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

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ABSTRACT: *The profound transformation of the Romanian society and the contemporary European realities imposed the adaptation of the rule of civil law to meet the new cultural, economic, scientific and socio-moral values.*
Expected with great enthusiasm, or on the contrary with skepticism, the emergence of the current Civil Code and its enforcement on 1 October 2011 sparked lively debates in the legal world. Regarded as a modern tool to regulate fundamental aspects of the individual and social existence, adapted to modern terminology, the current Civil Code is, after the Romanian Constitution, the most important normative act, both in extent and in terms of content, regulating the human relations even before the birth of the person, as owner of rights and obligations, and until after death.
Our research has set an objective: the study of the current liability regulations regarding the institution of civil liability in general and tort liability, in particular. In our assessment, the institution of tort liability finds itself in a thorough transformation to meet the needs of the modern society. On these coordinates, the current Civil Code reaffirms the idea of subjective liability conditioned by proving the fault of the responsible person. However, countless law assumptions of objective liability, independent of any guilt, were regulated in the positive law. In doctrine we discuss the possibility of interpreting the "guilt" from an objective position: the abnormality of the offender's behavior and, in a lesser extent, the imputability of his deed.
We appreciate that the main objective of tort liability must be to support the interests of innocent victims. In this way, we consider the possible transfer of the legal, ethical and moral debates, from the subjective level to the objective level, respectively regarding the act causing the harm, as the defining element of tort liability.

KEYWORDS: *tort liability, Romanian Civil Code, guilt, imputability*
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1. ARTICLE 1349. TORT LIABILITY

(1) Each person has the duty to respect the rules of conduct which the law or local custom requires and he shouldn't harm, by his actions or inactions the legitimate rights or interests of others.

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(2) The one who, with discernment, violates this duty is responsible for any prejudice caused, being forced to fully compensate.
(3) In cases expressly provided by law, a person is required to repair the prejudice caused by the act of another, by the things or animals under his care and by the ruination of the building.
(4) Liability for prejudices caused by defective products is established by special law.

1. Preliminaries. The book V of the new Civil Code was dedicated by the legislature to the general theory of obligations, valued in our doctrine as being "the cornerstone of civil law." As a social and juridical fact, tort liability represents the reaction of society towards the actions or inactions that harms the subjective rights and legitimate interests of others, by binding the guilty person to repair the prejudice. In chapter IV of the new Civil Code the legal relationship that was regulated sprung from a *juridical illegal fact* under the generic name "civil liability". In the absence of a legal definition, out of the assembly of provisions we detach the specific elements summarized in our doctrine as "obligation relationship on whose grounds a person is indebted to repair the damage caused to another by his deed or, in cases provided by law, the damage for which he is responsible".

2. The structure of the institution of civil liability. The first section contains general provisions regarding the two *forms of civil liability*; the way they were recognized in our doctrine: tort liability and contractual liability, and section 2 establishes "the exonerating causes of liability" applied to them. Sections 3, 4, 5 and 6 bring under regulation the conditions of engaging civil liability in tort for the person's own deed and certain special assumptions of liability, establishing the rules applicable to repair the harm.

The analysis of the new Civil Code texts, of the way of presenting the regulations in the contents of this chapter proves the fact that they intended to ensure a uniform provision regarding the juridical institution of civil liability as a whole, taking into consideration the fact that both forms have the same *goal*: the restoring of the social balance destroyed by committing a prejudicial act and restoring the victim to the previous state, as it was before the offence was committed. Thus, we determine that by the new regulations, the distinction between tort liability and contractual liability is maintained clear, each one with its specific features in relation to the source of obligations: the illicit tort, the fact that illicit deed consists in the breach of contractual obligations. This regulation corresponds to the orientation of the majority in the doctrine of the last decades regarding the recognition of the *unity of the institution of civil liability*, but with different legal regimes, i.e. civil liability means unity in diversity, being unique and inconsistent. Both civil liabilities have the same constituent elements: the prejudice injury, the prejudicial illegal act, the perpetrator's guilt and the causal link between act and prejudice. Regarding the relationship between them, the tort liability features the common law, being applicable whenever the prejudice is not related to a contractual relation.

