in 2 IOFFE 484-85.
rehabilitated citizen for damages suffered through illegal subjection to criminal proceedings, arrest, or conviction."

At the February 1957 meeting of the USSR Supreme Soviet, a delegate from the Ukraine criticized the old provision of Civil Code article 407 as being inconsistent with ideas of "socialist legality":

"In connection with the preparation of the civil codes of the union republics, consideration should be given to the question of the property liability of governmental organizations for damage caused by their workers. The current system has established limited liability. This liability exists only in cases prescribed by law. Essentially, no one bears liability in practice under Article 407 of the Civil Code of the Ukrainian SSR. Such a situation contradicts the principle of strengthening socialist legality and makes it a real necessity to broaden the property liability of governmental organizations for damage caused by their workers. The broadening of property liability will promote full protection of the rights of working people and improvement in the work of the governmental apparatus."

There was no immediate broad response to these trial balloons, and some writers said that the question should be left to individual republic formulation, despite the obvious general significance of the issue.

Debate behind the scenes on the desirability of including a clause introducing general governmental liability continued, and the author was told by legal specialists at the Academy of Sciences in Kiev in late 1959 that the decision to include such a provision in the new Ukrainian Civil Code had already been made. A similar decision seems to have been reached at a conference held at the same time in Moscow at the RSFSR Ministry of Justice. According to a summary of the proceedings published later, "It was proposed that a rule be included in the draft of the Civil Code according to which governmental institutions would bear material liability according to general principles for injury caused by improper acts of officials." While

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71 Strogovich, Teoreticheskiye vooprosy sovetskoy zakonnosti (Theoretical Questions of Soviet Legality), Sov. gos. i pravo No. 4, p. 15, at 25 (1956). A full review of the history summarized below of the adoption of the present form of article 89 is given in the excellent as-yet-unpublished dissertation by Berry, GOVERNMENTAL TORT LIABILITY IN THE SOVET UNION ch. VII (Syracuse 1963).

72 Zasedaniya verkhovnogo soveta SSSR, (Session of the Supreme Soviet USSR), 4th meeting, 6th Sess., Feb. 5-12, 1957. From the Stenographic Record 500 (Moscow 1957).

73 See e.g., Orlovskiy, K razrabotke osnov grazhdanskogo zakonodatel'stva Soyusa SSR (Toward the Working Out of the Civil Legislation of the USSR.), Sov. gos. i pravo No. 7, p. 81, at 86 (1957).

the report does not indicate the degree of support, Tolstoy, one of the leading civil law writers, said in 1960 that there was “unanimous” support among scientific and practical workers for the introduction of liability for injury caused by administrative acts, and cited in support of this the response of the participants at the 1959 conference.75

Conservative lawyers in the Ministry of Justice, perhaps armed with direct political instructions from policy sources, still seemed unconvinced by the reaction at the meeting, for when the draft was published for public discussion in 1960, the provision had not been included. The draft stated: “The conditions and limits of liability of state institutions for injury caused by the improper official acts of their officials in the sphere of administration and judicial activity are to be established by USSR and Union-Republic legislation.” 76

The advocates of a clear statement of governmental liability in the general principles were not daunted, however, even by what might have seemed like a political rebuff to the group sentiment expressed at the 1959 meeting. The provision was criticized from almost every side by eminent legal writers, and the drafters were taken to task: “The compilers of the draft of the Principles should listen to the voice of the wide scientific public and of authoritative practicing jurists and radically change their approach to the liability of governmental institutions for injury caused by administrative acts.” 77 A group article by distinguished civil law writers suggested the following formulation: “Governmental institutions are liable on the basis of the general [tort] principles for injury caused by the improper official acts of their officials in the area of administration and judicial activity, except in cases provided for by USSR legislation.” 78

When the final version was adopted as article 89 of the Principles in December 1961, the battle was shown to have been won only in part. While

75 Tolstoy, O proyekte osnov grazhdanskogo zakonodatel’stva Soyuza SSR i Soyuznykh Respublik (Concerning the Draft of the Principles of the Civil Legislation of the Soviet Union and Union Republics), Pravovedeniye No. 4, p. 33, at 44 (1960).
77 Tolstoy, supra note 75.
78 Ioffe, et al., O proyekte osnov grazhdanskogo zakonodatel’stva, (Concerning the Draft of the Principles of Civil Legislation ...), Sov. gos. i pravo No. 2, pp. 93, 101 (1961). Note particularly their suggestion that any exceptions to the general principle could only be made by federal legislation. This additional safeguard was not included in the final draft, although in some other articles, e.g., article 91, federal control of exceptions was provided for. In an article commenting on the final version, Saviskaya reiterates the need for federal legislation on the question of liability of legal organs, where the article reads only “provided by law.” The planned inclusion of provision for liability in such cases in the RSFSR Civil Code would indicate that federal legislation will not be forthcoming (infra note 80), although writers continue to stress the need for uniformity (infra note 134).
the essential principle was recognized, it was severely limited. First, only citizens were given a right to compensation. Second, the provision excepted the activities of organs of the legal system—ironically, the very source of original pressure for increased liability.

A balance sheet is hard to establish at the present time. Certainly there is a potential basis for increased protection of individual rights, but the Soviet jurists have been silent as to just what interpretation will be given to crucial terms in the provision. What are "official" acts, what acts are "improper," as well as what administrative remedies will have to be pursued before judicial action is appropriate, all remain to be elaborated. So far, the author has discovered no cases interpreting the provision, and an authoritative book-length commentary on the Principles simply restates the wording of the provision, without interpretation of any kind.

While the Principles make no specific provision for a right of recovery by the government institution held liable against the official who caused the injury, this was provided for even under old law and will undoubtedly be continued.

