

MINORS' RIGHTS TO MORAL DAMAGES AS INDIRECT VICTIMS OF ROAD ACCIDENTS

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Abstract

Unfortunately, lately, traffic accidents in Romania with serious repercussions tend to be a constant of our times. The consequences are dramatic. We refer here only to those events whose consequences are affected roads directly on minors by the death of one or both parents.

In this context, quite often, minors in their capacity as indirect victims of road accidents in Romania are not moral damages by courts in accordance with the amplitude and subsequent damage to multiple road accident victims whose indirect were. Surprisingly, in such situations, does not take into account national and European legislation and case law.

We propose therefore to examine critical decisions of judicial authorities who defeated a fundamental right of the minor, which is to be happy in the midst of his family to be raised in conditions that allow the child's physical, mental, spiritual, moral and social.

Keywords: *accidents, minors, victims, right, damages*

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1. Introduction

Unfortunately, as of late, serious road accidents in Romania tend to become a constant occurrence in our lives.

The aftermath is dramatic. We are referring here only to the events whose consequences directly affect minors because of the death of one or both of their parents in a car accident.

In this context, very few minors as indirect victims of road accidents in Romania receive moral damages in court or their moral damages and multiple losses are quantified incorrectly.

The definition of the loss can be found in most works within the literature, being considered the substance of tort liability „which consists in the result with a negative effect on a person due to an illicit act committed by another person, an animal or object.” (Stănescu, 1998). Surprisingly, in these

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situations, neither national, nor European legislation, or the specific jurisprudence in the matter are not respected.

We thusly aim to critically analyze some arguments of those who believe that minors should not be within the group of people who can benefit from moral damages because of the death of one or both of their parents as a result of car accidents. Such an approach can be found, in isolated cases, at the level of the court or within the doctrine, but especially and “heavily” at the level of insurance companies.

From our perspective, the allegations on this subject in the public space, which rule for non-indemnity, defeat a fundamental right of the child that of being happy within his or her family, to be raised in conditions that aid his or her physical, mental, spiritual, moral and social development. By family, as the national law states it, we understand the parents and their children. (Art. 4, letter b of Law no. 272/2004 concerning the protection and promotion of children’s rights, published in the Official Gazette of Romania, Part I, no. 557, June 23, 2004).

From the very start, we wish to circumscribe the group of persons who have the status of minors, as our current legislation is not steady on the matter.

At the same time, if the new Civil Code expressly and exclusively refers in art. 38 to the notion of minors when it refers to this category of persons, the Romanian Constitution speak both of minors and children. For example, art. 29, par. 6 states that “*Parents or legal tutors have the right to ensure, in accordance with their own convict the education of the minor children whose responsibility devolves on them.*”

Or art. 48, par. 1 states that “*The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.*”

Also, art. 49, par. 1 speaks of the fact that “*children and young people shall enjoy special protection and assistance in the pursuit of their rights,*” while par. 4 states that “*minors under the age of fifteen may not be employed for any paid labour.*” (Roş, 2017).

Another regulation, Law no. 272/2004, seeks to protect and promote children’s rights, with par. 1 stipulating that “*The present law regulates the legal framework concerning the observance, promotion and guaranteeing of the rights of the child,*” while art. 4 letter a specifies that by “child,” we understand “*a human being below the age of 18, who has not acquired full capacity of exercise, according to the law.*”

No matter the terms used in Romanian legislation however, we come to a clear conclusion, which is that all persons under 18 years of age are considered minors or children.

Irrefutably, the death of one or both parents in a car accident, no matter the situation in which it occurred, will inflict irreversible trauma, the life of

minors being on special coordinates. By the death of the parent, the minors are deprived, suddenly and undeservedly, essentially and irreversibly of a normal family environment, their moral development affected by this premature loss in their life, thus being left without a normal family climate, the love of their parent, the protection and psychological comfort of a two-parent family.

We can state, without a doubt, that they suffer limitations and deprivations resulting in dramatic long-term affective losses. The pain minors go through in these cases one of the most powerful family tragedies, being attached to the loss of the parent. Undoubtedly, by their death, a feeling of unrecoverable loss affectively settles within their being, destabilizing their values and ideals.

