# ENVIRONMENTAL LIABILITY AND LIABILITY IN TORT LAW

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*The Government Emergency Ordinance no. 195/2005 on the protection of the environment[1], stipulates in art. 95: (1) liability for damage to the environment has an objective character, independent of guilt. In case of several authors, the liability is a joint responsibility; (2) as an exception, liability is subjective for the prejudice caused to protected species and to natural habitats, in accordance with the specific regulations; (3) the prevention and remedy of the damage done to the environment are carried out in accordance with the provisions of the present emergency ordinance and specific regulations. From this text, it results that the rule in environmental law is represented by objective liability, independent of guilt (and the exception is subjective liability) and joint liability (in case of plurality of authors). Objective liability and joint liability are the expression of the fundamental "polluter pays" principle (stipulated under art. 3 letter e of GEO no. 195/2005 on the protection of the environment), actually meeting the needs of the victim who, on the one hand does not have to prove the guilt of the doer and, on the other hand, in case of plurality of authors, has the possibility to claim full remedy for damage from any of them.*

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**Legal framework.** The Government Emergency Ordinance no. 195/2005 on the protection of the environment[1], stipulates in art. 95: (1) liability for damage to the environment has an objective character, independent of guilt. In case of several authors, the liability is a joint responsibility; (2) as an exception, liability is subjective for the prejudice caused to protected species and to natural habitats, in accordance with the specific regulations; (3) the prevention and remedy of the damage done to the environment are carried out in accordance with the provisions of the present emergency ordinance and specific regulations. From this text, it results that the rule in environmental law is represented by objective liability, independent of guilt (and the exception is subjective liability) and joint liability (in case of plurality of authors). Objective liability and joint liability are the expression of the fundamental "polluter pays" principle (stipulated under art. 3 letter e of GEO no. 195/2005 on the protection of the environment), actually meeting the needs of the victim who, on the one hand does not have to prove the guilt of the doer and, on the other hand, in case of plurality of authors, has the possibility to claim full remedy for damage from any of them.

The principle of liability for an illicit/ wrongful act causing damage is instituted by the Civil Code in Chapter V "On torts and quasi-torts" (art. 998 – art. 1003) under Title III ("On contracts or conventions") of Book III ("On different ways of acquiring property). Art. 998 of the Civil Code stipulates that "any act of a person that causes a prejudice to

another, obliges the one whose mistake caused the damage, to remedy it", and art. 999 Civ. C. further disposes that "a person is responsible not only for the prejudice which he caused by his act, but also for the one caused by his negligence or recklessness". If the above-mentioned articles regulate liability for one's own act, art. 1000 Civ. C. institutes liability for certain categories of persons for the illicit/ wrongful act committed by another person, art. 1001 and art. 1002 Civ. C. establish liability for damage caused by animals or things which are in the legal custody of certain persons, and art. 1003 consecrates the joint character of liability in case the damage is imputable to several persons.

Consequently, liability in tort law is the sanction stipulated by the Civil Code for a tort (that is a wrongful act causing damage) and which consists in the obligation to provide compensation for the damage.

**Liability conditions**

**Wrongful act. "**Any act of a person" represents the first liability condition in tort, an idea that explicitly results from the formulation in art. 998 Civ. C.; this is the reason why the illicit/ wrongful act is to be studied first, although it is obvious that "the premise for constituting a civil relation of tortious liability is the prejudice, injury, damage, not the wrongful act" "[2]. If under criminal law, the premise is the wrongful act which must be punished and the wrongdoer must be punished as well, under civil law, the premise is the damage, since what actually matters is the compensation for the damage[3]. A proof in favour of this assertion is also the fact that liability in tort is not started ex officio (as under criminal law), but at the request of the victim, of the subjective right holder or of the prejudiced legitimate interest (if the victim does not take any action, the society cannot do it on behalf of the former).

