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Conditions and Characteristics of the Repairable Injury

Florin Octavian BARBU¹

Abstract

According to the Civil Code, the right to reparation arises from causing the injury, when the right to an action is born to obtain the prejudice redress, but we have some reservations, both in terms of prescribing the right to action and terminology. Thus, we consider that the practical use of the right to reparation will be possible after the procedures provided by the law, when the claim becomes cert, liquid and eligible, provided that the court decision has the constitutive character of rights.

The solution to assess the injury at the time of its occurrence is unfair to the victim because it refers to the assessment of the injury or the value of the injury can exponentially increase with the period between the moment of the injury and the moment of the decision to repair. The solution for a more effective protection of the victim would be the assessment of injuries in relation to the date of the judgment, the most frequent argument being made in the case of the personal injury with priority regarding the physical and moral integrity of the person, the Romanian Civil Code regulation being derogatory to common law. The victim's right to claim is born at the time of the injury, but at this point is an abstract prejudice, being an imperfect right. In this respect, the French doctrine is divided, some considering the "information claim" at the time of the injury, and others claiming the thesis of the declarative nature of the decision ordering injuries. If we take into account the realities we are confronted with, we cannot see that there may be changes in the extent of the injury caused to the victim even during the trial, especially as a cause that can last for many years. We also believe that it would be appropriate to extend civil liability assumptions to the limit of insurable activities, victims being fairly protected, both by committing civil liability and by triggering the insurance contract mechanism.

Keywords: *Education; communication; intercultural; learning academic; culture;*

Given that the issue of civil liability is more current than ever and, especially, forward-looking, repair and compensation prove to be ineffective

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or impossible, because the injury that may arise is irreversible, others particularly serious. [1] [2]

Thus, from the point of view of the precautionary principle, the injury is the very serious harmful effect of an activity, which at present is only hypothetical and uncertain but possible and which may occur in the future with irreparable catastrophic consequences. [3], [4]

The reparation of the injury is related to the fulfillment of three conditions that the injured interest must fulfill [5], namely: the interest is legitimate; to be as a result of a serious interest; the interest has the appearance of a subjective right.

As such, the legitimacy of interest is a precondition for the promotion of the legal action, a principle expressed in the Romanian Civil Procedure Code [6], according to which the interest must be “determined, legitimate, personal, born and present”.

Legitimacy is more and more a condition for reparable injury [7].

From a terminological point of view, the formula “*legally protected legitimate interest*” has been criticized because it associates two elements, one of which attaches to the pre-requisites of receiving the request, and the other to the requirements required for its admission” [8], [9].

As far as the interest is concerned, it must be said that this condition refers to the severity of the victim’s injury. In this interpretation, the condition of seriousness concerns the injury caused and not the injured interest.

On the other hand, there are a number of situations in which the individual’s prejudice is not of great importance to the consumer, while, from the point of view of a consumer body, the law of liability is applicable.

The third condition imposed on the interest of the art. 1.359 Civil Code - the appearance of a subjective right enshrines the solutions of the jurisprudence through which they have been subjected to reparation, and injuries caused by violation of the simple interest and not only those determined by the violation of a subjective right [10].

1. The injury is certain

The existence of the injury is insufficient to attract civil liability, in order to be reparable it must be understood as a legal notion. [11]

In this respect, the injury must in turn fulfill a number of conditions with the value of its own characters, the number and the name being different from one author to another. Thus, some doctrines [12] have concluded that the injury must be clear, personal, direct and to result from the attainment of a right or at least a legitimate interest. [13]

As far as we are concerned, we disagree with the opinion [13], considering that, in order to be a concept of law and therefore reparable / indemnified, the injury must meet the following conditions: to be certain, not to have been repaired.

As far as certainty is concerned, we must consider an unquestionable existence, and it can also be evaluated

Both current injuries (those that occurred up to the moment of claiming the injury) and future ones (surely, with sufficient elements to be assessed) are certain [8: 417-418].

It follows that future injuries are certain if their existence and extent are known.

The injury may not be certain because it is not certain that it will occur, while the virtual or potential injury, such as that caused by the loss of chance, is quantified according to the probability of its production [10: 340].

