THE ILLEGAL ACT – CONDITION OF TORT LIABILITY

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Abstract

In this paper we have highlighted the main aspects of illegal act as a condition of tort liability, both from the new regulation's and the old Civil Code's perspective.
We have also exposed practical relevant aspects concerning the need of paying the court costs and also the difference which surpasses the limit imposed to the insurer by law. From this point of view we may notice the possibility of having an insurance of court costs.
Even if it isn't a sensu stricto insurance it is important because of its connection to the third parties' liability. This is a new type of insurance.
Business entities are subjects of different risks which hinds the normal achievement of their objectives.
The protection against damages produced by those risks represents the subject of the risk's management inside a company, going from prevention to limitation of the risk's consequences which have already been produced.

Keywords: *tort liability, court costs, insurance, risks.*

I. The legislative framework

The illegal act represents one of the general conditions of tort liability besides the causal link, culpability and prejudice.

The principle of tort liability regarding the illegal acts causing injuries could be found in the old Civil Code in the articles no. 998-1003.

The old Civil Code's 998 article provided that "any human act which caused somebody a prejudice, made that person responsible for it". Article 999 provided that "a person was responsible not only for the injury produced by his/her act, but also for those caused by their negligence or imprudence".[1]

This issue is also treated in the first paragraph of the 1349 article according to the new Civil Code, as it follows: "any person must respect conduct rules which are imposed by law or local custom and must not prejudice, by their actions or inactions, the rights or legitimate interests of other persons." The second paragraph of article

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1 *Civil Code,*Hamangiu Publishing House, Bucharest, 2006, p. 120.

1349 also highlights that "the person with discernment who violates this duty is liable for all the damages that have been caused."[2]

Except tort liability for the own fact, the old Civil Code set the liability of some categories of people for the other person's fact (art. 1000), for the injuries caused by things or animals that were in their juridical guard (art. 1000, paragraph 1 and art. 1001) and also the owner's liability for the prejudices caused by the ruins of his/her buildings (art. 1002).

The aspect that may be noticed in the new Civil Code in contrast to the old legal provisions is the fact that tort liability is included in the same paragraph, when, according to 1349 article, paragraph 3, "a person is obliged to repair the prejudice caused by another person's fact, by things or animals that were in their juridical guard and also caused by the ruins of his/her buildings."[3]

Another important aspect, which can be noticed from those mentioned above, would be that regarding "the things and animals under the person's guard." A distinction must be made between the material guard and the juridical one which also results from the corroboration of art. 1000 and art. 1001 from the old Civil Code. From this point of view, the material guardian was acting according to the juridical guardian's orders.

As a matter of novelty, art. 1349, paragraph 4 from the new Civil Code says that "the liability for the damages produced by out of order products is settled by special legal provisions."

The jointly character of the persons' liability that have caused the prejudice could be found in art. 1003 of the old Civil Code.

The characteristic for the actual legal provisions is the fact that those "are limited in setting a principle: the principle of tort liability for the illicit act causing damages."[4]

The illegal acts that are likely to engage tort liability aren't enumerated nor described by law.

The charge of verifying the necessary conditions that must be accomplished with a view to tort liability comes to the legal practice.

II. Definition of the illegal act

According to an opinion, the illegal act constitutes a "tort", the liability for this kind of act being called "tort liability". So, we can affirm that "the illegal act which has caused prejudices starts a tort liability whose content is the civil obligation of repairing the damage that has been caused".[5]

From another perspective we could talk about tort obligations which were born from tort acts (art. 998 from the old Civil Code), of whose multiplication and diversification could have been observed. On the other hand, they were also talking

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[2] *Civil Code,* - Law no. 287/2009, C.H. Beck Publishing House, Bucharest, 2009, p. 328.
[3] Ibidem.
[4] Constantin Stătescu and Corneliu Bîrsan, *Civil Law. The General Obligations' Theory,* Hamangiu Publishing House, Bucharest, 2008, p. 124.
[5] Ibidem, p. 125.

about the existence of quasi delict obligations which were born from quasi delicts (art. 999 from the old Civil Code), it's effect being the same as the delict's one, to repair the prejudice that has been caused through that illegal act.

