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DEMARCATIONS BETWEEN CRIMINAL AND CIVIL NEGLIGENCE

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Abstract: *There are some differences between the negligence that attracts criminal consequences and the one that attracts consequences in terms of civil liability. These differences are also reflected in the judicial practice, respectively in the solutions pronounced by the courts in the cases whose object is acts committed as a result of the negligence of the perpetrator. Such a case, in which the two types of negligence were addressed, is presented in this article.*

Key words: *criminal negligence, civil negligence, demarcations, judicial practice*

1. Introduction

Negligence is a form of guilt and consists, on the one hand, in the fact that the perpetrator foresees the result of his or her act, a result which he or she does not accept, unreasonably assuming that it will not occur, and, on the other hand, in the fact that the perpetrator failed to foresee the result of his or her act, although he or she should have and could have foreseen it.

This content of negligence has a legal definition in Article 16 of the Criminal Code, but this definition does not cover all possible situations. For example, this definition does not cover other forms of culpability, such as carelessness, lack of skill, lack of care and others, which may occur in everyday life.

Although the concept of negligence is also to be found in other areas of law, such as civil law, in the area of tort, the definition given in these matters is similar to that in Article 16 of the Criminal Code.

This aspect has led to the conclusion, generally accepted in doctrine and judicial practice, that there is no qualitative difference between criminal and civil guilt and that, whenever a person is found to have committed a criminal offence through negligence, he will automatically be held responsible for civil guilt and vice versa, and that the finding of civil guilt necessarily requires the finding of criminal guilt.

However, as will be seen from the case to be analysed below, a perfect overlap between criminal and civil negligence may lead to inequitable solutions in judicial practice. That is

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why we dared to propose previously, in another paper, a qualitative differentiation between criminal and civil negligence (Volonciu, 2015, p. 98). In the present article I will exemplify how this idea has been transposed into a solution in judicial practice.

2. First Instance Judgement

2.1. The facts as found by the Court of First Instance

The trial court held that at the time the fireplace was installed and the fire started, the property located in mun. Brașov, was owned by Mr PM and Mr M, and in 2011, they entered into a commodatum contract with Mr SG and Mr S.A., on the basis of which they handed over the use of the property to the latter.

In May 2015, the civil party SG contacted the defendant IG in order to have a fireplace installed in the building in question. Defendant I.G. agreed to carry out this work, informing the civil party that he had seen on the internet how to install a fireplace, while also informing him that two more people would be needed to carry out this work, namely witnesses BB and BS.

The work to install the fireplace and the chimney was carried out by the defendant I.G. with the help of witnesses B.B. and B.S. and lasted about a month, and at the time of its completion, the fireplace was not tested with an open fire, the defendant arguing that, in his view, the fire should be made when the outside temperature is below zero degrees.

Subsequently, in autumn 2015, the civil party S.G. together with the defendant I.G., set the first fire in the fireplace, and in this context the defendant warned the civil party that the first fires would produce an unpleasant smell of burnt enamel. It was further held that the civil parties S.G. and S.A. lit the fire in the fireplace on several occasions and, as they found that the unpleasant odour persisted, they called the defendant several times to ask him for explanations, but each time he invoked various reasons to reassure the members of the S. family. Therefore, it is held that the defendant was warned by the civil parties about the unpleasant odour that persisted, but the cause of the odour was not identified.

It was further held that on the morning of 22.12.2015, at around 06:00, while the S. family was in the building located in mun. Brașov, a fire broke out in the fireplace and the chimney installed in the building, which caused the destruction of a part of the building, as well as of several goods in the building, and was likely to endanger the lives of the persons who were in the building, as the improper installation of the fireplace and the chimney led to the fire.

The trial court held that the defendant I.G. did not have specialised training in the field of fireplace installation, as he did not provide evidence in the case file regarding his possible professional qualification in fireplace installation, and the company of which he is the economic director has as its object of activity construction works, but does not have any competences in fireplace installation.

Further, as regards the cause of the fire, it was noted from the intervention report drawn up by the Brasov Inspectorate for Emergency Situations that the fire brigades that intervened on the scene judged that the place of the fire was in the attic of the building, the probable source of ignition was the thermal effect, the means that could have caused the ignition was considered to be the chimney, and the first material to ignite was wood.

In these circumstances, it was considered that the determining circumstance leading to the outbreak of the fire was the existence of a chimney that was not thermally protected from the combustible materials around it. It was also stated in the fire report that, when the firemen arrived, the ceilings of the rooms (under the plasterboard) and about 2 square metres of the roof were burning.