"Article 90. Liability for Injury Caused by a Source of Increased Danger"

"Organizations and citizens whose activity involves increased danger to those in the vicinity (transport organizations, production enterprises, builders, possessors of automobiles, and the like) are required to compen-

79 Savitskaya, supra note 53, at 50, interprets the provision to mean that organizations also got the same "right," but that the statute requires a special procedure to be set up for asserting such claims.

80 Provisions on liability of the organs of the legal system are likely to appear in the republic codes. The RSFSR draft code is reported to contain a provision providing for liability for certain acts of legal organs if they are found to have been committed intentionally or by gross negligence. Boldyrev, O proyekte grazhdanskogo kodeksa RSFSR (Concerning the Draft of the Civil Code of the RSFSR), Sov. gos. i pravo No. 8, pp. 15, 23 (1962). The suggestion that this liability should be provided for in a federal statute to insure uniformity continues to be advanced. See note 134 infra.

81 Under some of the old exceptions, cited note 70 supra, redress was by administrative action. One Soviet writer has assumed that under the new Principles, claims may in all cases be taken directly to the courts. Savitskaya, supra note 53, at 50. Recent trends in adjudication of labor disputes and workers' injury claims, discussed at note 102 infra, give reason to expect, however, provision for some kind of preliminary administrative decision and/or review, and a requirement that these remedies be first exhausted.

82 Ioffe & Tolstoy 163. The article by Savitskaya, supra note 53, is much more detailed, but still stops short of elaborating just what would constitute typical situations in which to invoke the new liability.

83 The liability for full reimbursement provided under the old act may be continued, even though an ordinary worker in such case would have the benefit of a limitation to one-third of his salary, unless his acts constituted a crime. A suggestion to this effect is made by Savitskaya, supra note 53, at 52. See the general discussion on reimbursement under art. 88, para. 2, supra.
sate for injury caused by the source of increased danger, unless they show that the injury arose as a result of irresistible force or the intent of the injured party.”

The parallel provision of the present RSFSR Civil Code reads:

“Individuals and enterprises whose activities involve increased danger for those in the vicinity, such as railways, tramways, industrial establishments, dealers in inflammable materials, keepers of wild animals, persons erecting buildings and other structures, etc., shall be liable for the injury caused by the source of increased danger, unless they prove that the injury was caused by irresistible force or the intent or gross negligence of the injured party.”

The Principles thus continued without substantial change the institution of strict liability for those whose activity involves increased danger to others. The criteria are now, however, oriented towards the activities of the persons, rather than the specific things employed. While it would appear that the defense of contributory negligence has been dropped, it has merely been shifted to the omnibus provision in article 93.

The fact that the institution of strict liability has been carried over in this basic reformulation of general principles of liability presents one of the paradoxes of Soviet tort law. In a society where public responsibility for the individual’s welfare is a dominant theme, it would seem natural to place at least the unavoidable risks of modern mechanized society on society as a whole, rather than on a blameless individual or production unit. Accidental injury from the hazardous operations of railroads, construction machinery, automobiles, etc., might well be compensated through tax-supported programs. Even compulsory liability insurance programs for the owners of such sources would convert the onus of absolute liability into an obligation to pay premiums. To the author’s knowledge, however, there is no liability insurance available in the Soviet Union to spread the burden imposed on the individual auto owner or the transport or production organization.

While it can be said that this constitutes an ordinary business cost, and is spread by being passed on to the consumer through the price of the

84 CIVIL CODE art. 404.

85 The new wording makes it clear that governmental institutions as well as individual citizens and enterprises are to be subject to strict liability, though this had already been held to be true through broad interpretation of the old provision. 2 ORLOVSKY 383.

86 Recent tourists entering the Soviet Union in their own cars have been offered liability insurance by the State Insurance Agency, but this does not seem to be available to Soviets.

86a There are limitations on the burden itself, principally through the defenses of contributory conduct on the part of the injured party, irresistible force, and the exemption from any strict liability for employers whose extra-hazardous sources inflict injury on their employees. See discussion under arts. 91 and 93, infra.
product or service, this is an effective argument only where the liability is imposed on an institution aimed at end profits. It is not a satisfactory rationale for liability from municipal snow-clearing activities, or from the cautious operation of the private automobile. In the case translated at the beginning of this article, the full burden of compensation was imposed on the public transportation unit, with only the possibility of reimbursement from a bicycle-owning peasant, and then only if fault on his part could be shown.

The rationale often advanced, that this increased liability is justified as a stimulation for persons who control such sources of increased danger to observe the rules of operation of such equipment and to take all possible measures to improve the safety of the operation,\(^8\) ignores the fact that this purpose would be accomplished by a rule which allowed a person to show that he had used the utmost caution in employing his source of increased danger, \textit{i.e.}, a rule which would exclude liability for mere accident.

In article 404 of the RSFSR Civil Code, the sources of increased danger listed were held by the courts to constitute examples rather than an exhaustive list, and the courts added such important sources as automobiles.\(^8\) While the new list in article 90 is built on types of activity, \textit{e.g.}, transport, certain traditional specific sources which have been omitted, such as wild animals and inflammable materials, are still within the meaning of the new provision according to the Soviet writers.\(^8\)

It is important to note that these sources or categories of activity will not always be considered extrahazardous. It is possible that injury may be caused by a car when it is not engaged in its hazardous activity of moving at high speeds. If someone shuts his hand in the door of the car, this does not come within article 90. "An empty truck is a source of increased danger only if it is moving, while a steam engine presents a danger if it is under steam, even though not moving."\(^9\)

Who is the "possessor" of the dangerous source for purposes of liability? While there has been some doctrinal controversy, the generally accepted view now is that "possessors" should be held to include persons using sources of increased danger as owners or on the basis of some other civil-law relationship, \textit{e.g.}, a property rental contract.\(^9\) Employees using such sources

\(^8\) See, \textit{e.g.}, Fleyshits, \textit{supra} note 53.

