ASPECTS RELATED TO THE AMENDMENTS OF CIVIL LIABILITY IN THE NEW CIVIL CODE

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Abstract

The issue of civil liability is easily justifiable even within the terms of the New Civil Code, being at the same time theoretically and practically very topical. Civil liability is considered as a complex of rights and obligations which is born as the result of committing an illegal deed and which represents the framework for state coercion through applying legal sanctions in order to ensure the stability of social relationships. The New Civil Code clearly delimits the two types of liability – delictual civil liability and contractual civil liability, and it brings a series of amendments/clarifications as for: applicable principles, remedies for non-patrimonial damages, the conditions for engaging liability, remedies in the case of damages consisting of losing a chance, the duality of these two forms of civil liability.

Keywords: *civil liability, modifications, guilt, legitimate interest, damage, reparation*

Aspecte privind modificările răspunderii civile în noul cod civil

It is very well known that human actions and attitudes have legal consequences that legal subjects correctly or incorrectly anticipate or which they do not completely anticipate in every situation. If natural or legal persons, who are civil legal subjects, are in breach of a legal norm, they shall be held legally liable.

Legal liability has been defined as „the totality of interconnected rights and obligations which – according to law – are born as a consequence of committing an illegal deed and which – through the application of legal sanctions – represents the framework for state coercion for the purpose of granting the stability of social relationship and guiding the members of society in the spirit of respecting the legal order”[1].

Technical, economic and social progress have also influenced the evolution of civil liability. The regulation of liability in the former Civil Code was characterised by: universalism, individualism and moralism. In essence, any human deed causing damages imposes reparation (art. 998-999 Old Civil Code); persons are individually responsible for damages caused (art. 998 Old civil Code);the centre of civil liability is fault or the mistake made by the author of the act causing damages.

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[1] M. Costin, *O încercare de definire a noțiunii răspunderii juridice, în RRD nr. 5/1970*, p. 83, cited in L. Pop, I. F. Popa, S. I. Vidu, *Tratat elementar de drept civil*. *Obligațiile*, Universul Juridic Publishing House, București, 2012, pp. 380; C. Stătescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor,* All Publishing House, București, 1994, pp. 112-113.

By the end of the 19th century, the evolution of society has determined slight deviations from the classical, traditional interpretation of the Civil Code, which have even lead to the elabortaion of some regulations for certain special fields. The appearance of insurance has had an impact on the equilibrium characteristic to the traditional system of liability in the sense of declining the element of guilt or fault, in certain exceptional situations causing the state to overtake the reparation of certain damages (for agricultural calamities, terrorism, pollution etc.). Naturally, this socialization of risks has determined the decline of civil liability. Concomitantly with this evolutions, the field of civil liability founded on guilt has narrowed down due to changes in its foundation. Situations in which civil liability has become objective liability are increasingly numerous and they are founded on the idea of risk or guarantee for example.

In the following we shall make a detailed analysis of some modifications brought by the New Civil Code to the institution of civil liability.

According to the classic conception, also kept in the New Civil Code, civil liability is exclusively remedying in nature and the main difference between civil liability and other forms of liability is represented by the obligation to remedy the damages caused by a person committing an illegal deed or by the person legally responsible[2]. It is necessary, however, to specify that due to current economic and social developments, the preventive aspect of liability is more emphatic and the aim is to get to two essentially different legal regimes: delictual civil liability and contractual civil liability. Of these two types of liability, delictual liability represents the general law in the field, whereas contractual liability derogates from delictual liability and it is only applicable when a contract has been concluded between the parties.

