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Civil Liability of the Principal Company for Workplace Accidents in the Subcontracting Regime: A Critical View of Case Law

La responsabilidad civil de la empresa principal por accidentes de trabajo en el régimen de subcontratación: una visión crítica a la jurisprudencia

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Abstract

Having elapse over fifteen years since the enactment of Act No. 20.123, the purpose of this work is to critically review the way in which Supreme Court's case law has interpreted the liability of the project's principal company for the accidents suffered by workers of contracting and subcontracting companies.

Keywords: *Safety obligation; qualified debtor; labor subcontracting*.

Resumen

Habiendo transcurrido más de quince años desde la entrada en vigencia de la ley Nº 20.123, el presente trabajo tiene por finalidad mostrar críticamente la forma en que la jurisprudencia de la Corte Suprema ha interpretado la responsabilidad de la empresa principal o mandante de la obra, por los accidentes que padecen los trabajadores de las empresas contratistas y subcontratistas.

Palabras clave: *Obligación de seguridad; deudor calificado; subcontratación laboral*.

I. INTRODUCTION

According to the ninth ENCLA survey from 2019,[1] a total of 3,719 companies subcontracted their main economic activity during the year 2018, which represents 4.7% of the total number of companies, involving a total of 321,070 workers. On the other hand, a total 3,905 companies subcontracted other activities different from their main one, accounting for 4.9% of all companies of various sizes, and

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[1] ENCLA, Informe de resultados novena encuesta laboral, 2019, Dirección del Trabajo.

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involving 215,399 workers. As it can be ascertained, there is a significant number of people working under this modality of productive outsourcing. On the other hand, more than fifteen years have passed since the enactment of Act No. 20.123, which had the following purposes: to regulate labor supply arrangements in detail, giving it an exceptional character; to improve the regulation of subcontracted labor through the systematization of its rules,[2] and afterwards, during the legislative process of the project, a third aspect emerged, namely: to intensify the responsibility of the principal company in relation to the workers of the contracting and subcontracting companies.[3] However, even in the original bill introduced by the presidential message that initiates its processing, direct responsibility of the principal company is contemplated regarding the safety obligation concerning the workers of the contracting companies, although not as precisely as in the adopted act.[4]

Well then, if we analyze the case law that has been generated from the mentioned reform, relevant differences can be observed in the way the rules regarding the fulfillment of the safety obligation by the principal company towards the workers of the contracting companies were established, which do not adequately reflect the purpose of the act regarding the mentioned intensification of the responsibility of the principal company towards the workers of the contracting and subcontracting companies, thus resulting in the courts resolving cases where the civil liability of the main company or principal of the project is claimed for the work accidents suffered by the workers of the contracting companies, deviating from the original sense and scope of the rules incorporated by Act No. 20.123. And although we are of the opinion that the decision of the legislature to impose on the main company the safety obligation towards the workers of the contracting company was entirely correct, unfortunately, the extent to which it should be considered that the principal has a direct responsibility in fulfilling this obligation was not clear in the text of the adopted act, which has led to various jurisprudential interpretations.

[2] Indeed, in the presidential message that initiated the processing of the law, dated May 21, 2002, only the first two aspects mentioned above were considered, maintaining subsidiary liability with regard to labor and social security obligations affecting the contractors (the project outlined in the message also does not specify that they are obligations to give, as the provision in Article 183 B of the Labor Code eventually became) (2943-13) (2002), pp. 6.

[3] PRADO (2009), p. 15.

[4] This way, Article 152 D of the Message, provided: "The owner of the work, company, or operation must take the necessary measures to ensure the protection of workers under subcontracting arrangements in accordance with the provisions of Title I of Book II of this Code. Without prejudice to the responsibilities of the contracting company, the owner of the work, company, or operation may be inspected regarding such protection and may be penalized if it is not adequately ensured."

Therefore, the purpose of this work is to critically analyze the recent jurisprudence of the Supreme Court, in order to identify the arguments used by that court aimed at making the principal company liable practically in all events for breaches of the main safety obligation towards the workers of the contracting companies. Our hypothesis is that on several occasions courts force the interpretation of the respective provisions in order to make the principal company liable, without invoking sufficiently robust arguments to justify it.

For this purpose, we will first analyze some aspects concerning the safety obligation, with an emphasis on how the courts currently assess the employer's standard of care in relation to it. Next, we will address the liability system of the principal company in relation to the workers of the subcontractor, which was legislatively adopted in Act No. 20.123, along with the various opinions expressed regarding its scope. Then, we will examine the central aspect of this work, which consists of identifying and criticizing the main arguments used by recent jurisprudence to hold the main company responsible in most cases, for the accidents suffered by the workers of the contracting companies.

It should be noted that the system we have adopted in this work is to analyze the judgments issued by the Supreme Court from the year 2016 onwards, both in civil and labor matters, that contain explicit pronouncements regarding our area of concern. We have discarded those cases where appeals for cassation, in the first case, and appeals for the unification of jurisprudence, in the second case, are dismissed for formal reasons, without any substantive reasoning on the matters at hand.

II. A Previous Matter: The Matter of the Standard of Care of the Employer

In order to understand the sort of reasoning employed by the courts to establish the civil liability of the principal company for work accidents suffered by workers of contracting companies, it is necessary to take a closer look at the safety obligation, specifically how the employer's standard of care is currently determined in the case of workplace accidents. Let us remember that there are several aspects under discussion in relation to this safety obligation. By way of example, its nature is debated, namely whether it is a legal or contractual obligation. An argument supporting its legal nature relates, first, to its imperative nature, and secondly, to the huge number of regulations that structure it.[5] On the other hand, those who argue for its contractual character emphasize the direct source of this obligation in

[5] Thus, in a recent judgment, it has been classified as a duty imposed by the legislator on employers, although it is subsequently added that it is incorporated as an essential element of the agreement. *Rebolledo* con *Andes Airport Services y otro (LATAM)* (2020).

each case, which is precisely the employment contract.[6] More recently, its contractual nature has been reaffirmed as it forms part of the content of the contract, but it is emphasized that it not only involves the particular interest of individual workers but also aims to safeguard the public or general interest of maintaining "a good level of collective public health." [7] In our understanding, the obligation is of a contractual nature in terms of its source, with the particularity of being strongly regulated in the Labor Code, special laws, and regulatory norms.

Furthermore, the determination of the standard of care that the employer must exercise in fulfilling the safety obligation, currently contained in Article 184 of the Labor Code, has been intensely debated and, although it is not the central purpose of these lines to analyze this area in detail, it is necessary to highlight that through various means, both doctrine and jurisprudence, have sought to strengthen the employer's liability for workplace accidents suffered by their workers.

Indeed, on one hand, there has been a debate regarding whether the obligation of safety is a means-based obligation or a results-based obligation[8] so that, if it is considered a means-based obligation, fulfilling the obligation of safety would involve adopting all necessary measures to protect the life and health of workers. Therefore, if such measures have been adopted and an accident still occurs to a worker, it would not constitute a breach by the employer. On the other hand, if it is characterized as a results-based obligation, the employer is obligated to prevent the worker from experiencing an accident[9] and thus, if such an unfortunate event occurs, it automatically constitutes a breach of the safety obligation. Doctrine and jurisprudence are divided regarding its classification.[10] However, with regard to courts, as we will see shortly, despite not explicitly classifying the safety obligation, the significant difficulty employers face in exempting themselves from liability suggests that the obligation of safety functions as if it were a results-based obligation.

On the other hand, regarding the degree of fault [*culpa*] for which the employer is responsible, although it has been on occasion stated that the employer's liability is strict, which can be inferred especially from the expressions “necessary” [*necesarias*] and “effectively” [*eficazmente*] used in the aforementioned Article 184, it is the case that currently there are few judgments with that line of reasoning.[11] On

[6] BARAONA (2011), p. 150, THAYER y NOVOA (2010), p. 197.

[7] Original text: “Un buen nivel de salud pública colectiva” NÚÑEZ (2023), p. 86.

[8] “Point on which, in any case, national jurisprudence has only tangentially addressed, without giving it concrete effects” PRADO (2011), p. 201.

[9] BARROS (2020), p. 766.

[10] GAJARDO (2014), p. 28; BARROS (2020), pp. 766 ff.

