

## The Substantiation of the Principal's Liability for the Agent's Act

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### Abstract

Although the institution of liability was consecrated centuries ago, the principal's liability for the acts of the agent has been one of the concerns of legislators in every epoch.

Even though the disputes in the juridical doctrine and practice continue, it ought to be appreciated that the New Civil Code has tried to regulate as clearly and concisely as possible the characteristic notions and relations of this type of liability which has its origin in article 1373 of the Civil Code. Being the type of liability with the highest applicability in court, the principal's liability is one of the three cases of indirect tort, answering for their agents' acts.

**Keywords:** liability, principal, agent, contracts.

### 1. The theory of the agent's absolute legal presumption of guilt

In the classic conception, the derogatory liability of the principals for their legal presumption of guilt has been explained with respect to the mistake that some of them have made in choosing the agents (*culpa in eligendo*), others in supervising them (*culpa in vigilando*), or in having committed both torts, in all these cases the presumption of guilt being irrefutable. It is the oldest theory formulated ever since the Civil Code in 1804 (Napoleon) emerged, which dominated in the XIXth Century and the first decades of the XXth century. Since recently, it is also invoked by certain court decisions<sup>1</sup> and supported by some authors (Anghel et al., 1970).

Besides the fact that most of the times the principal does not get to choose the agents, and does not have the possibility to permanently supervise them, this theory is accused by some authors of being characterized by a contradiction between the principal's presumption of guilt, which is considered irrefutable by the law, and his right to, nevertheless, return against the agent in order to ask him to restore the compensations.

This irrefutable presumption does not fit the category of presumptions stipulated in article 1202 of the Old Civil Code, and, on the other side, the elimination of the contrary proof (article 1000, paragraph 5 of the Old Civil Code) removes the idea of a presumption of guilt, which is nowadays a mere verbal layer or, as a great Romanian civil law specialist says: "...this returns, saying that the notion of culpability does not correspond to a reality, but to a fiction of the law" or "a culpability of pure legal creation is not a culpability"(Cantacuzino, 1921).

Besides, such a conception does not explain why the principal's liability is not only engaged if the culpable act was made by the agent when doing his job, but also only with respect to the fulfillment of his duties or, moreover, in case of an abuse in performing the tasks (Tutuianu, 2012; Decizia civila 163/1958 a Tribunalului Suprem).

This substantiation has been evolving more and more towards the idea of a legal absolute presumption only in supervision, especially since with respect to the conditions of the previous organized system regarding recruitment and employment cannot be mentioned the idea of "culpability in election" from the principal, who is usually a legal entity (Stătescu, 1981). What the principal might actually be accused of in the above-mentioned situations is his shortcomings in supervising, guiding and controlling the agent.

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<sup>1</sup> Decizia civila 739/1958, Culegerea de Decizii, 1958, p. 201.

Such motivations frequently emerge in court decisions, but independently on the content of the principal's duties, all these motivations relate to the fact that seeing the principal's responsibility as a liability for another person's acts is based on a presumption of guilt. The evolution of the jurisprudence and case law has begun from the assertion of the relative character of the above-mentioned presumption towards its absolute, irrefutable character (Radu, Curs de Drept Civil, p. 68; Tutuianu, 2008).

## **2. The theory of considering the agent's culpability as the culpability of the principal himself, and the theory of the legal representation of the principal**

Another substantiation that has found a certain echo was that the agent acts like a true representative of the principal; therefore his illicit act is in fact the act of the principal himself. In other words, in order to be maintained within the subjective liability, based on culpability, it has emerged another theory, that of considering the agent's culpability as being the culpability of the principal himself (Stătescu, 1984).

The authors who share this point of view show that its explanation must be searched for in the analysis of the principal-agent relationship. The one who resorts to the services of the agent does nothing but to prolong his own activity, while the agent is nothing but a tool whose actions are performed as if they were the principal's deeds himself. This theory does not correspond to the reality either, because culpability is a physical element with a strictly private character, therefore it cannot go from a person to another.

First of all, we can only talk about a warrant and about representation in the case of legal acts and not legal deeds such as those illicit ones that cause prejudices. Furthermore, the principal's liability is a responsibility for someone else's deed and not a responsibility for his own deed (Stark, 1972; Tutuianu, 2009), which means that by analyzing the problem from the point of view of the third injured party a certain confusion is produced between the culpable act of the principal and the agent's activity. Anyway, it is not in the nature of the circumstance according to which the act was committed "in the entrusted duties" to remove the personal responsibility of the one who committed it.

## **3. The theory of the liability without fault – objective – based on the idea of risk**

This theory supports the fact that by utilizing agents for developing an action, the principal creates more possibilities of jeopardizing the third parties, which justifies that the task of repairing the damages caused by the agents devolves upon the principal under the idea that whoever benefits from an action performed by others must also bear the risk of this action. There is practice of the theory of risk regarding the principals' liability for the actions of the agents, which was formulated at the end of the XIXth century both under the shape of the business risk and under the shape of the profit risk. In the Modern Age law the existence of the principal's liability for the action of the agent – connected to the idea of risk – was unknown, but its basis was found within the contractual liability, namely within the consecration of a security clause. This substantiation – which has not been kept in the Romanian law until 1989 – presents interest especially regarding the economic and commercial activities that involve a certain risk in order to gain profit.