As far as environmental law is concerned, the acts generating liability include both wrongful acts – causing damage to the environment and representing violations of the legal environment norms – and legal acts which can constitute a basis for damage to the environment; if in the case of wrongful acts the ground for liability is the guilt, in the case of legal acts, the ground for liability is the risk.

**The basis for liability in tort law:**

a) **The theory of subjective liability** comprised in the Civil Code is briefly expressed in art. 998 Civ. C. ("any act of a person … **obliges the one whose mistake** caused the damage to remedy it"). The theory of subjective liability mirrors the period between the end of the 18th century and the beginning of the 19th century, when any personal injury or property damage "could have been caused by nothing but a man's action, an imputable act, subject to moral censure, the guilt being both a condition and an exclusive basis for tortious liability"[4]. The mistake (guilt, fault) lays the basis for liability in tort: culpa in comitendo (typical of torts), culpa in omitendo (typical of quasi-torts), culpa in vigilendo (typical of the liability of parents, schoolteachers and craftsmen), culpa in eligendo (with reference to the liability of the one who delegates for the acts of the authorized agent). Therefore, in all cases, the damage has one's own recklessness or negligence as an antecedent (in case of liability for one's own action) or the mistake in supervision, or in the selection of the person for whom one is responsible (in case of liability for another's action). In the last two cases, the responsibility follows a turn, which actually does not make the specific character of the guilt disappear, thus becoming presumed by the law, and the responsibility for animals, buildings and things, in general, is explained by the theory of subjective liability through the idea of one's own guilt (unguarded animals, lack of maintenance of the building)[5]. It is unanimously admitted that the legal hypotheses of liability in tort for another's action can be analyzed as special situations of tortiuous

liability for one's own action, the legislator starting from the assumption that the wrongful act causing damage is a consequence of the failure of the person held liable to perform a legal or contractual obligation of supervision, guidance or control of another person[6].

The theory of subjective liability in environmental law, especially in the case of damage caused by pollution (in which the proof is hard to provide, due to the diversity of causes, as well as to the exact establishment of their scope), finds its place as an exception. The framework normative act stipulates subjective liability only in case of damage caused to protected species and natural habitats (paragraph 2 under art. 95 G.E.O. no. 195/2005 on the protection of the environment). We could add to this case the situation of damage caused by crimes, when it is necessary to prove the guilt in the form required by the text of the law incriminating the respective action. But the rule established by the framework normative act in the application of the "polluter pays" principle, is objective liability.

b) **The theory of objective liability.** The explosion of the industrial revolution (in the second half of the 19th century) led to more and more labour and traffic accidents (the victims often being in the impossibility to prove the act causing the damage) behind which the disclosure of the personal action of man is more and more difficult. Moreover, the use of nuclear energy, of chemicals, the polluting industries, genetically modified organisms, the cosmic or nuclear experiments, the electromagnetic fields represent the contemporary form of the acts causing damage (as far as the environment is concerned, they can have irreversible, devastating effects).

The reconsideration of the subjective view, of the liability theme and of the remedy only stand for the adaptation to the modern specifics where we also include the obvious originality of the ecological damage (characterized by: serious indirect damage, a multitude of synergic effects, irreversibility of the prejudice, difficulty in finding those who are responsible). The society is interested in not confining itself to the protection measures for a certain victim, but in ensuring the legal framework for the guarantee of the remedy for all innocent victims[7].

In 1897, the parent of "the abuse of right theory", Louis Josserand, talked about "anonymous prejudices", noting that: a) "the liability for the act does not primarily originate in a law notion, but in equity conceptions"; b) "the subjective thesis of liability becomes insufficient, leaving place to a wider conception, better adapted to the new society, in which liability is separate from guilt"[8].

