THEORETICAL AND PRACTICAL ASPECTS OF THE PRINCIPAL'S LIABILITY FOR THE ACT OF THE DEFENDANT

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Abstract

This paper aims to present some theoretical and practical aspects of the principal's liability for the act of the defendant.

Thus, we have proposed a brief review of the basic notions of the principal's liability for the acts of the defendant, the seat of the matter and a brief comparison between the old regulation and the provisions of the current Civil Code. We do not wish to summarise all the elements that make up this vast institution, but simply to focus on some practical elements whit importance in the economic resolution of legal problems involving the liability of the competent person for the act of the defendant.

The central elements in which we have recorded landmark decisions on the subject, handed down or validated by the supreme court, concern, on the one hand, the delimitation of the principal's liability for the act of the defendant from contractual liability and, on the other hand, the principal's right of recourse and the removal of this right through the concrete possibility for the defendant to prove the principal's own fault.

Finally, it should not be overlooked that this institution is also often applied in criminal proceedings, when the principal is called upon to respond as a civilly liable party, an aspect which also gives rise to a more or less apparent problem with regard to the application of res judicata in criminal matters in civil matters.

Keywords: *principal, tort liability, defendant, damage, work report.*

1. Introduction

Liability for the act of another person is a variety of tort liability, imposed on certain persons for wrongful acts causing damage committed by those under their supervision, guidance, education.

Legal literature[1] has classified the hypotheses expressly regulated by the Civil Code, based on the nature of the relationship between the perpetrator of the harmful act and the person responsible: liability arising from the supervision of another person's way of life and liability arising from association for the purpose of carrying out an activity of guidance or control.

The first classification is psychological, educational, affective or didactic in nature, while the second classification is economic and social in nature.

The current regulation maintains the rule of express regulation of the hypotheses of liability for the act of another person, which it has grouped into two categories, according to the criterion expressed above.

Thus, according to the current civil law regulations in Section 4 of Book V. On Obligations, Title II. Source of Obligations, Chapter IV. Civil Liability is regulated liability for the act of another. Specifically, the principal's liability for the act of the defendant (art. 1373 of the Civil Code) and the liability for the act of an underage or of a person placed under a restraining order (art. 1372 of the Civil Code).

2. Applicable law on the civil liability of principals for the acts of their servants

2.1. Regulation under the Old Civil Code

Art. 1000 para. (3) of the Old Civil Code contained provisions according to which the partners are liable for the *damage caused by (...) and their assistants in the functions entrusted to them*.

In the doctrine corresponding to the old regulation, it has been argued that the provisions of the first sentence of para. (1) of art. 1000 Old Civil Code - "*We are also liable for the damage caused by the act of persons for whom we are liable (...)*" could be interpreted as a "*principle of broad law*" of liability for the act of another person, favourable to the victims of wrongful acts. Although thoroughly argued, this view remained isolated.

Since the time of the Civil Code of 1864, the liability of principals for the acts of their defendants was intended to apply to both civil and criminal courts, since principals were called upon to answer, as a civilly liable party, for the criminal acts of their defendants which caused damage.

Thus, the concrete way of applying the liability of principals for the act of the defendant was also created by case law through the multitude of cases in civil or

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[1] G. Viney. P. Jurdain, in J. Ghestin (coord.), *Traité du droit civil*, 2nd ed., LGDJ, Paris 1998, p. 820, apud L.R. Boilă, *Răspunderea civilă obiectivă*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014, p. 346.

criminal matters which have been brought before the courts in which this type of liability is incurred.

2.2. Conception according to the current Civil Code

The current Civil Code extensively regulates the liability of principals for the acts of their defendant in art. 1373 of the Civil Code, which consists of three paragraphs: "*(1)The principal is obliged to make good the damage caused by his defendant whenever the act committed by them is related to the duties or purpose of the functions entrusted to him. (2) A principal is one who, by virtue of a contract or by law, exercises direction, supervision and control over one who performs certain functions or tasks in his own interest or in the interest of another. (3) The principal shall not be liable if he proves that the victim knew or, according to the circumstances, could have known, at the time the harmful act was committed, that the principal acted without any connection with the duties or purpose of the functions entrusted to him*".

2.2.1. Delimitation of contractual liability

This liability arises only in those situations where the defendant causes unjust damage to third parties through a tort. Where the wrongful act is committed in the performance of a contract concluded by the principal with a third party and thereby causes damage to the latter by failing to perform a contractual obligation assumed in the contract, the rules of contractual liability for the act of another, *i.e.* art. 1519 of the Civil Code, will apply.