[11] As stated in the dissenting opinion of minister Cerda, in a recent judgement by the Supreme Court: “3) The employer who hires services to be performed under risky

the contrary, the majority of legal doctrine and jurisprudence until recently leaned towards considering that the employer is liable even for very slight fault [*culpa levísima*], largely based on the same indicated words and the protective role played by labor law,[12] without prejudice to the opinion of Professor Barros, who argues that, considering the provisions of Article 1547 of the Civil Code, the employer should be held liable even for slight fault [*culpa leve*][13], or if the degree of fault is to be assessed according to the doctrine of *lex artis*.[14]

Now, in order to analyze the current state of judicial jurisprudence, it is necessary to distinguish whether the case is heard by labor or by civil courts, which is determined by who is the active party in the claim for compensation, namely, the worker herself as the direct victim, or the victims by rebound or repercussion. It should be noted that since 2003, this differentiation has been established by judicial jurisprudence, which has been criticized by some authors.[15] [16]

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conditions assumes their consequences, as is the case with the worker assigned to work on a high-speed road intended for the transit of vehicles of the maximum allowed weight.

4) The safety duty that arising for the employer from the unequivocal terms of Article 184 of the labor statute is not fulfilled when the performance in areas such as the mentioned one is tolerated without proper safeguards." *Fuentes Tapia, Jennifer Hixia, Acuña Fuentes, Martina Paz, Acuña Fuentes Bastían E. con Gómez Tapa, Julio* (2014).

[12] DÍEZ (2005), p. 88; DÍEZ (2008), p. 166; DOMÍNGUEZ (2011), p. 32; PRADO (2011), p, 208; CANCINO y CONCHA (2018) p. 77. In more recent rulings, this can be ascertained in *López* con *Sociedad Agrícola y Ganadera Cuyuncavi Ltda*. (2017). In this case, two workers are suing because, in their capacity as welders, they had to work at heights, falling from at least seven meters from the top of a construction site due to the breakage of one of the metal supports of the scaffolding. This was also recently declared in a Supreme Court judgment on February 26, 2018, *Quispe Flores Claudia y otros* con *Paisajismo Cordillera y otros* (2018), where, analyzing an appeal in cassation on the merits filed by a victim by repercussion, the Court once again distinguishes by pointing out that if the direct victim files the lawsuit, the employer is liable even for very slight fault -considering section eight-.

[13] BARROS (2020), p. 761.

[14] GAJARDO (2014), p. 28

[15] DÍEZ (2003), pp. 65-79.

[16] CORRAL (2017a). It was for this reason that a bill was introduced by parliamentary motion, in order to clarify the competence of labor courts regarding contractual liability claims derived from a labor related accident or occupational disease. In this vein, the motion indicated that due to the advantages of the new labor procedure in terms of celerity, it is necessary to allow that the family of the worker who has diseased due to the accident -widows, children and other surviving family members- to sue in a labor court, since these are victims who find themselves in the need to resort to civil justice in order to obtain compensation for the damages (Boletín Nº 8.378-13, from June 19, 2012, from senators Alvear, Pizarro, Letelier and Rincón). Regretably, due to the defective legislative technique employed, the norm incorporated to artcicle 420 f) by Act No. 21.018 from 2017, was

Now then, this distinction notwithstanding, and even though there is still debate concerning the scope of the standard of care that the employer must exercise in fulfilling the safety duty, it is possible to observe that the recent trend in case law emanating from the higher courts of justice, particularly the Supreme Court, is to support that the employer must exercise extreme care in fulfilling the aforementioned duty, both in cases where the lawsuit is known by the labor courts and in those cases brought before the civil courts, omitting the qualification of the degree of fault but emphasizing that there is a high level of expectation for the employer in fulfilling the duty of safety.

This can be ascertained in a Supreme Court judgement from November 30, 2017, which upheld a jurisprudence unification remedy (*recurso de unificación de jurisprudencia*) brought by the plaintiff before a labor court, aimed at establishing the sense and scope of Article 184 of the Labor Code.[17] In this case, the plaintiff indicates that due to the employer's lack of due diligence, she suffered a workplace accident. While operating a defective dough sheeter machine, her left ring finger was severed. It is worth noting that it was established as a fact that the employer warned the workers not to use the machine, despite which the plaintiff operated it nonetheless. The Court, upon reviewing the jurisprudence unification remedy, declares that: "Article 184 of the Labor Code imposes on the employer the obligation to take all necessary measures to effectively protect the life and health of workers. Given the multitude of sources of risk in the workplace, the legislator has been unable to specify what those measures are. However, they have used two categorical words that are unavoidable for the specific determination of these measures: "necessary" and "effectively". The occurrence of a serious accident constitutes significant evidence that the protective measures adopted by the employer were ineffective and that additional protective measures were necessary. This evidence must be considered by the judge."

worded in this way: "f) Procedures initiated by the worker themselves or their legal representative, seeking to enforce the employer's contractual liability for damages resulting from work accidents or occupational diseases. Regarding tort liability, the rules of Article 69 of Act No. 16.744 shall apply". Therefore, while the intention of the initiative was to allow victims by repercussion to present their claims before the labor courts, the reform only confirmed that contractual liability, which is asserted by the direct victim or their heirs, must be brought before the labor courts, while the civil courts retain jurisdiction over cases involving tort liability, which is precisely what the victims by repercussion seek. As a result, the reform proved futile for the purposes it aimed to achieve.

[17] *Barría Oyarzún, Heriberto* con *Miguel Eduardo Gutiérrez Gutiérrez, Establecimientos Yanny y Paoly S.A. y Comercial Daniela Gutiérrez Velásquez E.I.R.L.* (2017).

A similar criterium can be ascertained from the Supreme Court judgement from October 23, 2019,[18] which also upheld a jurisprudence unification remedy. The workplace accident consisted of a traffic accident suffered by the plaintiff, as the vehicle he was traveling in to work collided with another vehicle from behind due to speeding. The vehicle belonged to the company, and the driver was hired by the employer. Regarding the scope of Article 184 of the Labor Code, the Court declares that: "The transcribed provision reflects a requirement imposed on the employer that is not limited to considering safety measures of any kind, but rather that these measures be effective in achieving the objective of protecting the lives and safety of workers. This aims to diligently pursue activities directed at that goal and, in a way, obliges their evaluation based on their results." As it can be ascertained, in this case, the high level of demand imposed on the employer is based on the notion that it would be a result-based obligation, although without explicitly categorizing it as such, and once again, it is clear that the degree of fault for which the employer is responsible is not explicitly stated.

In civil matters, courts have argued in several judgements in a similar vein,[19] as it is the case in the lawsuit sentenced by the Supreme Court on September 28th, 2016,[20] in which the plaintiffs are the spouse and children of a diseased worker. This worker had experience and was properly trained and instructed to perform his assigned tasks, and for unknown reasons, he was found dead inside a refrigeration chamber, which is not a suitable place to sustain life. It is presumed that the bolts to open the hatch may have been loosened. Well, the Court concludes that the employer had not taken all the necessary measures to eliminate a hazard in the workplace, which was further supported by a fine imposed on the employer by the Labor Directorate [*Dirección del Trabajo*]. The Court states that Article 184 of the Labor Code "imposes a high standard of care for the employer, since it obligates her to "effectively" protect the life and health of her workers, which entails adopting measures able to obtain said protective effect"– tenth paragraph-.

In another case decided by the Supreme Court on April 17, 2020,[21] the victims by repercussion also sued the contracting company, the Municipality of Rancagua [*Municipalidad de Rancagua*], and the Housing and Urban Development Service of the Sixth Region [*Servicio de Vivienda y Urbanismo de la Sexta Región*] as

[18] *Saénz* con *Sociedad Agrícola Ganadera y Comercial San Sebastián Ltda*. (2019).

[19] However, as we mentioned, in civil proceedings there have been recent rulings declaring that liability extends to even the very slight negligence if the worker files a lawsuit, as in the Supreme Court judgment of February 26, 2018, previously cited. *Quispe Flores Claudia y otros* con *Paisajismo Cordillera y otros* (2018).

[20] *Guevara* con *Exportadora Unifrutti Traders Ltda*. (2016). It is necessary to specify that the Court reduced the amount of damages, according to the provisions of Article 2330 of the Civil Code.

[21] *Cruces Solis Elba* con *Cuevas González Hugo y otros* (2020).

principals. The worker died while performing repair tasks in apartments located in the city of Rancagua. He positioned himself in the staircase area of the third floor of the building and secured his lifeline to a metal structure that was part of the stairs. While being attached, the metal structure gave way and the rope he was hanging from came loose, causing the worker to fall and hit his head on a cement cubicle. The tribunal of first instance dismissed the lawsuit against all defendants. The Court of Appeals confirmed the first instance judgment in all respects. The Supreme Court, reviewing the appellant's appeal for cassation on the merits, accepts it and declares -fourteenth paragraph-:

> Indeed, although it is a regime of special liability, strongly objectified as there is a social insurance provided for in Act No. 16.744, related to occupational accidents and occupational diseases, the fact remains that if the employer's liability is to be enforced by demanding full compensation for the damage, it must be established in the respective trial that the measures taken by the employer were insufficient or ineffective, thereby failing to fulfill the obligation established in Article 184 of the Labor Code, so it is a case of infractions-based fault, where the mere infringement of obligations under the law allows for the presumption of fault.