3. The general obligation of "not harming another". For the first time in the content of the legal text, it is set the obligation of all members of society to adapt their own behavior to the rules of conduct imposed by "the law or local custom", in order to avoid causing prejudice to other persons unlawfully. This is actually a fundamental ethical-legal principle of a civilized society, which seeks to repair the damage but also to breed the citizens, to prevent them from committing acts that would prejudice the subjective rights and interests of others.

We note the general character of the obligation that was set as the task of *every person***,** relating to the respect for the legal provisions, respectively the provisions of the objective law but also to certain rules of conduct set by the local custom, rules that have acquired over time, legal value, being widely accepted and respected in the heart of the society, due to the moral valences that they represent and their generally known and constant feature.

There are specific conditions of tort liability presented in the legal text such as: prejudice, illicit act, guilt and causal link between act and prejudice. These provisions are corroborated with the introduction of the Code respectively Article 14 (good faith), Article 15 (abuse of rights) and Article 16 (guilt). It was expressly stated that civil liability in tort can be engaged primarily as a result of the violation of a person's subjective rights, but it was recognized as a repairable prejudice and brought in the detriment of the person's interests only, which represents a considerable enlargement of the field of indemnifying prejudices, on the basis of tort liability.

*4. Definition of civil liability in tort for its own act***.** Our traditional doctrine defined this assumption of civil liability as "the obligation of the one that caused another prejudice, through an extra-contractual wrongful act, which is attributable to him in order to repair the prejudice caused thereby."

The provisions of the Article 998 – Civil Code, applicable for tort liability for their own deed, have been implemented in the new regulation in paragraph (2) of the Article 1349, in a succinct form, with reference to the violation by a person with discernment of a general duty not to harm another person as established in paragraph (1). The legal text refers to "all damages caused" highlighting the principle of the "entire" compensation of the harm.

In the new regulation there is no indication referring to the perpetrator's guilt as a condition for engaging liability. It mentions only that he had *discernment for his deed*, effective or presumed by law, when committing it, which means that by its mental characteristics, intelligence and volition; he was able to realize the harmful consequences that may occur, being able to prevent or avoid them. In these circumstances, the tort capacity of a responsible person is prerequisite for tort liability, because only the person who has acted with discernment may be considered to be guilty of his actions. In the absence of discernment we cannot ask for the imputability of the person's behavior, thus the elements of liability aren't met and there is a risk that the innocent victim will unjustly bear the consequences.

5. Legal regulation of the assumptions of tort liability. Liability for defective products. The new Civil Code does not establish a general principle regarding tort liability requirements for the wrongdoing of another person, although, according to the scale and diversity of the harmful events, it would have been an effective solution, in which the victim would have had the possibility of obtaining reparation in every situation where, by law, a person is required to respond for the acts of another person. The variant chosen by the editors of the new Civil Code was to regulate, by express law, the assumptions under which a person may be forced to repair the damage caused by the act of another. This means that we keep the criteria under which tort is essentially a personal responsibility, each one being liable only for the prejudicial acts that he committed by being guilty. Exceptionally, only where there is express statutory provisions, liability may be engaged

for the harms that, in terms of causal, were produced by others, being legally defined by law such as contract or court disposition with the responsible person.

Tort liability may be engaged for the harm caused by animals or defective products found in the care of the person responsible or the ruin of a building (Article 1375, 1376 and 1378).

