Bulletin of the *Transilvania* University of Braşov – Special Issue
Series VII: Social Sciences • Law • Vol. 11 (60) No. 2 - 2018

CONSTANTS OF TORT LIABILITY'S

Laura MANEA[1]

Abstract: *The legislative changes brought through the adoption of the new Codes also affected the institution of civil liability, in the new drafting of the Civil Code the legislator maintained some solutions and the general line drawn by the Civil Code from 1864, but also have been adopted provisions by which the legal institution of liability has been adapted to the transformations that today's technological society imparts to the relationships between individuals. Regardless of the legal regulation, the institution of civil liability constantly presents the two defining elements: the damage and the guilt, the difference regarding the regulation is based on the liability's principles.*

Key words: *civil liability, responsibility, damage, guilt, servant.*

1. Introduction

Man is a social being who asserts and individualizes itself only in social relationships. Constrained by the rigors of co-living within a society, even though during the course of the evolution the individual has emancipated in respect of certain rights and obtained different degrees of freedom, the right to act at will, without reference to social relations rigors and the common good, is not a recognized right. The freedom of choice and decision-making is accompanied by the obligation to circumscribe its actions in the normative framework of the objective laws that govern society and nature as a whole, and to relate to the interests and aspirations of the other individuals with whom it socializes and the collectivities it belongs to. In a legal sense, "*freedom* (n.n. of the individual) *is the ability to manifest itself without legal obstacles, that is, sanctions that prevent manifestation by threatening certain accountabilities*" (Ivănceanu, Ș.V., 1944, p.12-13).

By addressing the correlation between the freedom and the ability of the individual (freedom of man in relation to himself), we distinguish between the actions of the individual in a social context: a person has the liberty to do certain things, but is not able to do them as it can be able to do certain things but does not have the liberty to do them. The approach of freedom in relation to society and community reveals the means required to achieve an action, making the distinction between formal freedom and material freedom, the connection between the two being part-whole; material freedom determines the scope of the formal one. Even if the individual is free to address a

[1] *Transilvania* University of Braşov, manea@unitbv.ro

certain course of conduct, the limits of liberty relate to the subjects the individual interact with, so that freedom is interpersonal and makes sense in relation to others and to the social framework in relation to which individual actions are regarded. Starting from the external moral accountability exerted by the community, the political-state society has innovated new forms of liability (Popa N., 1996, p.321).

2. Liability versus accountability

Human behavior is the subject of social evaluations and reactions and can only be assessed by comparison to the standard offered by the various norms governing the human life in society (religious, moral, political, legal norms). Depending on compliance or non-compliance with the said social rigors, certain social consequences are involved. Thus, social and individual order and security are ensured only by strict observance of social norms requirements that establish the obligations and the prohibitions. On the contrary, any deviations from these norms imply a legal, religious, political accountability involving the author's obligation to bear the consequences of the act contrary to social norms and to restore social order.

From this perspective, accountability arises as a means of ensuring, respecting and defending social norms and imposing a conduct that guarantees the existence of the society itself**.** Social accountability is nothing more than social sanctioning of the attitude chosen by the individual in the event of an inconsistency between his /her conduct and the established social norms. Social, by its nature, and unitary through content, accountability is multilateral at the same time, since it acts within the different forms of manifestation of social phenomena and relations. We may speak of moral, political, and legal accountability. To illustrate these forms of accountability, the literature proposed the concept of "accountability" expressing the consequences of social action in general and encompasses: religious, moral, political and juridical accountability in interdependence and correlation.

Although etymologically, the modern Romanian language dictionary (Dicţionarul explicativ al limbii române, Academia Română, 1998) puts the sign of equality between liability and accountability, defining accountability as an obligation to do one thing, to be liable, to account for something, we believe that from a legal perspective, liability implies the intrinsic accountability of the person, because in case of non-compliance with the breached rule, the legally liable individual will bear the consequences of his/her deed, both personally and over its assets. Thus, legal liability appears to be the classic tool for achieving legal prescriptions. Once legal liability is engaged, the person's accountability appears to be the correlative to restoration of the violated order. Liability is a social fact and is limited to the organized, institutionalized response triggered by a fact considered reprehensible in relation to the general behavior established according to norms accepted by the society. Liability and sanction are not and may not be blind forms of revenge, asserts the teacher Nicolae Popa (1996, p.321), but modalities of legal reward, reparation of the broken order, for reunification of the affected patrimony and social defense, are actually sides of the same social mechanism.