The Court adds -tenth paragraph-:

> Indeed, given that liability is not strict or objective, meaning that it is not enough for the damage -in this case, the death of the worker- to occur while performing his duties, but rather it must be a harm resulting from an accident related to the exercise of his duties where employer negligence in adopting safety measures is evident, it is necessary to determine whether the measures actually taken were sufficient to effectively protect the life of Pedro Gatica Espinoza.

As it can be seen, recently in both jurisdictions, the reasoning is based particularly on the provisions of Article 184 of the Labor Code, stating that the legislator imposes high standards of care on the employer, and then presenting in each case the factual reasons why the defendants have not fulfilled the safety obligation, but without further argumentation to support such assertion.

Therefore, in our opinion, it is necessary to provide a better chain of arguments in line with the current legal framework to this standard of behavior, which contributes to the understanding and application of the law by legal practitioners. In this regard, our opinion is that, as previously supported by national doctrine,[22] we are not dealing with a system of strict liability but rather one based on fault,[23] which is confirmed by Article 69 of Act No. 16.744. Some may

[22] BARROS (2020), p. 498.

[23] As it has been argued regarding the Spanish law: “When making a claim for damages against the employer, it is not possible to argue for strict liability of the company that

argue that the requirement of employer fault referred to in that provision was implicitly repealed with the entry into force of Article 184 of the Labor Code, which expressly states that the employer must act "effectively" in protecting the life and health of the worker, an argument that has been used to assert strict liability. However, two arguments are sufficient to refute this position. The first of these is that at the time the referred Article 69 came into force, there was a similar provision to Article 184, namely Article 244 of Decree Law No. 178 of the Ministry of Social Welfare [*Ministerio de Bienestar Social*], contained in the Labor Code of 1931.[24] Therefore, Article 69 began to apply while a provision that also established the obligation to adopt all necessary measures to effectively protect the life and health of workers was already in force. The second argument is that the legislature that adopted Act No. 21.018 recently modified Article 420 of the Labor Code without altering the provisions of Article 69 of Act No. 16.744 regarding the requirement of employer fault, which confirms that the norm is fully in effect. Furthermore, this same argument supports the notion that the degree of fault attributed to the employer is slight [*leve*],[25] once again because the legislature did not see the need to clarify any modifications to the general rule on onerous contracts contained in Article 1547 of the Civil Code.

Despite the above, we believe that in establishing the standard of care, it should be considered that the employer is a qualified debtor, given the special nature of the employment relationship, in accordance with the rules and principles of civil liability and labor law. There are several reasons that support the notion that, although the employer is liable even for slight fault in the event of work-related accidents, the construction of their standard of care should be carried out considering their status as a qualified debtor. These reasons, in our view, also serve as criteria that contribute to the development of such a standard in each case.

First, it is necessary to consider that the vast majority of employers are legal entities, and many of them have complex corporate organizations or fragmented

obligates it to provide compensation. Instead, it will be necessary to demonstrate the negligent or intentional behavior of the employer" SÁNCHEZ (2017), p. 296.

[24] The text of the norm was the following: "The employer is obligated to take all necessary measures to effectively protect the life and health of their workers and employees.

For this purpose, they must proceed, within the timeframe established by the General Labor Inspection and in accordance with the provisions determined by the regulations, to implement, at their own expense, all the hygiene and safety measures in the workplace and the necessary sanitation measures in company residences, industries, and work sites in general.

Furthermore, they must also have the necessary resources to provide timely and adequate medical, pharmaceutical, and hospital care in case of accidents involving their workers or employees".

[25] BARROS (2020), p. 761.

business structures,[26] so that, in shaping the standard, the employer's structure must be taken into account and in this last case, it is necessary to differentiate between a natural person and a legal entity and, in the case of the latter, determine the organization's form, considering its level of complexity.[27]

A second argument, also related to the legal personality of a significant number of employers, lies in the special way in which these entities can be held responsible for their own actions. As it is known, in this context, legal entities can be held accountable either for agreements or decisions made by their decision-making centers,[28] or due to deficient organizational measures, with the latter being the most paradigmatic case, that of organizational fault. Therefore, even though the lack of care may not be attributable to specific individuals, negligence is manifested in the processes and control mechanisms of the corporate organization.[29] Consequently, we believe that two aspects should be considered in shaping the standard and subsequently determining, in each case, whether the employer acted through organizational fault or not. The first aspect relates to the type of organizational structure of the company, and subsequently, the processes that the organization should have reasonably and adequately implemented must be compared with how these processes were actually carried out at the time of the incident. In this way, it is possible to objectively or abstractly assess the potential fault of the employer as a qualified debtor, and all of this should be duly explained in the judgment.

Thirdly, it is necessary to recall the special nature of the contractual relationship that binds the worker and the employer. This is not any contractual relationship, but, as stated by Professor Gamonal, this is a relationship of diagonal character,[30] since even though they are private individuals, there is a clear asymmetry or contractual imbalance between them, which justifies the existence of the obligation to ensure the safety of the worker. Then, the employer is not a common contractual debtor, but finds herself in a position of preeminence regarding the workers. This contractual asymmetry justifies the principle of protection, which constitutes the most defining feature of labor law.[31] Moreover, we are of the opinion that the rules and principles of civil liability must be interpreted in accordance with the principle of protection, in this relationship of harmonious complementarity that should exist between labor law and civil law. An expression of this is the construction of the standard of care that the employer must meet, as

[26] CREMADES (2021), pp. 15-22.

[27] SOLÉ (2012), p. 17 ff.

[28] BARROS (2020), pp. 202-206.

[29] BARROS (2020), pp. 204 ff.

[30] GAMONAL (2011), p. 28; GAMONAL (2015), p. 38.

[31] GAMONAL (2008), p. 105.

provided in Articles 44, 1547 of the Civil Code, and 184 of the Labor Code, among others. In this regard, it seems to us that the elaboration of the standard is supported by the large number of norms that specify the safety obligation, many of which are contained in special laws[32] and even regulatory provisions.

Furthermore, it seems to us that, however, the structuring of this standard of care by the judge, as well as the comparison they must make with the actual behavior of the employer in their assessment of fault *in abstracto*, the judgment must contain all the necessary elements of reasoning to arrive at a decision of guilt or innocence on the part of the employer, in accordance, moreover, with the conception of evaluating evidence according to the rules of reasoned judgment applied in labor proceedings.

III. Civil Liability for Work Accidents in the Labor Subcontracting Regime

As previously mentioned, one of the objectives pursued by Act No. 20.123 was to strengthen the liability of the principal company regarding the workers of contractor and subcontractor companies. This was addressed in two ways: first, Article 183 B of the Labor Code establishes that the main company or principal is jointly liable for the labor and social security obligations of the contractor company

[32] The safety obligation is developed in various legal norms, including: the Book III of the Sanitary Code (Libro III del Código Sanitario) on hygene and safety of the workplace; in Decree 594, which aproved the Regulation on basic health and environmental conditions in the workplace (Reglamento sobre condiciones sanitarias y ambientales básicas en los lugares de trabajo); of course, in Act No. 16.744 on Work-related Accidents and Occupational Diseases; (Ley Nº16.744 sobre accidentes de trabajo y enfermedades profesionales); in Decree 40 of the Ministry of Labor and Social Security (Decreto 40 del Ministerio del Trabajo y Previsión Social), which approves the Regulation on occupational risk prevention (Reglamento sobre prevención de riesgos profesionales); in Decree 54, which approves the Regulation for the establishment and operation of joint health and safety committees (Decreto 54, que aprueba el Reglamento para la constitución y funcionamiento de los comités paritarios de higiene y seguridad); in Decree 109, of the Ministry of Labor and Social Security (Decreto 109, del Ministerio del Trabajo y Previsión Social), which includes the Regulation for the qualification and evaluation of occupational accidents and diseases (Reglamento para la calificación y evaluación de los accidentes del trabajo y enfermedades profesionales); in Decree 76, of the Ministry of Labor and Social Security (Decreto 76, del Ministerio del Trabajo y Previsión Social) which contains the Regulation for the implementation of Article 66 bis of Act No. 16.744 on the management of safety and health at work in construction sites, workplaces, or specified services (Reglamento para la aplicación del artículo 66 bis de la Ley Nº16.744 sobre la gestión de la seguridad y salud en el trabajo en obras faenas, o servicios que indica); in Act No. 20.001, (Ley N° 20.001) published on February 5, 2005, which regulates the maximum weight of human load (que regula el peso máximo de carga humana)

towards its workers, unless the principal company asserts its rights of information and retention, as stipulated in Article 183 C, in which case the liability is mitigated and becomes subsidiary, as provided in Article 183 D.[33] Secondly, the main company or principal is made directly responsible for ensuring compliance with the safety obligation in relation to the same workers of contractor and subcontractor companies, in accordance with Article 183E of the aforementioned body of law.[34]

Therefore, the system adopted by the aforementioned act in its text was to separate the liability of the principal or hiring company into two levels. The first level pertains to the labor and social security obligations, which according to the Labor Directorate [*Dirección del Trabajo*], encompass those arising from individual or collective employment contracts of the contractor's or subcontractor's employees, as well as those derived from the Labor Code and its complementary laws. As for social security obligations, they are related to the full payment of social security contributions and the prevention of work accidents and occupational diseases, provided that both entail the payment of a certain amount of money.[35.] The second level concerns the liability with regard to the safety obligation.