**Ubi emolumentum, ibis onus** is the basis of Saleilles' theory. It is normal and in harmonization with the moral rules that the person who takes a benefit from a certain activity should bear the burden of the damage, which is the consequence of this activity. In addition, Saleilles extends the scope of the "risk" notion, initially conceived for labour accidents only, to "the whole field of application in the industrial activity." The rise of the "**risk theory**" was brilliant, seducing famous authors such as Georges Ripert, and its fall was fast and complete. Thus, if A. Esmein confines himself to considering this "news as inadmissible", Planoil, who gives the tone of a genuine counteroffensive in favour of guilt, does not hesitate to write: "any case of liability without a mistake, if admitted, is a social injustice and a monstrosity"[9].

**The guarantee theory** initially expressed by B. Stark in his doctoral thesis[10], has the merit to lay emphasis for the first time on the victim and his/her right to receive compensation. It eliminates the shortcomings of the other two theories (of guilt and risk), paradoxically succeeding in justifying the coexistence of the two grounds of the institution.

The contemporary reality confronted with the continuous growth in the potential accident risks, ranging from car crashes to nuclear or genetic catastrophes, is reflected at a juridical level into what is called "the crisis of tortious liability" or "the tort deadlock"[11].

**The neighbourhood disturbance.** The relationships between neighbours often generate annoyance, noise, different troubles resulting from the necessary coexistence of some persons within a limited space; if with regard to goods and the respective rights on goods, the matter has been slightly regulated by means of servitudes, there are discussions concerning the case when there was guilt in the exercise of the ownership right, and even more debates regarding the case when an owner or entrepreneur has taken all the precaution measures, has obtained all the necessary authorizations, but his activity proves harmful for his neighbours[12].

Noise represents the most often invoked disturbance in a lawsuit. Thus, jurisprudence retains several ideas: a) the property right is limited by the legal and natural obligation of not causing any damage to the neighbouring property; b) the abnormal character of neighbourhood disturbance also resides in the fact that "it exceeds the ordinary level and neighbourhood obligations"; c) the "excessive" character of the damage arises out of the fact that the normal neighbourhood inconveniences are exceeded. These considerations are to be found as well in a decision from October 2007 which disposed the remedy of the injury caused to the victims by a municipal polyvalent hall where noisy manifestations took place, even after midnight, and which, by the acoustic level, exceeded the normal neighbourhood disturbance [13].

**The precautionary principle,** which came into being in environmental law, seems to be the answer to the search for "an ethical responsibility of a new kind", necessary because "the rationality of science which brutally intervenes in the field of biological existence, can overthrow not only the natural order, but also the fate of mankind" [14]. A party in the triad of founding principles for environmental law – "the polluter pays", prevention, precaution – the precautionary principle appears as a mirror of our times where the wrongly driven science can have disastrous effects. The "polluter pays" principle implies a polluter which, by its action (whether it wants it or not, whether it considers it or not), causes a damage which it is held to remedy; the **prevention** principle implies the obligation to act before the damage is produced; the **precautionary principle** is one of anticipation: the damage was not produced, and the eventuality of its occurrence is not demonstrated, beyond any doubt, and not provable either, the risk is uncertain, its occurrence is only possible[15].

**The damage risk** has been considered "abnormal disturbance", lying at the basis of a decision which disposed the change of place of an aerial for mobile telephony, erected on a school roof. "The submission of children to the electromagnetic radiations emitted by the respective aerial represents a disturbance that goes beyond the normal vicinity inconveniences" [16], specifies the decision in a definite manner, in a period when there are still voices denying the danger of electromagnetic pollution.

**The abuse of right.** A creation of theory and practice as well (confronted with those situations when, by the exercise of some subjective rights, one gets to cause a prejudice to other persons), the abuse of right implies the intentional exceeding of the normal limits in the exercise of a right. In the field of environmental law one can say – with reference to some concrete cases – that a right exercised in contradiction with the normal purpose and beyond normal and rational needs, stops being a right, that is a legal act and becomes an abuse. It is the case of a landowner who has the obligation, in compliance with the legal norms, including those in the Constitution, to perform a series of material operations which – with intent or out of guilt - can prove to be an abuse.

