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Some Aspects Concerning the Civil Action in the Criminal Proceedings

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Abstract

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A civil action is an action ancillary to criminal action, representing the middle of the procedure through which the defendant is held civil liable, the party civil responsible for or his successor in title.
This tort liability is one of the persons responsible under civil law for the material and/or moral damage produced by committing the offence. The offence must be committed by the defendant with guilt, as in the case of supporting causes or lack of any fault of the defendant, both this and the party responsible cannot be civil forced to pay civil damages, although tort liability is involved for the easiest fault also.
We note that it is irrelevant whether these were new evidence during the criminal trial and the prosecutor has not made sufficient efforts to learn about them or simply these did not know existed. So we know that the lack of diligence cannot be imputed to the civil party (without legal capacity or limited legal capacity) in obtaining the evidence required to establish the full damage.

Keywords: Civil action; criminal proceedings; defendant; liable; liability.

1. The civil action is:

a) a private action, being exercised by a person who has suffered injury from crime;

b) a voluntary action, being left to the discretion of the injured person pursuit;

c) a heritage action can be exercised against both the accused and the person civil responsible, of their heirs, of their successors in title;

d) a divisible action, whereas the person aggrieved (injured) may request the liability of one or more persons, who participated in producing the injury;

e) an available action, whereas the injured person may renounce to the exercise of the action (Barbu, 2016, p. 101).

1.1. Conditions for exercising the civil action in criminal proceedings

These conditions are those set out in the civil liability and must be cumulatively met:

1) the offense to cause a pecuniary or non-pecuniary prejudice

2) between the crime committed and the damage suffered, which is required to be covered to have a causal link;

3) the damage must be certain;

4) the damage has not been repaired;

5) there is a request for the formation of the civil party in criminal proceedings for individuals with exercise capacity[1] or for legal entities.

6) not to exceed the reasonable duration of solving the criminal process by the civil action within it (Barbu, 2016, p. 102).

1) This condition leads to the idea that not every crime can lead to a civil action in criminal proceedings, since some offences by their nature, cannot give rise to material or moral damage, which makes the possibility of pursuing the civil action to be excluded (Neagu & Damaschin, 2014, p. 296), such as offences of danger which cannot generate material or moral damage directly (except for example, the crime of threat) (Pricope, 2013, p. 30).

In addition, the offence must be committed by the culprit with guilt, as in the case of supporting causes or lack of any fault of the defendant, both it and the party responsible cannot be civil forced to pay civil damages, although tort liability is involved for the easiest fault (Volonciu et. al., 2014, p. 60).

Compelling the full compensation of the damage of the defendant cannot take place if in its production contributed to the victim and the offence of culpable or if the defendant's guilt overlapped a fortuitous case or force majeure, an act of another person (third-party) to which the author is not obligated to respond (Art. 1371 C.c.).

In the case of participants in committing the same offences, the principle of joint responsibility applies (Art. 1382 C.c.).

[1] In case of injured person with no exercise capacity or with low exercise capacity, the civil action is exercised by the legal representative or, by the prosecutor. If the legal representative do not exercise civil action, the prosecutor is obliged to exercise ex oficia, the civil action, regarding the injured person's interests.

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2) The damage must be a direct consequence of the offence, but the doctrine and the damage (Mateuţ, 2007, p. 741) has been accepted indirectly, by ricochet.

Thus, a person can be held civil liable only if between deed and injury there is a causality relation, objectively (Stăescu, 1984, p. 21).

The injury must be certain, both in terms of existence, as well as in terms of its scope, where it resulted in the jurisprudence, that are inadmissible the applications for symbolic compensation, considering that such a condition of the certain injury is not met in terms of its existence.

The damage may be a present one, but also one in the future, if it is demonstrated that it is certain in terms of existence and of extension (Volonciu et. al., 2014, p.63).

We cannot discuss an eventual injury, whose production is not safe.

In terms of the certainty of the injury, another aspect particularly refers to the loss of a chance of achieving a win or avoid a loss (Art. 1385 para. 4 C.c.).

Thus, "*shall be granted compensation for future injury if its production is beyond doubt"* (Art. 1385 para. 2 C.c.).

4) This condition must be met because there is also the possibility that, before exercising the civil action in criminal proceedings, the damage caused by committing the offence to be covered partly or fully by other people (Barbu, Petrea, 2016, p. 88)

If the third parties have covered the damage wholly or in part, although they had no such obligation, the civil action may/may not be exercised in the criminal procedure, depending on the title which covered the damage (Neagu & Damaschin, 2014, p. 303).

So, if we talk about the tort liability insurer of the author of the offence, it is clear that it pays for the one responsible.

However, if we are talking about the victim's insurer, the question is if it is satisfied the condition that the damage has not been repaired.

In this case, the distinction between the personal insurance (which is a measure of foresight) and in this case, the victim shall be entitled to compensation from the perpetrator, and the insurance of goods, in this case the victim cannot aggregate compensation received from the insurer and the offender only within the limits of the injury (Pricope, 2013, p. 91).