This way, regarding the safety obligation, Article 183 E reproduces what is established in Article 184 of the Labor Code, omitting any reference to the principal company's joint or subsidiary liability for the infringement of this obligation by the contracting company. Therefore, once the reform came into effect, immediate questioning arose regarding the scope of this direct responsibility of the principal company, leading to various positions.[36] It should be noted that this debate is not related to the court that will ultimately have jurisdiction over a potential

[33] Mechanism that, in our opinion, is not appropriate, since there are no significant incentives for the liability to become subsidiary. PRADO (2009), p. 74.

[34] Article 183 E: "Without prejudice to the obligations of the principal company, contractor, and subcontractor regarding their own workers pursuant to Article 184, the principal company must take the necessary measures to effectively protect the life and health of all workers working on its works, company, or project, regardless of their dependency, in accordance with Article 66 bis of Act No. 16.744 and Article 3 of Supreme Decree No. 594, issued in 1999 by the Ministry of Health.

In cases of construction of buildings for a predetermined fixed price, the obligations and responsibilities indicated in the preceding paragraph shall not apply when the party commissioning the work is a natural person.

Without prejudice to the rights recognized in this Paragraph 1° for subcontracted workers with respect to the owner of the works, company, or project, the worker shall enjoy all the rights that labor laws grant in relation to their employer".

[35] Ordinario Nº141/5, from January 10, 2007 (which establishes the proper sense and scope of Articles 183 A, 183 B, 183 C and 183 D of the Labor Code, incorporated to Act No. 20.123, published in the Official Gazette from 16.10.2006.)

[36] On the diverse positions, LANATA (2019), pp. 115-126.

compensation claim in the event of infringement of the safety obligation, which, as we have mentioned, depends on the party who is the active plaintiff, but rather the questioning refers to the relationship that arises between the principal company and the worker of the contracting company while performing her duties.

Well then, to explain this so-called direct liability, it has been argued that the principal company's civil liability for the workplace-related accident suffered by a worker of the contracting company is of a tortious nature [*naturaleza extracontractual*], so the action should be brought before civil courts. This argument is reinforced by the fact that, according to Article 420 f) of the Labor Code, labor courts can only hear actions based on contractual liability.[37] However, it seems to us that this reasoning overlooks the purpose pursued by the legislator, which was precisely to intensify the principal employer's liability regarding the safety obligation. If it is understood that the principal employer should be held liable under the regime of tort liability, the reform would be irrelevant, as the same consequences would be reached simply by applying the rules contained in Title XXXV of Book IV of the Civil Code.

In another sense, it could also be understood that the application of Articles 183 B, 183 C, and 183 D extends to the safety obligation, so that if the contractor or subcontractor fails to fulfill their own safety obligation, it would be possible to assert the joint or subsidiary liability of the principal company. For this purpose, it should be assumed that a sort of subrogation occurs between the safety obligation, which is an obligation to perform, which, when breached allows obtaining compensation for damages caused by such breach, would constitute an obligation to give that occupies the same legal position as the obligation to perform. However, for some time now, our doctrine and judicial jurisprudence have adopted the more modern stance,[38] according to which the obligation to compensate for the damage is a new obligation of a second degree, as Professor Barros calls it. Otherwise, as Professor CORRAL argues, the distinction between obligations to give, to perform, and to refrain from doing would be devoid of relevance.[39]

On our part, we argue elsewhere that the best way to give practical effect to the purpose of intensifying the liability of the contracting party is to consider that the applicable statute for the principal company is that of contractual liability. Certainly, this stance presents a difficulty, namely, that there is no contract between the worker of the contracting company and the principal company -since the contractual relationship exists between the former and its workers- thereby contravening the principle of the relative effect of the contract, as contract rules

[37] CORRAL (2014).

[38] So it can be ascertained in judgments since over a decade, as in *Opazo* con *Inmunomédica Laboratorio Ltda*. (2010).

[39] CORRAL (2014).

would be applied to those who are not party to it. However, we believe that this difficulty can be overcome by considering that in the regulation of subcontracting and especially in the interplay of responsibilities contained therein, a legal exception to the relative effect of the contract is established, such that in matters of workplace accidents, the contractual liability statute applies to all contractual relationships between the parties involved -workers of the contracting company, contracting company, and principal company-. [40] Well then, in our opinion, this thesis has prevailed at the jurisprudential level. Indeed, on one hand, there are already judgments that have expressly accepted it,[41] but furthermore, even if it is not explicitly stated that there is an exception to the relative effect of the contract, the fact is that actions brought by the worker against the principal company are heard by the labor judiciary, thus applying the rules of contractual liability, as established in Article 420, letter e), of the Civil Code.

IV. The Supreme Court's Rulings and the Application of Civil Liability Regarding the Principal Company

Even though, as we have previously indicated, the law apparently clearly differentiated the liability of the principal company regarding labor and social security obligations to give and the safety obligation, case law in general and Supreme Court's rulings in particular, have interpreted the system of civil liability for breach of the safety obligation in diverse ways.

[40] PRADO (2009), pp. 97 ff.

[41] This is how it reads in the ruling pronounced by the Supreme Court when issuing a replacement judgment after accepting the respective remedy for unification of jurisprudence, in the case titled *Molina con Comercial SEPMO y Cía. Ltda. Orizon S.A.* (2014). "Thirdly, with the establishment of the owner's direct responsibility for the safety obligation as provided in Article 183 E and considering that this obligation is of a labor nature, incorporated into the contract by legal provision, its extension to the principal has given rise to two doctrines seeking to answer the question regarding its legal status. According to the first doctrine, the consideration of the owner's role in relation to the labor relationship between the contractor and the worker would allow for its classification as of an extracontractual nature, making the relevant legal provisions applicable to aspects such as the manner of contributing to the debt by the obligated parties and the jurisdiction to which its adjudication is entrusted. However, the same doctrine has noted that such a view appears to conflict with the purposes considered by the law in seeking to intensify the responsibility of the entity it addresses. Therefore, the other alternative is to classify it as of a contractual nature, which allows for its adjudication in the labor jurisdiction. The objection raised regarding the forced attribution of this status, considering the owner's third-party position, is overcome, according to the authors, by understanding Article 183E as a legal exception to the relative effect of contracts, considering that we are dealing with interrelated agreements."

To understand the different reasoning of the judiciary, it is necessary to distinguish between the various groups of cases that may arise regarding the infringement of the safety obligation in subcontracting work. It should be noted that not all these cases have been discussed in practice, but it is relevant to organize them in the most comprehensive way possible to encompass the varied situations that may occur. Thus, we must distinguish based on the company that has failed to meet the safety obligation with respect to the workers of the contracting or subcontracting company. This allows us to group them into three possible cases: those where only the contracting company has failed to meet the safety obligation; those where the failure to meet the safety obligation was solely on the part of the principal company and not on the contracting company; and those where both have failed to meet the safety obligation with respect to the injured worker. Taking a panoramic view, it can be observed that the jurisprudential trend, both in civil and labor law, is to hold the principal company responsible for accidents suffered by the worker of the subcontractor in almost all cases and to consider that both parties have joint or several liability or to acknowledge concurrent obligations in cases where both companies are responsible, which will occur in the majority of cases, precisely considering what we previously indicated, regardless of whether the worker files a claim on her own behalf or *in iure hereditatis*, or if the victims file claims based on repercussion, for the way in which the responsibility of the principal company is analyzed is similar in both scenarios.

