

Causing non-contractual damages according to Albanian law

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Abstract

This study is mainly focused on handling the causing non-contractual damage, achieving a theoretical analysis of its constituent components as fault, causal connection, unlawful act or omission and damage compensation.

Non-contractual liability is provided by our civil code, defining it as at fault or without fault liability. Our country, as a country in transition needs legal investment and its implementation into practice.

One of the cases on which liability on damage compensation arises is the combination of the rights of persons, whose dignity has been infringed against the right that is explicitly sanctioned in the Constitution of the Republic of Albania, freedom of speech as well as thought, fundamental principles of law, but always without thereby infringing the dignity of a subject of law and and being faced with moral and material damages.

In order to handle legally this issue as well as its civil legal consequences that threaten to influence on the entities that breach the law, but also their sensibilization. Hereafter I am handling the theoretical and legal way – the analysis of such a case, under legal - civil perspective.

Keywords: causing damage; moral damage; fault; causal connection; compensation of damage

Introduction

Damage caused in the absence of a contract arises in the moment in which the damage is caused, constituting a damaged subject fundamental requirement.

Where a damage is caused, its author should be responsible for. The liability is evaluated from different perspectives. Inwardly, the conscience is affected by the harmful action and it has to do with the moral liability. Secondly, the conduct is under judgment, as in the case where the compensation should be ensured to the injured party (civil liability)¹. To highlight the issues regarding the causing damage and the measures to be taken in terms of the provisions as well as implementation in practice,

¹ Dr.Rustem Gjata, Non-contractual obligations, MUZA, Tirana 2010.

too, we have to inspect the elements of causing non-contractual damage, for a more efficient evidencing of implementation issues and concept evolution, we will refer to some of the practice issues of our country and European ones.

Historical Development of causing non-contractual damage.

Causing damage is raised in Roman law by aquiline lawsuit. Its performance did not find consistent form except in the Napoleonic era, exactly in the Civil Code where, not only in this field, the adaptation of civil law is achieved in general and causing damage in particular, upon the development of the society. Napoleon Code² served as the foundation of civil law to legislation, jurisprudence and doctrine. During the years, the efforts of lawyers and lawmakers have changed only the appearance of institutes, leaving almost unaffected principles. Changing the political system brought new spirit and worldview on legislation of eastern European countries, and consequently in Albania. Institute of causing damage, by politicized and superficial definitions began to change, in line with the law and doctrinal heritage of continental European countries or, in a national assessment it was returned to civil law definitions regulated by the Civil Code 1929.³

Civil Code of the year 1981 not only brought nothing new about this institute, but also reduced the relevant provisions by 29 such that LVJD has in 14 sections.

Reformulation of the meaning of liability arising from causing damage defined in Section 336⁴ of the Civil Code provides that: "The person who at fault and unlawfully causes a material damage to another, is obliged to compensate the damage caused....". This reformulation of the provision was not intended to change anything regarding the meaning of this liability, but the term of "material damage" was intended to avoid any equivocation regarding the meaning of the damage that may be paid in the event causing it.

Our Civil Code⁵ provides for liability arising from causing unlawful damage to title IV of its Part IV (Sections 608-647). Having raised this liability, the person who caused the damage is obliged to compensate the injured person to restore it to its previous condition. But the law has decided the fulfillment of certain conditions for charging a person with responsibility. So unlawful damage, its illegal actions, causal connection between action or inaction and a consequence come as well as the damage author's fault, are conditions that should compete for arising civil liability of causing damage.

² Napoleon Code.

³ Civil Code of Zogu 1929.

⁴ Civil Code of 1981.

⁵ Civil Code of the Republic of Albania.