According to paragraph (4) of Article 1349, when speaking about liability for the harms caused by defective products, the provisions of special laws are applicable (a note that we consider unnecessary). In this respect, we share the opinion made recently in our literature according to which this area of liability in recent decades has seen unprecedented developments and so it needed to be expressly regulated in the content of the new Civil Code, just like the French Civil Code, which synthesized these provisions in Articles 1386-1 – 1386-18. In our assessment, liability for the harm caused by defective products is particularly important in the context of the contemporary society, being a true landmark of *the reform of the whole legal institution*, which should be reflected in the new regulations. In this respect, we mention the defective products that produced he establishment of an independent compensation system which means a derogation regarding the common law of tort liability but also regarding the contractual liability, thus creating a specialized tort liability which has particular rules, distinct from those of the common law. The provisions of the Directive no. 85/374/EEC of 25 July 1985 regarding liability for defective products have been implemented into national laws of the Member States, in our country by adopting Law no. 240/2004. The purpose was the unification on European level of the provisions regarding tort law and the elimination of apparent and insignificant differences between tort and contractual liability. Thus, by engaging the liability of all those involved in the production, revalue and launching of *defective products* on the market that do not meet the *legitimate expectations of the consumers***,** was accomplished "the first important interference of the European legislator in civil matters" even without a contractual relationship or proof of culpable conduct.

2. ARTICLE 1350. CONTRACTUAL LIABILITY

(1) Any person must fulfill the obligations which they contracted.

(2) When, without justification, the person fails to fulfill this duty, he is responsible for the damage caused to the other party and is forced to repair this damage, according to the law.

(3) If the law doesn't stipulate otherwise, neither party may remove the contractual liability rules in order to opt for other rules that would be more favorable.

*1. Preliminaries***.** Under placement aspect, in the new Civil Code, the principle of contractual liability is included in the first section of Chapter IV, devoted to *civil liability*, in general. After the presentation of the general provisions applicable to tort liability, in Article 1349, naturally, in a logical sequence, in the content of this chapter, it was imposed to be presented the conditions of engaging such liability, the assumptions of contractual liability for the act of another person, the rules applicable to compensate the damage etc. In our assessment, complying with the principle of symmetry, the regulation of the two forms of liability would have been useful for providing the necessary information in a more organized way.

However, we note that within *the general provisions*, only the definition of this liability was inserted and the rule regarding the possibility of the creditor to opt for other rules that would be more favorable. Provisions concerning the legal status of contractual liability are set out in Book V, Chapter II, *Executing the obligations*, Sections 1-4, Articles 1516 to 1548.

2. The general rule regarding the compulsory execution of contractual obligations. By respecting the logical thread of the presentation in the introduction of the provisions of maximum generality, applicable to contractual liability concerning *the obligation of not harming another person*, Article 1350 begins with the establishment of similar rule: *the obligation of executing the contract.* These provisions are corroborated with the provisions of Article 1270, which resumes the Article 969 - Civil Code on *the binding force of the contract*, according to which "the validly of the concluded contract has the force of law between the contracting parties". Raised to a rank of law, the contract is the emanation of the free volition of the parties thus it must be respected by execution in good faith of all the obligations. The establishment through the new regulation of this civil liability is a matter of innovative aspect if we consider the quantitative and qualitative expansion of the contract in the last decades, in the economic and social life, being acknowledged as a major factor for boosting and harmonizing the social relationships in progress.

Traditionally, the contract was based on *the theory of the will independenc***e** which is based on three principles: freedom of contract, the binding force of the contract and the relativity of contract effects. We note that in our literature, relatively recently, *the theory of contractual solidarity* has been supported, in the attempt to strengthen the theoretical construction of the contract to match the interests of citizens of the contemporary society. This new orientation takes into account on the one hand the principle of proportionality regarding the accomplishment of "a balance between the tasks and benefits arising from the contract on account and in favor of the contracting parties", and on the other hand, complying with the principle of coherence of the contract as "a means of ensuring the contractual balance".