4.1 The Application of Regulations Regarding Labor Subcontracting in Civil and Labor Spheres

Despite what has been mentioned, concerning the fact that most of arguments used to hold the main company responsible are similar in both labor and civil contexts, there is a relevant aspect that must be analyzed in cases where victims claim damages by repercussion, namely the applicable legal statute. This is because, as we previously stated, the applicable responsibility regime is based on the legal statute of tort liability, given that there is no contractual relationship between the victims claiming damages by repercussion and the defendant company or companies. However, doubts arise regarding the application in this field of the norms contained in the Labor Code regarding labor subcontracting.

In practice, even though the plaintiffs usually invoke the rules and principles of tort liability, it is common that they argue that the direct victim was working under a subcontracting regime, citing the provisions of the Labor Code regarding this form of outsourcing. This can be seen in the case entitled *Muñoz y otros con MADESA S.A.*, which has the particularity that only the main company was sued and not the contractor. In this case, the plaintiffs, after invoking the rules contained in Title XXXV of Book IV of the Civil Code, refer to the infringement of the safety obligation, as provided in Article 183 E, in relation to Article 184, both of the Labor

Code, as well as Articles 66 bis and 69 of Act No. 16.744,[42] asserting that if the defendant had taken measures and established basic conditions to ensure the prevention of accidents by implementing safety measures, the accident would not have taken place. On the other hand, in order to dismiss the defendant's appeal for cassation on the merits, the Supreme Court indeed considers that the applicable regime is that of tort liability, but it also applies the provisions of the Labor Code, especially Article 183 E, because the accident occurred within the context of a direct victim's employment relationship -as stated in the fifteenth paragraph-.[43]

Something similar can be seen in the case titled *Molina con Chilectra S.A. y otro*.[44] In this case, as commonly occurs,[45] the victims claiming damages by repercussion sue both the contractor company and the principal company - Chilectra S.A. - and both are condemned by the Court on the basis on the provisions of Articles 2314, 2317, and 2329 of the Civil Code, as well as Articles 183 B, 183 E, and 184 of the Labor Code.

Another very interesting case is the one titled Torres con *Constructora Branex Ltda. y Fisco de Chile*, where the spouse and daughter of a worker who died while working as a professional truck driver for a project called "Improvement of Route D-41-C H, Juntas del Toro Puente Camarón" ["*Mejoramiento ruta D-41-C H, Juntas del Toro Puente Camarón*"] commissioned by the Ministry of Public Works [*Ministerio de Obras Públicas*] and under the supervision of the Directorate of Highways [*Dirección de Vialidad*], filed a lawsuit. The worker's death resulted from a rollover accident caused by him falling asleep at the wheel, allegedly due to the violation of his rest periods. During the trial, the liability of the contractor company was established, but not the liability of the State of Chile [*Fisco de Chile*]. In particular, the State argued that the rules of labor subcontracting do not apply to it, and therefore, it had no duty to supervise the workers of the construction company. The Supreme Court, on its own motion, via cassation on the merits overturned *ex officio* the second-instance judgement that confirmed the non-liability of the State of Chile, as it found that there was a lack of reasoning regarding the application of the labor subcontracting regime in this case. Thus, in the replacement judgment,

[42] Norm whose first paragraph states: "Employers who contract or subcontract the performance of work, tasks, or services related to their business must ensure compliance by such contractors or subcontractors with regulations regarding hygiene and safety. To do so, they must implement a workplace safety and health management system for all workers involved, regardless of their employment status, when they collectively employ more than 50 workers."

[43] *Muñoz* con *MADESA S.A.* (2021).

[44] *Molina* con *Chilectra S.A. y otro* (2021).

[45] *Aguilar y otros* con *Sky Bombas de Hormigón, Ready Mix Centro S.A., Tecnomix S.A., Constructora Santa Elena Ltda.* (2020); *Garcés* con *Sociedad Comercial Alejandro y José YOB y Compañía Ltda.* (2019).

the Court first declares that while the liability for lack of service regime is applicable in this context, the construction of this legal framework is closely linked to the infringement of legal obligations set forth in the Labor Code, particularly the general safety obligation owed to all workers in the public or private sector. Furthermore, in order to establish the liability of the State, the Court cites Article 183 E of the Labor Code, which imposes the safety obligation on workers of the contractor company and qualifies it as a legal obligation. The Court concludes that even though the provision refers to the owner of the project, company, or task, this does not prevent extending the concept to government agencies, considering the protective nature of subcontracting regulations.[46] This judgment is of interest not only because it considers subcontracting regulations fully applicable to government agencies, in addition to applying tort liability along with the Labor Code's subcontracting provisions but also because it qualifies the safety obligation in this context as a legal obligation.

In general, if we analyze the defenses put forward by the hiring or principal companies, we can ascertain that they fall into two types. They either argue that there was no breach of the safety obligation, which is the case in most instances, as we will see, or they claim that the labor subcontracting statute does not apply to them, but rather the one contained in Title XXXV of Book IV of the Civil Code, as an exemplary argument, emphasizing that the principal company should not be held responsible for the actions of the contractor company, as that would imply holding them liable as a third liable party, even though Article 2320 of the Civil Code does not apply in these cases, so that the principal company should be held accountable for its own actions, all this being the case that there has been no violation of the duty of care imposed directly on the latter company.[47]

Well then, regarding the inapplicability in civil cases of the rules contained in the Labor Code and Act No. 16.744 on labor subcontracting, it seems to us that despite the invoked framework of liability being tortious, the judge must also analyze the event causing the damage which, in these trials, entails investigating the nature of the relationship between the worker and the company or companies responsible for said damage, being therefore necessary to establish the type of subordinate relationship that the direct victim was subject to in order to determine and legally classify the liability of the defendants, including the principal company. This implies that the civil court must examine not only whether there is an employment contract with the direct employer but also whether the labor subcontracting regime is applicable or not. In the latter case, it is this regime that explains the nature of the duty of care that the principal company must exercise, making the application of the rules contained in the Labor Code and Act No. 16.744

[46] *Torres* con *Constructora Branex Ltda. y Fisco de Chile* (2017).

[47] *García* con *Sociedad Consorcio para la Reconstrucción (de la Villa Portales Fernández Wood Sagunto Ltda.* (2019); *Molina* con *Chilectra S.A. y otro* (2021).

unavoidable. Moreover, elsewhere the plaintiff has only invoked the provisions of the Civil Code in her lawsuit and subsequently, upon the rejection of the lawsuit, in the appeal of cassation on the merits raised the circumstance that the liability of the principal company falls under the subcontracting regime, citing the relevant labor laws. In such instances, the Supreme Court has dismissed the appeal of cassation on the grounds that it is inappropriate to rely on labor laws or Act No. 16.744 since they were not part of the trial's discussion -fourth consideration-. As seen, the Court does not consider the labor laws, particularly the laws on labor subcontracting, to be generally inapplicable. Rather, their inapplicability arises from not being timely invoked during the proceeding.[48]

Indeed, there is no doubt that the principal company can always be exempted from liability if it is proven that they fulfilled the duty of care required by the labor subcontracting statute.

On the other hand, as mentioned earlier, if it is the worker herself -or her heirs- who assert civil liability arising from the accident they were victim to, the cases are heard by the labor judiciary. The same applies when attempting to hold the principal company liable, so such actions, contrary to what might be believed, are also within the jurisdiction of the labor courts, which indicates that, in accordance with Article 420, letter f) of the Labor Code, the civil liability asserted against these companies is contractual in nature, as mentioned in the previous section, even though there may not be an explicit pronouncement by the courts regarding this point in practice. Furthermore, it is important to consider that, except for some exceptions,[49] the trend is to sue both companies for failing to fulfill the duty of care, so the plaintiffs usually do not differentiate between cases where only the contracting company or the principal company may be responsible for breaching the duty of care. This strategic decision is entirely understandable, considering not only aspects regarding procedural efficiency but also two compelling reasons. The first reason is that, as will be seen, establishing the duty of care is less challenging regarding the principal company.[50] The second reason is related to the structure of the duty of care. In practice, both companies are usually required to comply with the duty of care towards the workers of the contractors so that, in fact, the duty of care is fragmented into various acts that both the principal company and the contracting company must carry out, often involving both concurring and

[48] *Sepúlveda y otros* con *Compañía de Cervecerías Unidas S.S. (CCU) y Transportes CCU Ltda.* (2020).

[49] As in the case of *Muñoz* con *MADESA S.A.* (2021), although in this case the lawsuit was filed by the indirect victims to assert tort liability solely against the principal company.

[50] Unless, of course, labor subcontracting is not established, in which case only the contracting company will be responsible, as in *Valenzuela* con *Instituto Nacional de Deportes y Cubillos Ltda., Esparza Barra* (2016); *Cruces* con *Cuevas y otro* (2020), *Rojas* con *Olivares y otro* (2022).

overlapping behaviors on part of both companies. For example, providing protective clothing and other safety equipment, supervising their proper use, developing and adopting protocols, and supervising their implementation by the workers, among others.