For example, in a relatively recent decision, the HCCJ ruled that: "*In the case of a contract whose non-performance or defective performance has resulted in damage, it is not possible to have recourse to civil liability in tort, the only legal remedy for damages being that of contractual liability.*

Accordingly, the action in tort seeking compensation for the damage caused by the wrongful act committed by the employees of a banking establishment, consisting in the defective execution of a bank transfer, is inadmissible. The applicant, as a bank account holder (which presupposes the existence of a contract concluded between him and the banking establishment), had only one option, namely to seek compensation for the damage under contractual civil liability, since the source of the obligation to compensate for the damage is contractual and not tortious. "[2]

Specifically, in the above case, the Supreme Court was called upon to rule on the appeal brought by the applicant company (the injured party). Thus, by its application to the Bucharest Tribunal, the applicant company requested that the respondent (the bank) be ordered to pay the sum of 415 635 lei representing the damage suffered as a result of negligence on the part of bank employees in carrying out a banking operation, namely the execution of a payment order issued by the applicant which was to be transferred to the account of the Treasury of District 1 Bucharest by way of VAT payment. In law, the applicant based its claim on the provisions of art. 998 and 1000(3) of the Old Civil Code and art. 1349, 1373, 1385 and 1386 of the current Civil Code.

Among other things, the respondent pleaded the inadmissibility of the application, arguing that there were commercial relations between the parties consisting of specific banking transactions, on the basis of the agreement concluded when the applicant's bank account was opened. Thus, since the tort is subsidiary to the contract, the application must be dismissed as inadmissible. Analysing this objection first, the Tribunal rejected it, holding, in principle, that: (i) the respondent did not submit the agreements to which it refers, and is therefore unable to analyse their content, and (ii) "*the defendant's obligations regarding the execution of the payment order derive from a regulatory act, namely the BNR Regulation no. 2 of 23. Feb. 2005, regarding the payment order used in credit transfer operations, so that the defendant's obligation was legal (and not contractual*)"[3] .

Finally, the First Instance granted the application in part and ordered the respondent to pay the sum of 273 342 lei.

Subsequently, at the appeal stage, the Bucharest Court of Appeal admitted the respondent's (the bank's) appeal and dismissed the claim as inadmissible. The Court of Appeal held that: "*By opening a bank account by any person (natural or legal), a banking services contract is concluded between the professional (bank) and the customer for the performance of all banking operations through that account (payments, collections), a contract with specific and implicit rights and obligations (mandate, good faith, etc.). There is therefore no doubt that a legal contractual relationship existed between the two parties*.

Both the old Civil Code and the present Civil Code have adopted the concept that the legal regime of tort liability is the common law regime, while the legal regime of contractual liability is special, derogatory."[4]

Thus, by opening a bank account, a banking services contract for collections and payments is concluded, under which the bank executes the payment orders of the contract holder, under the conditions laid

[2] See Decision no. 1134 of 5 June 2019 of the HCCJ, civ. s. I.
[3] See Civil Judgment no. 2032 of 24.05.2017 delivered by the Bucharest Court, civ. s. VI.
[4] See Civil Decision no 246 of 08.02.2018 of the Bucharest Court of Appeal, civ. s. VI.

down in the specific banking regulations. In the present case, the unlawful act is the defective performance of banking operations and the nature of the transfer order given by the account holder is a mandate, by which the customer authorises the bank to debit a certain amount from his account and to credit that amount to another account.

Therefore, as trustee, the bank has the obligation to check the payment orders for apparent non-conformities, to execute the order within a short period of time and to account for the execution of the order in the sense that the beneficiary's account (in this case, ANAF) has been credited.

According to the reappeal, which was decided by the HCCJ, the appellant pleaded infringement of art. 22 para. (4) of the Code of Civil Procedure, on the ground that the court of appeal, in its appeal proceedings, dealt with an issue relating to the legal classification of the claim and did not play an active role in that regard, which led to an infringement of the appellant's right to a fair trial and made it impossible for the appellant to assert its claims on account of an alleged error in the legal classification of the claim. Furthermore, the company submitted that it was not apparent from the documents on file that there were any contractual relations between the parties governing the factual situation at issue.

