Journal for Ethics in Social Studies
ISSN: 2559 - 7612
Covered in: CrossRef; RePEc; CEEOL; KVK; WorldCat; Google Scholar

2021, Volume 5, Issue 1, pages: 45-49 | https://doi.org/10.18662/jess/5.1/41

Tortious Liability vs Contractual Liability. Comparative View

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Abstract: To speak of responsibility and accountability in human actions is to bring together two disciplines: philosophy and law. The society we live in is based on knowledge, one in which human values have transformed, relativism being an element that outlines certain justifications of the individual for their actions. The same is not the case in law, where everyone is accountable and responsible for their actions. In this paper we will bring to the forefront the tortious liability vs. contractual liability.

Keywords: *tortious civil liability; contractual civil liability; the New Civil Code; obligations.*

How to cite: Terec-Vlad, L. (2022). Tortious Liability vs Contractual Liability. Comparative View. *Journal for Ethics in Social Studies, 5*(1), 45-49. https://doi.org/10.18662/jess/5.1/41

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1. Introduction

Romania was under the influence Old 1865 Civil Code for approximately 15 decades, but with the extensive reform of civil law and the adoption of legislation adapted to the reality of our days (Huidu, 2019), it was desired to eliminate the imperfections highlighted in the specialized doctrine, the legislator offering a legislative work "that would evolve by surprising contemporary social relations" (Colţan, n.d.). There have been multiple cases in the jurisprudence when a person who caused an injury could not be held liable due to the fact that they were legally incapable or they were minor, or the legal person was insolvent. In such a situation, the victim had to bear the negative consequences of the act, even though they had no fault in causing the damage.

Precisely for this reason, the national legislation provides for a "form of substitutive civil liability pointof view, which is undertaken by the person who had the obligation to supervise the author (in this case the minors and the prohibited persons), or had the right of direction, supervision and control over them" (Ilies Neamt & Toma-Dăuceanu, 2019). Against the background of the evolution of complex situations, the issue of a compensation law was raised: "The debate became more and more animated, in the context of the proliferation of claims seeking compensation, under the pressure of the unprecedented diversification of human rights and fundamental freedoms, making traditional morality to be more and more relaxed. This explains the tendency of many modern codifications to include it in the broader concept of public order, as a component of it. Even the French, known for their refusal, sometimes clearly expressed in favor of adopting modern solutions and have agreed to reform their Civil Code, through the Contract Law Reform Ordinance of February 10th, 2016, by relating freedom of contract only to public order" (Niculăescu, 2019). If previously the damages were borne by the person responsible for causing damage to another through the patrimonial damage caused, nowadays the civil liability insurances have taken over the risk of the tortious civil liability of the insured (Mangu, 2020).

Illegal acts were regulated in art. 998-1003 of the Civil Code of 1864; the new Civil Code includes a series of provisions regarding tortious civil liability, contained in articles 1349-1395. Tortious civil liability for one's own deed, but also for a third party's deed and liability for damage caused by animals or things are provided as follows, in art. 1349: "(1) Every person has the duty to respect the rules of conduct that the law or local custom imposes

and not to harm, through their actions or inactions, the rights or legitimate interests of other persons; (2) The one who, having discernment, violates this duty is responsible for all the damages caused, being obliged to repair them in full; (3) In the specific cases provided by law, a person is obliged to repair the damage caused by the act of another, by the things or animals under their care, as well as by the ruin of the edifice; (4) Liability for damages caused by defective products is established by special law".

In order for an act to be considered illegal, it must meet several conditions: it must be committed with guilt, there must be damage, and there must be a causal link. What is important to mention is the fact that the definition of guilt was taken from criminal law and introduced into the New Civil Code, at the same time "the express regulation of objective liability is welcomed by the doctrine, especially in the case of parents' liability for minors" (Colţan, n.d.). Among the functions of tortious civil liability, we highlight: the reparative function, the preventive-educational function (Apostu, 2019), the punitive function (Barbu, 2019; Barbu & Nicolae, 2019), the afflictive function.

2. Contractual civil liability vs. tortious civil liability

At first glance, we can say that contractual civil liability presupposes the existence of several points of view, including: the scope, the conditions for intervention, the causes of exoneration from liability (Terzea, 2020). Starting from the explanation provided by art 1350 of the New Civil Code, i.e.: "the existence of a damage caused by the non-execution of a contractual obligation and the debtor's obligation to repair said damage", we highlight the fact that as far as the concept of "contractual liability" is concerned, all remedies for the non-execution of the contract will be integrated, "whose essential purpose is to repair the damage caused by the lato sensu non-performance of a contractual obligation" (Terzea, 2020). Contractual liability first of all requires the existence of a contract, but at the same time, the existence of the contract does not require the existence of a causal link, and in the absence of this, it cannot be about contractual civil liability but about tortious civil liability (Terzea, 2020).

There are a number of differences between the two types of liability, which consist of (Ghiţă, 2009):

- in the case of tortious liability, the breached obligation is a legal, general one, which "belongs to all subjects of law"; in the case of contractual liability, only the obligation established in the contract is violated;

- the conditions of liability, i.e. what we call the capacity of the person responsible: the tortious capacity does not coincide with the capacity to exercise in contractual matters;

The extent of the reparation is greater for tortious liability than for contractual liability;

- application of coercive means;

- regarding the tortious liability, the guilt of the author of the illegal act must be proven by the prejudicial person.

3. Conclusions

Tortious civil liability and contractual civil liability are the main forms of liability in civil law. Following the aspects analyzed throughout this paper, we can affirm that contractual civil liability arises in the case of the defective execution of the obligations assumed by the contract, while tortious civil liability is a framework legislation for legal liability.

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