Causing damage and its constituent components

In the Constitution of Republic of Albania in its first chapter, the basic law principles have been provided; one of the main components is also the respect for the dignity of the person.⁶ In the Constitution it is provided also freedom of expression and press.⁷ The latter is not absolute but it is limited to in certain cases when the information published constitutes a state secret or violates national security, even when certainly honor and dignity of the subjects of the right have been violated.⁸ A dignified attitude in respect of the rights and freedoms of subjects of law highlights the European Convention of Human Rights which provides the restriction of freedom of expression, a limitation existing under the purpose of protection of to others reputation or rights.⁹

European Court of Human Rights has held the attitude that restrictions will be considered as acceptable only if they are provided by law and are estimated necessary in a democratic society. Also, the European Court of Human Rights provides that national authorities (Administrative bodies, court) are those which ought to determine, in assessing the facts, the limitation of freedom of expression under the law and necessity in a democratic society.¹⁰

Referring to the above example, a journalist has the right of opinion within the context of non-infringement of personal dignity but investing in valuable evidence to clarify the facts producing his opinion and thought, so, in case where the subject is before the defamation to another subject, it will be liable to the law, compensating moral and material damage it has caused to the individual, as a result of his / her wrong action. For this reason, the civil liability is defined as the obligation to repair the damage caused to another.¹¹

In the issue Von Hannover against Germany¹², request No. 59320/00, dated 24.06.2004 Princess of Monaco claimed that the publication of her daily life pictures affected her personality. According to the Strasbourg Court in the case of a public person should be "a lower minimum level of fulfillment of Article 8" than for a common person. However, even in these cases there is not tolerance measure, but other criteria such as: if the public person is injured in a public place or in a private place, if the damage has been caused during service work or at the time corresponding to private his/her

⁶ Article 3 Constitution of the Republic of Albania.

⁷ Idem. Article 22.

⁸ Note: see for this content of article 10 of the European Convention on Human Rights and the Strasbourg Court caustics about this interpretation on issues "Ligens k/ Ausrise-series A, no.103), "Castells k/ Republic of Spain" (Series A, no. 236), "Schwabe k/ Austrisa" (Seria A, no. 242-B), "Prager e Oberschlik k/ Austria" (Series A, no.313), "Tolstoy Miloslavsky k/ The United Kingdom" (Series A. no. 316-B), etc.

⁹ 6. Art. 10 §2 I European Convention on Human Rights.

¹⁰ See Institute of Legal and Public Studies, European Court and Freedom of Expression », Press now and Foundation SOROS, f. 4-5

¹¹ Alain Bénabent, Droit civil, Les obligations, 10-é édition, Montchrestien, Paris 2005, f. 353.

¹² Issue Von Hannover against Germany, request No. 59320/00, dated 24.06.2004.

life, as the infringement of the latter is potentially more likely to be considered as a damage, should be evaluated.

Referring to the type of damage caused, Article 625 is formulated in such a way producing only the consequence, and not counting legal reasons or situations that lead to that effect. This means that the court will case by case deem whether the action or inaction has caused or not a reduction or harming the honor or personality of the person injured.

Non-contractual liability is provided by Civil Code Article 608 thereof, as follows:

“A person who unlawfully and at fault causes a damage to another person and his property is obliged to compensate the damage caused.

The person who caused the damage is not liable if he proves that he is innocent. The damage is considered to be illegal when it is a consequence of interests and others rights breach or violation, which are protected by judicial order or good morals”¹³

Through this article interpretation it results that there are two liabilities causing the non-contractual damage, at fault and without fault. This theoretical and legal division has existed in our Civil Code. The doctrine has recognized four elements of causing the damage as the fault, damage caused, causal connection and the unlawful action. Theoretical analysis of these components is important to understand what they are and what they constitute in non- contractual damage.

The damage, as one of the important elements for asking non-contractual compensation, requires to be proved by the injured party, as the latter one has the burden of proof.¹⁴ Such a fact is supported by the Albanian consolidated jurisprudence.¹⁵ The interpretation of this article reflects that the damage should be clear, legitimate and direct on the subject is has been attributed. Despite this attitude has been defined in our legislation¹⁶, discussion about direct and indirect damage causes debates among lawyers, since our legislation provides no definition on these two types of damages.¹⁷ So it turns out that there is not only direct damage but there is also indirect damage, which is difficult to be proved by the subject, burden of proof holder. The damage that can be caused to the subject is of two types, moral damages and property damages. The latter includes the real damage and the missing profits.¹⁸

¹³ Art. 608. Civil Code

¹⁴ Art. 12 i C.Pr.C

¹⁵ See V.U. no. 12 dated 14.09.2007 regarding damage.