In the light of those aspects, the Supreme Court rightly held that: *'Having regard to the specific content of the claim, the High Court finds, as the Court of Appeal rightly held, that the appellant brought an action for civil liability in tort, the purpose of which was to obtain compensation from the defendant for the damage caused by the wrongful act of its employees in making a bank transfer.*

In view of this, although under the provisions of art. 22 para. (4) of the Code of Civil Procedure, the court shall give or restore the legal classification of the acts and facts in issue, even if the parties have given them a different name, in the present case it was neither necessary nor possible for the court of appeal to intervene of that nature in order to classify the action brought by the plaintiff-appellant, since its claims were unequivocally set out in the application in the sense that they were based on the manner in which the obligations arising from the bank account contract were fulfilled, and it was in those terms that the case was also tried at first instance. "[5]

However, the active role of the judge must not affect the parties' right of availability, but must be in harmony with their initiative in order to establish the truth.

Therefore, the HCCJ validated the arguments of the Bucharest Court of Appeal and dismissed the reappeal as unfounded.

2.2.2. The notion of principal and defendant

In the corresponding regulation of the Old Civil Code there was no definition of the notion of principal and defendant, so it was up to judicial practice and literature to establish the content of these two notions.

In the doctrine[6] it has been concluded that what defines the notions of principal and defendant is "the *existence of a relationship of subordination based on the fact that, by agreement between them, a natural or legal person has entrusted a natural person with a particular task. This entrustment enables the first person - called the principal - to give instructions, to direct, guide and control the activity of the other person - called the principal - who is obliged to follow the instructions and directions given*".

Currently, according to art. 1373 para. (2) of the Civil Code, a principal is a person who, by virtue of a contract or by virtue of the law, exercises direction, supervision and control over a person who performs certain functions or tasks in his own interest or in the interest of another.

In a recent criminal law case[7] it was rightly held, in accordance with the provisions of the current Civil Code, that the essential element for defining the relationship of prepuce is not so much the subordination of the defendant, but the fact that he acted under the authority and in the interest of the principal, for his benefit and with the means provided by him.

In conclusion, the principal is the person who has the power of direction, control and supervision over the principal by virtue of a contract or statutory provisions, and the defendant is the person who performs certain functions or responsibilities in the interest of the principal or another person, being under the principal's power of direction, supervision and control.

It should also be pointed out that for the relationship between principal and defendant to exist, it does not have to be direct and immediate or permanent, and the principal's right to give orders and to supervise and control the defendant does not necessarily require that it be exercised in fact.

Finally, one last clarification is necessary, *i.e.* the principal can be either a natural person or a legal person, but the defendant can only be a natural person.

[5] See Decision no. 1134 of 5 June 2019 of the HCCJ, civ. s. I.

[6] C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligations*, 3rd ed., revised and added, All Beck Publishing House, Bucharest, 2000, p. 236.

[7] See Criminal Decision no. 219/A of 28.02.2022 of the Ploieşti Court of Appeal, crim. s. for juvenile and family cases.

2.2.3. Grounds for the relationship between principal and defendant

Most often the legal relationship between principal and defendant arises from a contract concluded between them. First, there may be an individual employment contract.

Secondly, this type of relationship may also arise from non-contractual acts, such as: the acceptance of a position by a person as a member of a cooperative organisation or the performance of voluntary work for a trade union or an association or foundation; the hypothesis of a child carrying out an activity in the interests of his or her parties.

At the same time, we can state that, in principle, there is no relationship of subordination within the framework of the mandate contract, the contract of entrepreneurship or the lease contract.

2.2.4. Conditions and basis for the liability of the principal for the act of the defendant

From the provisions of art. 1373 of the Civil Code it can be seen that three of the general conditions of liability must be proven, namely: damage, wrongful act and causal link.

The text of the Civil Code does not provide for the condition of guilt of the defendant who committed the wrongful and harmful act, which is why we can say that the liability is principal and autonomous and which puts an end to the debates corresponding to the old regulation on the basis of liability and the need to prove the fault of the defendant.

2.2.5. The principal's regress action

The principal is objectively liable for the damage caused by the perpetrator, so that, after making reparation, in whole or in part, the principal has the right, under certain conditions, to claim from the perpetrator the value of the reparation granted to the victim.

The legal basis giving the principal the right of recourse is art. 1384 para. (1) of the Civil Code, according to which: "*the person who is liable for the act of another may take recourse against the one who caused the damage, unless the latter is not liable for the damage caused*. ". The principal's recourse against the defendant is therefore admissible only if the conditions of the defendant's liability for his own act are met, and it is therefore necessary to prove the defendant's guilt or personal fault.