We also must keep in mind the disintegration of the family, the minor having to grow up without the affection, love, support and guidance of the deceased parent, crucial in this stage of their life. To summarize, the child's right to grow up with their parents is breached. (Art. 30, par. 1 of Law no. 272/2004)

Not having one or both parents is devastating, as they help and guide children as they grow and learn, in all domains, especially with school, and as minors have the right to benefit from a decent living standard that allows their physical, mental, spiritual, moral and social development. From this perspective, it is beyond a doubt that the disappearance of a parent deprives the minor from proper financial support that may affect and destabilize the entire family left behind.

More than that, the parents can properly ensure according to the constantly growing capacities of the minors the necessary guidance and advice to exert their rights, emotional stability and confidence, all necessary to follow an honest and right path in life.

Minors are considered in these cases indirect victims, third-party victims or victims, "par ricochet" of the road accident. As demonstrated in the doctrine, in these conditions, "the victims par ricochet suffer a personal loss, generated by the death of the direct victim," that is, the death of the parent. (Jugastru, 2013).

We ask then if the minors in the situation are entitled or not to damages. Art. 1390, par. 1 and art. 1391, par. 2 of the Civil Code offer us the answer. Thus, the former states that "damages from losses caused by the death of a parent can be given only to those, according to the law, under the care of the deceased," while the latter states that "the court will, also, offer damages to the parents, children, siblings and spouse for the suffering caused by the death of the victim, as well as any other person who can prove the existence of such loss."

Thus, the new Civil Code speaks of a larger group of people who can benefit from damages in the case of a death, including not only members of the family, but also any other person who can prove that there has been loss caused to them by this event.

The sole condition to claim damages is the existence of a strong affective bond between the victim and the person claiming the right in court. In other words, the affective bond is the essential criterium which determines the affective loss manifested in psychological ailment caused by the death of a dear person.

The affective loss marks relationships which are personal, bonds that are specific to family life and include the spouse, parent, children, siblings and close relatives.

Moral damages for the affective loss, as it has been proven in the literature, can be “granted if there is proof of a shared life with the victim until their death and of a strong affective bond.

The shared life must be understood simply, as a very close relationship and not in the physical sense of sharing a residence.

The shared life means the fact that the two were in tight relationship, were very close, supported each other, shared each other’s joys and failures, advised one another, etc, even if they had separate residences, but were sufficiently close to spend a lot of time together.” (Vladu, 2010)

This means, in the case of minors, who shared a household with parents, that the affective loss cannot be refuted. Evidently, the minors who go through such an experience also suffer a moral loss, because of the psychological suffering caused by the death of a loved one.

There is also a psychological loss, of company, caused by this premature disappearance which implicitly produces recreational problems, limiting the possibilities for the children to enjoy life, to enjoy the material, spiritual and sentimental satisfaction that life with the victim could have given them.

With all that said some court institutions, a part of the literature and, last but not least, insurance companies consider that very young minors cannot feel psychological trauma that demands moral reparations. Essentially, they believe that minors in such situations are not conscious, in their bio-psychological stage, of “the gravity of the disappearance of one of their parents as the child’s degree of attachment and feelings, as superior forms of conscious manifestation of affective experience, are present later.” Based on this, the conclusions are that “in such situations, the affective loss is non-existent and the request for reparations made by the legal representatives of these persons must be denied.” (Vladu, 2010)

A first observation about these allegations refers to the minors’ “being conscious” of the death.

This element is not in the Romanian law, and rightfully so, as it is impossible to demonstrate. A second observation refers to the term of “very young minors.”

There is no definition of what that means anywhere, of what age the minor must be to be registered in this category. A third observation refers to the segment that states that human feelings “develop later.”

A few rhetorical questions: How late? Up to what age? Who can determine the moment when the minor can be conscious of the loss and solicit reparations through his legal representatives?

