# A NEW PERSPECTIVE ON THE BASICS OF CIVIL TORT LIABILITY IN THE CURRENT CIVIL CODE

Associate professor **Lacrima Rodica BOILĂ**[1]

***Abstract***

*The institution of Tort Criminal Responsibility faced this millennial beginning with a real "crisis" by affirming reformist ideas placed between tradition and modernity, present and future, subjective and objective. The increase and diversification of the damage, on the one hand, but also the real difficulties in identifying the responsible person and proving his culpability, on the other hand, call into question the need to harmonize the legal norm with the realities of social life, providing the legal framework for reparation of all injustice caused. In the evolution of this legal institution three phases have emerged: **sanctioning**, based on fault, aimed at punishing the guilty of producing damage, **reparation**, based on warranty, risk and equity, aiming mainly to ensure the legal framework to cover the indemnity independent of the fault to the responsible person for the restoration of the destroyed and **preventive** social balance, consisting in anticipating and avoiding serious, immeasurable, environmentally damaging, human existence, not yet produced but possible. Our study aims at presenting the main issues regarding the foundation of tort law in the current Civil Code, taking into account the realities of contemporary society, to highlight the innovative, progressive aspects, capable of providing more effective protection to the victims of the illicit deeds.*

***Keywords:*** *civil liability, guilt, risk, warranty, equity, civil law.*

***JEL Classification:*** K13, K15

## 1. Introductory considerations

Having other European models, in particular the French Civil Code, the Italian Civil Code, the Swiss Civil Code and the Civil Code of Quebec, Unidroit Principles and Principles of European Contract Law, the current Civil Code has taken on new, modern regulations corresponding to the realities of society contemporary. Compared to the 6 articles of the Civil Code of 1864, Chapter V devoted *Civil Liability* of the current Civil Code contains in the 44 articles detailed regulations on tort liability, from general provisions, to hypotheses of liability, exonerating causes of liability and reparation of the prejudice .

The V$^{th}$ book "On obligations" proposes a new structure for this area for a unitary approach to all binding relations, without distinguishing which branches of law they belong to. The distinction between civil relations and commercial relations has been waived in order to ensure effective protection of all subjects of law, by removing legal regimes differentiations by professional or non-professional status. In the 11 titles dealing with the matter of obligations are regulated: general provisions on the content of the obligation report, provisions on sources, modalities and types of obligations, execution, transmission, transformation and extinction of obligations as well as a special chapter on the refund of benefits. Special contracts and arrangements for guaranteeing obligations are treated in a distinct title.

As regards the *Sources of Obligations*, alongside the contract, unilateral act, licit business - business management, unjust enrichment, undue payment - was added "any other act or fact that the law binds the birth of an obligation".

In the field of tort liability, the previous regulations included well-founded solutions of doctrine and jurisprudence: the regulation of the general negative obligation of "not to prejudice by its actions or inactions, the rights or legitimate interests of other persons" (article 1349) the establishment of clauses which could remove liability in the case of damage caused "by mere recklessness or negligence" (article 1355), the specification of particular criteria regarding the assessment of the culpability (article 1358), the determination of the conditions under which the juvenile can answer for his own (article 1366) or unreasonable persons (article 1367), the

[1]Lacrima Rodica Boilă - Faculty of Economics and Law, University of Medicine, Pharmacy, Sciences and Technology, Targu-Mureş; lawyer at Mureş Bar, Romania, boilalacrima@yahoo.com.

establishment of a subsidiary obligation to indemnify the victim by the person who acted indiscriminately, which was known as the liability based on the principle of equity (article 1368 ), engaging in liability and harming an interest legitimate (article 1359), liability in the performance of an activity imposed by law or order of the superior, if it was possible to know the unlawful character of the act committed under these circumstances (article 1364), a new liability for injuries caused by minors and those under the prohibition, to those who by law, court order or contract are obliged to oversee them (article 1372), the extension of the principal's responsibility for the deed of the pregnant (article 1373 ), the definition of legal guardianship (article 1377), new assumptions of liability for "falling or throwing out of the real estate of a thing" for those occupying that building (article 1379).