The principle of the contractual binding force is the *central axis* of the entire legal construction, the one that, in case of non-compliance, engages the mechanism of civil liability. In order for a creditor to claim his debtor to fulfill his contract obligations, certain conditions must be fulfilled: a) there must be a valid contract concluded between them involving compliance with the content and formal requirements, the way they are specified in Article 1179, meaning that at the time of its settlement, they had the capacity to contract, expressed their consent freely and uncorrupted, disposing on an (determined) object, possible and legitimate and considering a legal and moral cause; b) there must be an injury resulting from non-compliance with the contractual obligations.

Although the legal text used the phrase *any person* only to designate the responsible person, from the statement we draw that the execution of obligations undertaken rests solely on the person who has concluded a civil contract as he refers to the obligations "that he has contracted". We must keep in mind that these obligations have been established by an agreement of will between two or more persons that have acted "with intent to form, modify, transmit or end a legal relationship" as required by Article 1166. The freedom of the contracting parties is limited by law, the public order and morals, according to Article 1169. The contract obligations must be complied with even

by the court which, in case of litigation cannot intervene to modify its contents, only to check how the parties comply with their commitments, and if it is incomplete to invoke "certain flexible provisions of the objective law, designed to supply for the will of the parties".

*3. Definition of contractual liability***.** The new regulation places landmarks on the main features of contractual liability, essentially showing the aspects retained up to this point in our legal doctrine, but also in the French one: "The contractual liability consists in the obligation of the contractual debtor to compensate the harm caused to his creditor by non compliance, inadequate compliance or delay of fulfilling the obligations found in the validly concluded contract."

The legal text content presents the constituent elements of the contractual liability: committing *an illicit act* by the debtor consisting in that, without justification, he failed to comply fully or partially, or didn't comply properly with the obligations assumed in a concluded valid contract, the existence of *a prejudice* in the creditor's patrimony and the *causal link between act and damage.*

We note in the legal definition, that there is no reference to *the debtor's fault*, the debtor being forced to compensate the damage *according to law*. According to the traditional orientation of our doctrine regarding contract law, culpability is considered to be a prerequisite for liability, the proof being achieved by non compliance with *lato senso* of the assumed obligations. From this perspective, the contractual culpability has the same nature as the tort culpability, *displaying a mental attitude of the author towards the illicit act that generates damage***.** It follows that, as in the case of tort liability that is purely subjective, the contractual liability is based on the wrongful conduct of the liable person.

However, we note that in the recent years, in doctrine, this issue was highly interpreted, an aspect noticed even by the authors of the legal text. The debates took into account the distinction between contractual obligations *of result* and *of means*, appreciating that usually the contractual debtors' obligations are obligations of result. In these cases, contractual liability is independent of any fault and a liability on objective grounds is engaged, without having to prove the guilt of the liable person. The mere fact of failure to accomplish the pursued objective of concluding a contract is likely to cause contractual liability. Exceptionally, only for certain compliance obligation, qualified as being of means, diligence and caution is necessary to invoke and prove the debtor's fault to obtain the compensation. We rally to this opinion, which we consider to be thoroughly justified, providing the prejudiced creditor an effective solution.

*4. The creditor's option of choosing a more favorable legal regime***.** In certain circumstances, the creditors' interest would justify the invoking of certain rules, more favorable, applicable to civil liability in tort, as opposed to the contractual liability, thus it's called into question the extent to which the two Civil liabilities exclude each other or on the contrary, they complement each other, being possible also their overlapping. The provisions of the paragraphs (3) of Article 1350 were dedicated to the establishment of a rule, generally applicable, a rule regarding the *relation between contractual liability and other liabilities*, particularly tort liability. Thus, the creditor, in order to obtain the compensation of prejudice, cannot choose between the two civil liabilities, except as provided by law.

This solution was supported unanimously by the doctrine and our case law, holding that tort liability is *the common law in the field of liability* and contractual liability is only

one exception. Drawn from the common trunk of civil liability, just like branches, the two liabilities establish distinct legal regimes with respect to certain aspects such as: the need for putting the debtor in default, the proof of the caused damage, the starting moment of the right to compensation, its prescription, its limitation, the solidary conjunct feature of the obligation to compensate etc. Contractual liability is a special derogatory responsibility of strict application. Consequently, the legal relationship between the prejudiced creditor and the debtor – author of the illicit act, includes private and relative obligations according to the special clauses set by their agreement, in this case neither the overlapping is possible nor the choice of another liability by the creditor .