This conclusion is also accepted by the courts. In a case concerning the regress of the principal (Ministry of National Defence) for the unlawful acts of the defendants established by a final criminal judgment, the HCCJ held that: "*Against the action for regress of the principal, the defendants cannot defend themselves by invoking the presumption of liability established by art. 1000 para. (3) of the Civil Code, but they may possibly invoke and prove the principal's own act, an act which would have caused all or part of the damage. However, if a criminal judgment of conviction has expressly held that the principal was not at fault in causing the damage, this aspect can no longer be raised in the action for regress, and the defendants may not plead that they committed the acts causing the damage as a result of the orders* received"[8].

Specifically, in the above-mentioned case, the first court found that, on the basis of criminal judgment no. 329/2005 delivered by the HCCJ, crim. s., final by Decision no. 121/2006 delivered by the HCCJ, 9-judge panel, the Ministry of National Defence was ordered, jointly and severally with the defendants, to pay the sum of 3,778,530.00 lei, representing material and non-material damages and court costs to the 83 civil parties in the criminal case. The Ministry of National Defence has provided proof of the payment of damages to the civil parties, so that the claim for recovery of those sums from the defendants is legitimate. The court did not accept the defendants' arguments that they had carried out an order, given that those defences were considered by the courts when they definitively established guilt and criminal and civil liability, so that no such analysis was required.

Moreover, the HCCJ held in the recitals of the criminal judgment that the Ministry of National Defence, the perpetrator, is not guilty, but is only a guarantor, which gives it the right, after compensating the victim, to ask the perpetrator to pay the amount he paid to the injured party. Lastly, the Court also held that it *is the defendant and not the principal who pays the damages, which he, the principal, guarantees. In other words, the principal who pays the damages in full has a regress action*.

In the light of the foregoing, the Court of Appeal found that a civil action had been brought in the criminal case and that reparation for the damage had been ordered to be made in accordance with the provisions of civil law. Since the criminal court did not determine the specific payment obligations of each defendant, but clarified the relationship between the parties, it was held that, in the present case, the rules applicable to joint and several liability should be determined.

The Supreme Court dismissed the reappeal and concluded that: „*the defendants are tending to reassess their guilt (repeating in this dispute a defence which they have consistently upheld before the criminal court, namely the fulfilment of military orders given to them and their lack of responsibility as executors), which*

[8] See Decision no. 290 of 20 January 2012 of the HCCJ, civ. s. I.

would be contrary to the principle of res judicata of the final criminal judgment establishing the facts, the persons who committed them and their guilt."[9]

On the other hand, in a recent case of the HCCJ, the principal's reappeal was dismissed because the defendant was able to prove that the principal was involved in causing the damage.

As a general rule, the Supreme Court held that: "*it is necessary to distinguish between the defendant's own fault and his official fault, the defendant will be liable for the damage caused only if his guilt or fault is proven, when he has committed the harmful act by acting beyond the duties of his office, by deviating from them or by abusing his functions. In so far as the act was committed by the principal acting strictly within the limits of his office or in order to carry out the orders, instructions and directions of the principal and in his interest, the fault is circumscribed by the concept of official misconduct, which is attributable to the principal.*"[10]

Specifically, in the above-mentioned case, the Court of Vâlcea registered a claim on 7 November 2017, by which the "MARIE SKLODOWSKA CURIE" Children's Emergency Hospital requested that the defendant be ordered to pay the sum of RON 910 394.

By court ruling no. 1212 of 26.10.2018 delivered by the Court of Vâlcea, civ. s. I, the court admitted the claim. Against the judgment, the defendant filed an appeal. By court ruling no. 4048 of 24.10.2019, the Pitești Court of Appeal, civ. s. I admitted the appeal and dismissed the claim in its entirety, finding that the conditions regarding the existence of the principal's own fault in organising the activity of his defendant were met.

The Court of Appeal held that, in the present case, the defendant had proved that the unlawful activity for which he was held responsible was the consequence of orders and instructions received from the principal, namely the way in which he organised and carried out all the activity relating to the performance of on-call duty during the period in which he was working as a resident at the principal hospital.

By its reappeal, the hospital has raised the issue that the judgment on appeal infringes the res judicata nature of the criminal judgment, which finds that the principal was not at fault in causing the damage.

From the considerations of the Supreme Court: "*it is true that neither of the two criminal judgments found the hospital to be at fault, but it participated in the trial as a civilly liable party.*

The criminal court examined the criminal liability of the defendant and ordered the liability of the principal, which is a case of civil liability for the act of another person, to increase the guarantees for the payment of damages in favour of the civil parties.