The delict and quasi delict obligations are part of the classification which had been took over the Justinian's Institutes, a classification that had been criticized from several points of view. Regarding the quasi delicts' category, we may say this would be "useless because the delict and quasi delict are different through the author's culpability form of the illegal and prejudicial act; the delict is an illegal act committed with intention and the quasi delict is an illegal act committed with actual fault, that is imprudence or negligence. Instead, their nature and effects are identical."[6]

The illegal act as an element of tort liability is defined as "any act causing damages to the subjective right of a person by breaking the objective legal provisions."[7]

From this point of view, the principle of objective law which has been violated is that nobody is allowed to prejudice, by their own acts, another person's subjective rights.

In the legal practice, the illegal act notion is seen in an extensive manner. That means the tort liability is to be taken into account not only when a subjective right has been violated - *stricto sensu* - but also when there have been prejudiced some interests of certain people.

In order to defining the illegal character of the act, regarding the breaking of the social cohabitation norms which aren't established by legal provisions, a question is arising: "what must we understand by the violation of the objective right's norms?"

The unanimous opinion, both in theory and judicial practice is that in appreciating the illegal character of the act, there must be taken into account besides the legal provisions also the cohabitation ones.

III. The objective nature of the illegal act

Through the analysis of doctrine and judicial practice, the legal acts, as obligation sources, according to their nature, can be found in two types: judicial acts as human behavior, that means the illegal or legal human conduct and other judicial acts which aren't human behavior and consist in some circumstances of internal or external origin, such as: the breaking of a mechanism part, the tire's explosion, the hidden defects of a thing, the animal's fright, some natural phenomena. In such a circumstance, which isn't human act, the persons who must be held liable are obliged to repair that prejudice. [8]

In defining the objective character of the illegal act the culpability element is ignored without taken into account the subjective attitude of the author towards his/her act.

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[6] Liviu Pop, *Civil Law Treaty. The Obligations. Volume I. The General Juridical Regime* , C.H. Beck Publishing House, Bucharest, 2006, p. 49.

[7] Constantin Stătescu and Corneliu Bîrsan, *op. cit.,* p. 176.

[8] Liviu Pop, *op. cit.,* p. 54.

Some authors do not distinguish between the illegal and the culpable nature of the act, but they include the illegal character in the culpable one, retaining as an element of liability the culpable act of a certain person.

The doctrine says that a distinction between the author's illegal act and mental attitude is not only possible, but also necessary. It is possible because the illegal act objectifies in certain activities of the author, activities that can be perceived and analyzed separately. It is also necessary because the existence of an act can be conceived as an illegal one, but as a subjective aspect it must have been committed without guilt. The liability in such conditions won't be set up (the force majeure, the lack of discernment).[9]

There are also special cases in which tort liability is taken into account only according to the simple objective existence of the illegal act found in causal link with the prejudice without being necessary the proof of the author's culpability.

IV. Causes for the removal of the illegal nature of the act

There are some situations in which liability isn't set up after an illegal act has been committed because the illegal nature of the act is removed. The removal cases of the illegal nature of the act are as it follows: self-defense, the emergency state, the fulfilment of an imposed activity by law or the superiour orders, the exercise of a subjective right, the victim's consent.

V. Tort and criminal liability

As a consequence of committing an illegal act which affects the social values protected by legal provisions both tort and criminal liability come into action.

These two types of liability could be confused in the late judicial liability's history, but, in course of time the difference between them became more and more obvious, nowadays being unanimously accepted by all law sistems.

According to its' gravity, if an illegal act is provided by criminal law, the criminal liability would be set up for the responsible person even if that act didn't cause any prejudice to a certain person.

