

The Modern Theory of Objective Substantiation of Parental Responsibility for the Illicit Acts Committed by Their Minor Children

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Abstract: Generically speaking, the responsibility exceeds the law domain, but its most relevant forms usually take legal forms. The current coordinates of parental liability for the acts committed by their children know objectifying tendencies of this type of liability. The current tendency in the literature and legal practice is that of extending parental liability, to the extent in which the guilt (through its defining features) faces a serious identity crisis. Facing these realities the legal doctrine and jurisprudence had the no easy task of renovating the traditional legal institutions, by the deep transformation and adaptation of the new social needs.

Keywords: liability, tortuous civil liability, fault, prejudice

It was consistently stated that civil liability is the biggest star of modern civil law. Substantiating this legal concept is and it will be determined by the great changes that the human society ever knew, especially in the European area and within the last two centuries.

Accelerated rhythm of economic development and the changes that have occurred in the social structure, determined by scientific-technical and informational revolution made the lives of people to bear the imprint of an existential anguish and generating difficulty in maintaining the care and prudence necessary to avoid the damage to society members. Thus, to point out the fundamentals tortuous civil liability, and extending the problematic issues which will be discussed, that is parental responsibility for the illicit acts committed by their children, is a welcomed approach for any jurist. And not only! Also the philosophy, by its ontological categories of determinism, namely causality, effect, necessity, finality, responsibility, allows a jurist to better penetrate into the essence of that concept, which is so present in almost all branches of law. These categories highlight the fact that nothing happens without a reason, causality is omnipresent even in the realm of law. It is this kind of causal relationship between parental duties and the facts of their minor children that is the subject to this approach, endeavoring in the specialized literature the objective substantiation tortuous civil liability, to which there are attached the theory of substantiating the precaution and preventing function

of perpetrating serious prejudice.

Liability involves the idea of guilt and behavior contrary to law, materializing under the form of legal obligations and precise correlative rights. In the specialized literature there is a vast material on parental responsibility for the illicit acts committed by their children, with very different opinions about certain aspects of the problem and even an extensive legal practice. The main aspects considered by both theorists and practitioners have gravitated around the fundament, the juridical regime, parental responsibility conditions.

Over time, each era helped to establish those logical-legal arguments such as the involvement of parents tortuous civil liability when committing a harmful act by their minor child, according to the spirit that dominated the era that, according to their conception of life and society of the parents and how they understood or were able to impose and how they managed to transmit general and particular values to the children.

More than ever, at the beginning of this millennium, given the new socio-economic conditions, but also the explosion of information technology, it is said that the tortuous civil liability of the parents is at a "crossroads", being submitted at the same time, to the influences of family and obligations right.¹ Thus, on one hand, committing prejudicial acts by minors determines the appearance of civil repair obligation covered by obligations law. However, the fact that parents are the persons designated to respond to such prejudices, finds its reason in the appurtenance of the perpetrator to its family, as social group to which is linked by biological, social, economic, emotional relations. Unity and cohesion of the family take the responsibility off the shoulders of the true perpetrators. In this way the interests of victims regarding redressing damage correlate with the principles that govern the family relationships, financial and moral support, mutual respect and help.

Subjective and objective responsibility theory

Like any legal institution, depending on factors such as evolution, progress, reform in all domains that have made a significant mark on the idea of responsibility, liability driven into the account of the parents, encounter, as I previously considered, an ordeal moment. It must not be neglected any precocity and resourcefulness of today's children which diversify the range of illicit acts that they might commit.

Determining the circumstances for assuming parents' liability has brought different supporting or opposing theories in literature, theories that favor either the subjective, objective or mix argument which characterize this type of liability.

¹ Radé, Ch., *Plaidoyer en faveur d'une réforme de la responsabilité civile*, in *Recueil Dalloz*, n° 33, Doctr. 2247 apud Boilă, Lacrima Rodica, *Răspunderea civilă delictuală subiectivă*, București: Editura C. H. Beck, 2009, p. 139.

There is a unity of opinions in the literature and in practice that consider that it is fully justified and in accordance with equity, to grant protection to the injured victim, establishing the proper responsibility of parents for the illicit acts that cause injury committed by their children, who in most cases would not be able to cover the caused material damage.¹ For a very long time, the author's responsibility for damage was based on a mistake committed by him. We are now under the form of subject responsibility, a theory which belongs to Pothier, the legal counsel that inspired the authors of the French Code: only a culpable conduct may be punished – an opinion both shared opinion by the legal doctrine and the practice courts. Romanian Civil Code legally implements the stipulations of this Article 998 under which "any act of man that causes to another an injury, obliges that person that caused the mistake, to repair it".

