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Duality of Categories of Persons for whom Civil Liability of Parents is involved. Aspects of Civil Law and Family Law

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Abstract: Objectives: In this study, we have analyzed the continuity of an old concern, a brief aspect of the broad issue of parental liability for the deed of a juvenile or a minor under court interdiction. Prior Work: From the analysis of art. 1372 of the Civil Code the scope of this type of liability is easily noticed, and in this paper we only analyze the category of liable persons for the purpose of repairing the damage. Approach: In relation to the two categories of persons, that of the minor and that of the person under court interdiction, there will also be highlighted interpretations from the field of family law, points of view regarding situations arising from the interpretation of the text of the law. In addition, concepts such as age, the presence or absence of minor discernment, anticipated exercise capacity, tort capacity will be correlated.

Keywords: exercise capacity; discernment; minor under court interdiction; age

1. Introduction

The connotation that emerges from Descartes's statement "Before being parents, we were children", allows us to assert that the child is still at the center of the human universe. Beyond its social and philosophical content, this assertion develops a few consequences in the legal terms, as it expresses the child-parent-family relationship³, under all principles, rights and obligations, by directing our attention to the content and the way of exercising the legal relations among parents and children. We will develop in this study a particular aspect of this report, namely the "legal algorithm" whereby the law obliges parents or guardians to be responsible and to repair the damage caused by their **minor children** or **the child without discernment**. We therefore place at the center of the discussion an analysis of the provisions of art. 1372 of the Civil Code, but also other texts of family law or special laws with direct reference to this issue.

The minor, within the meaning of Law no. 272/2004 on the protection and promotion of the rights of the child, republished and updated, the child, which we place in the center of the parental and institutional concerns, is subjected by the human factor to many vulnerabilities, anxiety, consumerism, challenges, morals, deprivation. These circumstances, along with belonging to a particular subculture or inappropriate models to which they are attracted, cause them to act in directions that draw the illicit, and implicitly, the sanction. If in criminal law the liability is a personal one and it cannot be

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³ For a point of view that reflects the sociological and legal perspective of the family see (Lupșan, 2001, pp. 6-10).

transferred to another person, the civil law system extends the liability beyond the limits of its own deeds by establishing the two hypotheses of liability for the deed of another person, regulated in articles 1372 and 1373 of the Civil Code. On the one hand, the situation of parents and guardians' liability for the damage caused by juveniles or those under legal prohibition and, on the other hand, the liability of the consignee for the agents. The role of this commitment of indirect liability is directly related to the principle of the need to repair any prejudice caused to a person and it derives from the circumstances strictly prescribed by law. We will achieve a partial analysis of them, under the aspect of answering the question: who is the person for whom parents or guardians are liable?

The first paragraph of art. 1372 of the Civil Code, on the basis of which we will construct the entire argument, reveals the following provision: (1) "A person who under the law, of a contract or of a court order is obliged to supervise **a minor or a person placed under the court interdiction** is liable for the prejudice caused to another by the latter persons." Even from the marginal title of the article in question, there are nominated the categories of persons who, due to legal grounds, are not liable for their own deed, although they are the **active subjects** of the deed, but for which under the law, indirectly, other persons are liable. The indicated rule refers first to "minors" and then to "people under interdiction". Therefore, the new codification concerned a wider scope than that covered by art. 1000 (2) and (4) of the Civil Code of 1864, currently repealed, proceeding to a double extension, the first hypothesis being the liability for the prejudice of the minor and the second one for the deed of the one under court interdiction. The novelty of the legislative approach consist in regulating the liability of the person obliged to supervise a mentally ill person, since liability "*should also be committed in the case of injuries caused to third parties who have reached the age of majority, who lack discernment, whether or not they have been submitted to court interdiction*" (Pop, 2010, p. 107). This doctrinarian desiderate has become reality in the sense that it has been regulated. Therefore, the legal approach does not come into arid legal field, but is the answer of the situations encountered in practice and analyzed by the doctrine, as well as the guidelines from other legal systems.

The provisions of art. 1372 of the Civil Code should be corroborated with other laws, those referring to: minority status, the situation of the married minor, the minor who, for good reason, has acquired in advance the full exercise capacity (the emancipated minor), the provisions regarding putting under court prohibition, the presence of discernment in the minor or the person under interdiction, the parental authority and its duration, etc. Obviously, the minority, or, as the case may be, the status of a person under judicial interdiction is appreciated at the time of the commission of the prejudice by the direct author of the prejudice of the prejudicial illicit deed.

2. The Condition of Minor vs. Minor Child

Art. 38, par. (2) of Civil Code determines that "*the person becomes adult at the age of 18*". *Per a contrario*, minor means any person below the age of 18, therefore either without the exercise capacity, but also regardless of whether he has limited or anticipated exercise capacity as a result of a valid marriage or the emancipation of the minor under art. 40 of Civil Code.