\(^8\) 2 \textsc{Orlovs}ky 377. While giving every auto accident victim a recovery without proof of fault may seem drastic to us, a similar solution (though with some limitations not yet recognized in Soviet practice) has been adopted by statute or worked out by the courts in many civil law jurisdictions. For a description of the French and German schemes, see \textsc{Ryan}, \textit{Introduction to the Civil Law} 122, 127 (1962).

\(^8\) \textsc{Ioffe} \& \textsc{Tolstoy} 162. In an earlier article Ioffe and others had said these should be specifically included. Ioffe, \textit{et al.}, \textit{supra} note 78.

\(^9\) 2 \textsc{Orlovs}ky 377.

\(^9\) \textit{Ibid.} This includes an owner using it through his servant, and also seems to include use through someone who misappropriates the source (though perhaps only if the owner is at fault in allowing the misappropriation). See the \textsc{Lomov} case, \textit{supra} note 57. Case law development is reviewed in a passage translated from an article by
are not included, however, so that a hired taxi driver who collides with another car incurs liability for his employer and not for himself under article 90.92

The possessor may relieve himself of liability only by showing that the injury has been brought about by an irresistible force,93 or as the result of the intent or gross negligence of the injured party, discussed under article 93 infra.94

This is an area in which there is likely to be a good deal of development in the coming years.95 The liability imposed is a heavy one, and unless liability insurance intervenes to equalize the burden, it would not be surprising to see either a limitation imposed on the basic principle or a modification of the recovery pattern.96

Dobrovolskiy, Novoye v sudebnoy praktrke po delam o vozmeshenii vreda (New [Developments] in Court Practice in Cases of Compensation of Damage), Sots. zak. No. 8, p. 59 (1960), Hazard & Shapiro pt. 3, at 86. For the resolution in practice of the complicated problem between organizations using each other's equipment, see 2 Ioffe 481.

92 The bus driver in the translated lead case of the article incurred no strict liability for himself. 2 Orlovsky 378 points out that he probably incurred no direct liability at all, even if at fault, for even where there seems to be a clear element of fault on the part of the employee, the strict liability of the employer has been held to be the exclusive ground available for recovery. E.g., Collective Farm v. Okuneva, [1959] Sov. yus. No. 3, p. 83, Case No. 4, (Presid. R.S.F.S.R. Sup. Ct. 1958), Hazard & Shapiro pt. 3, at 85. As to his liability to reimburse his employer if he was at fault, see discussion under art. 88, para. 2, supra. There is no limitation to use within the scope of the servant's employment. Lomov, supra note 57, and Ministry of Foreign Affairs Motor Pool v. Collective Farm, [1960] Sov. yus. No. 12, p. 26, Case No. 2, (Civ. Coll. R.S.F.S.R. Supt. Ct.), Hazard & Shapiro pt. 3, at 86.

93 See generally the excellent article by Matveyev, O pomyatii nepreodolimoj sily v sovetskom grazhdanskom prave, (On the Concept of Irresistible Force in Soviet Civil Law), Sov. gos. i pravo No. 8, p. 95 (1963). Ioffe states that this defense is rarely encountered in practice. 2 Ioffe 480. In the lead case, supra note 1, and in the Lomov case, supra note 57, the court held in effect that intervening wrongdoing by a third party was not such a force.

94 As to whether a defendant can relieve himself of liability by showing that there is no specific regulation prohibiting what he did, the answer is clearly "No". His fault is not at issue, and there is no "lawful activity" clause as under article 88 from which the argument could be developed. The general conclusion of "unlawfulness" of the conduct follows from the fact of liability. See notes 26 and 59 supra.

95 Some variations in the pattern of liability have been made in special statutes. Article 101 of the new USSR Air Code continues the provision of article 78 of the old Air Code imposing even the risk of force majeure upon the airline. The only defense is the intent or gross negligence of the injured party. There is a translation in Hazard & Shapiro pt. 3, at 87. A limitation on liability is provided in the provisions of articles 157 and 158 of the Ocean Navigation Code. While ships would normally be counted as sources of increased danger, liability in the case of collision of ocean ships is made to depend on fault. There is an English translation in 4 Law in Eastern Europe 23, 56 (1960).

96 It is possible for the courts to give relief in specific cases of hardship under the general equitable power to reduce tort recoveries after consideration of the means of the defendant, discussed below under article 93, though this is hardly a satisfactory substitute for insurance protection from either party's point of view.
"ARTICLE 91. LIABILITY FOR INJURING OR CAUSING THE DEATH OF A CITIZEN FOR WHOM THE PERSON WHO CAUSED THE INJURY IS REQUIRED TO PROVIDE INSURANCE COVERAGE

"If a worker is disabled or otherwise injured in the course of his work through the fault of the organization or citizen required to make state social insurance payments in his behalf, such organization or citizen must compensate the injured party for the injury insofar as it exceeds the amount of assistance payments received by him or any pension awarded to and actually received by him after the injury to his health. Exceptions to this rule may be established by USSR legislation."

This article purports to establish a separate pattern of tort liability for the insuring employer, i.e., for the party who provided insurance coverage for an injured claimant.\(^7\) In effect, however, it seems merely to limit his liability to cases where there is fault on his part, and the same result could have been obtained by including under article 90 a clause to the effect that an employer has no strict liability toward his employees when they are injured by an extrahazardous source under his control.