This is also the position of our case law that has recognized only one exception: when non-compliance of the contract meets the elements of a crime (cheating in Conventions, Article 215 paragraph (3) of the New Criminal Code and breach of trust, Article 213 of the new Criminal Code), situations in which the creditor may opt in choosing to obtain a contractual liability in order to force the debtor to compensate for the damages (the plenum of the Supreme Court no. 11 of 5 August 1965 CD 1965, p. 37). The civil action that joins the criminal action is based on the provisions of tort liability. This however does not prevent the creditor to promote a separate civil action based on the provisions of the contractual liability.

3. ART 1357. CONDITIONS OF LIABILITY FOR SOMEBODY'S OWN ACT

(1) The one who causes damage to another by an unlawful act, committed with guilt, is obliged to fix it.

(2) The author of the damage is liable for the slight fault.

1. Preliminaries. The provisions of Article 998 and 999 - Civil Code were implemented in a new formulation, in the content of the article devoted to tort liability for somebody's own act, summarizing the key issues that characterize the institution of tort liability, on the whole, applicable to all assumptions regulated by the positive law. The statement affirms that in order for the perpetrator to compensate the victim by restoring him to the previous situation, it is necessary to fulfill the cumulative four conditions: the existence of *damage*, commission of *illegal act*, establishment of a causal link between it and the harmful consequences and the guilt of the perpetrator. Thus, the essence of tort liability is causing damage by violating the subjective rights or the legitimate interests of a person, objective conditions in the absence of which one cannot determine the obligation of the liable person to compensate the damage. Guilt, defined as the subjective aspect of tort liability, has the role of defining the conduct that may be attributable to the perpetrator, in order to punish him by forcing him to compensate the victim.

2. The essential conditions for tort liability regarding somebody's own act

a). *The prejudice* is the "cornerstone" of the entire legal construction, representing "(...) not only the condition of liability but also its limitation meaning that the perpetrator is liable only in the extent of the damage caused". In the absence of a legal definition in the current Civil Code, over time, doctrine and jurisprudence had the task of defining and detailing its characteristic features in order to specify the conditions of engaging the obligation to compensate of the liable person. We find that neither part of the new Civil Code contains a definition of the damage itself, but from all provisions established in tort

liability, especially those in Section 6, *Compensation for damage*, we draw its specific elements. Thus, in paragraph (1) of Article 1349 new Civil Code, which regulates *the general obligation of not injuring or harming another person*, invokes that every "prejudice (...) of the rights or legitimate interests of others" for which the culprit is "responsible for any damage caused, is obliged to fully compensate for the damages" The definition according to which the prejudice, injury or harm represent those "moral and patrimonial negative effects of a person, as a result of an illegal conduct of another person - either of a human act, of an animal, of a thing or of an event that removes the tort liability of the agent", was taken from our traditional doctrine.

In order for a victim to obtain compensation from the person responsible for the damage, the prejudice must be *clear*, both in terms of its existence, in the present or future, and the specific possibilities of evaluation, not being yet repaired. Regarding the first condition, it is considered to be fulfilled when the damage is certain, beyond doubt, even if it occurs later, and its extent is unknown (such as regular compensation to the victims of some serious body injury resulting in disability or in the case regarding the death of a person, where the compensations are given to people that were in his care). This orientation was shared by our practice court, which ruled that the damage can be compensated and which, although not yet produced, it is likely that will happen in the future, being thus capable of evaluation. The total removal of the effects of the illicit act by compensating the prejudice, is the purpose of engaging tort liability. But if the damage was compensated by the insurer or a third party without that requirement, acting on behalf of the person responsible or paying pension of social security, then tort liability would be exonerated. In these cases, the damage being compensated, the victim is not entitled to claim again, compensation.