However, whether the lawsuits against the principal company are filed before civil or labor courts, the fact remains that there is a general trend to hold the principal company responsible for accidents suffered by workers of the contracting companies, making it extremely difficult for the principal company to exonerate itself from liability. Let us examine some of the reasoning used by the judicial jurisprudence, especially that emanating from the Supreme Court.

4.2 Jurisprudential Arguments to Uphold Lawsuits Filed Against the Main Company.

4.2.1 The Principal Company: Guarantor of the Obligation of Safety?

One of the statements found in some judgments pronounced by the Supreme Court is that the main company is not liable as a guarantor of the obligation of safety that rests upon the contracting company, but rather for its own actions, as read in a cassation judgment pronounced in the case titled *García con Sociedad Consorcio para la Reconstrucción de la Villa Portales Fernández Wood Sagunto Ltda*.[51] whose eighteenth consideration expresses: "Its content represents an important change to the preexisting situation prior to its issuance, by repealing the subsidiary liability established by Article 64 of the relevant Code, establishing a direct liability that falls on the principal company in the event of non-compliance with the duty imposed by the same text, no longer as a guarantor of the workers' rights that should be protected by their direct employer, but due to its own conduct that contributed to the occurrence of the harmful event." In this case, the claim was brought by the victims by repercussion seeking to enforce tort liability against both the direct employer and the principal company; well then, the first instance judgement dismissed the claim in its entirety, decision that was reversed regarding the dismissal of the claim against the direct employer or contractor, and confirmed with respect to the liability of the principal, for which the liability contained in Article 183 E of the Code is applied.

It is remarkable that the judges do not argue based on a potential lack of supervision responsibility of the contracting company, but rather on their own act, and that is the emphasis made by the Court, considering that the principal or hiring

[51] *García* con *Sociedad Consorcio para la Reconstrucción (de la Villa Portales Fernández Wood Sagunto Ltda*. (2019).

company is not a guarantor of the safety obligation that the contractor must fulfill,[52] but rather a debtor of its own safety obligation, in line with the purpose pursued by Act No. 21.123, of establishing direct liability.

We agree with the statement made by the Court, regarding the fact that the principal company does not assume the position of guarantor and, as such, there is no guarantee obligation on its part regarding the safety duties that fall on the direct employer of the contractor, but, according to Article 183 E of the Labor Code, the principal company is a debtor of its own safety obligation towards said worker, implying that the analysis to be carried out is, indeed, whether as a debtor, it fulfilled the behavior it should have displayed towards the worker. However, two comments should be made. First, the status of guarantor or not of the security obligation of the contracting company is not a matter where there is uniformity of criteria. On the contrary, in other cases, the Supreme Court itself declares that the main company does hold such a status, as stated in the case titled *Cifuentes con Carrillo y otro*[53] in a judgment dated June 26, 2018, where the Court declares –seventh paragraph-:

> That such norms, as they are part of the statute that governs labor relations, are to be understood from a perspective consistent with the purpose of that branch of law, namely, in accordance with the principle of worker protection, which runs through all the regulations in this matter, and that, specifically, the incorporation of such norms by means of Act No. 20.123 was aimed at reaffirming, on the one hand, the guarantor position of the hiring company as the owner of a project in relation to the safety of subcontracted workers who work in it; and, on the other hand, to establish its direct responsibility in the fulfillment of the pecuniary obligations of its contractors, not only labor and social security obligations but also those corresponding to the field of safety, and in this way, to ensure respect for the rights of the worker and not the particular situation of control of the company or lack thereof.

And the second comment is that, as we will see below, through the statement made by the courts of justice that the principal company has not properly carried

[52] On obligations of guarantee, see NEME (2018), pp. 45 ff.: "The technical meaning of *praestare* is "to guarantee" or "to ensure" that the agreed activity will be performed directly, or that the agreed-upon result will be achieved, or alternatively, to assume responsibility in case the activity is not performed or if something that should happen does not occur, or if something that should not happen does occur. Thus, the obligation does not consist of carrying out an activity or providing a result, but rather, it entails guaranteeing the creditor with one's own responsibility that everything necessary will happen to satisfy the creditor. This type of obligation has transcended into contemporary law under the designation of "guarantee obligation," "security obligation," or "indemnity obligation," with explicit reference to the Roman category of *praestare*."

[53] *Cifuentes* con *Carrillo y otro* (2018).

out supervision, often in a somewhat forced manner, it becomes, in practice, a guarantor of the safety obligation of the contracting company.

4.2.2 Lack of Supervision of the Principal Company

As we mentioned, one of the most frequently used jurisprudential arguments to hold the principal company responsible for accidents suffered by contractors' workers is the lack of supervision on the part of the former. However, court rulings often do not specify who or whom the proper supervision of safety obligations was not exercised upon, whether it was the contracting company's compliance that was not supervised, or the implementation of safety measures by a worker causing the damage, or even the very worker that was the victim of the accident. Instead, only a general reference is made to the aforementioned lack of supervision. In fact, if a more detailed analysis were to be carried out, it would be necessary to consider whether the lack of proper supervision results in liability based on the principal company's own act or potentially the liability of the debtor of the obligation due to the acts of their assistants, as provided in Article 1679 of the Civil Code, in the context of contractual liability; and in the case of tort liability, it would depend on the possible liability of the main company as a liable third-party, in accordance with Article 2320 of the same body of law. However, as mentioned, these considerations are not commonly explicitly addressed in the analyzed court rulings. These deliberations are relevant because, as previously stated, beyond the sense and scope of the legal framework applicable to the liability of the principal company, it should be noted that the legislator's intention was to establish direct liability for the former regarding the workers of the contracting company, which raises the question of whether this liability only implies responsibility for its own actions or also as a liable third party in the case of tort liability or due to the acts of its assistants in the case of contractual liability. In our view, although Article 183 E of the Labor Code establishes direct liability, which can be interpreted as liability for the company's own actions, it does not exclude the possibility of the principal company being held accountable through the forms of liability indicated above, according to general rules. However, due to the fact that it is easier to establish liability for the hiring company's own actions in order to apply the aforementioned legal provision, there is either a lack of reflection on how liability is structured in each case or simply categorizing it as liability for one's own actions,[54] even if it may not be the case in practice. Let's examine some judgments that argue in favor of this viewpoint.

[54] As in the case named *Garcés* con *Sociedad Comercial Alejandro y José YOB y Compañía Ltda*. (2019). In this case, the victims by repercussion filed a lawsuit, and the sixth consideration of the Supreme Court's judgement, which rejected the appeal for cassation brought by the hiring company, states that "the reasoning behind the decision to uphold the lawsuit arises -in relation to the appellant- from its responsibility in failing to exercise proper supervision over the works entrusted to the contractor and co-defendant. It became evident that the

A first case is the one entitled "Cifuentes con Carrillo" already mentioned, in which the Supreme Court, in a judgment dated June 26, 2018,[55] dismissed the appeal for the unification of jurisprudence. In this case, the worker filed a lawsuit against both the contracting company and the main company because, in his capacity as a driver for the former, he reported to work at the premises of the latter to load the truck he was driving. It so happened that while he was on the road, the brakes of the truck stopped working, causing him to lose control of the vehicle. One of the tires burst, resulting in the truck overturning and him being ejected from it. Well then, the first-instance judgment precisely reasons about the lack of proper supervision of the plaintiff's work by the principal company. In the twentieth consideration of the same judgment, it is expressed that the principal company did not properly control the use of protective equipment by the contractor's workers:

> according to the testimony of Abraham Muñoz, both of them were not wearing seat belts when they left the company with the truck loaded with cobblestones, and he only managed to put it on once the truck lost control of the braking system when they were going downhill through the Lo Prado tunnel. Furthermore, the principal company had the obligation to regularly carry out mechanical checks on the trucks used for transporting concrete or, alternatively, to demand proof of the maintenance and periodic mechanical inspections of each of the trucks of Carlos Carrillo used for the transportation of its products.

In the case entitled *Rebolledo con Andes Airport Services y otro (LATAM)* in a judgment dated May 10, 2022,[56] a worker filed a lawsuit due to an accident he suffered while performing loading and unloading tasks on airplanes, during which his foot became trapped in a cargo tractor, resulting in a fracture. The Supreme Court accepted the appeal for the unification of jurisprudence and issued the corresponding replacement judgment, in which it upheld the lawsuit against both defendant companies. In this ruling, the employment relationship under subcontracting regime is established, and then, regarding both companies, it is only stated:

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safety measures under which the victim was working were deficient, with no concern for ensuring a safe working environment and providing precise instructions. As a result, each worker carried out tasks based on their own experience without seeking rest areas. This led the victim to seek shelter from the heat on the roller, which, when activated, caused their death. In other words, it is a liability for one's own act, as the defendant failed to exercise their prerogative of supervising the adoption of necessary safety measures, which the direct employer of the worker was obligated to do under the relevant labor regulations. This violation thus infringes upon Articles 2314 and 2329 of the Civil Code, as determined by the substantial decision."