¹⁶ See the content of Article 609 § 2 of C.C.

¹⁷ See Dr. Rustem GJATA, Non-contractual obligations », MUZA, Tirana 2010, p. 35-36

¹⁸ Article 640 Civil Code.

Moral damage is non-pecuniary damage in the form of biological and existential damage. To receive compensation as a result of non-pecuniary damage caused to entity should determine these elements:

- personality of the injured
- violated interest
- activities performed by the injured
- Impact of illegal action or inaction on the personality of the injured.
- Changing the status of the injured of family and social relationship¹⁹

Existential damage comes clearly evidenced by the Supreme Court as a damage on quality of life, is expressed as follows: "Existential damage caused by the illegal fact of third party violates the human rights of personality by damaging almost permanently expression and realization of the injured as a human, the appearance of his personality to the outside world, objectively shocking daily life and its ordinary activities, causing deterioration of the quality of life from change and disruption of equilibrium, behavioral habits of life, personal and family relations. Due to a such psycho-physical condition, the injured party can not carry certain activities that characterize his being positively or positively could characterize in the future, forcing to be postponed to different solutions in life from those desired or expected in the withdrawal of the latter due to certification of the illegal fact. Existential damage, by not having the internal and sensory nature only, is objectively verifiable."²⁰

So to obtain compensation for non-pecuniary damage is necessarily required completion of the above criteria.

Article 608/2²¹ of the Civil Code provides that "person who caused the damage is not liable if he proves that there is no fault", the interpretation of this provision shows that guilt is presumed, therefore belongs to the damager to prove he is not at fault for the damage caused to the injured party, on the opposite side the entity which is injured is required to prove the damage and the consequences whether moral or material that another person brought to it. So Article 608 does not provide a clear definition of what is fault but looks like one of the essential conditions for causing non-contractual damage. Our civil law makes absolutely no kind of fault classification and its forms.

Regarding the interpretation of the blame there are different attitudes. However I am citing the attitude of the French Cassation Court, which on this assessment takes into account not conduct of a perfect citizen, but that of a good citizen, who is normally careful and responsible. To achieve this assessment, the court does not consider guilty

¹⁹ Milan Court of Appeal, Civil Section 2, 14.02.2003.

²⁰ V.U. no. 12 dated 14.09.2007.

²¹ Art. 608/2 of Civil Code.

“in concreto” by the actions and conduct of the person in question, but “in abstracto” in relation to the conduct of an abstract model.²²

For classification and forms of interpretation we refer to guilt in criminal law which makes a clear separation entirely of the guilt and its components.

In Article 609 of the Civil Code is expressly provided: “the damage should be the result of direct and immediate action or inaction of the person”.²³ Thus sanctioning causal connection between the damage caused and the effect that weighs on the subject. Law necessarily requires that between action and inaction of the subject in connection with pecuniary or non-pecuniary damage caused to another person. This applies to the aim to put before the civil liability of law subject which violates the right.

Article 608/2²⁴ “The damage is illegal when it is a consequence of breach or violation of the interests and rights of others which are protected by judicial order or good morals” This provision means that the action and omission was made in violation of the law and the legal order, from the subject of law breaker. From this results that we should find ourselves before the breach or violation of the interests of an individual or rights of the other, these rights and interests are protected by the legal order or good morals. So the law presumes necessarily that fact should be illegal to put before the Civil Liability the subject with the intention of seeking compensation of pecuniary or non-pecuniary damage caused.

Elements treated till now have cumulative nature, which means that should exist four elements simultaneously and without the existence of even just one of them there is no compensation of damage. So it is necessarily required fulfillment of their intention to put before the civil Liability of subject of law breaker.

Compensation of damage

After the existence and being proved the non-contractual damage consisting of its constituent elements, the injured party has a legal obligation to seek compensation for damage caused. In economic terms, to seek compensation means that the subject to return to the same economic and financial situation that was before the damage happening. Always here referring to the pecuniary damage caused to the subject. Problematic lies in the fact of the valuation in monetary value and of compensation of non-pecuniary damage. Does money creates the possibility of the returning to the same state of mind before the damage? It is subjective because many individuals may compensate non-pecuniary damage in monetary value by accepting it and many others not.