Accountability is “caring for success or risk, outcome and efficiency*, consequences and value of the activity he individual carries out to the benefit of the collectivity it belongs to*

and which is affected by the outcome of such action" (Florea M., 1976, p.79). This definition underlines the following features of accountability: 1) a social institution of value, 2) institution specific to each individual who acts in the socialization process, 3) the aim is to improve the social system and 4) is optional, being the result of the free engagement of the individual in its actions. To be understood, accountability must be seen in relation to the personality, as a set of features, individual moral and intellectual characteristics that make each person to be unique. Thus, if accountability is purely moral, linked to good behavior and relation to the society, liability is a predominantly normative institution aiming at preserving the society within the normative framework assumed by it and becomes effective when a norm of behavior is violated. Accountability shall not be confused with legal liability, as the latter it is a legal relationship imposed on the outside individual, while accountability is the internal and personal act that the individual does in relation to his / her own consciousness, referring to norms and social values. The moral-law distinction will be emphasized by Immanuel Kant and his individualized definition of law, with an accent on the freedom of the individual, where the moral action (and not knowledge) come first, and thus law is subordinated to the moral. Moral is a limit for the Law, which is not presumed to act on the inner springs of the human being. Conversely, the law derives from morality, because a moral action is led by the concept of duty prescribed by the law (Kant, 2014, p.26).

Focused on the concept of reason, Kant distinguishes between native rights, natural rights, domestic and moral rights, and acquired rights, external rights. Since the only natural right is freedom, the subordination established by the philosopher between the law and the moral appears even more evident if we remember his definition of law as "science limiting liberties to establish an agreement between them".

3. Theories of Civil Liability

If at first the Roman law outlined objective and individual legal liability in the form of voluntary cash composition, gradually it became legal pecuniary composition, consecrating legal liability as a social fact. Its foundation was objective: the act of causing damage or other damages gave rise to the right to a legal fine.

The concept of fault at the base of liability occurs around the year 286 BC with the adoption of the Aquila Law, which stipulated that liability can not be accepted when raised against unreasonable beings, such as children and madmen, people who cannot be at fault. During the Middle Ages, are consolidated the foundations of the subjective concept of civil liability, the fault becomes not only the basis of civil liability, but also an essential condition indispensable to it. Thus, the subjective theory (based on fault) divided the ground of the foundation with objective theory (regardless the fault and based on the idea of risk and warranty) and mixed theory - the conciliation between substantiation of civil liability by fault or at risk (Uliescu M. coord. 2011).

Into the conception of subjective responsibility theory, civil liability is considered as a civil sanction with reparatory character, liability based on error or fault, intentionally or not intentionally. In this vision, the guilt or error or fault in any form of it is the basis of civil liability, in this subjective situation (the psychological element), it brings the obligation of the person who caused the damage by his own deed to repair it. Of course,

the victim must prove both damage and guilt or fault, unless there is a legal presumption of guilty.

Even if in French law the principle of civil liability is based on a fault, in the sense that any action by the person causing the damage causes him to be repaired in respect of the one whose negligence, error or recklessness has caused the damage, in the German Civil Code, the regulation of civil tort liability was limited to the offenses expressly provided for by law.

In this subjective view, civil liability appears to be a sanction specific to law, of a reparatory nature, which can only be applied if it is based on the fault or mistake of the author of the prejudicial act or of the person responsible. Mistake, guilt or guilt is the sole basis for liability, being conditioned by the attitude of the author or person responsible for his deed and his / her detrimental consequences. Along with economic and social development, industrial and technical development, and implicitly the use of other people's work, the conditions of civil liability based on individual immoral and unethical conduct are changing, the care and prudence that a person has to manifest in an ample engagement industrial production became the argue. Thus, precisely the work accidents have highlighted the deficiencies and insufficiency of the concept of subjective accountability (this is just an example). Often the victim was in the situation of being unable to prove the culprit of the person who was the author of the illicit deed, and the damage suffered by it had risked to be left uncorrected.

In doctrine and jurisprudence, in spite of the attempts to eliminate the culprit and to find a new basis of civil liability at risk, a common denominator was not reached, for which was make a conciliation of the idea of guilty was attempted with the necessity of finding a favourable solutions for victims, too, by broader redefinition of civil liability. In an attempt to save the idea of culpability, judicial practice has confirmed that accepting the concept of objective responsibility based on the idea of risk has a moral justification, which can be argued from the position of equity, the social state in which the persons must find themselves in the social relations. Thus, when the detrimental consequences of conduct and activities are impossible to foresee and avoid with the usual average prudence and diligence, it is justifiable to engage civil liability independently of any proven or presumed misconduct.

The elaboration of mixed theories that admit the coexistence of both grounds - fault and risk - has faced it controversy over the weight of the two, most claiming that the main motivation is and remains the fault, the idea of risk intervened in a subsidiary way.

4. Guilt - Condition of civil liability and of the responsibility of the servant

According to common law, the liability is conditioned by the gather of four elements: the unlawful act, the damage suffered, the causal link between the deed and the damage and the guilt of the author. Under the previous Civil Code, there has been controversy over the extent to which the fourth condition, namely the guiltiness of person, is necessary for the accountability of the servant.

The majority opinion in both the legal literature and the jurisprudence was in the sense of fulfilment of the obligation regarding the guilt, considering that the accountability of the principal can be committed only if the servant has acted guiltily.