This liability is based, as described in legal literature, the presumption of failure or improper performance by parents of their duties towards their children. It is a premise that is based on a legal presumption that there was misconduct or negligence on the part of the parents, regarding the performance of their duties to their children. But, regarding the contents of the duties of their parents, which are presumed not to have been fulfilled, there are different opinions. However, precisely defining the exact content of these duties is essential to understand the system adopted in our legislation.

Legal doctrine has showed two ways on substantiating the parents' liability:

- Traditionally, it was asserted that interpreting Article 1000 (2) Civil Code, is driven parental responsibility based on a relative legal presumption of guilt², regarding the failure or improper fulfillment of supervision obligations, raising, educating the minor, with the possibility of removing these presumptions, if it is proved the inability to prevent the harmful occurred event;
- Another point of view maintains full responsibility as parents, motivated by the idea of solvency guarantee of the responsible person or on the risk in exercising authority over minor children, by their willingness to assume the status of "parent".³

In the case of the first situation based on the **relative legal presumption of guilt**, the parental responsibility can be relieved by proving that it could not prevent the damage, according to paragraph (5) of article 1000 Civil Code, considering that

¹ Stătescu, Constantin, *Răspunderea civilă delictuală pentru fapta altor persoane*. București: Editura Științifică și Enciclopedică, 1984, p. 216.

² This opinion was shared by Ghimpa, N. D., *Răspunderea civilă*, București, 1946, p. 261-274; Anghel, Ion M.; Deak, Francisc; Popa, Marin, *Răspunderea civilă*, București: Editura Științifică, 1970. p. 147-159; Eliescu, Mihail, *Răspunderea civilă delictuală*, București: Editura Academiei, 1997, p. 255; Pop, Liviu, *Drept civil. Teoria generală a obligațiilor*, București: Editura Lumina Lex, 2000, p. 240.

³ Boilă, Lacrima Rodica, *Răspunderea civilă delictuală subiectivă*, București: Editura C. H. Beck, 2009, p. 141.

is the essence in the paragraph. (2), Article 1000 Civil Code to facilitate the victim's burden of proof, but also to mobilize parents to deal with closely and appropriately raising, educating and supervising their minor children. After proving the illegal acts committed by minor, the existence of a prejudice and a causal link between them, under the law, is now facing a triple presumption as it concerns the parents of the minor:

- the presumption that, in exercising their duties, there has been *violations*, consisting of illicit actions or inactions, their consequences consisting in producing a prejudice, in order to engage the liability;
- the presumption of the existence of a causal relationship between the offense for which parents are deemed at fault and their minor child committing an illicit act causing prejudice;
- the presumption of guilt of the parent's failure or improper performance of their duties towards their minor child, where the guilt is in the form of negligence.¹

In the literature there have been shaped more opinions regarding the very object of proof that these presumptions refer to.

A. A first view starts from the premise that liability is based on *not respecting the obligations that the parents have*, to exercise supervision over their minor children, an opinion also shared by the doctrine and jurisprudence.²

B. According to another conception, the presumption of guilt imposed against parents to article 1000, paragraph 2 refers to not only lack of supervision, but also the lack of education. Based on a more demanding concept towards the parental duties, this view has echoed in some court decisions also, including some decisions of the former Supreme Court that marked new orientation of legal practice. For example, a decision in 1976 of the Penal Section of the former Supreme Court, where it was examined the parents' liability of their minor child, who managed to escape from a rehabilitation center, then he committed several crimes causing injury, it was stated that: *"whereas the liability of parents for acts causing prejudice committed by their children is based on a presumption of fault consisting of a lack, not only of supervision, but also of education, the courts must examine and verify the responsibility of minor's parents resulted from deficiencies of their child's education that would be attributable to (...). Of course, minor's parents may be exempt from the liability only if they prove convincingly that specifically in relation to their*

¹ Stătescu, C., *op. cit.*, p. 216.

² Anghel, Ion M.; Deak, Francisc; Popa, Marin, *op. cit.*, p. 148, Calmuschi, Otilia, "Aspects of parental responsibility for the act of their minor child drawn from judiciary practice", in Legal Studies and Research no. 4 / 1978, p. 347; The Plenum of the former Supreme Court, in the Decision Guidance no. 6 of November 17, 1973, it specifies that the illicit act of the minor may be prevented "if the parents exercise properly a continuous supervision". If, however, it was exercised a continuous supervision (...) parents will not respond"; the same concept is also found in other court judgments, the Supreme Court, Criminal Section, Decision no. 160 of January 24, 1973, in *Culegerea de Decizii ale Tribunalului Suprem*, 1973, p. 172 apud Stătescu, C., *op. cit.*, p. 217.