A separate section, 6th, is devoted to "*Damage reparation in the case of tort liability*", articles 1381-1395, included specific rules as enshrined, over time our jurisprudence: repair work (article 1381), solidarity between debtors (article 1382), the right to recourse (article 1384), scope repair (article 1385), forms of repair (article 1386). One element of novelty is the express regulation of the way of restitution of non-patrimonial damage (article 1391), which is one of the issues much debated in doctrine and jurisprudence. New rules were introduced in matter prescribed right of action in tort: whether compensation is derived from a fact subject to criminal law, the limitation of the right to claim for damages is the limitation for criminal liability (article 1394), and where the injury consists in the death or injury of a person's bodily integrity, the prescription is suspended during the determination of the retirement pension or social security benefits (article 1395).

In this context, the analysis of the institution of civil liability under the regulations of the current Civil Code brings into discussion innovative aspects, meant to harmonize the legislative framework with the requirements of the modern society.

## 2. Fundamentals of tort criminal liability

The realities of modern society have forced a new assessment of this fundamental institution of civil law by rebuilding its legal categories, especially the culpability of the responsible person, and by defining new interpretations of the functions of tortuous, preventive-educational and reparatory responsibility. According to the new guidelines of the doctrine and the jurisprudence of the last decades, we are witnessing the gradual abandonment of the subjective substantiation of civil tort liability, established by the provisions of the Civil Code more than two centuries ago, and the recognition of new foundations of objective nature. The economic and social considerations that motivated the regulation of a liability having as sole and exclusive basis the fault of the author of the illicit deed have changed profoundly over time.

The current regulations of the Civil Code harness the creative visions analyzed in the doctrine and confirmed by jurisprudential solutions. Despite some inconsistencies in terminology and imprecise wording, new hypotheses of liability have been established in which liability for harm caused to an innocent victim can be assumed without the need to prove the fault of the person responsible.

We are thus witnessing a tendency to objectify the founding of civil tort liability through the emergence of legal regulations on new hypotheses in the positive law that have expressly enshrined the foundation independent of any fault of the responsible person as exceptions to the subjective liability rule.

In an evolutionary incursion of civil liability, the recognition of the objective substantiation of civil liability for damage caused by things at the beginning of the last century triggered the disappearance of the harmony and coherence of this legal institution traditionally based on the subjective fault by demonstrating that liability can be assumed even in the absence of conduct attributable to the person responsible. Thus, the culprit, with its precious ethical and moral values for the whole of society, has proven to be sometimes useless and ineffective in the face of the pragmatic need to ensure the full compensation of the injured person. What the legislator considered as a rule of strict applicability, enshrined in the provisions of article 998 et seq. of the

Civil Code, and which should give full satisfaction to the victim of the detrimental deed, safety in human relationships - "Every man's deed, causing another prejudice, obliging the one whose error he has, repaired" has become so fragile and ephemeral, often inapplicable, that there is a danger of unfairly bearing the consequences harmed by the innocent victim himself, whose subjective rights and interests have been injured.

In the face of this legal reality that concerns doctrine and jurisprudence, law theorists and practitioners around the world[2] have said that we are at this new beginning of the millennium "*at a turning point in establishing the foundations of this responsibility*". The balance of civil tort liability in the contemporary world demonstrates the disappearance of the unity of the system essentially based on fault and the establishment of new objective foundations in response to the uninterrupted quest for a better compensation of the victim. It is argued that we are in a real "crisis of civil tort liability"[3] in which the general principle of liability based on the fault of the responsible person is less applicable to the "*mosaic*" of special rules applicable to certain compartments of social life. The harmony of the system based solely on the subjective fault of the responsible person ceased, which led to the rebuilding of the entire legal institution. The tendency to objectify the content of the culprit has led to a reconsideration of the economic dimension of long-term marginalized liability in relation to the educational-preventive side. New foundations of objective nature, such as Risk, in several variants, Guarantee, Equity and Precautionary Principle, have been established.