²² Alain Bénabent, *Droit civil, Les obligations*, 10-é édition, Montchrestien, Paris 2005, f.372.

²³ Art. 609 of Civil Code.

²⁴ Art. 608/2 Civil Code.

In judicial practice is noting that the compensation of the non-pecuniary damage is not compensation, in the full sense of the word, but only one possible way to reduce the harmful consequences.²⁵

Pecuniary damage and its compensation means the damage caused and missing profit, so that the subject of law breaker is obliged to compensate not only the damage caused to the subject but also the profit that this subject would have possessed if the action not happened.

In the line, the provisions on non-pecuniary damage and its compensation in our civil law, have been the subject of recent revisions to our Civil Code, by law no. 17/2012 "On some amendments to Law no. 7850, dated 29.7.1994 "Civil Code of the Republic of Albania (as amended)." Section 3 of this Law, adds in our Civil Code, the Section 647 a), which deals specifically with the manner and criteria of a non-pecuniary damage compensation caused to the injured party to his honor, personality or reputation, as a result of insult and defamation. It is of interest to note that the content of this article gives to court the authority to decide on the extent of non-pecuniary damage and its compensation and evaluate the extent of the damage and compensation requested by the injured party, taking into account the criteria set forth in this provision as: (a) the manner, form and time of the spread of the statements or commission of actions, (b) the degree of the observance of the rules of professional ethics by the author of the statements, (c) the forms and degree of culpability, (d) fact whether the statements have cited or correctly referred to statements of the a third person, (e) fact whether the statements are false, especially in the case of harm to reputation; (f) fact whether the statements relate to issues of privacy of the injured person and their report with the public interest.; (g) fact whether the statements constitute opinions or statements that contain only insignificant factual inaccuracies (h) fact whether the statements relate to matters of public interest, or to persons exercising state functions or candidates for election; (i) performing actions to prevent or reduce the extent of damage, such as making of the correction for false statement, and any other measures taken by the author of statements to restore the honor, reputation, or personality of the injured person, (j) fact whether the author of the false statements has brought benefits by spreading them, and the extent of that benefit; (k) fact whether the compensation can significantly aggravate the financial situation of the person who caused the damage."²⁶

The concept of compensation for non-contractual damages has been expanded with the legal amendments and with the interpretations of the various issues by the court, but still needs specific legal improvements.

²⁵ See Dr. Rustem GJATA, Non-contractual obligations», MUZA, Tirana 2010, p.139-140

²⁶ See Article 3 of the Law no. 17/2012 On some amendments to Law no. 7850, dated 29.7.1994 "Civil Code of the Republic of Albania (as amended), on the content of Article 647a of the Civil Code.

Conclusions

Causing non-contractual damages, by referring not only to pecuniary damage but also to moral one presents a special interest on legislation and its implementation in practice where the entities of law are affected by its action.

Referring to the theoretical analysis of non-contractual damage it results that there are two kinds of liability: at fault and without fault, explicitly defined in our civil code.

Constituent elements to non-contractual damage as: the fault, caused damage, causal connection between the action and effect, as well as the unlawful action, very important components to set the law breaking subjects under civil liability.

Regarding property damage compensation, the Code accepts the principle of full compensation of the damages. This way, the responsible person should reward the loss sustained, and missing profit, too. As to the question whether the damage will be rewarded in kind or in cash, the practice has almost preferred cash reward of damaged caused, whether or not it enabling cash or in kind reward. Two types of damages have been here highlighted; pecuniary and non-pecuniary damage, distinctive between them from the method of compensation.

The innovation the Civil Code brought about was accepting cash award of civil damages. This way, the former thought that only the pecuniary damage should be compensated, is no longer prevailing. Our law has recognized the system, under which moral damages explicitly provided in law, will be compensated. Today only moral damages provided by the Civil Code may be compensated in money. I think in the future, our legislation should expand the concept to include also other moral damages.

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