According to art. 263, par. 5 of Civil Code and art. 4, with the same content, from the above mentioned Law no 272/2004, **child** means "*the person who has not reached the age of 18 and has not acquired the full exercise capacity, according to the law*". Given the possibility for the 16-year-old to marry, the unmarried and the non-emancipated minor will be still a child (Bodoaşcă, Drăghici & Puie, 2012, p. 10).

From these aspects, it follows that not in all cases the content of minor and child notions overlap. As a common rule, the quality of child and minor overlap when the person is under the age of 18. However, as a derogation, and what differentiates the two concepts, it refers to the second condition in the content of the legal concept of a child: not to have acquired the full exercise capacity (between 16-18 years) in one of the two hypotheses which we mention: the marriage of the 16-year-old, with all the conditions and the so-called emancipation of the minor. In the latter case, we refer to the provisions of art. 40 of the Civil Code, which allows a minor to invoke the trusteeship court certain sound reasons that would require the early grant of the entire civil legal mechanism available to a major person.

Liability established by art. 1372 of the Civil Code will not exist in the case where the perpetrator of the detrimental act is major, in which case the liability for the deed is enforced. A special situation is required by the case of the married minor¹, who, under the conditions of art. 39, par. (1) of Civil Code, as a result of marriage, will acquire full exercise capacity. In the same situation is also the 16-year-old, who acquires anticipated exercise capacity by the decision of the tutelage court passed on the basis of well-founded reasons. The problem that arises is: what is the relation between the acquisition of the full exercise capacity by a minor (as a result of marriage or proof of good reasons) and the legal regime applicable to civil liability, or rather, what interpretation should we give to this situation? In whose task do we engage tort civil liability in the event of the commission of a damaging act by such a minor?

The majority doctrinal opinion excludes the possibility of parental liability, invoking different reasons. A first opinion stating that in this case an accountability for the own deed will be established, it is argued by the fact that “*the minor has come of age by marriage*” (Eliescu, 1972, p. 263), an idea with which we cannot agree, due to express legal considerations, the acquisition of full exercise capacity does not have the implicit recognition of the majority. The 18-year-old is a “physical” period, explicitly prescribed by law, at which many more rights are born for the fresh major, including the constitutional right to elect and to be elected. If we agree that by marriage a 16-year-old minor will become major, we should also accept the potential of the right to vote. Minor and major legal criteria are relevant only to the flow of time, not to the exercise capacity. Going further with the analysis, in matters of tort liability, this criterion of exercise capacity is not at all relevant, only time, and implicitly the age.

In the same vein, we admit that parental liability will not be held in these situations, but on different grounds, invoking the provisions of art. 484 of the Civil Code, in the sense that, with the acquisition of full exercise capacity, the married minor will no longer be under parental authority. Becoming of age has the effect of acquiring the full exercise capacity, but not vice versa, having only one criterion of appreciation, the age of 18 (Vasilescu, 2012, pp. 640-641)². The consequence: the married minor is liable for his deed. The same situation will also apply to the juvenile who has reached the age of 16 and has acquired full exercise capacity, decided on good grounds, as it results from art. 40 corroborated with art. 484 of the Civil Code, as a result of a putative marriage, he “recovers” the minor quality as a person under the age of 18 whose marriage is annulled, he was in bad faith at the conclusion of marriage (the liability belongs to the parent), while the minor who was in good faith at the conclusion of the marriage retains full exercise capacity, so he will be liable for any detrimental act.

¹ According to art. 272, par. (1) Civil Code, the matrimonial age is 18 years old. By exception and under the terms of the law (article 272, par. 2), the 16-year-old can also be married, gaining full effect of exercise. For details, see (Bodoașca, Drăghici & Puie, 2012, pp. 44-48).

² The married minor will not become an adult, but will no longer be under parental authority, and the liability of his parents will be without ground”.

Returning to the provisions of art. 1372, par. (1) Civil Code, there is no reference to the juvenile's tort capacity and it is not distinguished the discernment compared to the situation of liability for his deed, art. 1366 of the Civil Code. According to this article, the minor who has not reached the age of 14 old, nor the one who is under court interdiction is without discernment, while the minor who is 14 years old is relatively presumed to have the knowledge of his deeds, giving him a tortuous capacity. Therefore, to attract tort liability for the deed of another person, we retain both the fulfillment of the minority condition, but also the existence or the lack of discernment.

We appreciate that these provisions are irrelevant as in matters of liability for the deed of another person, it is not necessary to prove the guiltiness of the minor or the one under court interdiction, nor the presence of their discernment. In the same sense, art. 1372, par. (2) of the Civil Code, which emphasizes that the liability of the person responsible for supervision, control, guidance and authority is engaged regardless of the perpetrator's discernment at the time when the offense was committed.