There were, however, authors who even considered under the previous Civil Code that guilt is not an essential condition. Indeed, part of the doctrine has held that the obligation of the principal to repair the damage has an indirect and ancillary character in relation to the obligation of the servant to do it; consequently, if the obligation of the servant does not exist (because of his lack of fault), the obligation of the principal can not exist either. On the contrary, other authors considered that there is an obligation of the principal to repair the damage caused by the servant, independent of a possible obligation of repair by the servant. As a result, even if the principal repairs the damage caused to the victim, it is possible that his regress action against the servant may not be successful, as a result of the fact that he alleges his lack of fault. This solution is only explicable in so far as it is considered that there are two distinct obligations, none of which is the accessories of the other, namely the duty of the servant to repair and, independently, the duty of the repair by the principal. The problem of the extent to which the servant's guilt is a condition for engaging the principal's responsibility goes, in essence, into the way about solving the relationship between the accountability of the servant and the accountability of the principal. As long as the principal's liability is considered to be that of the servant, the fault of the latter determines the accountability of the first. However, if the obligation of the principal is not considered an auxiliary of the obligation of the servant, but an independent liability, then it will be appreciated that it is happened independent through the determination of the servant's fault into committing the deed causing the damage

The adoption of the new Civil Code does not completely remove these controversies, as it does not in itself provide an express provision on the issue of the servant's fault. Although it should be pointed out that neither the old Civil Code explicitly provided for the guiltiness of the servant as a condition for the accountability of the principal, the absence of the reference to fault is today considered to reflect the (new) conception of the legislator on the conditions of the principal's responsibility for the servant's deed. An argument in this respect is the fact that a preliminary form of the draft law, which expressly provided for the necessity of the fault, was ruled out, which could lead to the conclusion that the legislator understood to embrace the opinion (so far in minority) of the accountability the principal based on the assembly of only three of the four conditions (unlawful deed, injury and the causal link between them).

5. The Damage - the condition of civil liability and of the liability of the principal

Article 1373 C. civic stipulates in par. (1): "The principal shall be required to make good the damage caused by its servants whenever the act committed by them is connected with the duties or functions entrusted to them". Although par. (1) refers only to the functions entrusted, correlating these provisions with those of paragraph (2) shall consider that the responsibility of the principal is also involved if the act is committed in the execution of "servants". The difference is the permanent or occasional nature of the activity. Thus, for example, in the case of an employee, he will carry out the duties stipulated in the job description (therefore, "assigned functions"), but also the superior's orders, which may occasionally exceed the job description (as "assignments"). If he carries out a detrimental act on the occasion of any of these, his employer's liability as

the principal will be imputed. The principal is therefore answerable if the servant produces the damage in the performance of his activities or duties. But the principal's responsibility exceeded this limit; he will even answer for acts committed by abuse of office, violating the limits of his activities or duties. The only condition that the law requires is that the victim did not know that the servant does not act in performing the function or duties received. Thus, art.1373 par.(3) reads as follows: "The Principal shall not respond if it proves that the victim knew or, in the circumstances, could have known, at the time when the harmful act was committed, that the servant acted without any connection with his activities or duties entrusted to him". *Per a contrario*, responsibility arises if the victim is unaware of the abusive function of the servant. Good faith is presumed [art. 14 par. (2) C. civ.], therefore the victim of the damage is presumed not to be aware that the servant has acted unrelated to the functions entrusted to him. It is the task of the principal to prove that the victim is in fact in possession of this information.

In any case, the rapport of subordination must exist, be present. Thus, for example, it might be questioned whether this responsibility can not be traced even after the rapport of subordination has ended, to the extent that the victim of the act is unaware of this circumstance. For example, the employee is fired, then he commits an injurious act. Will his former employer, as an "apparent principal," answer if the victim of the deed was unaware of the fact that the rapport of subordination had ceased? We think not; the essential condition for committing the accountability of the principal is that the rapport of subordination exists, not to be ended, regardless of whether or not the victim is aware of this issue. The situation is different from the one in which the subordination rapport does exists, but the servant acts unrelated to the duties or the functions entrusted to him, although the victim was unaware of this circumstance, considering that the servant acted in the exercise of his duties assigned to him from the principal.

As has been shown, the prejudicial act must be non-contractual. In other words, there must be no contractual relationship between the principal and the injured third party. If, on the contrary, the damage is caused by a person designated by one of the parties to perform the contractual obligations of the other party to the other party, the legal basis of liability will be different, it will be article 1519 C. civ.

References

Florea, M. (1976). *Responsabilitatea acțiunii sociale* [Responsibility of social action] Bucharest: Editura Științifică și Enciclopedică.

Ivănceanu, Ș.V. (1944). *Libertate și autoritate. Înțelesul lor constituțional* [Freedom and authority. Their constitutional meaning]. Bucharest: Institutul de Arte Grafice *Marvan.*

Popa, N. (1996). *Teoria generală a dreptului.* [General Theory of Law] Bucharest: Actami.

Uliescu, M.(coord.) (2011). *Noul Cod Civil. Comentarii, conform Noului Cod civil republicat*. [The New Civil Code. Comments, according to the New Civil Code republished]. Academia Română, Institutul de Cercetări Juridice, third edition revised .Bucharest: Universul Juridic.