5) This condition is laid down in article 20 paragraph 1. C.c.p. showing that the person aggrieved may constitute in civil party until the beginning of the legal proceeding.

The Code of Criminal Procedure stipulates in art. 20 paragraph 1 the final thesis, that "*judicial organs are required to bring to the attention of the person injured by such right",* but in this case the active role of the Court would be compatible with the principle of impartiality of judges or with the principle of equality of arms?

We believe that the active role of the Court in this case is much diminished, consistent with the principles of the criminal process.

The setting up of the civil party in the criminal proceedings would constitute the will of the injured person to be repaired and/or the material / moral damage caused by committing the offence.

If the civil action was initiated ex officio, the condition is no longer required, the Court being obliged to rule ex officio upon remedying (Neagu & Damaschin, 2014, p. 304).

6) If it is to resolve the civil side required a longer period of time could lead to violation of the principle of solving the criminal cases within a reasonable time, the Court may, ex officio or at the request of the Prosecutor or of the parties, dispose the disjoin of the civil action (Art. 26 para 1 & 2 C.c.p.).

The civil action disjoin retains its character to that of the Penal accessory.

2. Exercising the civil action

The pecuniary and/or non-pecuniary is done according to the provisions of the civil law (Art. 19 para. 5 C.c.p).

The civil action in criminal proceedings is exercised either by the civil party, or after having been introduced ex officio.

2.1. The right of option of the injured person to repair the damage by committing the offence

- constitutes the right to choose between exercising the civil action in civil court or the establishment of the civil party in criminal proceedings.

For there to be this right to option must be both criminal proceedings, by setting in motion the criminal action and the possibility of pursuing the civil action in a civil court.

The limitation of the right of option is given:

1) when the injured person through the crime is a person who lacks capacity to exercise or low exercise, or when the civil action was exercised ex officio in criminal proceedings;

2) when the injured person transmitted through the offence is entitled to compensation for damage to another person, conventionally, this exercise in terms of civil action in criminal proceedings, but only through a separate action in the civil court (Art. 20 alin. 7 C.c.p.; Udroiu, 2014, p. 110).

The right of option of the natural or legal person affected by crime is irrevocable, in principle, which means that you may not opt out for whom opted initially, the penalty being loss of the right to obtain reparation[2].

Exceptions to the right of the irrevocability of the option:

1) when the person or its successors that have constituted the civil party in the criminal proceedings may leave the Court going to the civil court in the following situations:

a) the prosecution/the judgement) were suspended (Art. 312 C.c.p., 367-368 C.c.p.)[3].

b) when the closing was ordered by the Prosecutor, then in this case, the injured party may seek civil court, which is not held by the solution given to the prosecution.

c) when it has been left unresolved the civil action by the Criminal Court in cases of acquittal of the defendant or of the termination of the criminal process (Art. 16 para. 1 letter b) first stanza, e, f, g, i, j C.c.p.) or when he accepted plea bargain agreement and there is no settlement or mediation relating to civil action (Udroiu, 2014, p. 110).

[2] *„Electa una via non datur recursus ad alteram"*

[3] In these cases, the civil party is not obliged to wait for recommencing the criminal proceeding, this might address to the civil court. If recommencing the criminal proceeding, the acţiunea is introduced to civil court is adjourned to solving it in the first instance of the criminal cause, but not more than 1 year – art. 27 para. 3 and 7 C.c.p.

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Leaving unresolved the civil action by the Criminal Court has held in a situation where heirs/successors in rights/civil party, the liquidators shall have the option to continue the pursuit of the civil action or the civil side does not indicate within a period of not more than 2 months for the heirs/successors in title/liquidators of the civil party responsible from the time of death/reorganization/dissolution of the civil party/the party civil responsible.

Apart from these exceptions, the civil party in the criminal proceeding, if leaves or waive the civil claims, he lost the right to obtain claims/can no longer enter the civil action in the civil court for the same claims.

2) The injured person material/moral by committing the offence, which has pursued the civil action in the civil court may leave this path and may exercise the civil action in the criminal proceedings when:

a) the criminal proceeding was put into motion after exercising the civil action in the civil court (Neagu, 2014, p. 321; Volonciu & Uzlau, 2014, p. 125)[4].

b) where the criminal trial was resumed after suspension or the prosecution resumed after reopening (Neagu, 2014, p. 321), noting that it is not required to return to the injured person in the criminal trial, but the civil action in the civil court is pending to the resolution of the case in the first instance, but not more than 1 year.

However, according to art. 27 paragraph 4, of the C.c.p., the person cannot leave the civil court, though it has rejected a non-final judgment, this provision of the Code of Criminal Procedure being explained by the "necessity of avoidance for pronouncement of contrary solutions" (Teodoru, 1971, p. 287).

Thus, if the injured person by committing the offence leaves the civil court in situations other than those above, he loses the right to obtain claims by judicial process.