By court decision¹, it has been concluded that a four-year-old whose father died because of a car accident cannot benefit from moral damages because the minor “is not aware of the same moral suffering that the other older members of the family are going through, and his status was not substantially affected by the death of his father, the civil party still living with his paternal grandparents as before the death, even if, in fact, the minor son of the victim is the most affected by the death of his father in what concerns his development from now on, as he must grow up without his father, without his support...”. (Penal Sentence no. 97 from February 25, 2013 by the Court of Justice of Petroșani, unpublished).

Although the court references, fully, with subject and predicate, that the minor is the most affected by the death, it still concludes that all of the aforementioned aspects “in the assessment of the court, do not call for moral reparations.”

Such an approach is unfounded. In our conceptions, a minor deprived of the care and affection of the parents suffers the most. Even if, in this hypothesis, the minor would be too young (but how young!!!) to process the loss, the pain will grow proportionally as time goes by, because no child in the world should grow up without the love of their parent.

No joy, however great, will be felt fully without being shared with that person who was not long ago their father.

The sadness, suffering and frustration the minor will go through at different stages of his or her life, from childhood to adolescence and also afterwards cannot be denied, not ignored. All of these will not be alleviated by the wisdom, understanding and love that only a parent can offer. He or she will always be under the weight of a depressing question: How would it be if my father was alive?

Thus, it is evident that the minor has suffered a permanent moral loss by the death of his father, being, as the court also understood, the most affected. Yet, if he is the most affected, as a consequence, reparations should be necessary, directly proportional to the loss.

It is the very arguments that the court bases its reasons not to compensate the minor are also the arguments for which the court should rule the opposite.

The claim that states, in our opinion, that the minor’s status and situation were not *substantially affected by the death of the father* is not real because he

¹ Penal Sentence no. 97 from February 25, 2013 by the Court of Justice of Petroșani, unpublished.

is still living with his paternal grandparents. It is true that while the father was working, his grandparents cared for him, as is the case with any united and responsible family, as long as the grandparents are capable to provide help.

But that does not mean that the life of the minor has not changed because of the father's death, as he, during his life, looked after the child after work.

Any other comment regarding the lack of foundation for this assertion we consider being superfluous.

Countering the decision, the civil party's appeal was accepted, the four-year-old, through his legal representative, obtaining moral reparations from the court in light of national and community jurisprudence, refuting the judge's reasoning to exclude the minor from the right to moral damages, as it was proved without basis. (Penal Decision no. 526/2013 by the Court of Appeals of Alba Iulia, unpublished).

Another case, overseen by the court, saw a 3-year-old minor soliciting, through a legal representative, at the date of the road accident, moral reparations for the death of her father, a direct victim of the accident. The insurance company requested the court to deny the civil action of the minor because "*at this age, a child cannot understand what is happening around him or her and what's more, he or she does not have the necessary ability to feel the loss of a person,*" she does not have "*the psychological capacity to perceive the disappearance of the parent,*" and that "*she does not possess the biological capacity to feel emotions.*" (Penal Sentence no. 1326/19.11.2014 by the Court of Justice of Cluj-Napoca, unpublished).

The very pretension not to grant moral reparations to the minor is, at least in our opinion, unfounded and without basis, if not outright gratuitous. It is obvious the minor has suffered an affective loss by the death of her father, being the most affected out of all the other adult members of the family. As jurisprudence has correctly objected, "the affective loss does not occur instantaneously, but survives and grows in time by the feelings, sensations or memories it causes." (Civil Sentence no. 79/2013 by the Court of Appeal of Cluj, unpublished).

Undoubtedly, as the psychological report done in this case pointed out, the minor suffered an emotional shock, the psychologist underlining that the minor "has symptoms of depression and there are signs of a regression to previous stages of development, specific to children going through intense stress."

Furthermore, the court is obligated to operate in service of the utmost interest of the orphaned child, stripped of his or her right to grow up and develop harmoniously with their parent still alive by the irresponsible act of the person responsible for the car accident.