We conclude that he will be liable to the juvenile's deed while he / she retains this status, i.e. under the age of 18, and not being in the situation of the married 16-year-old or the person who has acquired the full exercise capacity for good reasons. Children, in general, school children, preschool children, pupils, apprentices, etc. are part of this category. By virtue of the above and by analogy with the above-mentioned scope, we can also conclude that in the case of the juvenile the supervision obligation can be found in: law, through the broad institution of parental authority; in the contract (e.g. professional maternal assistant); based on a court decision - appointment of a guardian, etc.

3. Person under Court Interdiction¹

The second analyzed category is the person under court interdiction, for which there is no requirement for the fulfillment of any age limit, but only for the special interdiction procedure.² “*A person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, will be placed under court interdiction*” - confirms art. 164, par. (1) of the Civil Code corroborated with art. 104 of the Civil Code.³ The current legislative context had as starting point the provisions of the former Family Code, being regulated today in art. 164-177 of the Civil Code, “The Protection of the person under court interdiction”.

As a measure of civil protection of the individual, it will only be ordered by the court and only if the interest of the protected person is justified, which will deprive the person under court interdiction from the exercise capacity. From the civil provisions, namely, art. 104 of the Civil Code, it results that the principle that will govern such a situation is that of protecting the superior interest of the protected person. With the ruling of court interdiction, the court will also order the establishment of a **guardian**. In special cases, until its appointment, the court may designate the appointment of a **special curator**, according to the provisions of art. 167 of the Civil Code.

¹ Gheorghe Beleiu (2001, pp. 368-369) defined the interdiction as the measure taken against “*the individual lacking the necessary discernment to take care of his interests due to alienation or mental debility, consisting of lack of exercise capacity and the establishment of guardianship.*”

² The procedure for imposing a judicial interdiction is provided in art. 936-943 of the New Code of Civil Procedure. In Official Monitor no. 196 of March 21, 2017, Law no. 17/2017 on the approval of G.E.O. no. 1/2016 for the amendment of the Law no. 134/2010 on the Code of Civil Procedure, as well as related legislative acts.

³ This welcome clarification of the situation comes after long doctrinal approaches that have supported such a point of view, of which we mention: “*If the author of the illicit deed is under an interdiction and the guardianship of the person under interdiction is established, we believe that liability for that deed would fall within the charge of the guardian, on the basis of art. 1000, par. (1) of Civil Code.*” (From 1864 – s.n.) (Pop, 2010, p. 107).

There is no relevance to the matter of tort liability for the nature of the full designation, in the case of the tutor or the partial designation, in the case of the special curator. It is important that the liability will be made according to the moment of the harmful act and the person to whom the supervision obligation was at that moment.

From the interpretation of art. 164 of the Civil Code, we observed the following three substantive conditions of this procedure:

- lack of judgment of the person. And under the provisions of art. 1366, par. (1) of the Civil Code, the prohibition is presumed not to have the discernment of his deeds, as a consequence of being under court interdiction, regardless of his age;
- the cause of lack of discernment is the alienation or mental debility of the person;
- lack of discernment will not allow the person to take care of his interests.

The person responsible for establishing the state of alienation or mental debility is the specialist doctor. The legislator establishes the meaning of these phrases in the art. 211 of the Law no. 71/2011: *“Mental alienation or mental debilitation is a mental illness or a psychic disability that determines the psychic incompetence of the person to act critically and predictively on the social and legal consequences that may result from the exercise of civil rights and obligations.”*¹

As a matter of novelty to the former provisions of the Family Code, minors with restricted exercise capacity may also be under interdiction, if the conditions of art. 164, par. (1) of Civil Code are met. (Fodor, 2013, pp. 29-47)

Also as an element of novelty, art. 166 of the Civil Code provides the possibility for any person to designate, through a unilateral act or mandate contract, the guardian who is to take care of the person and goods of the person under court interdiction, subject to certain formal conditions. It is the so-called “assigned tutelage” (Fodor, 2013, p. 37) or the “protection mandate” (Boti, 2012, p. 393), according to the model of the Quebec legislation (art. 2166-2174 of the Q Civil Code) or French civil law (articles 477-494).

Article 111 of the Civil Code lists the sphere of persons who may request the establishment of guardianship in this case: a) persons close to the minor, as well as administrators and tenants of the house where the minor lives; b) civil status service on the occasion of the death of a person, as well as the public notary, on the occasion of the opening of a succession procedure; c) the courts, on the occasion of the conviction of the criminal sanction of the parental rights prohibition; d) local government bodies, protection institutions, and any other person. We also add to this list the possibility of the prosecutor's request for the measure under art. 92, par. (1) Code of Civil Procedure.