As the article states, an enterprise or an individual citizen (who may employ a maid, chauffeur, secretary, etc.) whose employee is injured in connection with the performance of his work is liable only if the employer was at "fault," just as under the ordinary principles of liability of article 88. This continues in effect article 413 of the RSFSR Civil Code, which provided for liability in cases where "the injury is caused by a criminal act or omission on the part of the person making the payments." (Emphasis added.) While the substitution of "fault" for "criminal act or omission" may seem to be a major increase in the scope of employers' liability, court practice had already reduced this requirement to one of simple "fault."\(^8\)

\(^{7}\) To the effect that the corresponding provision of prior law should be viewed as setting up independent bases for recovery, see 2 ORLOVSKY 387. In most writing, a separate section is devoted to personal injury claims with these special provisions as the basis for discussion. In fact, some courts took the position that since the tort recovery "supplements" the pension payments, no tort recovery should be allowed where no right to a pension was recognized, while other supreme courts took the contrary view. See Anan'yeva & Laasik, Ob obyazatel'stvakh voznikayushchikh v sledstviye prichineniya vreda (Concerning the Obligations Arising in Consequence of the Causing of Damage), Sov. gos. i pravo No. 3, p. 101, at 103 (1961). Perhaps this separate treatment of employers' liability was what led to the apparent claim in some cases that the employment relationship alone furnished a basis for recovery in tort. See, e.g., Barmotin, [1963] Byul. verkh. suda S.S.S.R. No. 5, p. 7 (Plenum U.S.S.R. Sup. Ct.), where the lower court had imposed liability on that basis without any finding of fault in a case where a worker was injured on his way home from work. An apparently similar lack of causal relation and fault was present in the suit brought in Neff, [1963] Byul. verkh. suda R.S.F.S.R. No. 6, p. 4 (Civ. Coll. R.S.F.S.R. Sup. Ct.). The claims were finally rejected, but that they were brought at all and had to go through so many levels of courts testifies to the confusion which exists.

\(^{8}\) The Ioffe-Tolstoy commentary takes the position, at 167, that this new language is a significant expansion of liability. The standard text states clearly, however, that even
Far from expanding the employer's liability, the Principles are perpetuating the exemption of the employer from strict liability toward his employees, a position which has been vigorously attacked by Soviet writers. Absent a showing of fault, the employee must content himself with his social insurance recovery, which is usually less, and sometimes nowhere close to, full compensation. A nonemployee injured by the same source has a right to full compensation without any showing of fault.

The rationale given is that industries do not employ people to work with ultradangerous sources who are not competently trained, so that there is no need for the strict liability. A more satisfactory rationale might be the fact that this is some compensation to employers for the burden imposed on them to pay for comprehensive social insurance benefits for workers—insurance which covers the strict liability situations, but which in addition provides benefits even for sickness or injury which has no relation to their work.

Since January 1, 1962, the supplemental portion of a worker's recovery—that part based on the fault of the enterprise, has been subjected to preliminary determination by the plant administration and review by the local trade union committee. Only in the event that either party is dissatisfied with the disposition of the claim by these bodies is it to be brought to the people's court. This procedure, which also applies to claims by dependents, should not be confused with a workmen's compensation board award.

under pre-Principles law "civil fault in the infliction of the injury on the part of the person providing insurance is sufficient for liability to be imposed on him under article 413 of the Civil Code." 2 ORLOVSKIY 287. See to the same effect Dobrovol'skiy, supra note 91. Court practice in recent years does in fact appear uncertain as to the standard. For example, the old "criminal" standard was repeated by the USSR Supreme Court Plenum even in 1962. Azarov, [1962] Byul. verkh. suda S.S.S.R. No. 4, pp. 28, 29 (Plenum U.S.S.R. Sup. Ct.). In 1961 the same test was applied by the RSFSR Supreme Court Presidium in a case where no liability was found, Guba, [1961] Byul. verkh. suda R.S.F.S.R. No. 4, pp. 2, 3 (Presid. R.S.F.S.R. Sup. Ct.), but in a more recent case the Civil College of the same court held there was liability in a case where a worker was placed in dangerous work while in poor health, apparently a case of simple civil "fault." Krylov, [1962] Byul. verkh. suda R.S.F.S.R. No. 4, p. 2 (Civ. Coll. R.S.F.S.R. Sup. Ct.).

100 See the example cited in note 5 supra. Note that provision is made for exceptions to this pattern by USSR legislation, continuing past practice. IOFFE & TOLSTOY 167.


103 Infra under para. 2 of this article.
is merely an introduction of mandatory direct negotiation between the parties, followed by an appeal to a trade union committee, before the possibility of "judicial" determination of the same "tort" claim. The basis of liability, the fault of the employer, remains the same, as does the scope of recovery.

The effect of the scheme of compensation for work injuries is, then, that the worker does get the benefit of workmen's-compensation-type quick recovery for part of his claim through social insurance. He is then allowed to get full recovery if he can prove a formal tort claim based on fault. This part of his claim, however, is subjected to an administrative decision and to the possibility of trade union committee review as outlined above before it gets into the regular courts.

From our point of view, the lack of discussion of the possibility of making the workmen's-compensation-type recovery a substitute for ordinary tort liability is perhaps the most significant feature of the compensation picture. Most of the Soviet literature has taken the opposite tack; it has criticized the continuation of the strict liability exemption, and would establish a triple possibility of recovery for industrial injuries: social insurance, fault liability, and strict liability for injury caused by an extrahazardous source.

"In the event of the death of an injured party, there is a right to compensation on the part of persons unable to work who were dependent for support on the deceased, or who had at the time of his death the right to receive support from him, and also on the part of children of the deceased born after his death."

This last part of article 91 of the Principles gives an independent right of recovery for wrongful death to two groups of persons: first, those who are unable to work and who were, in fact, dependent on the deceased at the time of his death, i.e., those whom he chose to support; and second, those who at the time of his death were entitled to be supported by him, even though they were not in fact receiving support, including children of the deceased born after his death. These people have an independent right of recovery based on the amount of support they were in fact receiving or the amount of support to which they were entitled.