Thus, the current period in the evolution of the institution of civil liability can be characterized by the recognition of new principles that justify civil liability for justified damage, along with subjective guilt, in certain assumptions, objective foundations, or, in some cases, mixed foundations.

All these concerns have triggered in the last decades a wide-ranging debate on the need for a "global reform of the civil liability"[4], in which "another type of liability for damages", distinct from the contractual or delinquent, generically built on the idea of protection the right to security of the person in the face of the danger of prejudicing his or her bodily integrity or property[5]. At the same time, there have been concerns about socializing risks and developing insurance by taking risks from all those who carry out harmful activities and creating a "*true compensation system for victims of corporal injury*"[6].

In this context, the opportunity to maintain the subjective guilt as an element in the structure of civil tort liability has become a topic of reflection in the contemporary civil law doctrine[7], with deep ethical and juridical meanings.

Its total removal could have serious consequences by creating an unfair situation for the responsible person, presumed to be "guilty" and obliged to respond even when not guilty of the damage caused. By enshrining the objective substantiation of tort law, culpability ceases to be the argument and the measure of responsibility. The entire legal construction would be based objectively on the causal link between the deed and the victim's injury. This would be an unacceptable aggravation of civil liability, as it would mean that the responsible person may be required to bear compensation even in those situations where he was objectively unable to predict and avoid the harmful event. The "guilty presumption" perspective is flagrantly contradicting the philosophical idea of "being responsible for your deeds". The person responsible is not guilty unless it is proven that by the conduct he has adopted he has pursued the damage or has imprudently failed to take all measures to avoid such adverse consequences. In principle, subjective accountability is so intimately linked to the personality of the respondent and the concrete circumstances in which

---

[2] In this regard, see Ch. Radé, *Réflexion sur les fondements de la responsabilité civil. Le voies de la réforme: la promotion du droit à la sureté*, Recueil Dalloz, Cahier nr. 31/1999, Chronique, p. 323.

[3] P. Jourdain, *Les principes de la responsabilité civile*, 2-ème édition, Ed. Dalloz, Paris, 1996, p. 17; F. Terré, P. Simler, Y. Lequette, *Droit civil. Les Obligations*, 6-ème édition, Ed. Dalloz, Paris, 1996, p. 545.

[4] Ch. Radé, *op. cit.*, p. 323.

[5] This idea was first asserted in Community law in the case of liability for damage caused by defective products.

[6] Ch. Radé, *Plaidoyer en faveur d'une reforme de la responsabilité civile*, Recueil Dalloz, nr. 33/2003 Doctrine, p. 2247.

[7] G. Viney, P. Jourdain, *Traité du droit civil*, under his direction J. Ghestin, *Les conditions de la responsabilité civile*, L.G.D.J., Paris, 3rd ed., 2006, no. 444, p. 370-373.

the damage occurred, so that only the one who is guilty and guilty of such pursuit can be compelled to indemnify him.

From this perspective, the educative role of the culprit should not be neglected by preventing deviant behaviors in society in order to protect citizens against harmful and destructive deeds. The possibility of damages for guilty damages is a warning to adapt the conduct according to the rules imposed in society, so as to avoid any deeds that might prejudice the rights or legitimate interests of others.

Nevertheless, it has been observed that lately, in the doctrine and jurisprudence of several European countries, including in our country, the subjective accountability has often extended artificially the content of the civil culprit, reaching the obligation of compensation even in those situations in which the objectively responsible person had no representation of the deed and its harmful consequences or was unable to act consciously, not having the discretion of his deeds.

### 3. The necessity of objectification to civil tort liability

From our succinct introductory presentation on the Civil Code provisions on civil liability and the presentation of guidelines on the basis of this responsibility, the main issues that concern doctrine and jurisprudence are:

1) The tendency to objectify the content of civil litigation by accountability for its own unlawful deed.

2) Changing the relationship between civil liability and other elements of liability, damage, unlawful deed and casualty.

3) Strengthen the repressive function of responsibility in relation to its preventive-educational function, which acquires new meanings.