*obligations as parents they were concerned about their son's education and that, therefore, they were not disinterested of the child nor neglected his education.*¹

The same concept is also found in another decision stating that the illicit act of the minor *"definitely shows the ineffectiveness of his education ..., his education has remained weak and inadequate, due to the activity of the two parents.*²

C. The last point of view agrees that parental responsibility should be based both on the failure or the improper performance of duty of supervision and parental obligation to raise the minor, according to article 101 Family Code: *"Parents have the duty to take care of the child. They are bound to raise the child, tacking care of his health, his physical development, his education, learning and professional training."* This last opinion was established, by some academics and practitioners, as a judicious one, because it responds to the imperative of protecting the minor.³

By the legal consecration of the obligation of raising the minor child there are synthesized all the obligations of parents under the special nature of the relationship between the responsible persons and the author of the crime, one which, by law it must respond. The consecration of a generic obligation of raising the minor child covers all situations in which the parental responsibility can be engaged. It renounces at lining up all obligations for the parents, given the fact that their number and content it has never been satisfactory regarding the importance and the attributes complexity of parental authority. In fact, parents are "models that the children follow" as the philosopher Immanuel Kant shows. The quality of the parent or "the will to be a parent" - an expression used in French legal literature by author Jerome Julien - is the only the only premise of assuming parental liability; regardless their subjective attitude, the parents will be responsible for the injurious acts of their minor children.⁴

It has been estimated that to give an interpretation as wide and up to date according to article 1000, paragraph 2 of Civil Code, they must be linked with the article 101, Family Code, which make important predictions about the duties of their parents and about their parenting.

In judicial practice they have established some court rules, which tend towards the same goal, that of increasing parental responsibility for the illicit acts that cause minor prejudice to their children, they appeal, however, to motives in law as the correlation between the previously two articles has not been correctly understood. Thus, it was established that under Article 1000, paragraph 2 Civil

¹ Supreme Court, Decision no. 1777/9 August 1976, in Turianu, Corneliu, *Răspunderea civilă delictuală. Practică judiciară comentată și adnotată*, București: Editura Pinguin, 2004, p. 86.

² Decision no. 4 of 17 January 1977 of the Supreme Court published in *Culegerea de decizii* of 1977, p. 310-313.

³ Turianu, Corneliu, *Curs de drept civil. Drepturile reale. Teoria generală a obligațiilor*, București: Editura Universitară, 2006, p. 196.

⁴ Boilă, Lacrima Rodica. *op. cit.*, p. 189.

Code, it was considered the fault that consists of lack of supervision, and by article 101 Family Code, it was considered the fault that consists of the failure of education obligation. On a good reason, this reasoning in law was not accepted in the legal literature, showing that the only text that establishes the responsibility of parents is the Civil Code. However, in our legal literature there have been found difficulties regarding the impossibility of administering the contrary evidence for overthrowing the relative legal presumption of guilt which must be considered as *"an argument in support of adopting the concept of increased responsibility as parents in favor of the victim, as the parent will be more obliged to civil repair the damage caused by his child, and so he will fulfill the performance of two tasks, which will be higher"*¹.

Directly correlated with the triple assumption we have stipulations in Article 1000 paragraph 5 that the fault may be rebutted by proving that the parents "could not prevent the injurious act". The relative presumption established by the legislator proved to be temporary; meaning that only in totally isolated cases it was accepted by judges to remove parental liability from the consideration that parents could not prove the harmful fact. Given this jurisprudential reality, there was the question whether parental responsibility is really subjective, given that it may be engaged even in the absence of culpable conduct. This resulted in a shift towards an objective basis for substantiating this liability.

Strict liability theory

The quasi-exclusivist domination of fault, understood as the basis for civil liability, ended as proved to be insufficiently comprehensive to the new situations that have occurred due to the development of society. The evolution of positive law has imposed a new reflection on the foundations of civil liability, and therefore the traditional concept of guilt did not allow solving all created situations.

Legal doctrine in some European countries supported the need for objectifying the parental responsibility of equity matters, for protecting the victim and restores promptly the social balance destroyed by committing injurious acts to the minor children. Regulated in the Civil Code as a liability for the act of another, based on a relative legal presumption of guilt; this responsibility was oriented gradually towards objective liability, independent of fault. The fault of the responsible person has ceased to be ranked as the exclusive basis for such liability.

For the first time, the concept of objective responsibility was substantiated in the modern Law by German doctrine, which suggests as its grounds to substantiate the principle of causality, the principle of active interest, the interest principle and the idea of risk.² According to this theory, the victim should be compensated without

¹ Barasch, E. A.; Nestor, I., Zilberstein, S., *Ocotirea părintească*, București: Editura Științifică, 1960 apud Stătescu, C. *op. cit.*, p. 220.