The provision of the old Code was more limited: "Art. 409. In the event that death is caused by an injury, the right to compensation belongs to the persons who had been supported by the deceased and who have no other means of support." By judicial practice, however, a right to compensation

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104 For example, in a case where the administration declined to grant a recovery, the worker took his case to the factory trade union committee and was also unsuccessful. He then brought his tort suit in the people's court as he would have done before the new system. After hearings in the rayon court, the civil college of the oblast' court, the presidium of the oblast' court, the Civil College of the Supreme Court of the RSFSR, and finally the Presidium of the Supreme Court of the RSFSR, he got his recovery. Lebedev, [1963] Byul. verkh. suda S.S.S.R. No. 5, p. 46 (Presid. R.S.F.S.R. Sup. Ct.).
was recognized in persons who, although not in fact dependent upon the deceased, had by operation of law a right to receive means of subsistence from him, i.e., minor children, and disabled and indigent parents.\textsuperscript{105}

It is significant that under the new provisions, persons have a right to support without regard to their means. This carries out the general idea of the article that tort recoveries should not be limited to cases of actual need. As pointed out above in relation to the basic right of the employee, the difference-money tort recovery in industrial accidents is subject to being reduced only by the amount of pensions being received because of this accident, and is independent of the general income of the injured party.\textsuperscript{106}

In all of these cases the amount of compensation is determined according to the portion of the deceased's wages which in fact went for the maintenance of the dependent or to which an entitled person would have had a right.\textsuperscript{107} As in the case of recovery by the deceased, the amounts of any social insurance pensions which these persons receive in connection with the death of the deceased are to be deducted from any recovery against the tortfeasor. Children retain the right to compensation until they reach 16, or if they are still in school, until they reach 18.\textsuperscript{108}

"**ARTICLE 92. LIABILITY FOR INJURING OR CAUSING THE DEATH OF A CITIZEN FOR WHOM THE PERSON WHO CAUSED THE INJURY IS NOT OBLIGATED TO PROVIDE INSURANCE COVERAGE:**

"If a person is disabled or otherwise injured by an organization or citizen not obligated to make state social insurance payments in his behalf, such organization or citizen must compensate the injured party for the injury according to the rules of Articles 88 and 90 of these Principles, insofar as it exceeds the amount of assistance payments received by him or any pension awarded to and actually received by him after the injury to his health.

"In the event of the death of the injured party, there is a right to compensation on the part of those persons mentioned in the second paragraph of Article 91 of these Principles."

This article taken together with article 91 may be read as providing the basis for all tort recoveries for causing the injury or death of a citizen. As pointed out above, however, article 91 simply limits the employer's liability

\textsuperscript{105} 2 Orlovskiy 393.

\textsuperscript{106} Text accompanying note 48 supra. It is only with regard to the means of the defendant that the recovery can be reduced. See discussion under art. 93, para. 2 infra.

\textsuperscript{107} In a recent case under the Principles it was held that all who are entitled to support are in effect necessary parties, and that even though they have not joined in the original action, they must be brought in and their shares determined in order to allocate the recovery property. Uvarova, [1962] Byul. verkh. suda R.S.F.S.R. No. 12, p. 2 (Giv. Coll. R.S.F.S.R. Sup. Ct.).

to cases where normal fault can be shown, and the present article says that where the person who causes the injury is not one who pays insurance premiums, then the general rules apply, i.e., articles 88 and 90.109

The only real significance of the article is the inclusion of what amounts to a wrongful death provision parallel to the one in article 91. Taken together, they provide for an independent right of recovery for persons within the protected group in all cases where the deceased would have had a recovery had he lived.

"Article 93. Account To Be Taken of the Fault of the Injured Party and the Means of the Person Who Caused the Injury

"If gross negligence of the injured party contributed to or increased the extent of the injury, then the amount of compensation for such injury is to be reduced or denied entirely, taking into consideration the degree of fault of the injured party (and where there is fault on the part of the person who caused the injury, the degree of his fault as well)."

This is in effect a reformulation of the court practice under existing law. The RSFSR Civil Code provided in article 403 that a person who caused injury was "absolved from liability if he proved . . . that the injury arose as a result of the intent or gross negligence of the person injured."

It quickly became apparent that the clause either applied only where the injury was wholly caused by the injured party, in which case there would be no liability anyway, or relieved the tort-feasor of all liability if the requisite fault or intent of the victim contributed to the injury, the effect we give to contributory negligence. The court chose to introduce a scheme of comparative negligence rather than to apply the provision literally.110 The rules to be applied in cases where careless conduct of the injured party partially caused or aggravated the injury were restated in the basic ruling on tort law of the USSR Supreme Court of June 10, 1943:

"Para. 12. Where it is established by the facts of the case that the injury occurred not only as a result of improper acts of the person who caused the injury, but also as a result of the gross negligence or gross carelessness of the injured party himself, the court may, applying the

109 Some important problems regarding the employer's liability are not mentioned in this section or under the general provisions. Under prior law, it was held that an employer could not exculpate himself through a clause in the labor contract putting his responsibility for careful observation of proper work standards on the employee. Feoktistov v. Lumber Combine, [1960] Sov. yus. No. 7, p. 27, Case No. 3 (Giv. Coll. R.S.F.S.R. Sup. Ct.). HAZARD & SHAPIRO pt. 3, at 93. The independent contractor status is recognized, however, and if such a relationship is found to exist it is proper to include an appropriate exculpatory clause. Mokshin, [1962] Byul. verkh. suda R.S.F.S.R. No. 4, p. 3 (Giv. Coll. R.S.F.S.R. Sup. Ct.).