4) Shaping a new perspective on the future of responsibility for precautionary actions and the prevention of serious, irreducible and irreparable damage that is likely to affect the ecological balance and the evolution of life on earth.

5) Supporting new guidelines on the objective substantiation of civil liability in cases governed by the Civil Code, judged to be almost unanimous subjective in doctrine and jurisprudence (liability for injuries caused by minors to both their parents and those who, under the law or contract, are required to supervise or educate them).

6) New arguments in favor of recognizing direct, autonomous and principal torts of civil liability for damages caused by others, almost unanimously regarded as indirect and subsidiary responsibilities (liability of parents, commanders, teachers and craftsmen).

7) Diversification of specialized liability regimes in certain areas (liability for damages caused by defective products, liability for environmental damage, nuclear damage, liability for judicial errors).

8) Recognition of a new liability for damages caused by an own deed, that of professionals in certain areas of activity, considered to be more aggravated, with much higher requirements (liability of the doctor, lawyer, notary, architect, etc.).

9) Extend the risk socialization process by setting up special funds guaranteeing the full and immediate payment of damages and increasing the role of insurances in order to ensure the reparation of the damages.

10) The need to establish a European civil liability system under the conditions of globalization of contemporary society.

The central issue of the whole analysis concerns a new approach to the culpability of the responsible person redefined by reference to an objective content, independent of the personality of the perpetrator, namely the abnormality of injurious behavior. Thus, a person can be held guilty of causing damage not because he has not foreseen and avoided producing it but because he has adopted some destructive or harmful conduct for the other members of the society which has the consequence of causing the damage. Such behavior is "abnormal" to that imposed by social rules,

deviance which, regardless of the perpetrator's psychic attitude towards the deed and its consequences, may constitute the idea behind the commitment of responsibility.

It is a different approach to what is known in our classical doctrine, which is detached from the elements of subjectivity closely related to the person of the perpetrator, oriented to the negative consequences produced by it, interpretation to the benefit of the victim whose interests are thus more effectively protected. An objective fault, detached from the claimant's personality, could be an effective solution to commit tort or delict whenever damage occurs. From this perspective, only the act of a third person, the fault of the victim or the case of force majeure would constitute exceptional situations that could remove the civil liability, which would significantly restrict the cases in which the victim would remain unpaid.

The absence of a legal definition specific to civil (culpable) guilt will maintain this state of confusion as to the basis of civil liability, continuing to "lend" the rationale of criminal law to justify the incurring of liability in the event of the commission of unlawful detrimental facts.

Due to these uncertainties that will address the content of the notion of civil litigation, we will try in the judicial practice in the future to distinguish, for each individual hypothesis, what are the conditions of the culpability in order to determine whether tort liability can be committed. This means that it will remain the objective of scientific research in the field of detecting the content of civil culpability, given in the first place the imputability of the behavior of the responsible person, and only, in the alternative, his illiteracy. Thus, we will find ourselves on the same coordinates of moral culpability, for which it is essential to be aware of the consequences of our own deeds, although in the matter of civil liability, the essential aspect is the making of damage, the correction of which must be accountable, not the moral values society.

In the current Civil Code, the commitment of civil tort liability is conditioned by the perpetrator's discernment, according to paragraph (3) of article 1349, which means that we maintain the orientation towards subjective accountability for our own deed, in which the author's conscience plays a decisive role in the illiteracy of his actions or inactions. In other words, only if he knew the consequences of his deed and deliberately acted for their production may be obliged to compensate the victim. If in the Civil Code of 1864 the "mistake" of the perpetrator has been invoked that caused such damage, the following regulation is expressly mentioned: "*The person who, having discretion, violates this duty* [of paragraph (1) - our emphasis] *is liable for all the damages caused, being obliged to repair them fully*". It eliminates any possibility of interpreting the content of civil culpability from the point of view of its objective element, that of harmful conduct, with all attention being given only to the subjective element, to the psychic state of the person responsible. In other words, only if the perpetrator or the respondent has acted with discernment, the civil liability can be committed.