It cannot, however, be argued that the criminal court ruled that the hospital was not at fault in the occurrence of the harmful event, given that the limits of the criminal proceedings did not give rise to an analysis of the hospital's liability for its own act.

In fact, as the Court of Appeal correctly held, the criminal proceedings analysed the liability of the defendant and the legal relationship between the parties to the present proceedings, and the present judicial proceedings must analyse the effects of the principal's liability in relation to the defendant."[11].

Thus, the Court of Appeal did not violate the authority of *res judicata* of the criminal judgment and did not set out contradictory considerations in its reasoning; in fact, starting from the statements in the criminal judgments concerning the defendant's guilt and having regard to the provisions of art. 28 para. (1) of the new Code of Criminal Procedure, the civil court analysed the defendant's defences concerning the existence of the principal's own fault.

Therefore, the Supreme Court validated the arguments of the Court of Appeal, according to which the criminal proceedings did not analyse the aspects related to the organisation of the hospital's activity in the assignment of residents to the emergency unit and in the planning of the on-call activity, aspects which reveal the exclusive own fault of the principal in committing the harmful act.

The Court of Appeal found that there were no criteria contained in the hospital's duty roster, protocols or instructions to guide the resident or to lead the resident to make the decision to call the senior doctor on call. It was held that the obligation to draw up such criteria governing the work of residents sent to the first line of the emergency unit was incumbent on the commissioning doctor and that failure to comply with that obligation, in the light of the way in which the work was organised, entailed the exclusive fault of the commissioning doctor. In particular, the Court of Appeal held that the fact that the work had been carried out on the basis of custom and practice over a long period of time created an appearance of legality and gave the impression that the orders and instructions of the commissioner in that regard were lawful, since it was clear from the evidence that even the experienced doctors (head of the hospital department) in the hospital did not question the legality of the organisation of the residents' work, since the custom in the hospital was for them to work unsupervised.

[9] *Ibidem.*
[10] See Decision no. 2142 of 21 October 2020 of the HCCJ, civ. s. I.
[11] *Ibidem.*

3. Conclusions

Therefore, the liability of the principal for the act of the defendant is a constantly developing institution which, from a practical point of view, has a wide variety of solutions depending on the specific elements of the case.

Thus, for example, in relation to the delimitation of this type of civil liability from contractual liability, it should be borne in mind that the former is the rule and the latter the exception, which applies with priority.

At the same time, practical solutions are of particular importance as regards the right of recourse, especially when this liability derives from an unlawful act established by a final criminal judgment.

Therefore, if the criminal court does not find that the principal is not at fault, the defendant may, in the action for regress, prove the principal's fault in organising the activity of his defendant.

References

- P. Vasilescu, *Civil Law. Obligations*, Hamangiu Publishing House, Bucharest, 2012;
- Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord), *The New Civil Code. Commentary on articles*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014;
- Liviu Pop in L. Pop, I-F. Popa, S.I. Vidu, *Civil Law Course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015;
- L.R. Boilă, *Objective Civil Liability*, 2nd ed., C.H. Beck Publishing House, Bucharest, 2014;
- G. Boroi, C.A. Anghelescu, I. Nicolae, *Fişe de drept civil. Obligations, Contracts, Inheritance*, 5th ed., revised and added, Hamangiu Publishing House, Bucharest, 2020;
- G. Boroi, L. Stănciulescu, *Civil law institutions in the regulation of the new Civil Code*, Hamangiu Publishing House, Bucharest, 2012;
- C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligations*, 3rd ed., revised and added, All Beck Publishing House, Bucharest, 2000;
- Decision no. 1134 of 5 June 2019 of the HCCJ, civ. s. I;
- Civil judgment no. 2032 of 24.05.2017 rendered by the Bucharest Court – civ. s. VI;
- Civil decision no. 246 of 08.02.2018 rendered by the Bucharest Court of Appeal – civ. s. VI;
- Decision no. 1134 of 5 June 2019 of the HCCJ, civ. s. I;
- Criminal decision no. 219/A of 28.02.2022 delivered by the Ploiesti Court of Appeal, crim s. for juvenile and family cases;
- Decision no. 290 of 20 January 2012 of the HCCJ, civ. s. I;
- Decision no. 2142 of 21 October 2020 delivered by the HCCJ, civ. s. I.