The criminal liability does not exclude tort liability as tort liability does not exclude the criminal one; the two liabilities can act simultaneously, they can actually cumulate.[10]

In the judicial literature the unity and diversity problem of the culpability concept has been debated, considering that it is unitary because in every case it defines the subjective element, the subjective attitude of the act's author to the damaging consequences of his/her action or inaction, but it is diversified because the shape or gravity of this attitude is different in some juridical reports regulated by properly legal provisions from different branches of law.

[9] Constantin Stătescu and Corneliu Bîrsan, *op. cit.,* p. 177.
[10] Constantin Stătescu and Corneliu Bîrsan, *op. cit.,* p. 128.

So, it is supported that "the culpability's unity, through the diversity of its shapes and events, in all social fields has an intimate bond to the human nature in all its ethical-legal-moral hypostasis and valences."[11]

Having in view the quantitative aspect, between the subjective side of tort and criminal liability, a difference may be noticed: the coverage of civil culpability is much vast than criminal culpability, the first including not only criminal acts, but also "any prejudicial human act."[12]

Making an analyze from the culpability's point of view, we may observe an essential difference between civil and criminal culpability, the forms of culpability being rigorous determined and defined in article 16 from the new Penal Code. "The culpability forms of tort liability are generically invocated as intention, imprudence or negligence, without having a meaning according to the conditions that can be taken into account for setting out the liability, the compensations' amount."[13]

VI. Decision 832 from February 2008

Public Session from 29 February 2008.

About the following appeal:

After examining the file's proceedings it comes out that:

Through the civil sentence no. 406/C from 5 April 2006, Braşov trial court, commercial and administrative section, admits partially the complaint's demand SC A.T.A SA Bucharest, through the Braşov subsidiary, with the principal office in Braşov, contradictory with the respondent SC A. SA with the principal office in Cluj-Napoca and SC C.S. SA with the principal office in Arad.

It forces the defendant SC A. SA to pay the complaint 200.000 lei , amount that would be updated with a 0,1% quotation for every day of delay for the payment starting with the 29 November 2004 introductory moment of the action and till the integral payment of the debit.

It forces the defendant SC C.S. SA to pay the complaint the 78.345,6675 lei amount.

Rejects, as unfounded, the in solidarity obligation claim of the two defendants as well as the updated amount owed by the SC C.S. SA defendant, formulated by the complaint.

Rejects the obligation claim of the complaint for the SC A. SA defendant to pay the court costs.

It forces the defendant SC C.S SA to pay to the complaint the 2.621,6776 lei amount and the court costs.

In order to provide the issues mentioned above, the first instance retained the following aspects:

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[11] Lacrima Rodica Boilă, *The subjective Tort Liability. Second Edition*, C.H. Beck Publishing House, Bucharest, 2009, p. 89.

[12] Ibidem, p. 90.

[13] Ibidem.

On 21 June 2004, in Stăncești locality, Prahova county, there was a traffic accident on DN 1 road; the vehicle which was dragging the XX-80-LYI trailer, going on the other side of the road and got in collision with the BV 812106/06 tractor, which was moving properly, damaging it totally and also its trailer no. BV from 06 June.

The two drivers died in the accident. The A.T. person mentioned above, the driver's truck no. CJ – 8573/06.01, employee of the SC C.S. SA defendant, was guilty for the accident as it could be observed from the expertise report submitted in the file in conjunction to the documents performed by the prosecution bodies.

For SC L. SRL's vehicle, there is an auto liability insurance series AV no. 0049190 contracted with the insurer defendant SC A. SA.

For the destroyed truck and trailer, no. BV – 8121 from 06/2006 and BV – 8141 from 06/2006, there were insurances for damages and theft CASCO no. 2039492 from 19 January 2004 and no. 203993 from 19 January 2004 concluded with the complaint as insurer, by the injured SC I.B. SRL, the owner of the damaged vehicles; SC A.T.A SA paid as compensation the 2.783.456,675 lei amount to SC I.B. SRL, subrogating, according to 22 article from Law no. 136/1995, pursuant to the paid allowance, in the insured person's rights.