With the final ruling of the court decision of court interdiction, according to art. 169, par. (1) of the new Civil Code, it has its effects: the person under interdiction will have the right to be included in the sphere of the persons for whom a civil tort is answered, as it was ordered by art. 1372 of the Civil Code. As a matter of fact, the designated guardian will also fall within the sphere of liable persons under the same article.

Finally, reiterating what has been said above, the Civil Code does not set any minimum or maximum age limit for the person under court interdiction. As a result, they may be placed under a court interdiction, according to par. (2), art. 164 of the Civil Code *and minors with restricted exercise*

¹ On the difference between alienation and mental debility, see (Chirică, 2012, pp. 26-59).

capacity. A fortiori, it is only if they suffer from alienation or mental debility and if they meet all the other above-mentioned conditions can such a decision be made by both the adult and the minor.

Summing up, however, the interdiction of a minor will only take place from the age of 14, and until this age he is under the protection of parents. Establishing such a procedure before this age would be devoid of interest or effect, due to the cumulative fulfillment of two conditions, namely the lack of exercise capacity and the presumption of lack of discernment.

Directly related to our subject, it notes the possibility of the accumulation of two qualities by a single respondent, if the juvenile of the age of 14 and 18 is placed under a court interdiction, a minor who at the time of him being under court interdiction was under the protection of the parents. Under what civil capacity will the parents be liable for the damages caused by the illicit acts of such a minor placed under court interdiction? Will they be liable under the law, that is to say, as parents of the juvenile or on the basis of a court decision, as persons “required to supervise” a child under court interdiction? What does it prevail, the law or court judgment, by extension, the quality of parent or supervisor?

The legislator makes no reference to this state of affairs. The mere listing of the grounds (“the one under the law, of a contract or judgment” ...) does not empower us to consider that this is also the preferred and obligatory order to follow. Although the enumeration is limited, it is a random one, assuming that a particular form excludes the other two. This does not apply in the mentioned case.

The Doctrine has stated and was the one who shared the issue, arguing the controversial provisions of art. 1372, par. (3), the content of the supervising obligation, that of the parents and other responsible persons. The conclusion has been that the parental obligation is wider and it integrates that of the mere supervisor.¹ (Mangu & Motica, 2011, p. 18)

We believe that this situation could be avoided by endorsing *in terminis* a differentiated regulation according to the subject of civil law for which it is liable.

Although the law does not provide expressly, no liability will be imposed on other persons if the perpetrator of the deed is a major person without discernment, on whom it has not been ordered to place a court order for alienation or mental debility. He does not answer for his deed if, at the time when he committed the damaging deed, he was in a state, even temporal, of a mental disorder that prevented him from realizing the consequences of his deed (article 1367, par. 1 of the Civil Code), excepting the states of mental disorder caused by himself, by alcohol, narcotics or other substances (par. 2). Therefore this situation does not fall within the scope of art. 1372 of Civil Code. Until the appointment of a special curator by the court, no other person will be held liable for the damage caused by the person without discernment. The author of the damage, if he or she was without discernment, will be obliged to pay compensation to the victim in a fair amount, taking into account the patrimonial status of the parties (Pop, 2010, p. 168). Lack of discernment does not exempt the injured party from paying a compensation to the victim whenever the liability of the person cannot engage the duty to supervise him, according to law. The compensation will be set in a fair amount, taking into account the patrimonial status of the parties. We believe *de lege ferenda* is necessary, for a fair solution to the problem through the full compensation of the victim, a special insurance system, such as a guarantee fund established at national level, in order to ensure that those who have suffered prejudices that cannot be recovered for reasons such as those highlighted above or the insolvency of the responsible ones.

¹ Considering the fact that the content of parental protection includes, besides raising, the education and professional training of the juvenile also supervising the juvenile, the conclusion is that parenting will prevail, encompassing even the supervisor.

Concluding, as in the case of the juvenile, the obligation to supervise the one under court interdiction can find its grounds in the following: judicial decision - the most common situation; contract - the case of the trustee appointed by mandate contract; in the law - the case of state hospital units treating psychiatric patients under court interdiction. It is not liable under art. 1372 of Civil Code for the fool who is not under court interdiction, in which case the liability for his deed is established, unless it is proved that the conditions of art. 1367 of the Civil Code are met, placing the issue of a subsidiary obligation to compensate the victim.

4. Conclusions

In the light of the above, we conclude that parental liability for the deed of the juvenile or the minor under court interdiction is an indirect liability and we have argued in the present analysis that it can only be engaged when the damage is brought by the deed of a minor or a person on which the special measure of court interdiction was taken. Commitment to liability for the two categories (minor and the one under court interdiction) is justified by the nature of the relationship of the person responsible with the perpetrator of the deed, and is also motivated by the authority it exercises over it, materialized by controlling its way of life or conducting its activity.

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