2.2. The legal situation found by the Court of First Instance

The trial court held that the offence described above objectively meets the constitutive elements of the offence of culpable destruction, provided for by Article 255 para. 1 Criminal Code.

Analysing the objective aspect of the offence of culpable destruction under Article 255 para. 1 of the Criminal Code, the trial court held that the material element of the offence consists in the destruction, degradation, rendering unusable, committed by arson, explosion or by any other such means, if it is likely to endanger other persons or property. In concrete terms, the action of the defendant I.G. to contract the installation of a fireplace at the residence of the civil parties, located in mun. Brașov, work that he carried out improperly, which led to the outbreak of a fire on 22.12.2015, as a result of which a part of the building in question was destroyed, as well as several goods in the premises, fulfils the material element of the offence of culpable destruction. It is also held that the offence was likely to endanger the lives of the members of the S. family, given the time when the fire broke out and the fact that it was only the intervention of a third party that made it possible to inform them of the outbreak of the fire.

The immediate consequence of the committed offence consisted in the damage caused by the fire on 22.12.2015, in concrete terms, as a result of the fire, to a part of the building located in mun. Brașov, as well as to the property of the civil parties S.G. and S.A. from that dwelling. The causal link between the material element and the immediate consequence resulted from the materiality of the offence.

As regards the subjective aspect, the defendant has acted with foreseeable negligence, within the scope of Article 16 para. 4 lit. a of the Criminal Code, since he had foreseen the result of his offence, but did not accept it, unfoundedly assuming that it would not occur. Thus, the trial court found that the defendant was able to foresee the consequences of a faulty installation of a fireplace (particularly important in this respect was the defendant's decision to add thermal insulation to the chimney, as he stated at the hearing during the criminal proceedings), given his lack of specialised training in this field. The socially dangerous result actually produced was not accepted by the defendant, who considered, without sufficient grounds, that it could not be caused in practice.

3. Judgement of the Court of Appeal
3.1. The facts as found by the Court of Appeal

Essentially, the Court of Appeal held the same factual situation as the trial court, consisting in the fact that in May 2015, the defendant IG contracted a work to install a fireplace and a chimney at the home of the civil parties SG and SA, located in mun. Brașov,

work which the defendant carried out defectively, with the help of two other persons (namely, witnesses BB and BS), which led to the outbreak of a fire on 22 December 2015, which destroyed part of the property in question, as well as several goods in the premises.

3.2. The legal situation found by the Court of Appeal

In contrast to the trial court, the appellate court, although it found the same factual situation as the trial court, considered that this did not denote the existence of criminal guilt on the part of the defendant I.G. (which is why it ordered his acquittal), but it justified the finding of civil guilt on his part (which is why it ordered him to pay civil damages to the civil parties).

In reaching this decision, the Court of Appeal held that the possibility of foreseeability constitutes the essence of the subjective criterion for assessing the existence of guilt and is assessed in concreto both by reference to the totality of the factual circumstances and the conditions of the action, and with reference to the qualities and particularities of the defendant, and not by reference to an abstract standard of a man endowed with the best moral or intellectual qualities. The existence of guilt may be presumed if the defendant could have foreseen the socially dangerous result. *Per a contrario*, there will be no guilt in cases where the socially dangerous result was not foreseeable for the defendant or, although foreseeable, was inevitable. In criminal law, therefore, the avoidability of the dangerous consequence must be analysed in the light of the personal characteristics of the perpetrator (professional training, life experience) and not only the specific circumstances in which he acted. Of course, personal characteristics which in themselves reveal a breach of the duty of care, such as carrying out a specialised activity without the necessary training but as a professional in that field, or certain particular characteristics of the perpetrator such as indifference, superficiality or inattention, will not be taken into account.

Thus, in order to establish the subjective attitude of the defendant to the offence, it is necessary to analyse all the factual circumstances and the way in which he was able to perceive them, in the light of his personal circumstances relating to his age, life experience or professional training.