Regarding the multiplicity and diversity of the damages in society, they were classified having in mind several criteria: by their *economic content* they can be patrimonial or non patrimonial damages, by *the juridical nature* of the damaged patrimony they are damages caused to public or to private wealth, *according to their anticipation* there are anticipated damages and unforeseeable damages, *according to the way of producing them* they would be instantaneous or successive damages and according to *the damaged social values* we may have damages caused to individuals (bodily, mental, social, emotional etc.) or damages caused to his property etc.

b) *The illicit act* represents the act generating liability which in terms of extra contractual nature it may be the perpetrator's own act or the deed of another person or of the animals that are in his care. In order to get full compensation, fair and equitable, the victim must prove that the injury suffered is the consequence of the illegal act, committed by a responsible person. Under these conditions, the "illegal act" triggers the mechanism of involving compensation obligation for the responsible person. The former Civil Code, Article 998 claimed, in a comprehensive form, that "any act of the man that causes to the other damage" is the source of tort liability. The provisions of Article 1357 new Civil Code refer to "illegal act" without detailing the contents of this phrase. In these conditions we will consider the main coordinates of "culpability" regarding the deed of the liable person, the way they were established by doctrine and jurisprudence.

The objective element of tort liability, the illicit act is that action or inaction, which has affected the subjective rights of others or their legitimate interests, is likely to cause injury. In the French doctrine, in a synthetic style, this concept was defined as "a breach

of pre-existing obligation" or "ignoring a right or obligation imposed by law". The illegal act may be *an action* consisting in doing what shouldn't be done according to moral and legal norms (to destroy, to cause injury, to plagiarize a scientific work) or *inaction*, manifested by not doing anything, although it should be done or could be done (*e.g.* failure to take certain safety measures by the one who initiates, organizes and supervises an activity with risk of injury or damages to others).

The culpability of the perpetrator is assessed by reference to general rules of conduct established by law and moral norms in society. In essence, they establish the responsibility of the citizen's task, an imperative obligation of "not hurting or harming another person". The violation of this general obligation is contrary to the rules of the objective law, being an illicit act that would engage the civil liability in tort. This is the way of exteriorization of the perpetrator's consciousness and will regarding the offense and the harmful consequences. Unlike the "contractual illegal act" which relates solely to non-compliance established by agreement of the parties, the illegal act may be committed in an infinite number of ways, if it is likely to harm other people.

c) The causal link between the illicit act and harm is a prerequisite, of objective nature, for engaging tort liability, which helps to identify the person responsible for "causing" the other damage. The existence of this condition requires a link from cause to effect between the produced damage and the generator fact, so that, in the countless causal circumstances and the conditions that contributed to some extent, we would be able to identify those previous actions or inactions that directly and necessarily caused the damage. Lack of causal link eliminates the hypothesis of tort liability regarding the damage produced.

In our literature certain legal theories were supported regarding the principle criteria that must determine the causal link between the illegal act and damage: the equivalence of conditions or the prerequisite (*sine qua non*), the system of proximate cause and system of appropriate cause. The constructive theory that summarizes the positive values of these guidelines and eliminates the detected deficiencies is the theory of the indivisible unity of cause and condition, that, in the event that one cannot determine accurately the cause of damage, it assigns causal value to all the facts or circumstances that preceded it. In these theories it was stated that "such external conditions that contributed to the detrimental effect ... form, together with the causal circumstance, an indivisible unit in which such circumstances also acquire, through interaction with the cause, a causal character".