[55] *Cifuentes* con *Carrillo y otro* (2018).

[56] *Rebolledo* con *Andes Airport Services y otro (LATAM)* (2020).

> At this point, it is already possible to observe that the reasoning does not start from the correct perspective of the duty of safety that rests on the employer, since -instead of requiring the defendant to provide adequate evidence of ensuring the effective protection of the lives of its workers and maintaining safety conditions in the work tasks- it transfers this burden of proof to the plaintiff in order to demonstrate the occurrence of accidents that would evidence the infringement of those obligations imposed by labor norms, unduly relieving the defendant from the burden of proving the proper compliance with its duties of care and worker protection (fourth paragraph of the unification judgment).

There is also no further argumentation in the replacement judgment. In other words, it is not explicitly stated, but it needs to be inferred from the judgment in question, that not only did the principal company fail to fulfill its safety duty, but the subcontractor also failed to do so, as it did not provide evidence of such compliance.

In the cases known to civil courts, the Supreme Court employs similar reasoning, as can be seen in the case entitled *Torres con Constructora Branex y Fisco de Chile* already mentioned,[57] in which, as we mentioned, the State is held responsible as the principal of the work for its failure to supervise, which, in addition to being considered by the Supreme Court, is supported by the testimony of witnesses presented by the plaintiff. This would have been "implicitly acknowledged by the State when stating that it was not an obligation that fell on the Ministry of Public Works (MOP), seeking to evade its responsibility by arguing that the aspects that are accused of infringement, related to the fulfillment of labor obligations and hygiene and safety measures, should be supervised by the Labor Directorate [*Dirección del Trabajo*] and the Health Services [*Servicios de Salud*], respectively, and that this was not an obligation of the principal, which is a completely erroneous argumentation, because although such matters must be supervised by the aforementioned entities, this in no way excludes the fulfillment that, as the owner of the company, work, or project, is imposed on it by the aforementioned Article 183-E of the Labor Code" -tenth paragraph, replacement judgment-.

Also in civil matters, in the case “García con Sociedad Consorcio para la Reconstrucción de la Villa Portales Fernández Wood Sagunto Ltda.”,[58] also mentioned, the Supreme Court engages in a similar reasoning, as it considers that the lack of supervision by the owner of the work is evidenced by its tacit acknowledgment when responding to the lawsuit, claiming that the safety obligation did not fall on its part, but only on the contractor, thus attempting to evade its responsibility.

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[57] *Torres* con *Constructora Branex Ltda. y Fisco de Chile* (2017).

[58] *García* con *Sociedad Consorcio para la Reconstrucción (de la Villa Portales Fernández Wood Sagunto Ltda.* (2019).

In *Montenegro y otros con Farmacias Cruz Verde S.A. y otros*,[59] the victims by repercussion filed a lawsuit. In this case, the worker was employed by a company dedicated to manufacturing and installing furniture, which was contracted by a chain of pharmacies to perform work at their locations in Tocopilla and Calama. Now, under circumstances where the worker was traveling as a passenger in a vehicle driven by another person, on their way to perform furniture-related tasks at the pharmacy's premises in the city of Tocopilla, the vehicle overturned due to excessive speed, resulting in the worker's death. The first instance's judgment holds both the contractor and the principal company -the pharmacy chain- jointly and severally liable for compensatory damages to the plaintiffs. Upon appeal, the Court of Appeals of Santiago overturned the judgment and dismissed the claim against the principal company. The Supreme Court, reviewing the claimant's appeal for cassation, upheld it and also held the principal company liable. In its reasoning, the Court stated in the cassation ruling that, according to Article 183 E of the Labor Code,

> the monitoring duty imposed by the legislator on the employer is not only *in situ* but also entails effective protection through oversight and verification wherever the activity is carried out and under the employer's control. Undoubtedly, in this case, the defendant Cruz Verde S.A. was fully aware that after completing the furniture installation in the city of Calama, Muebles Val Limitada's workers had to travel to Tocopilla to continue their work. Therefore, having knowledge of the assigned tasks, distances of travel, delivery times, and installation delays, it can be expected that suitable protective measures should have been taken to ensure proper protection of the workers' lives and prevent work-related or commuting accidents with grave consequences, such as the death of a worker (twelfth paragraph).

Therefore, the Court concludes that the principal company was in a position to foresee and adopt appropriate control and oversight measures. As seen, in a very concise manner, by merely referring to labor regulations and relying on a generic argument that the principal company failed to adopt accident prevention measures, it is held liable. In our opinion, although we may agree with the Court's decision, it appears once again that it is not sufficiently clear whether the issue arose because the principal company failed to supervise the contractor's fulfillment of its own safety obligations, or if, given the circumstances, it was indeed the principal company that should have directly implemented measures to prevent the unfortunate incident.

Recapping, although it is possible to envision situations where one could infer the liability of the principal company for failing to adequately supervise the contractor's compliance with its own safety obligations, even though these scenarios

[59] *Montenegro y otros* con *Farmacias Cruz Verde y otros* (2017).

are not explicitly stated in Article 183 E of the Labor Code, they are fully applicable according to general principles, in practice, the judgments reason about the liability of the principal company based on its own actions in order to align this responsibility with the provisions of the aforementioned article, thereby simplifying the establishment of said liability. There is no doubt that the underlying motive behind this approach lies in the principles of labor law, particularly the *in dubio pro operario* principle. Indeed, in this case, among several possible interpretations of the norm, the one most favorable to the worker is chosen,[60] which precisely leads to the application of the aforementioned Article 183 E by categorizing the principal company as having liability based on its own actions.

4.2.3 The Issue of Joint and Several Liability and Concurrent Obligations

A central aspect of labor subcontracting regulation, as mentioned above, is the application of joint or subsidiary liability between contracting and subcontracting companies and the principal company, regarding labor and social security obligations to give. On the contrary, the legislation introduced by Act No. 20.123 did not foresee such joint or subsidiary liability regarding safety obligations, as explained earlier. Nevertheless, the judicial jurisprudence has taken a different path. In fact, as we will see next, in some cases, it holds the involved companies jointly liable for compensation payments,[61] or determines that it is a concurrent obligation, in both labor and civil cases.

One clarification we must make is that in none of the analyzed cases has joint and several liability been ordered against the principal company for the payment of damages ordered against the contracting or subcontracting company. Instead, in all cases where the principal company has been held liable for the payment of damages, it is due to acts that, according to the Court's judgment, have been committed by both the principal company and the contractor, meaning, cases where the infringement of the safety obligation has been determined for both companies. In this regard, the jurisprudence has adopted two solutions, both in the civil and labor spheres: first, applying joint liability for the payment of the aforementioned damages; and second, considering it as a concurrent obligation. Only exceptionally has the Supreme Court determined that the obligation is joint and several with proportionate share (*obligaciones mancomunadas*), as in the previously mentioned case *Montenegro y otro con Farmacias Cruz Verde y otros (Muebles Val Ltda.),*[62] in which, however, the specific share of payment to be made by each party was not specified.

[60] PLÁ (1990), p. 40; LANATA (2010), p.47; GAMONAL (2013), p. 431; MUNITA (2014), p. 90, among others.

[61] CANCINO y CONCHA (2018) p. 74.

[62] *Montenegro y otros con Farmacias Cruz Verde y otros* (2017).

However, regarding solidarity, it has been reached in different ways depending on whether it concerns cases heard by labor courts or by civil courts.

Indeed, regarding the cases heard in labor courts, as mentioned, one way in which the infringement of the obligation of safety by the contracting and subcontracting companies has been addressed is by declaring that the responsibility of both companies is joint and several. For this purpose, the courts apply the provisions of Articles 183 E, in relation to Article 183 B of the Labor Code. Thus, it is stated in relation to these provisions, for example:

> That such norms, as they are part of the statute that governs labor relations, are to be understood from a perspective consistent with the purpose of that branch of law, namely, in accordance with the principle of worker protection, which runs through all the regulations in this matter, and that, specifically, the incorporation of such norms by means of Act No. 20.123 was aimed at reaffirming, on the one hand, the guarantor position of the hiring company as the owner of a project in relation to the safety of subcontracted workers who work in it; and, on the other hand, to establish its direct responsibility in the fulfillment of the pecuniary obligations of its contractors, not only labor and social security obligations but also those corresponding to the field of safety, and in this way, to ensure respect for the rights of the worker and not the particular situation of control of the company or lack thereof.