110 Gsovski points out that the Tsarist courts faced a similar problem and arrived at the same conclusion. 1 GSOVSKI 518.
principle of mixed liability, impose upon the person who caused the injury the duty of partial compensation for the injury in accordance with the degree of fault of each party.” 111

In practice, however, it seems that the courts have not usually undertaken the kind of sophisticated comparison of fault called for by the Supreme Court's ruling, as well as by the similar language in the Principles. 112 In most cases the court has simply made a finding of “mixed fault” and then proceeded to assess 50 per cent of the damages found against the defendant. 113 This is particularly inappropriate in view of the fact that the Soviet law did not and still does not under the new Principles recognize simple fault as a basis for deduction. 114 Since it is only gross negligence which will reduce the recovery, in any case where only simple negligence on the defendant's part is proved and mixed liability is applied, it would seem appropriate to assess less than 50 per cent of the proved damages against the defendant. Practice to date is probably a good indication, however, of the difficulty of weighing simple negligence against gross negligence, or strict liability against gross negligence, and no amount of additional guidance in the republic codes will help to solve the problem. 115

“The court may reduce the amount of compensation for injury caused by a citizen after taking into consideration his means.”

The RSFSR Civil Code contained a provision to the effect that “in determining the amount of compensation to be awarded for an injury, a court in all instances must take into consideration the property status of the party injured and that of the party causing the injury.” 116 Under the Principles there is now to be no such comparison, and it is the property position of the tort-feasor alone (along with the fault or intent of the injured party) which may be considered by the court as grounds for reducing the recovery.

111 Reprinted in DOZORTEV 804, 807.
112 For example, in Zernov v. Factory, [1960] Sov. yus. No. 6, p. 84 (Civ. Coll. R.S.F.S.R. Sup. Ct.), HAZARD & SHAPIRO pt. 3, at 82, the court simply states that both parties were “negligent,” and indicates no attempt to determine the degree of fault of either party.
114 See cases cited in 2 IOFFE 499.
115 For example, in Kosartsev v. Auto Transport Office, [1960] Sots. zak. No. 11, p. 86 (Presid. Kustanay Prov. Ct.), HAZARD & SHAPIRO pt. 3, at 83, the court rejected the application of the idea of mixed liability entirely. The driver of the truck in which the plaintiff was riding was speeding (and intoxicated) at the time of the accident, and the court said that the lower court could not consider as grounds for a possible reduction the fact that the plaintiff was negligent in riding in the back of the truck instead of in the cab with the driver.
116 CIVIL CODE art. 411. Practice under this provision is discussed in 2 ORLOVSKY 39
A practice not too different from the new provision had already developed in prior law, for the courts had long held that the means of an organization should not be considered under the provision quoted above. This meant that in many cases it was only the means of the citizen tort-feasor which were to be considered. A statutory provision based on the same idea was written into Labor Code article 83, limiting recovery against an employee who damaged his employer to one-third of his salary, except where his acts constituted a crime. Even this full liability where the acts constituted a crime was made subject to the means test by a 1954 ruling of the USSR Supreme Court Plenum, so that in effect the rules now embodied in the Principles in article 93, that the size of the recovery should be determined with regard to the comparative degree of fault and the means of the tort-feasor, had already been widely applied.

It is still too early to say whether this provision might lead to a pattern in Soviet tort cases of frequently awarding less than full compensation. It seems unlikely that it will have so broad an application, for the basic provisions in the Principles are inspired generally by the desirability of imposing liability for fault in order to encourage careful conduct. It might be invoked, however, to relieve the heavy burden of strict liability in extreme cases.

"Article 94. Reimbursement Claims"

"Organizations or citizens who are liable for injury caused by them are required to reimburse on demand the organs of social insurance or social security for assistance payments or pensions paid by them to persons mentioned in Articles 91 and 92 of these Principles."

"In the event of a reduction in the size of compensation for injury (Article 93 of these Principles), the size of the reimbursement is reduced accordingly."

117 Ruling of the USSR Supreme Court Plenum of June 10, 1943, reprinted in Dzorotsve 804, 807.


This article gives to an insurance agency a right to reimbursement from the tort-feasor to the extent that the agency has made payments to the injured party or his dependents. The formulation is not a particularly happy one. The first paragraph seems to say that if the person who caused the injury is liable at all, then there is a right to full reimbursement on the part of the insurance agency, *i.e.*, that no reduction for mixed liability or limited means is to be made, as would be done in the tort recovery. This was in fact what some courts allowed under the similar provision of the old law,\(^1\) so the second paragraph has been tacked on to make it clear that this was not the result intended. It might have been better simply to say that an agency which has made a payment because of an injury caused by X is subrogated to the extent of its payments to whatever claim the injured party may be found to have against X. This would make it clear that all of the possibilities for reduction under article 93 were to be applied in the reimbursement action.

Such a formulation would also help to clarify the ambiguity created by articles 91 and 92, and by the language of this section, as to the nature and scope of the injured party's claim. On the one hand, under the language of article 91, it would seem that there is a certain preemption of the ordinary liability provided for under article 88, *i.e.*, that there is no claim against the tort-feasor on the part of the injured party up to the amount of his insurance recovery. He has a right to the insurance payments without regard to the source of his injury, and then a limited tort right to recover the difference between this amount and his full damages.\(^2\) In other words, he has no "claim" for the amount of the insurance to which the insurance agency could be subrogated, and it is therefore necessary in article 94 to reintroduce a quasi-tort liability plus all the normal defenses in order to define properly the scope of the "reimbursement" recovery.\(^3\) On the other hand, articles 91 and 92 seem to assume a full claim on the part of the worker which is reduced by subsequent insurance payments if and when received. Since the insurance agency's right is only for reimbursement of sums actually paid, subrogation would then seem to be the appropriate way to describe this right to reimbursement. Article 94 might better have provided simply for the transfer to the insurance agency, at the time a payment is made, of any claim the injured party might have up to the amount of the payment.