We should note that the final judgement of the Criminal Court (irrespective of the solution) has the authority of res judicata in the civil court which prosecutes the civil action with respect to the existence of the offence and of the person who committed it (Udroiu, 2014, p. 124; Art. 28 alin. 1 C.c.p.).

2.2. Exercising the civil action ex officio

The civil action is exercised ex officio and alongside the criminal proceedings, in this case the right option tied to resolving the civil action in criminal or civil court should be no longer valid.

The exercising ex officio of the civil action is performed (cf. art. 19 paragraph 3 of C.c.p.):

- the legal representative
- the Public Prosecutor,

When the injured party does not have the exercise capacity or has the capacity to exercise, from which it follows that the civil action is official (exercising the civil action being required); exception - when not requested by the legal representative of the injured person lacking the capacity to exercise or the exercise restricted compensation for damage.

[4] Thus, in this situation, we are not talking about an exception „electa una via", because the injured persoan by commiting the crime did not have the possibility of choosing a way, respectivly criminal or civil, the only way, being introducing the civil action to civil court.

If the injury to the persons referred to above arise from a breach of contract, a breach which constitutes a civil infringement action, may be contractual liability basis, whether tort liability (Stăescu, 1981ş Sanielevici, 1967), depending on the way the civil side chooses.

Regarding the confusing provisions of article 25 and 397, we propose de lege ferenda that the civil action to be pursued on its own initiative in the following cases:

1) where the injured person has the capacity to exercise or has low exercise capacity, the civil action is exercised in the name of the legal representative or by the Prosecutor;

2) where the Court acted on its own initiative, without the setting-up of the civil party, with regard to the abolition of all or a registered part restoring a previous situation for committing the offence or refunding the thing.

2.3. Exercising the civil action in the civil court

This occurs when the injured person through the offense has opted for this path, or when there is no possibility of the civil action to that of Criminal rapprochement.

The code of criminal procedure provides for special cases to pursue the civil action in the civil court:

1) any injured person or its successors who were not civil parties in criminal proceedings, may pursue a civil action in a civil court (Art. 27 para. 1 C.c.p.).

2) any injured person or his successors that have constituted the civil party may introduce the civil action in a civil court if the Criminal Court left unresolved the civil action (Art. 27 para. 2 C.c.p.; art. 16 para. 1 letter. B, stanza I, art. 16 para. 1 letter. e, f, g, i, j C.c.p.).

In all cases in which the civil action remained unsettled, the samples during the criminal process administered can be used in the civil court.

3) Where the Prosecutor has pursued civil action ex officio, but new evidence is found from that the injury has not been covered in full, the balance may be required in the civil court (Udroiu, 2014, p. 126; Volonciu, et. al., 2014, p. 89, art. 27 alin. 5 C.p.p.; Neagu, 2014, p. 325).

We should note that it is not relevant whether these new evidence existed during the criminal process, and the Prosecutor has not made sufficient steps to inspect them or simply did not know their existence. So, we conclude that the lack of diligence cannot be attributed to the civil party (lacking in exercise capacity or a restricted exercise) in getting the evidence needed to determine the damage.

4) In the case of birth or discovery of the injury since the formation of the person injured by the civil party (Art. 27 para. 6 C.c.p.).

In this case, the time reference is that of the establishment of the civil party and not that of the judgment of the first instance court, because, after the start of the research, the civil court may not require new compensation in the criminal proceedings.

If the injury was born at the time and discovered at the establishment of the civil party in the criminal proceedings, and the civil party never requested it, shall be presumed/considered to have renounced its repairing (Volonciu, et. al., 2014, p. 85).

In addition, compensation may be increased, reduced or removed, if, after fixing them, the damage increased/decreased/stopped (Art. 1386 para. 4 C.c.).

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We should note that the provisions of art. 27 paragraph 6 of the C.c.p. must be supplemented by the provisions of art. 20 paragraph 5 letter b of the C.c.p., thus the civil party can increase or decrease the extent of claims until the completion of the research.

5) In the case where the injured person has communicated through committing the offence are entitled to compensation for damage to another person, before the formation of the conventional, as a civil party in the criminal proceedings, in which case the civil action shall bear only the exercise of the civil court (Art. 20 para. 7 C.c.p.). If the transfer of compensation took place after the formation of the person as a civil party who has suffered loss, then the purchaser may continue the civil action already started in criminal proceedings (Volonciu, Uzlău, 2014, p. 67).

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Art. 1371 C.c.
Art. 1382 C.c.
Art. 1385 para. 2 C.c.
Art. 1385 para. 4 C.c.
Art. 1386 para. 4 C.c.
Art. 16 para. 1 letter b) first stanza, e, f, g, i, j C.c.p.
Art. 19 para. 5 C.c.p.
Art. 19 para. 3 C.c.p.
Art. 20 alin. 7 C.c.p.
Art. 20 para. 7 C.c.p.
Art. 26 para. 1 & 2 C.c.p.
Art. 27 alin. 5 C.p.p.
Art. 27 para. 1 C.c.p.
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