As for the foundation of civil liability, the provisions of the New Civil Code are very clear;[3] it keeps fault or guilt as a principle of liability (art. 1357 Civil Code)[4]. In cases of liability for damages caused by minors or persons under court interdiction (art. 1372), the liability of principals for agents (art. 1373), the liability for damages caused by animals, things or, as the case may be, by the ruin of an edifice (art. 1375-1380), liability is founded on the idea of objective guarantee which is supported by the risk inherent to activities and the risk of authority. The theory of risk was widespread and it benefited from explanations, theoretical[5] and practical foundations. These are supplemented by the idea of equity and the principle of caution. We would like to point out that the idea of objectifying civil liability has evolutively emerged due to the fact that engaging civil liability only on the grounds of guilt or fault has become unsufficient and inadequate to cover the multitude and variety of practical situations. However, it could not be generalised as unique foundation of civil liability. The influence that it exerted on explaning and founding de jure liability without guilt.

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[2] D. Sîngeorzan, *Răspunderea contractuală în materie civilă și comercială*, Hamangiu Publishing House, București, 2009, pp. 4-5.

[3] L. Pop, *op. cit.,* p. 404.

[4] "Those who cause damages to others through an illicit deed committed intentionally shall repair the damages caused. Persons causing damages are liable for the smallest fault."

[5] G. Marton, *Les fondaments de la responsabilité civile*, Libraire du Recueil, Sirey, Paris, 1938. pp.156-209.

Besides the subjective and objective theory there are also mixed theories which have appeared aut of a natural necessity to conciliate the idea of guilt with the necessity to offer solutions favourable to victims.

In our opinion it is clear that for the present only one of the exclusivist theories, subjective or objective, is able to completely explain the entire institution of liability, both from a theoretical and practical perspective.

As a rule, contractual liability (art. 1547-1548) is based on the debtor's guilt or fault, presumed by law. Thus, debtors are obliged to remedy damages caused to their creditors by non-fulfilment, inadequate fulfilment or late fulfilment of obligations arising from a validly concluded agreement (art. 1518 para. 1 of the new Civil Code). We may state that contractual liability is synonymous to fulfilment through equivalent, being a remedy for non-fulfilment of the agreement.

Although both forms of civil liability are engaged if the same conditions are met: damage, illegal act, fault or guilt and the existence of causation, the relevant legal provisions subject them to considerably different regimes which produce important legal consequences.

As for delictual civil liability, which represents the general law in the field of liability, we shall note that „persons whose judgement is not impaired and who breach the provisions of para. 1[6], shall be liable for the damages caused and have the obligation to make them good entirely", without distinguishing between patrimonial or non-patrimonial damages. The obligation to make good non-patrimonial damages is provided for in art. 253 para. 4[7] of the New Civil Code. The rights pertaining to human personality are thus protected as „common law" in the field as there are also special regulations in accordance with fundamental human rights.

A new element introduced by the New Civil Code in the case of delictual civil liability refers not only to breaching certain legal provisions, but also to not taking into consideration "local habits" if this would cause damages to another person.

Moreover, the foundation of delictual civil liability shall be also engaged in the case of abstention from committing an action, abstention which causes a damage through violating the rights and legitimate interests of a person.

The principles of establishing the presence of discernment in the case of people who committed acts causing damages are kept by the New Civil Code. Thus, minors under 14 years of age or persons under court interdiction shall only be held liable for the damages caused if proven that their judgment has been impaired at the time of committing the act. Therefore, the presumption regarding the presence of discernment in the case of minors with restrained exercise capacity is a relative one (art. 1366 of the new Civil Code), which thus allows proving the contrary. However, persons under court interdiction shall be held liable if the temporary state of mental disorder has been triggered by themselves through drunkenness produced by alcohol,

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[6] Art. 1349 para 1: "Persons have the obligation to comply with the rules of conduct imposed by law or the local habit and not to breach, through their actions or inactions, the rights or legitimate interests of others."