The same orientation is found in our jurisprudence as it takes into account the assumption of coexistence between cause and conditions, including in the causal complex not only the facts that are "necessary causes" but also "causal conditions" respectively the illegal acts that made the damage possible.

c) Culpability is a distinct and essential condition of tort liability, precisely determined and with an independent character. Thus, liability may be engaged only to the perpetrator that is found guilty of committing the harmful act. The paragraph (1) of the Article 1357 new Civil Code is limited to invoking the "guilt" of the perpetrator, as a condition for engaging the tort liability because the term was defined in the introduction of the Code, Article 16 paragraph (2) and (3). In terms of terminology, we note that the new provisions used the notion of *culpability*, which, in a generic formulation includes two forms, intention and negligence. In paragraph (2) of the Article 1357, the provisions

of the Article 999 have been updated and refer to the liability for the slightest negligence, referring to that specific negligence or imprudence that not even the person who lacks cleverness would display have regarding his own interests [IInd theses paragraph (2) of the Article 16].

The legal literature of our country defines guilt as "the mental attitude of the perpetrator towards the damaging act and towards the results of this illicit act the moment it was committed". The structural elements of negligence are the *intellective factor* of consciousness – which consists of an intimate psychological process regarding the knowledge of objective laws acting in nature and in society, the analysis of the possible consequences of an act determined by certain purposes, followed by a volitional factor, of will, embodied in the psychological process of deliberation and the behavior of deciding what conduct would be adopted, which is materialized in tort conduct. Regarding the *severity of the guilt*, in principle, it is not relevant in tort liability; the offender is required to compensate even for the slightest fault. Law and jurisprudence added particular effects for certain categories of illegal acts which contributed to the reconstruction of a true "hierarchy", in relation to the seriousness of the culpability of the liable person.

The provisions of Article 1357 new Civil Code keep our orientation towards a tort liability essentially subjective, sharing the idea of moral imputability of conduct. The culpability of the perpetrator is ambivalent: *moral*, referring to the mental processes that precede and accompany the damaging illegal act, requiring awareness of the socially dangerous consequences on the one hand, and *social***,** generated by the need of restoring the previous situation by compensating the damage, that concerns only the exterior manifestations, that abnormal behavior of the individual, independent of his mental attitude. The guilt remains the moral, ethical, psychological, emotional element, which precedes and accompanies the illegal act, a true legal standard on which the sanction of the liable person for compensation is based.

In this respect, as we have already stated, we consider that, in defining culpability as a condition of liability, we must refer, in particular, to the abnormality of the offender's behavior and, to a lesser extent, to the imputability of his offense. We note that in contemporary positive law, some assumptions of liability have been established for someone's own fault, independent of any guilt, aiming to support the interests of the innocent victims as a priority (liability for the damage caused by defective products or environmental damage). In this way, we consider possible the transfer of legal, ethical and moral debates from a subjective level to an objective level, namely regarding the act causing the damage, the element of tort liability. This could create a new perspective to real and effective protection of the interests of the victim, as it would make possible the compensation for the damage even by those who, due to age or poor mental health status, were not aware of the dangerous consequences of their actions, without having discernment of their actions.

3. The basis for tort liability regarding someone's own fault. Guilt, as the foundation of such liability, in our opinion, is an axiological *summum*, bringing together the most important guiding principles regarding the interpretation of this legal institution. Viewed from the perspective of the new regulation, tort liability is essentially subjective, being intimately linked to the perpetrator's personality and consciousness for the prejudicial act.

4. The functions of tort liability. The primary role of the subjective liability will continue to be the punishing function, being directed only against the one who is guilty of committing an illicit damaging act. If his guilt cannot be proven, there is a danger that the victim will be unable to obtain compensation, which is an unfair solution. We find that only as an alternative, it is taken into view the reparative function of restoring the situation prior to this action. However, examining the current state of the liability institution, we note the need to streamline the basic institutions of civil law by regulating, in the recent decades, the positive law, a growing number of objective tort liability assumptions aiming for providing the repair of damage. The European law states the tendency of objectivize this liability on the one hand, and on the other hand the restriction of cases based on the subjective guilt. However, in our future, regulation guilt was maintained in the form of intention or negligence, with a value of principle for the foundation of subjective liability.

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