Because the defendant SC A. SA did not pay the 200.000 lei sum to the complaint, although there was a compulsory auto liability insurance series AV no. 0049190 concluded with the vehicle's owner driven by the guilty person, according to 22 article from Law no. 136/1995, she will be required to pay the amount taking into account that the imposed limit, according to art. 10 from O.C.S.A., no. 3113/2003, can not be exceeded.

As the total prejudice of 2.783.456.675 wasn't fully covered, according to art. 998, 999 and 1000, paragraph 3 from the Civil Code, the difference of 783.456.675 lei will be supported by the principal defendant SC C.S. SA, the article 55, last paragraph from the Law no. 136/1995 not being in the legal provisions at the communication's date of the judicial fact under discussion, respectively at the time of the accident, and the law does not have a retroactive effect.

The trial court will reject the in solidarity obligation claim for the two defendants to pay the total amount shown in the introductory request because, according to the insurance's principles, the insurer does not pay together or for another person, but he accomplishes himself the obligation risen from the insurance contract.

Towards the dispositions from the first paragraph art. 35, of the Order no. 3113/2003, where it is shown that the limit can not be exceeded nor by allowing the civil trial's expenses, the court will reject the complaint's demand regarding the obligation of the SC A. SA defendant to pay the court costs.

The Braşov Court of Appeals, through the decision no.29/A from 27 February 2007, rejects, as unfounded, the appeals declared by the SC C.S. SA Arad and SC A. SA Cluj defendants against the civil decision no. 406/C from 5 April 2006 of the Braşov Court of Justice, commercial section, that will be kept.

Forces the appellant SC C.S. SA Arad to pay the respondent SC A.T.A. SA the 1.108 lei sum as court expenses.

By the dismissal from 22 May 2007 it has been disposed to correct the material error from the decision's purview no.29/Ap from 27 February 2007 of the Braşov

Court of Appeals, commercial section, insofar the 1.108 lei sum will be changed in 3.960 lei amount as court costs.

The Court of Appeals retained that the appeals were unfounded.

By the dismissal from 7 November 2006 the trial court disposed the restoration of the technical expertise, that couldn't have been removed otherwise after discovering some damages regarding the lack of research and the fact that the advisors, approved by the court, didn't receive the citation.

Through the new technical expertise it was settled that the limit speed did not constitute a conducting factor for the accident.

The threatening conditions from the preceding collision's moments were created by AT driver who lost the control of the vehicle and went on the other side of the road. Regarding this technical conclusions the SC C.S SA defendant's appeal can not be accepted.

About the SC A. SA Cluj defendant' s appeal we may say that it regards only the penalties of 1%/day of delay which have been accorded by the first court, appreciating correctly that this defendant was responsible for the failure to pay the compensations to the complaint, the invoked defenses being unjustified. This also results from analyzing the correspondence between the two companies; through successively addresses there were sent to the defendant the damage files for the truck and then for the trailer, addresses that weren't followed by the payment of the requested amounts and not even afterwards at the moment of the direct conciliations. The objections made subsequently are unimportant as he didn't receive the documents from the damage file for the transported merchandise. This defense can not be taken into account because of its lack of efficiency and the existence of the insurer's availability principle in establishing the procedural framework of exerting the right regression.

Through the action formulated, the SC A. SA Cluj-Napoca defendant sustained that the court's decision was groundless and illegal and the admitted update of the sum with the percentage rate of 0,1%/day of delay, starting with 29 November 2004, was wrong because the complaint didn't calculate and stamp the claim according to the penalties.

Further is mentioned that before the conciliation term, in 4 October 2006, by the address no. 25214 from 21 September 2004, the complaint was communicated the approval for paying the requested compensation but only in accordance to the explanatory files both for the trail and goods, documents which weren't communicated by the complaint.