Also, another legal provision takes account of the criteria on the basis of which the codecators' obligation to repartee the damage caused will be allocated. Thus, if liability is to be borne by several debtors, according to art. 1383, "the burden of reparation shall be proportionally divided to the extent that each participated in the damage or according to the intent or gravity of each individual's fault, if such participation can not be determined", and only if that criterion is not applicable, the burden of reparation be equally divided among the participants. In this way, the gravity of the offense may be a criterion for the aggravation of liability, which may be considered to be from a fair point of view, but is contrary to a principle according to which in the matter of civil liability it is irrelevant to commit the detrimental act intentionally or but only the appearance of the damage caused by the victim.

As regards the tort liability for the deed of another person, according to paragraph (3) of article 1349, only "In the specific cases provided by law, a person is obliged to make good the damage caused by the deed of another ...". Thus, only two hypotheses were regulated in the Civil Code, in article 1372, *Liability for the deed of the juvenile or the offender* and, in article 1373, *Commanders' Responsibility for Servants*. In these circumstances, although the idea of regulating a principle of tort liability for another person's deed was not shared by the editors of this civil code,

who considered that the possibility of accountability in the absence of express regulation was removed.

If so far we have considered the guilt and the risk as possible fundamentals that could justify the victim's compensation by reference to a particular behavior of the responsible person, the fundamental human right to the security of his person and the integrity of his patrimony requires all members of society to oblige others. is the basis for the obligation to pay compensation. Renowned French civilian Boris Stark[8] said over half a century ago: "Our activity is not exercised in a deserted island, but in a social environment, and (...) people have not only different freedoms of action but have as well as the right to quietly enjoy their lives and their possessions". It is a plea for new civil liability for damages caused in society by breaching the security requirement that aims to make victim protection more effective.

## 4. Conclusions

Injury to a person's health or bodily integrity in the course of a profession such as the performance of a medical act constitutes evidence of a breach of the security obligation that engages the accountability of a physician even in those situations where he has not acted guiltily. A professional faultless civil liability for his patient could be considered an illusion to some or an innovative idea for others, but if we look at the risks of practicing the medical professions at the limit of scientific uncertainty and recklessness, we will understand that we must assure the victim a more effective protection regime to obtain compensation. By practicing certain activities, especially those intervening, the physician assumes the risk of possible bodily harm that he may even produce involuntarily. In this respect, some solutions from the French case-law in recent years could also be the subject of reflection for practitioners of the law in our country as a new position regarding the foundation of this responsibility.

Concluding, we appreciate that the current civil liability regime in the Civil Code is undoubtedly a real breakthrough to the old regulation by recognizing the primacy of the reparatory function of responsibility, to the detriment of the sanctioning, to ensure more effective victim protection.

## Bibliography

1. Ch. Radé, *Réflexion sur les fondements de la responsabilité civil. Le voies de la réforme: la promotion du droit à la sureté*, Recueil Dalloz, Cahier nr. 31/1999, Chronique.
2. P. Jourdain, *Les principes de la responsabilité civile*, 2-ème édition, Ed. Dalloz, Paris, 1996.
3. F. Terré, P. Simler, Y. Lequette, *Droit civil. Les Obligations*, 6-ème édition, Ed. Dalloz, Paris, 1996.
4. Ch. Radé, *Plaidoyer en faveur d'une reforme de la responsabilité civile*, Recueil Dalloz, nr. 33/2003 Doctrine.
5. G. Viney, P. Jourdain, *Traité du droit civil*, under his direction J. Ghestin, *Les conditions de la responsabilité civile*, L.G.D.J., Paris, 3rd ed., 2006, no. 444.
6. B. Stark, *Essai d'une théorie générale de la responsabilité civile considerée en sa double fonction de garantie et de peine privée*, Ed. L. Rondstein, Paris, 1947.

[8] B. Stark, *Essai d'une théorie générale de la responsabilité civile considerée en sa double fonction de garantie et de peine privée*, Ed. L. Rondstein, Paris, 1947, p. 39.