[7] Art. 253 para. 4: "Moreover, persons who have suffered damages may ask for compensation or, as the case may be, for patrimonial damages for the prejudice – even non patrimonial – suffered if the damages may be attributed to the author of the act causing damages...."

drugs or other substances. This provision is transposed from criminal legislation where accidental drunkenness excludes the penal character of a deed, whereas voluntary drunkenness, intentionally provoked by the perpetrator, represents an aggravating circumstance when individualizing penalties (art. 75 para. 1 letter e) of the Criminal Code, as well as art. 77 letter f) of the New Criminal Code)[8]. The lack of discernment does not exempt the author of damages from the payment of an indemnity to the victim any time the liability of the person responsible, according to law, for his/her surveillance may not be engaged. In our opinion, the provisions of art. 1368 of the new Civil Code are equitable also having in view that the courts of law shall take into consideration the material state of victims.

As for the effect of civil liability – remedying damages, the principle of joint liability is maintained by the New Civil Code. Therefore, those who have paid integrally the damages caused have the right of recourse against the other authors of the illicit deed. Recourse shall be limited to what exceeds the share of the person who has integrally paid the damages (art. 1384). The right to recourse was also allowed by the former regulation and it was established by doctrine and jurisprudence. Those situations when the author of a deed shall not be held liable due to being exonerated for one of the causes provided by law represent exceptions. Paragraph 2 of art. 1384 imperatively provides the obligation of the Ministry of Public Finances to turn against the author of an illicit deed when the person responsible for this person's deed is the state, according to special rules in force.

Compensation for damages shall be in kind[9], through restoring the parties to their previous situation and if this is not possible or the victim is not interested in compensation in kind, damages shall be awarded, as established by common agreement of the parties or by court decision. When establishing compensation, the following shall be taken into consideration: the date when the damage has been caused unless otherwise provided by law and the nature of the damage caused. As for moral damages, the criterion regarding the seriousness of damages caused and the criterion of equity shall be taken into consideration.

According to the new provisions, remedying damages caused by the violation of an interest is also mandatory if this interest is legitimate and serious and – through the way it manifests itself – it creates the appearance of a subjective right (art. 1359 of the New Civil Code). We would like to point out that this legitimate interest shall be licit and moral and the right of the person to manifest a certain conduct and to demand from other persons to manifest an adequate conduct shall unequivocally result from actual circumstances.

Naturally, according to legal logics, any damage gives birth to reparation. The right of the victim to reparation is born at the moment of committing the illicit deed causing a damage even if this person has not validated it immediately. According to the provisions of art. 1385 para. 4 of the New Civil Code, both damages suffered

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[8] Authors – A. G. Atanasiu, A.P. Dimitriu şi alţii, *Noul Cod civil. Note. Corelaţii. Explicaţii*, C. H. Beck Publishing House, Bucureşti, 2011, pp. 507-508.

[9] See Decision . 466 / 03.16.2015 Decision no. 3809 / 01.10.2013 and the Decision . 4134 / 10.24.2013 , the Court of Appeal Cluj available to the jurisprudence of the site Cluj Court of Appeal ..

[9] L. Pop, *op. cit.,* p. 241.

effectively and unrealized gains shall be remedied unless otherwise provided by law. Complementary, the author of the deed shall also reimburse the expenses incurred in order to avoid or mitigate the damages. As for future damages, the injured party may obtain damages if he/she proves that the damage suffered is certain and consequently it is susceptible of evaluation. The loss of the chance to obtain an advantage as a result of the illicit deed shall be repaired proportionately with the probability of obtaining the respective advantage. The situation is the same in the case of losing the chance to avoid the occurrence of damage.

For a damage caused by losing a chance to be certain and able to be remedied the following conditions must be fulfilled: the chance shall be real and serious, losing this chance must directly follow from an illicit deed or another circumstance which engages delictual civil liability; when establishing remedies the margin of uncertainty which affects the possibility of the chance of winning or of avoiding the risk of losing[10]. Taking into consideration all of the above, the role of judicial practice appears as evident in identifying and interpreting relevant practical aspects and – why not – in elaborating certain general criteria for analysing and actually individualising these conditions. From this point of view, in our opinion, we may compare this situation with the issue of moral damages[11].