Along these lines, our legislation has as an objective the utmost interest of the child, an aspect regulated, among others, by art. 32 of Law no. 272/2004,

concerning the protection and promotion of children's rights, which states that *"the child has the right to be brought up in an environment which would allow the child's physical, mental, spiritual, moral and social development."*

However, it is evident, from this fact that this right will be difficult to fulfill if one or both parents die, however much the remaining parent, the siblings or grandparents with which the child hypothetically lives will struggle to fill this void.

The principle of the utmost interest of the child is specified in art. 2 of Law no. 272/2004, "in all actions and decisions concerning children, whether undertaken by public authorities and authorized private institutions, as well as courts of law, the best interests of the child shall be a primary consideration."

The courts of law must respect, when tasked with actions that concern moral reparations for minors who have lost a parent, the national law, art. 1391, par. 2 of the Civil Code, national and community jurisprudence, but also Resolutions 75-77 of the Committee of Ministers of the European Council from 1975, chapter 19, concerning the reparation of losses caused by bodily trauma or death which maintain that reparations for psychological ailment is also granted to children, no matter their age. Resolution no. 74 of the same organization, set in motion on March 14, 1965, also states unequivocally that, "in the case of a death, the reparations for the affective loss must be granted to the parents, spouse and children of the victim because it is only in these cases that the reparations is subject to the condition of the persons receiving it sharing a tight bond based on affection at the time when the death occurs."

As a consequence, any exclusion of minors from the right to benefit from moral damages for the death of one or both of their parents is null legally. Jurisprudence in this situation is, in large part, in order to successfully receive moral reparations, underlining how the moral damages caused by the death of the parent is all the more significant if there are minors of a very young age in the situation, and as such, there is no room to question the moral losses and it is quite the contrary.

Of course, we acquiesce to the legal practice in the domain, underlining ourselves that there is no case in which the moral suffering of minors cannot be ignored, especially given their age when the death occurred, when the negative consequences are more intensely understood, accepted and perceived than at an adult age, with effects on further psychological development.

Thus, for example, by Penal Sentence no. 1877 of December 22, 2011 ruled by the Court of Law of Oradea, maintained by the Court of Appeals of Oradea, by Decision no. 299 of March 20, 2012, under the aspect of moral reparations the minor is entitled to, it was established that the minor, who was one year old when her father died in a car accident, is to be granted reparations.

The reason was that *“the moral damages are in this case meant to partially compensate the disappearance of the father, especially in the first years of life, and all that the care of a parent means.”* As a consequence, as opposed to what has been claimed, sometimes, in the doctrine, it is the very young age of the minors that is the foundation to the existence of adequate and reasonable reparations.

Another example speaks for itself in this case. By Penal Decision no. 677/R/2012 of the Court of Appeals of Cluj, all of the moral reparations granted to a minor were fully granted as a result of his father in a car accident, by Penal Sentence no. 175 of February 9, 2012 by the Court of Justice of Cluj-Napoca.

It was concluded that *“by the victim’s death, moral damages have been produced to the civil parties, consisting of psychological suffering caused by such a loss, which is greater because the minor was only five years old at the time of the accident, thus being stripped of the care and affection of one of the parents.”*

Also, Penal Sentence no. 861 of May 17, 2013 by the Court of Law of Huedin and the appeal through Penal Decision no. 1593/R/2013 of the Court of Appeals of Cluj, in Criminal Case File no. 3475/235/2011, the moral reparations to a four-year-old minor after the death of her father in a car accident were considered just, as both her and her mother, the wife of the deceased, suffered *“intense and long-term affective losses.”*

Moreover, in the same context of the right of minors to reparations after the death of one or both parents in a car accident, even children who were not yet born at the time of the accident have the right to such reparations. For example, by Penal Decision no. 389 of June 13, 2006, the Court of Appeals in Alba Iulia granted moral reparations to a minor who was not born when her father died in a car accident. The only condition was for the legal conditions for the situation to be met, as art. 7, par. 2 of Decree 31/1954 states that *“the rights of the child are recognized from their conception, but only if he or she is born alive.”*

The conceived child is treated as if he or she were born when it comes to his or her rights. As a consequence, establishing the minor’s relationship to the victim (her father), she benefits from all legal rights that she would have had if the victim were alive.