It should not be overlooked that the recovery pattern laid down by this

\(^{1}\) Ioffe & Tolstoy 169.

\(^{2}\) In effect this interpretation supports the theoretical position of some writers, mentioned in note 97 *supra*, that this is an independent scheme of liability.

\(^{3}\) The recovery pattern is in fact complicated by the practice of deciding reimbursement suits against organizations in Gozarbitrazh, *i.e.*, the arbitration tribunals for disputes among governmental and production units, instead of in the ordinary courts. See Order of the Presidium of the USSR Supreme Court of July 27, 1959, in [1959] *Ved. verkh. sov. S.S.S.R.* No. 30, p. 163.
article eliminates any liability “insurance” effect of the social insurance program so far as the industrial enterprise is concerned. It bears full liability for all injuries caused by its fault, and simply pays part of the damages direct to the employee and part to the social insurance agency.\(^{124}\) The “insurance” payments are in effect a tax on the employer to provide benefits for sickness and accidental injury for which the employer would not be liable. They are not used to provide the kind of workmen’s compensation recovery which relieves the employer of ordinary tort liability.\(^ {125}\)

**CONCLUSION**

The tort provisions of the Principles show that familiar problems will, for the most part, be solved in familiar ways in the new Soviet tort law about to take shape in the civil code of each republic. Fault liability has been retained, and a significant expansion in the area of application of tort law may result from the provisions for broad governmental liability under article 89.

Some of the “changes” in the 1922 Code provisions made by the new Principles constitute merely a recodification of the extensive changes introduced by the courts as conditions and legal thinking changed over the years.\(^{126}\) Others resolve doctrinal controversies or clarify provisions which had given rise to varying interpretations in practice.\(^ {127}\)

Some of the questions left unanswered by the Principles will be covered in the more detailed provisions of the republic codes, while others will only be worked out in practice after the codes are adopted. For example, there are no provisions in either the tort chapter or the general sections of the Principles relating to the liability of infants and others with limited capacity. Provisions in some detail on this topic are contained, however, in the as-yet-unpublished draft of the new RSFSR Civil Code,\(^ {128}\) including a pro-

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\(^{124}\) Employers receive some relief through being exempted from strict liability toward their workers (see discussion under art. 90, *supra*).

\(^{125}\) See the discussion on this point following note 104 *supra*.

\(^{126}\) Other examples of this type of “change” would be the wrongful death recovery of persons having a right to support under articles 91 and 92, and the addition of the automobile as an extrahazardous source under article 90.

\(^{127}\) E.g., the *respondeat* provisions of article 88, paragraph 2, the substitution of “organizations” for “enterprise” in article 91, and the reimbursement provisions of article 94, paragraph 2.

\(^{128}\) Boldyrev, *O proyekte grazbdanskogo kodeksa RSFSR* (Concerning the Draft Civil Code of the RSFSR), Sov. gos. i pravo No. 8, p. 15, at 23 (1962). Under existing law, liability of those with limited capacity is divided into two categories. *Incompetents*, including infants under 14 and adults who have been declared incompetent, are not liable for their torts, though the persons responsible for their supervision (parents, guardians, director of an insane asylum) may be liable if they can be shown to be at fault in failing to exercise proper supervision. 2 IoFFE 487. Minors from 14 to 18 are liable for their torts. Civil Code art. 9. There is, in addition, a joint liability with the latter on the part of their guardians, although IoFFE cites a case where a court thought it might be appropriate to relieve parents of this joint liability. 2 IoFFE 490. According to Boldyrev, RSFSR Minister of Justice, the RSFSR draft provides that “schools and...
vision relieving a person under the influence of alcohol or drugs of liability unless he was responsible for getting himself into that condition.\footnote{120}

One interesting question which will probably not be covered in the republic codes but will have to be worked out in practice is that of the duty to rescue life or property. While article 131 of the 1936 USSR Constitution establishes a universal duty to protect and strengthen common socialist property, and article 130 summons all citizens to render assistance in those situations in which common socialist property and the life, health, or property of another is endangered, no general provision for civil liability for a breach of this duty has ever been enacted or applied in court practice.\footnote{120} The Principles contain no provision for such liability, but they do provide for an obligation to reimburse a person who does in fact rescue socialist property, and even broader compensation provisions covering saving of life as well as property have been included in some republic code drafts.\footnote{131} There is no indication that the codes will go so far as to provide explicitly for liability for failure to rescue, however, and the courts will probably have to work out in practice the scope of the duty and the recovery for its breach.\footnote{132}

The area of governmental tort liability will undoubtedly continue to receive a good deal of attention in the near future. The additional provisions of the RSFSR Civil Code draft providing for liability of organs of the legal system, an important area sidestepped by the Principles, have already been discussed above, and it is possible that additional statutory regulation may be forthcoming. The major question will be, however, the patterns of recovery that the courts work out under the general liability provisions. This area of contact between the courts and the "official" acts of government is bound to be a sensitive one, and the actual recoveries allowed will be watched with medical institutions are liable for harm done by infants under their control, unless they show it did not occur through any fault on their part. The liability of parents and guardians for harm done by minors without sufficient means of their own to make compensation ends when the minor reaches majority or when he acquires sufficient means." Boldyrev, \textit{supra} at 23. While this only hints at the content of the general provisions, it at least indicates that the subject of tort liability of incompetents and minors will be covered in some detail in the forthcoming code, and will contain some modifications of present practice.  

\footnote{120} Boldyrev, \textit{supra} note 128, at 23.