The cause of action indicated by the petitioner is art. 304, dot 9 from the Civil Proceedings Code.

Through the brief motion formulated, the respondent SC A.T.A. SA Bucharest requested the rejection of the appeal and the maintaining of the decision no.29/A/2007 pronounced by the Braşov Court of Appeals, commercial section, as being well-grounded and legal, specifying that, in the matter, the appeal can not be grounded on the 304 article of the Civil Proceedings Code because it concerns an appeal decision.

Although the illegal reason invocated by SC A. SA is that provided by 304 article, dot 9 of the Civil Proceedings Code, the defendant-petitioner is asking actually for a reconsidering of the case facts retained by the appeal court, which is inadmissible as the declared appeal against a decision of the appeal court is limited to the reasons provided by 304 article from the Civil Proceedings Code, during an appeal trial being examined only the illegal aspects of the attacked decision.

The parties didn't submitted documents in accordance to article no.305 from the Civil Proceedings Code.

The appeal isn't founded.

The Supreme Court, analyzing the appealed decision in accordance to the invocated reason, the file's documents and the incident legal provisions establishes that the exposed situation doesn't fit the provisions from art. 304, dot 9 from the Civil Proceedings Code.

Regarding this unique appeal reason, meaning the pronounced decision doesn't have legal grounds and was taken with the wrong legal application, the petitioner did not make the distinction between the imperative or purview character of the material legal provision which has been ignored.

About the reiteration of the case facts, the petitioner can not retain one analyze of the allegations regarding the groundless aspect of the appealed decision because it has already been entitled of devolutive paths for the evidences' research and establishment of the case facts in accordance to them.

For the considerations exposed, according to art. 312, first paragraph from the Civil Proceedings Code, the Supreme Court will reject the appeal declared by the SC A. SA Cluj-Napoca defendant against the decision no. 29/A from 27 February 2007 of the Braşov Court of Appeals, commercial section, as unfounded.

VII. Conclusions

Supposing the truck's driver had lived, no removal cause of criminal liability would have been applied and he might had been responsible for manslaughter because "the guilty driver caused himself the impossibility of avoiding the accident as he didn't observed the speed limit and the legal provisions regarding the circulation on public road"[14] and the danger estate from the preceding collision moments had been created by himself.

We may notice the application of the principal defendant's liability SC C.S. SA for the proxy's act, according to 1000 article, paragraph 3 from the old Civil Code.

So, he had to pay the court costs and also the difference which surpassed the limit imposed to the insurer by law. From this point of view we may notice the possibility of having an insurance of trial expenses.

Even if it isn't a *sensu stricto* insurance it is important because of its connection to the third parties' liability. This is a new type of insurance which can be used "in order to compensate the court costs which arise during a trial. The situations that justify this

[14] Bucharest Court of Appeals, *The Courts of Appeals'Jurisprudence* - Decision no. 105 from 23 January 2009, in "Pandectele Române", no.8, 2009, p. 171.

kind of insurance are pretty frequent and include actions supported by the insurer's clients and employees."[15]

The last paragraph of the 55 article from the Law no. 136/1995, reprinted, presents the removal of the guilty person's and the principal's liability. So, "if the insurer would subrogate the injured person's rights according to 22 article, the possible difference of compensation between the optional insurance and the compulsory vehicle tort liability remains in the optional insurance account without the possibility of recovering it from the insurant (guilty person) if the paid compensation from the optional insurance doesn't surpass the maximum limit of the reparation that can be granted by the insurer for the damages produced by one vehicle according to the legislation."

Business entities are subjects of different risks which hinds the normal achievement of their objectives.

The protection against damages produced by those risks represents the subject of the risk's management inside a company, going from prevention to limitation of the risk's consequences which have already been produced.

[15] Marius Drăghici, *The Insurer – Guarantor of Payment,* C.H. Beck Publishing House, Bucharest, 2009, p. 143.