**The prejudice/ damage.** One can infer from the founding text of liability in tort law (art. 998 Civ. C.) that the prejudice is the direct and immediate consequence of the wrongful act (" any act … that causes a prejudice"). The Romanian legislator (art. 998 Civ. C., G.E.O. no. 195/2005 on the protection of the environment) prefers the term prejudice (art. 2. point 52) although the common expression is 'ecological damage'. The prejudice refers to the direct and immediate consequence of an act (also called direct prejudice). In civil law, one is not liable for the indirect prejudice; there is an indirect prejudice when a causality connection cannot be established between it and the wrongful act (illicit act) – the ground for this solution is one of equity, since " it is not in accordance with justice that someone suffer the distant echoes of an illicit act, because one cannot know the position that the victim would have had if it had not been for the illicit act to occur, therefore it was decided that the payment of the debts of the victim, killed by the author of the illicit act, cannot be incumbent on the doer, for one cannot know whether the victim, if alive, would have wished, or could have paid the debts he/she had to his/her creditors"[17].

Used for the first time[18] in the French specialized literature in order to emphasize the specifics of indirect damage, arising out of the prejudice done to the environment quality (characteristics consisting, among others, in the fact that the damage caused to one of the natural environmental components – air, water – influences the others – soil, flora, fauna – due to their unity and interdependence), the expression **ecological prejudice** designates "that damage causing a prejudice to the whole of elements of a system and which, due to its diffuse and indirect character, does not allow a right to compensation" [19]. Because of this "diffuse and rebellious" character, a financial evaluation for an ecological damage – that is for the destruction of flora, fauna, for air, water, soil and subsoil pollution, for the destruction of an aesthetic order (namely the beauty of the scenery) – encounters serious difficulties with concern to "the reasonable level of restoration which has to be the basis for evaluation" [20]. This basis should have a weaker economic aspect, and a stronger psychological one, since "the loss of recreation" (which the evaluation has to cover, to compensate) presents, besides the difficulties inherent to moral damages (due to their immaterial or extrapatrimonial character), difficulties (obstacles) that arise out of its collective nature (in the sense that the center of the damage is not a determined person, not a collectivity of individuals, but the natural environment considered as "a patrimony common to all nations")[21].

**The causality relation.** There must be a relation of determination between the act and the damage, from cause to effect, more precisely, that act led to that wrongful effect, to that prejudice – either moral or material. The necessary character of this relation results from art. 998 Civ. C. which stipulates "any act of a person, which causes … a prejudice". Hence the succession in time – namely the act is applied before the prejudice in the passing of time – and also the determination of the prejudice by the act (in other words, the prejudice is necessarily generated by the act). The prejudice (the negative effect which must be remedied) may be the consequence of one or several concurrent or successive causes (in the form of an action or inaction – either of the two or both), and of some principal and secondary causes, of direct and indirect causes. The proof of causality is therefore hard to administer, especially when some aspects of the prejudice occur successively or the damage is not directly produced, but by the intervention of intermediate actions, or when the author of the damage cannot be individualized from among those equally suspected of having committed the damaging act.

The determination of the causality relation in the Romanian law involves the following: 1) the necessary causality – it proposes the criterion of the necessary relation between the

illicit/ wrongful act and the damaging effect for the establishment of the causality relation; 2) the indivisibility of cause and conditions – it emphasizes the reality that the factors of condition, although indirectly contributing to the damaging effect, form together with the (determining) cause factor, an indivisible unity, within which the conditions acquire a causal character by interaction with the cause.

If in ordinary juridical relations, **the establishment of the causality relation** proves to have a higher degree of difficulty, it is even harder to establish it in the case of the **ecological damage** to which the meteorological conditions (such as atmospheric pollution) often contribute. There are also other diffuse, hard to identify causes, added in the process of generating the damaging consequence, which led to the necessity of "socializing the indemnity of the damage"[22].

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