As for contractual civil liability, as provided for in the New Civil Code – art. 1350, any person shall fulfill his/her obligations undertaken and when these obligations are not fulfilled without justification, the person in question shall be held liable for the damages caused to the other party.

The conditions for engaging this kind of liability are as follows: an extra contractual illicit deed, damage caused to the creditor, causality and the author's guilt[12]. We would like to point out that the parties may not derogate from the rules of contractual liability even if the rules of tort liability would be more favorable.

As for the guilt or fault of the debtor of an obligation, art. 1547 of the New Civil Code clearly states that debtors have the obligation to remedy the damages caused to their creditors intentionally or by negligence. The technique of regulating guilt is the same as in criminal law.

In order to remedy damages caused, debtors shall pay pecuniary damages when fulfillment in kind of their obligations is no longer possible. Damages are divided into the same two categories as in the former Civil Code, i.e. compensatory and moratory damages. The difference between these two types lies in the possibility of being cumulated with fulfillment in kind. While compensatory damages replace fulfillment in kind and they may not be cumulated, except for the case when we have to deal with a partial non-fulfillment of obligations, moratory damages are cumulated with fulfillment in kind or compensatory damages.

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[10] L. Pop, *Reglementările noului Cod Civil cu privire la repararea prejudiciului în cazul răspunderii delictuale,* in "Dreptul" nr. 6/2010, p. 20-21; L. R. Boilă, *Discuții privind prejudicial cauzat prin pierderea șansei de a obține un avantaj în cadrul răspunderii civile delictuale,* In Dreptul nr. 7/2010, pp. 99-128.

[11] In this respect, see Decision no. 714/A/2015 and Decision no. 715/A/2015 of the Cluj Court of Appeal, available in the Jurisprudence section of the Cluj Court of Appeal website.

[12] L. Pop, *op. cit.,* p. 241.

When compensating damages, both actual damages and future – but certain – damages are taken into consideration. We would like to emphasize that potential future damages and damages consisting of losing a chance to obtain an advantage are not identical. These latter ones may be repaired proportionately with obtaining an advantage and taking into consideration the circumstances, as well as the creditor's actual situation.

Debtors are only responsible for damages foreseen or that could have been foreseen as a result of non-fulfillment of their contractual obligations, provided that non-fulfillment is unintentional or there is no gross negligence on behalf of these debtors. The proof of non-fulfillment does not exonerate creditors from having to prove the damages caused, unless otherwise provided by law or the agreement between the parties.

Damages are owed from expiry until the date of fulfilling the obligation, in the amount agreed upon by the parties or – in the absence of such agreement – as provided by law. Their amount will not decrease even if the debtor would prove that the damages suffered by the creditor is smaller, and if before expiry the debtor has owed higher interest than the statutory interest, moratory damages are owed in the amount determined before expiry.

As for cumulating the two forms of liability, this has also been clarified by the New Civil Code which has eliminated any uncertainty regarding this problem. Art. 1350 para. 3 states that unless otherwise provided by law, none of the parties may set aside the application of the rules on contractual civil liability in order to opt for other rules.

In conclusion, as a result of comparatively analyzing the legal provisions from the former and the new Civil Code, we may observe a clear and complete regulation of these two types of liability. Thus, problems regarding the uniqueness or duality of civil liability have been clarified and the two forms that civil liability may take have become unequivocal: tort liability and contractual civil liability.

Moreover, principles used in jurisprudence in the field of civil liability have been transposed into legal provisions in the New Civil Code. Thus, different interpretations of aspects related to the conditions in which a form of civil liability may be engaged, to the extent of damages caused and compensation awarded may be avoided.

The problem under scrutiny remains an open subject especially from the perspective of solutions offered by judicial practice, which has the very important role of clarifying – by application to actual cases – the new regulations regarding these fundamental civil law institutions.