In the case, it was held that it was the injured persons who approached the defendant and asked him to carry out the work of installing the fireplace, which by its nature presupposes a relatively high degree of technical specialisation. Although the civil parties were aware of the professional profile of the defendant and his availability through his construction company, and could reasonably understand that he was a professional in the field, however, the absence of written agreements or other such formalities (tax invoice, receipts, etc..), viewed only from the point of view of forming their belief (and not from the point of view of compliance with tax or other legal rules), should have led the same parties to the certain conclusion that the defendant would not act in his professional capacity as a builder, which would have involved, as he also pointed out, a different approach to the work, such as drawing up a project, obtaining authorisations if necessary, (sub)contracting strictly specialised persons or the like. Nothing can lead to a contrary conclusion, irrespective of the parties' allegations and even if the work was carried out

for a fee, as long as the defendant did not present himself publicly (through a public tender, a specialised fireplace installation website, etc.) or to the civil parties (who did not expressly present this version) as a specialist in the construction of stoves or fireplaces, either personally or through his company or through any other form of professional practice.

The conclusion that the defendant did not act in his capacity as a professional in a strictly specialised field does not, however, preclude the finding that he took legal responsibility for the entire work, given that he personally presented himself to the persons who knew him previously through his profession as a builder, thus also involving such highly specialised work, personally commissioned two workers to execute the fireplace, to whom he gave technical instructions, which he followed up in order to implement them.

What has been emphasised in the case is precisely the way in which the Court of Appeal referred to the defendant, who was treated as a mere private individual who agrees to carry out work for a fee, and not as a professional in a field of strict specialisation, which not only that he did not actually possess, but did not assume it publicly or to the civil parties. However, factual aspects such as the close monitoring of the execution of the work and the additional containment provisions even where it was not necessary lead to the certain conclusion that the defendant - with the exception of accepting the proposal to execute a highly specialised work for which he was not formally, officially qualified, but which he did not carry out either as a professional in that specialisation - did his best to ensure that the work was carried out properly, in particular as regards the prevention of fire hazards, and his efforts were made precisely in that respect, as regards fire protection, by taking additional but erroneous measures. Unfortunately, however, it was precisely those measures which contributed to the unfortunate outcome, which reveals not the acceptance of the specific risk (fire risk), on the unfounded assumption that it would not occur, but, on the contrary, the attempt to prevent and remove such a risk, which he did not foresee in any specific way, calling into question whether he should have and could have foreseen it. However, in the present case, although the defendant ought objectively to have foreseen the consequences of his conduct in relation to the way in which the fireplace was built, subjectively he was not in a position to foresee them, given that he did everything in his personal power, taking into account his professional training, which was not specialised, an aspect which was known and accepted by the civil parties by omitting the formalities necessary for the execution of the work and in the absence of evidence to the contrary regarding proof of the professional assumption by the defendant of the carrying out of the work.

Therefore, although it cannot be held that the defendant acted with the form of culpability required by the incriminating text in committing the offence of destruction through negligence, the Court of Appeal nevertheless analysed whether he acted culpably in the commission of the same act, viewed from the civil tort aspect, given that the absence of criminal culpability does not exclude the retention of civil culpability in the commission of the same unlawful act, the theory of the duality of culpability being embraced by the Romanian criminal procedure, which expressly provides for the requirement of a judgement also on the civil action in the event of the impediment of lack of culpability provided by law, as is apparent from the provisions of Art. 25 paras. 1 and 5

of the Criminal Procedure Code.

The Court of Appeal concluded that criminal liability represents the last resort in restoring legality and preventing crime (*ultima ratio*), being analysed also according to the personal circumstances of the offender, whereas civil negligence can be found for any civil offence committed with the slightest form of culpability (*culpa levissima*), assessed exclusively according to an abstract model of good conduct (*bonus pater familias*), supplemented only by circumstances external to the person of the perpetrator, with the sole aim of a full disgorgement in favour of the injured party (*reparatio in integrum*). For this reason it found the defendant civilly liable and ordered him to pay civil damages.

4. Conclusions

As can be seen, the question of the unity or duality of criminal and civil culpability is not fully clarified at present, and there are rare cases in which the courts have given reasons by invoking the duality of culpability. The reasoning of the Court of Appeal to the effect that in order to establish civil negligence it is sufficient to establish the slightest negligence (culpa levissima) is justified. It would be excessive to apply this standard also in criminal matters, since the rationale of the criminal sanction is to punish the perpetrator in order to prevent him from repeating the offence (punitur ut ne peccetur). In English law it is accepted that ″The criminal law knows two types of negligence: ordinary negligence and gross negligence” (Simester and Sullivan, 2010, p. 152). However, Romanian law does not make such a distinction with regard to criminal negligence, accepting the existence of only one type of negligence. We believe that it is up to the legal conscience of the judge to make such a distinction in judicial practice, given that the central elements of legal conscience must be ″the idea and sense of justice” (Ghigheci, 2017, p. 63).

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