## **4. The principal's liability without fault – objective – based on the idea of guarantee**

The idea of guarantee as an explanation of the principal's liability for the prejudices caused by the agents has emerged during the preparatory work of the French Civil Code in 1804 (Napoleon), when it was said that: "in fact, liability derives, in the cases we deal with, not from the notion of culpability or imputation, but from the wider notion of warranty" (Beleiu, 1993).

According to this theory, the principal is held responsible neither for his own culpability presumed by the law, nor for the culpability of the agent, which would have become his own through a phenomenon of transposition or reverberations of the agent's culpability, or of substitution or confusion between the principal and the agent as individuals, or of representation of the principal by the agent, but merely in order to protect the third parties, for the law to establish the principal as a guarantor of the victim's interest of immediately obtaining compensations for the suffered prejudice and for the victim to be protected from an eventual insolvency of the agent. This theory explains the request for the agent's culpability, for, responsible for the compensations is, after all, the agent, who is the author of the damage and the one who ought to meet the liability terms, for the principal is merely the guarantor of the victim. It is a guarantee for someone else's act, which has to be of a nature to engage itself the personal responsibility of the agent when he represents the general conditions of the civil responsibility for his own act. Through the Decision of Guidance, no. 2 of 30.01.1960, the ex Supreme Court Plenum stood on a firm position by pronouncing in favor of the thesis of the principal's liability as a guarantor called in to ensure the victim's compensations for the suffered prejudice.

The ex Supreme Court Plenum asserted that: the economic organization, civilly responsible legal entity, in its quality if principal is bound to pay the compensations to the indemnified party in place of its employers culpable for causing the prejudices. Hence, the civilly responsible legal entity – in the civil side of the penal trial – answers for its culpable employers, but not with them. Consequently, “this organization, although bound to pay in full the indemnity to the injured party, is not in the same situation as those culpable for causing the damage. They have to eventually pay the consequences of their actions” (Ionașcu, 1973).

## 5. Conclusions

In conclusion, it results that “in the last analysis the civilly responsible party has only got the role to ensure the compensations for the injured party.”<sup>2</sup> Through this decision of the Decision of Guidance no.2 of 30.01.1960 of the ex Supreme Court Plenum was consecrated the thesis of the liability without fault, based on the idea of guarantee. Likewise, the Criminal Law College of the ex Supreme Court established that: “The provisions of the Law according to which the principal is held responsible along with the defendant are meant to constitute an extra guarantee for compensating the civil party” (Tutuianu, 2008).<sup>3</sup>

With respect to the practice of this guarantee stipulated by the Law, which is assigned to the principal, in the literature and in Law practice seem to take shape two tendencies:

➤ According to one tendency named *the conception of the objective guarantee* we stand before a guarantee based on the risk of activity, which in this conception is detached from any idea of culpability of the principal (Volonciu, 1972).

➤ According to another tendency – to which we add the so-called *conception of the subjective guarantee*, “we would be standing before a type of guarantee that does not detach, but grafted onto the idea of a presumption of guilt assigned to the principal” (Eliescu, 1972).

The latter considers that the guarantee of the principal for the personal act of the agent derives from the circumstance that, according to the principal-agent relationship, the principal performs the supervision, guidance and control of the agent's activity. The idea of subjective guarantee is not utterly derived from the idea of culpability of the principal, the agent's committing of certain illicit acts that caused prejudices being explained sometimes also through the existence of insufficiencies in the agent's execution of his duties.

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<sup>2</sup> Decizia civilă, nr. 352/1983, în Culegere de Decizii 1958, p.245

<sup>3</sup> Decizia civilă nr. 2/1960 a Tribunalului Suprem, în Culegere de Decizii, 1960, p.126;

However, the idea of guarantee exceeds the idea of culpability of the principal, which makes his presumption of responsibility impossible to remove by the simple lack of the presumption of guilt in performing the supervision, guidance and control. That is why in literature it is often mentioned an absolute legal presumption of guilt assigned to the principal. Asserting the absolute character of the presumption seeks to cover, in this context, both the idea of culpability in performing the principal's attribution, and the idea of general guarantee with respect to the act of the agent (Stătescu, 1984; Tutuianu, 2013).

In literature (Pesalega, 1961), some authors, by revealing the insufficiency of the theory of guarantee in explaining the fundament of the principal's liability, have considered that to the idea of guarantee must also be added the idea of insurance, which is taking the risk of some activities by using for this purpose the services offered by other people who are subordinated to an authority, their work being supervised, guided and controlled, have to take the risk of such an organized activity.

Whether it is insured or not, the victim must eventually receive the indemnity in full. Under another aspect, in the countries which have adopted the system of the exclusive responsibility of the principal, the units that have indemnified the third injured party for the act of the agent cannot turn against the latter unless they go after one part of the paid amounts of money, according to the provisions of the labor law or of cooperative law.

The loss registered by the organization in this context, respectively the legal entity, is borne by the State, in final analysis, for the legal entities with state capital (Anghel et al., 1970).

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