It is evident that if moral reparations are granted to unborn children, under the condition of meeting legal requirements, they should not be in question when it comes to the rights of children already born, no matter the age.

The fact that some courts of justice paralyze the right of minors to moral reparations after the death of one or both of their parents in road accidents while the majority, on the contrary, grant them to minors no matter their age breaches constitutional principles, those of respecting equality in front of the law and of non-discrimination.

It is the natural consequence of the constitutional dispositions that state in art. 16 of the Romanian Constitution that no one is above the law and all citizens are equal in front of the law and public authorities, with no privileges or discrimination, meaning that equal legal situations need equal legal treatment and different legal situations require different legal treatment.

In other words, the principle of equality in front of the law means the institution of equal treatment for situations that, according to the purpose, are not different.

As a consequence, as stated, a different treatment cannot be just the expression of exclusive appreciation of the lawmaker, but it has to be justified within reason, to respect the principle of equality of citizens in front of the law and public authorities.

This is because art. 4, par. 2 and art. 16, par. 1 of the Constitution stipulate that Romania is the common and indivisible country of all of its citizens, no matter the race, nationality, ethnicity, language, religion, gender, opinion, political beliefs, wealth or social origin. It is evident that this principle of non-discrimination must guide the activity of courts of justice also.

We believe that the suffering caused to the child by the death of their parent is the same no matter the conditions in which the car accident took place and no matter the financial status of the perpetrator.

The judge must only estimate which are the best conditions in which the reparations can be ensured and not to refuse the minor's right to them. Thus, legal norms concerning minors' rights to moral reparations that reference Romanian legislation and jurisprudence are mandatory for the court of justice, not optional.

As a consequence, according to constitutional dispositions, the treaties that Romania has signed and instated are part of Romanian law, even having priority over it, a context in which both the jurisprudence of the Court of Justice of the European Union and of the European Court of Human Rights are mandatory for Romanian courts of justice.

We believe that judges have the obligation, in establishing the right to and amount of moral reparations, to examine Romanian jurisprudence and the aforementioned Courts, in order for minors to receive their reparations and for the reparations to be just and reasonable.

In this sense, of the non-discrimination we mentioned, we also have art. 14 of the European Convention of Human Rights. In essence, the right to non-discrimination, recognized in art. 14 of the Convention protects physical persons, including children, found in similar situations, against a different treatment, in relation to the rights and freedoms that the Convention recognizes.

At the same time, moral reparations not only should be given in the cases analyzed here, but they also have to be sufficient and established "in equity,"

according to national and European legislation and jurisprudence. European Directive no. 2009/103 seeks to guarantee direct and indirect victims of car accidents a comparable treatment, no matter where the accident takes place in the E.U.

The lawmaker of the E.U. has continuously affirmed this objective in its numerous decisions in the matter as well, respectively that “*victims of car accidents should be guaranteed a comparable treatment, no matter where the accident takes place on the territory of the Community.*” (Decision C-409/11 on July 11, 2013, Gabor Csonka et al, point 26) (See the Decision of October 23, 2012, Marques Almeida, C-300/10, point 26).

Because, as estimated (the Decision from April 28, 2009, the Commission of the European Communities v. the Italian Republic, C-518/06, points 73-74), adequate reparations to direct and indirect victims of car accidents are an imperative requirement of general interest, a guarantee in fulfilling the objective of social protection of the aforementioned victims, especially when the indirect victims are minors.

This objective, pursued and constantly reinforced, with obstination, by the E.U. lawmaker, is also apparent from the Decision from September 4, 2014, Damijan Vnuk, C-162/13, point 52.

The European directives in what concerns insurance refer to the “*sufficient*” character of reparations, mentioning that, in any circumstance, “*guaranteeing sufficient reparations to the victims, no matter the member state where the accident occurred*” must be a priority.

As a result, even the Romanian state, through its courts of justice, should guarantee the reparations to minors for the losses caused by the death of their parent(s) in a car accident and also the adequate amount of these reparations.

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