² Rumelin, M., *Die Grunde der Schadenzurechnung*. Tübingen, 1896. p. 28, p. 45-46, p. 71 apud Dogaru, Ion; Popa, Nicolae; Dănișor, Dan Claudiu; Cercel, Sevastian. *Drept civil. Teoria generală a*

the need to fault the person responsible, the basis of liability being in the idea of *risk-profit*, giving the reasons that it is normal and according to moral rules as the one that takes advantage of a business, to pay the damage repair which are the consequences of that activity. In other words, the risk must be paired with the economic benefits of the activity (*emalumentum ubi, ibi omnes*), as the passive corresponds to the active.¹

In our legal doctrine, the idea of objective substantiation was supported by the authors Liviu Pop and Gabriela Hoffer decades ago², but without being adopted by the majority of doctrine and applied in practice courts. Moreover, given the fact that they are very rare the cases in which parental responsibility can be removed, there is the question whether there are actual the stipulations of Article 1000 paragraph 2, align. 5 of Civil Code or they should be interpreted from another perspective?

From the experience of other European countries, it is noted that there was dropped also at a fundamental responsibility on relative legal presumption of guilt in **favor of fully rightful liability**, which can be removed only by proving a foreign causes or victim's act.³

The main theories regarding the objective substantiation of misdemeanor responsibility of parents about the conduct of their minor child support the following principles:

- it has been invoked to guarantee the solvency of the parent about the conduct of his minor child, to cover the damage and eliminate the risk of its insolvency;
- the idea of security was whole with the presumption of guilt of the parents in fulfilling their obligations by considering the opportunity of a mix substantiation, objective and subjective, capable of supporting the victim for damages repair, but also to be aware of the moral significance of parental duty;
- it was introduced as the basis of this type of liability and risk theory.

But this theory was criticized, and the most severe one was that the theory of risk should not be generalized, because in practice it cannot cover all the cases; moreover, the fault, the Eternal Lady of civil liability, and it is the foundation of all civil liability under both forms, it is an essential concept based on human wisdom and common sense, adapted to any social transformations. Also, any idea of

obligațiilor, București: Editura All Beck. 2002. p. 964-966.

¹ Weill, A. Terre, Fr., *Droit civil. Les obligations*, Paris. Dalloz. 1975, p. 667 apud Dogaru, Ion; Popa, Nicolae; Dănișor, Dan Claudiu; Cercel, Sevastian, *op. cit.*, p. 965.

² Pop, L., Hoffer, G., *Cu privire la fundamentarea răspunderii fără culpă a părinților pentru prejudiciile cauzate de copiii lor minori*. in *Studia Universitatis Babeș-Bolyai*, Series Jurisprudentia, no. 1/1982, Cluj-Napoca, p. 45-49.

³ Aspects of comparative law on matters of parental responsibility for the illicit acts of their minor children are found in the volume of Professor Statescu, *Răspunderea civilă delictuală pentru fapta altei persoane*, 2nd edition, cared for and reviewed by Corneliu Bogdan Georgescu Bîrsan and revised by Corneliu Bîrsan, București: Editura Hamangiu, 2009, p. 83-107.

associating a more objective substantiation, that of guarantee, with the subjective one regarding fault is inapplicable in the judicial practice, which leads to the need of earmarking an essentially objective liability of parents for the caused damage by the acts of their children.¹

References

- Anghel, Ion M.; Deak, Francisc; Popa, Marin (1970). *Răspunderea civilă*. București: Editura Științifică.
- Dogaru, Ion; Drăghici Pompiliu.(2002). *Drept civil. Teoria generală a obligațiilor*. București: Editura All Beck.
- Eliescu, M. (1972). *Răspunderea civilă delictuală*. București: Editura Academiei.
- Lulă, Ion (1997). *Contribuții la studiul răspunderii civile delictuale*. Cluj-Napoca: Editura Cordial Lex.
- Lupan, E. (2003). *Răspunderea civilă*. Cluj-Napoca: Editura Accent.
- Petrescu, Raul (1996). *Drept civil. Teoria obligațiilor. Răspunderea delictuală*. București: Editura Oscar Print.
- Pop, Liviu (2000). *Drept civil. Teoria generală a obligațiilor*. București: Editura Lumina Lex.
- Stătescu C., Bârsan, C. (2008). *Drept civil. Teoria generală a obligațiilor*. București: Editura Hamangiu.
- Stătescu, C. (1984). *Răspunderea civilă delictuală pentru fapta altor persoane.*, București: Editura Științifică și Enciclopedică.
- Stătescu, C. (2009). *Răspunderea civilă delictuală pentru fapta altei persoane*, ediția a 2-a, îngrijită de Bogdan Georgescu și revăzută de Corneliu Bîrsan, București: Editura Hamangiu.
- Turianu, Corneliu (2004). *Răspunderea civilă delictuală. Practică judiciară comentată și adnotată*. București: Editura Pinguin.
- Turianu, Corneliu (2009). *Răspunderea civilă delictuală. Răspunderea civilă pentru daune morale*. București: Editura Wolters Kluwer.

¹ Boilă, Lacrima Rodica, *op. cit.*, p. 205-214.