\footnote{130} While the standard text recognizes the basis for liability under the general tort provisions, it is quick to add that "under Soviet conditions suits of this nature are singular occurrences." Z Orlovskiy 397. They are so singular that no case or authority is cited for the statement advocating liability.

\footnote{131} Fleyshits & Makovskiy, \textit{Teoreticheskiye voprosy kodifikatsyi respublikanskogo grazhdanskogo zakonodatel'stva, (Theoretical Questions of the Codification of Republic Civil Legislation)}, Sov. gos. i pravo No. 1, pp. 79, 91 (1963).

great interest by all countries interested in developing "legal" sanctions for harm inflicted by governmental acts.

Some expansion in the scope of the personal injury recovery, probably through court practice, seems to be likely, and it is possible that there will be some satisfaction of the pressure for something like strict liability for injuries to employees caused by extrahazardous sources. This may come about through modification of the tort rule, or may be effected simply by increasing the level of social insurance benefits for job-connected injuries generally to the point where they approximate full compensation.

The whole question of strict liability is likely to be re-examined to some extent. Either some restriction will be imposed on the liability or the scope of recovery in line with European patterns, as mentioned above, or liability insurance will be introduced to spread the heavy risks of accidental injury now imposed on the individual citizen or the governmental or production unit.

These and the problems to be worked out in other areas of Soviet law call for serious discussion by legal writers, and the most important question of the immediate future will be whether the climate of relatively free discussion in which the Principles were adopted will be maintained. As was pointed out above, there has been some tendency on the part of Soviet writers to return to a passive role now that the Principles have been adopted, and the temptation will be even greater once the republic codes are enacted. It is probably too much to expect real criticism from Soviet legal

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133 Ioffe, one of the leading civil law writers, for example, authored with others a very incisive critical article during the discussion of the draft. The article made among others five specific suggestions in the tort area—federal control over exceptions to the principle of governmental tort liability, inclusion of liability of organs of the legal system, inclusion of certain items in the list of extrahazardous sources, removal of the strict liability exemption from the employer, and the inclusion of federal principles governing liability of incompetents and minors—which were described as "necessary," "extremely desirable," or "shown to be necessary by prior practice." Ioffe et al., O projekte osnov grazhdanskogo zakonodatel'stva Sovyuza SSR i Soyuznykh Respublik (Concerning the Draft of the Principles of Civil Legislation of the Soviet Union and Union Republics), Sov. gos. i pravo No. 2, p. 93, at 100 (1961). All of these suggestions were rejected in the final version of the Principles. In Ioffe's authoritative commentary on the tort provisions of the Principles (Ioffe & Tolstoy 159) there is no mention of the fact that there had ever been any controversy over these provisions. While this may seem at least less than scholarly to a Western jurist, it is typical of much of Soviet writing over the past 40 years, and is an example of how much favorable light has been shed on the quality and quantity of critical thinking in Soviet legal circles by the discussion of the Principles.

134 One of the most vigorous post-Principles debates has centered on the many problems of federalism raised in connection with the enactment of republic codes and related federal and republic legislation. The picture of interlocking USSR and republic legislation presented by the Principles' constant references to laws and procedures to be established at one or the other level (or both, e.g., "limited legal capacity of minors is to be established by federal and union republic legislation." Art. 8) is far from specific or complete. In the process of drafting the codes and implementing legislation, the wisdom of some of these provisions themselves seems to have been questioned as it was
writers of some of the basic policy decisions discussed above, but we may at least hope that the fact that prominent writers took strong positions opposing some of the provisions of the Principles which were subsequently enacted in spite of this opposition\(^{185}\) will be taken as an indication of the possibility of honest academic discussion, and not of the futility of reasonable criticism. There is some evidence that they have not been entirely discouraged, for serious discussion has continued over the provisions of the republic codes, and there has even been some continued criticism of certain of the provisions of the Principles.\(^{186}\)

Practice has not yet been significantly affected by the Principles, for it will not be until the republic codes go into effect that real interpretation by the courts will be possible. The crucial test of whether the recodification process will result in improvement in the law as applied, or will merely change the statutes, is still to come. While the Principles constitute a good beginning, much will depend on the solution of other problems which affect the application of the rules in practice,\(^{187}\) and the kind of people who will be attracted into the legal system in the years to come.

in the pre-Principles discussions. See the emphasis on the desirability of more uniformity than required by the Principles in connection with the capacity provisions (discussed in note 128 supra) in Fleyshits & Makovskiy, supra note 131, at 83. They also stress the need for uniformity in provisions for tort liability of the organs of the legal system. \textit{Ibid.} To the same effect, see Savitskaya, \textit{Otvetstvennost' gosudarstvennykh uchrezhdennykh za vred, prichinennyi deistviyami ikh dolzhnostnykh lits} (The Responsibility of Government Institutions for Damage Caused by the Actions of Their Officials), Sov. gos. i pravo No. 8, pp. 48, 52 n.8 (1962).

\(^{185}\) See note 133 supra.

\(^{186}\) See notes 99 and 134 supra.

\(^{187}\) The most crucial of these is the continued uncertainty injected into the judicial process by the possibility of "review" and reversal \textit{ad infinitum} of what appear to be final decisions. Protests by a prosecutor or the head of a superior court regarding a decision often result in a given case being heard six or eight times, as illustrated in the labor case cited note 104 supra. From the point of view of the parties involved, not to mention the legal writers commenting on the decisions, the certainty of the new statutory provisions is outweighed by the hazards of the judicial process. Perhaps the eventual elimination of the political insecurity which probably provided the justification for this elaborate control mechanism in early practice, coupled with an increasing supply of higher quality personnel with better training for the legal system, will lead to a decision in the not too distant future in favor of increased security of decision.