The distinction between future reparable damage and the eventual non-reparable damage may be attributed to damages that are the result of loss of opportunity.

This category includes the injuries caused by the loss of a person to make a profit or to avoid damage.

However, this issue is very controversial in the doctrine, the French jurisprudence [14] stating that *“the loss of a chance may in itself have a direct and certain character in cases where the real probability disappears as a favorable event, to lead to that chance.”*

In order for the injury resulting from the loss of a chance to have a certain and reparable character, the following conditions must be fulfilled [9: 97]; [15] the chance to be real and serious; the loss of chance is the direct consequence of the illicit deed; the determination of the remedy must necessarily take into account the margin of uncertainty that affects the possibility of achieving the chance of winning or avoiding the risk of loss [16].

As Professor I. Dogaru pointed out, the extent of compensation in case of losing a chance is always inferior to the benefits that would result from the capitalization of that chance. Thus, art. 1.385 para. (4) the final thesis of the Civil Code, stresses that “*the reparation will be proportionate to the probability of obtaining the advantage or, as the case may be, avoiding the damage, taking into account the circumstances and the concrete situation of the victim.*”

As regards the direct nature of the injury, it should be pointed out that it is necessary to have a causal relationship between the unlawful act and the injury to the victim, in this case an objective element - the causality ratio. [17].

From this hypothesis, we can conclude that, as regards the direct nature of the injury, it exists both in the case of those produced directly (suffered by an immediate victim) and in the case of indirect injuries (injuries to others, indirect victims). [18]

We should point out that the notion of direct injury must not be confused with the concept of damage caused directly, since the first notion defines both the damage caused by a direct link and an indirect link, the concept being broader.

Instead, the damage is indirect in the event that there is no causal relationship between the illicit act and the injury [8: 419].

The repair of the injury caused to third parties through ricochet is widely debated, being called damage by ricochet or reflection. They mainly arise in the case of personal injury to immediate victims [19].

Indirect victim means any person who is related by a relationship of kinship or interest with the immediate victim and who, due to the damage suffered by the immediate victim, loses a patrimonial value or is harmed in her/his feelings of affection towards this [20].

The reparation of damage through ricochet is long recognized in the European law [21].

In the Romanian Civil Code, this idea was agreed in the area of tort law civil liability, both in terms of ricochet and moral injuries, consisting of emotional injury.

By personal injury, we understand that liability is directed to the protection of the injured person. This idea, however, does not prevent the

reparation of collective damages resulting from the violation of interests belonging to a community or from ricochet injury [22].

As regards the condition that the injury should result from a breach of a right or a legitimate interest, the specialized literature considered [26] that the attainment of a simple interest resulting from a factual situation gives rise to the right to reparation if the facts are of a stability and the injury is to a legitimate or moral interest [22].

This orientation of jurisprudence and doctrine has found its consecration in the Civil Code in art. 1359.

Finally, it should be noted that, as a rule, the injury caused by the attainment of a legitimate interest is, in reality, injury by ricochet or reflection [22].

2. The injury has not been repaired

Another condition for repairing the damage is that it has not been repaired [6];[8] because there are situations where the victim receives the third party from the injury, and yet the injury must exist [8];[10].

The civil liability reparation function nowadays is even bigger in the context of increased victim protection; a tendency can be seen in the Civil Code regulation as well.

Thus, the injury is fully repaired [6];[8], and the compensation must include both the loss actually suffered (*damnum emergens*), the unrealized gain (*lucrum cessans*) and, as the case may be, the expenses that have been incurred to mitigate the damage [10].

This is what the doctrine calls “the obligation to minimize injury”[31].

The repair can be done in kind, with the consent of the parties (transaction) or by the court decision, the principle of availability being the essence of the civil action, or by the equivalent when repairing in kind by restoring the previous situation is not likely or the victim is not interested [8].

The impossibility may be of several kinds: material, when the object no longer exists; when it is paralyzed by the right of a good and moral third party, when no one can be forced into a personal deed [23].

Also, the principle of solidary liability should be mentioned, the solvent debtor being able to oppose the others, if such participation cannot be established, as provided by art. 1.383 of the Civil Code.

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