Or that:

> This led them to conclude that with regard to the joint and several liability to which the appellant was condemned, Article 183 B of the Labor Code, as indicated, establishes a particular and special obligation in terms of hygiene and safety, imposing on the owner of the project the duty of effective protection of the life and health of all workers who work in its company, which differs from the former liability established in Article 64 of the Labor Code, no longer as guarantor of the right of workers that must be safeguarded by their direct employer, but rather by their own conduct that contributed to the occurrence of the harmful event. This provision must be understood based on the principles on which Labor Law is based, especially that of protecting the weaker party (fourth paragraph).

As seen, the way in which jurisprudence arrives at joint and several liability is through the application of Article 183 B of the Labor Code. So, despite the fact that this provision refers to labor and social security obligations to give, labor courts make an ellipse and, by referring to the provisions of Article 183 E and in accordance with the principle of protection, they conclude that the liability is joint and several.

Different is the reasoning contained in civil judgments that establish joint and several liability of the companies because, in this case, what is done is to apply the provisions of Article 2317 of the Civil Code. An example of this is found in the case *Torres con Constructora Branex Ltda. y Fisco de Chile*,[63] which we have already mentioned, where the Supreme Court deems it appropriate to apply the previously mentioned provision, considering that both the principal company and the contractor failed to supervise the compliance with the safety obligation of the workers involved in the project. This unity of action would give rise to said joint and several liability -as stated in the twelfth consideration of the replacement judgment-. A similar argument can be seen in *Garcés con Sociedad Comercial Alejandro y José YOB y Compañía Ltda.*, although in this case, there is no express pronouncement from the Supreme Court as it only dismissed the appeals for cassation on procedural grounds and cassation on the merits filed against the Court of Appeals' decision that had upheld the first instance decision.[64]

On the other hand, a portion of the analyzed judgments, both those known by the labor courts and the civil courts, classify the safety obligations of the companies involved as concurrent obligations, requiring them to respond in that way for the payment of the compensation awarded to repair the damage caused by their infringement.

Thus, in labor matters, this is evident in the case of *Palma Rivas con José Paredes Torres y otros*,[65] where the Supreme Court clarifies that the source of the concurrent obligation is not found in the provisions of Article 183 B of the Labor Code. Similarly, in the case titled *Carrillo Arriagada con SERMINOR Ltda. y otros*;[66] the Court once again makes it clear that it is not within the scope of said provision, but rather governed by Article 183 E of said legal body. The Court then goes on to cite professors Pamela Mendoza and Enrique Barros, in order to state that these are the obligations that doctrine refers to as *in solidum* or concurrent obligations.

In civil matters, a similar reasoning can be observed, as evidenced in the case of *Molina con Chilectra S.A. y otro*.[67] This judgment is interesting as it discusses the non-application of Article 2317 of the Civil Code in these cases, since said provision does not relate to the concurrence of culpable conduct, as is the case here, but rather to the "lack of supervision in one case and lack of planning and control in others, so that each one is responsible for their own omissive conduct that resulted in the damage" -fifteenth paragraph-. It then adds -sixteenth consideration- that "in the present case, there is no legal joint liability, but a similar effect is produced in that

[63] *Torres* con *Constructora Branex Ltda. y Fisco de Chile* (2017).

[64] *Garcés* con *Sociedad Comercial Alejandro y José YOB y Compañía Ltda*. (2019).

[65] *Palma Rivas, Jhuliano* con *José Paredes Torres y otros* (2016).

[66] *Carrillo Arriagada* con *SERMINOR Ltda. y otros* (2018).

[67] *Molina* con *Chilectra S.A. y otro* (2021).

all those who have contributed with their culpable conduct to the occurrence of the harm must contribute to its reparation. Thus, among all the responsible parties, what doctrine refers to as *in solidum* obligations is created." A similar argument can be found in *García con Sociedad Consorcio para la Reconstrucción (de la Villa Portales Fernández Wood Sagunto Ltda.)*, where this time, extensively citing Professor Corral, it is also considered that there are multiple agents involved in causing the harmful outcome, contributing to its generation, thus assigning the qualification of concurrent obligation. The replacement judgment even states, citing the above-mentioned professor: "It is possible to establish the unity of action that gives rise to the joint liability claimed, since, as reflected above, each wrongful act is the cause of the damage in its entirety, and each perpetrator, even if their acts are independent, must bear the full amount of the compensation. Therefore, we are dealing with concurrent obligations" -sixteenth paragraph-.

A different argumentation can be seen in "Aguilar y otros con Sky Bombas de Hormigón y otros",[68] in which, although it is acknowledged that a concurrent obligation exists, the Court regards as correct the application or Article 2317 of the Civil Code, that is, it infers the existence of said concurrent obligation between the parties from this provision.

Thus, there is no doubt that the concept of concurrent obligations has already been incorporated by our case law in various areas,[69] including the one at hand.[70] However, in our opinion, given the difficulties posed by the incorporation of this type of obligations into our system, it seems to us that, contrary to the position adopted by courts, it is possible to find other solutions regarding the liability of the principal company, which may become joint and several, without necessarily applying the provisions of Article 183 B of the Labor Code, nor resorting to concurrent obligations.

In that regard, we believe that in cases dealt with by the labor courts, where contractual liability is invoked, we propose, as mentioned earlier, to recognize that we are facing a legal exception to the relative effect of the contract and, furthermore, based on certain interpretations of Article 1526 No. 3 of the Civil Code, and as we have previously argued, to acknowledge that, since the norm establishes that "The co-debtor who, by their own act or fault, has rendered the fulfillment of the obligation impossible, is exclusively and jointly responsible for all damages to the creditor." We suggest recognizing that if there is fault [*culpa*] or intent [*dolo*] in the breach of the safety obligation by both the principal company

[68] *Aguilar y otros* con *Sky Bombas de Hormigón, Ready Mix Centro S.A., Tecnomix S.A., Constructora Santa Elena Ltda.* (2020).

[69] CORRAL (2015), pp. 464-468; CORRAL (2017b), p. 692; KUNCAR (2017), p. 227; BRAVO (2020), pp. 457-460.

[70] MENDOZA (2021), p. 266.

and the contracting company, they are jointly and severally liable.[71] On the other hand, in cases heard by civil courts, where the applicable liability is tortious[72] (based on tort law), it would be feasible to apply the provision contained in Article 2317 of the Civil Code, in broader terms than those traditionally provided by our doctrine and jurisprudence, as aptly proposed by Professor Pinochet.[73]

V. CONCLUSIONS

1.- In recent case law, both in cases heard in labor courts and civil courts, the degree of fault for which the employer is responsible in the breach of the safety obligation is not specified. Instead, it is simply stated that the employer must meet a high standard of care. In our view, although the employer is liable even for slight negligence, the standard of care corresponds to that of a qualified debtor, in line with the structure of the employment relationship.

2.- The jurisprudential trend, particularly that from the Supreme Court, is to hold the principal company responsible for work accidents suffered by employees of the contracting company, which is done through arguments such as the establishment of their role as guarantor of the safety obligation or considering the lack of supervision by the principal company. However, regarding this second argument, the judgements do not distinguish whether there was a lack of supervision of the injured worker, the worker who caused the accident, or the contracting company itself, although, in general, due to the fact that the reform introduced by Act No. 20.123, which aimed to directly hold the principal or hiring company responsible for accidents suffered by the workers of the contractor, it appears that the courts understand that they have not supervised the fulfillment of the safety obligation regarding the injured worker.

3.- The judgments issued both in the labor and civil areas have inclined towards recognizing either the joint liability of the principal company and the contractor for the payment of compensation for damages resulting from a work accident suffered by the contractor's employee, or that these are concurrent obligations. Regarding joint liability, this has been established by applying the provisions of Article 183 B of the Labor Code in cases heard before labor courts and based on the provisions of Article 2317 of the Civil Code in cases heard before civil courts. The other alternative, as we mentioned, has been to recognize that this are concurrent obligations both before labor and civil courts, for which recourse has been made to national doctrine on the matter. For our part, we prefer the application of joint

[71] PRADO (2009), p. 101. This is also the more recent opinion of Concha. CONCHA (2019), pp. 340 ff.

[72] T.N. in the original Spanish version: "*aquiliana*", meaning "based on tort law", "tortious" or "delictual".

[73] PINOCHET (2020), pp. 538-541.

liability: in the civil area, based on an extensive interpretation of the aforementioned Article 2317 of the Civil Code, and in the labor area, in accordance with the provisions of Article 1526 No. 3 of the Civil Code.

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