

ON TORTIOUS LIABILITY AND THE CIVIL LIABILITY OF PERSONS NOT ENDOWED WITH REASON IN THE CONTEXT OF THE CURRENT CIVIL CODE

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Abstract: *The drafters of the current Civil Code have also included the provisions concerning the ability to bear tortious liability in the regulation of tort liability for one's own acts, in the Arts. 1366-1368.*

The first legal text sets the framework of the tort liability of minors and persons interdicted for their own acts. According to para. 1 of Art. 1366, the minor under the age of 14 or the person interdicted is not liable to reparation for the injury caused by an act, unless it is proved that he was endowed with reason when he committed the respective act. It is thus worth noting that the solution adopted by the editors of the new Civil Code regarding minors under the age of 14 is identical to that enshrined in our legislation nearly six decades ago, under Art. 25 para. 3 of the Decree no. 32/1954, instituting, in this respect, a rebuttable legal presumption of lack of reason that can be overturned by evidence to the contrary. The innovation consists however in the extension of this solution to the mentally disordered persons interdicted, whose ability to bear tortious liability is not envisaged by our country's current legislation.

Key words: *the ability to bear tortious liability, tort liability of minors, tort liability of persons interdicted for their own acts, legal presumption of lack of reason*

1. Overview of the ability to bear tortious liability: concept, delimitations, rule, exceptions, proof. An aspect demanding particular attention in the field of tortious liability is the individual's reason, which grounds his ***ability to bear tortious liability***.

While there are, in academic literature, opinions that view the ability to bear tortious liability as a fifth prerequisite of tortious liability, we join those points of view holding that, as it is actually based on reason, it constitutes the absolutely necessary premise of the tortfeasor's guilt.

It is only where an individual is endowed with reason and fails in this duty, that he is responsible for an injury he causes to another person by such fault, i. e. where he has *the mental capacity needed to understand the meaning of his acts and their consequences, being capable to discern between what is lawful and unlawful*. This is, *de facto*, the ability to bear tortious liability, intimately linked to the existence or the lack of reason.

In legal terms, reason determines the existence or the lack of guilt, meaning that only an individual who is capable to properly understand the meaning and value of the

wrongful act he commits may be held liable for the commission of such act and the negative consequences entailed thereby for the legal order¹.

Thus, the tortfeasor's reason is a *sine qua non* requisite for the existence of guilt and of civil legal liability. Conversely: lack of reason entails the innocence of an individual.

An individual's ability to bear tortious liability mustn't be confused with his ability to exercise his civil rights. The former concerns civil liability, and is a premise of the tortfeasor's guilt. The latter regards the conclusion of legal acts, i.e. an individual's ability to exercise his rights and assume obligations. This is also the explanation for the fact that the criteria based on which the law establishes the two types of legal ability are different.

The issue of the ability to bear tortious liability and, implicitly, of an individual's guilt eventually reduces to proof. Thus, an individual is responsible for an injury he causes to another person by his fault only where, as mentioned above, it will be proved that he was endowed with reason when he committed the respective act; or, in other words, that he had the capacity to understand the wrongful character of his acts and their negative consequences, the capacity to discern between what is lawful and unlawful; once this has been proved, it establishes the respective individual's ability to bear tortious liability, i.e. his responsibility for any injury he causes to another person by his fault.

The ability to bear tortious liability or the ability to be held responsible of an individual thus appears to be actually a person's ability to coherently assess the legal consequences of his acts and, at the same time, incur such penalties as provided by the law and inflicted by the authorities having jurisdiction, after the commission of the act².

The ability to bear tortious liability is a form of the legal ability to have rights and assume obligations, consisting in an individual's ability to be held accountable, by the society, for the injury caused, to properly assess the meaning of the legal sanction imposed for his acts and to bear the negative consequences that state coercion exercised, in the infliction of those sanctions, deems necessary and unavoidable³.

Once the individual's ability to bear tortious liability has been established, it is guilt, which is not implied by the mere existence of reason, which has to be proved subsequently.

Guilt is a mental, intellectual and volitional, complex process, having as a necessary but not sufficient prerequisite reason, as the basis of the ability to bear tortious liability. Thus, only an individual endowed with reason is able to develop an internal volitional process, in both its sides - intellectual and volitional - that supposes, on the one hand, awareness of the purpose of an act and of the means by which one can achieve this purpose, understanding, weighing and deliberating on these possibilities, followed, on the other hand, by the free making of a decision to act in one form or another; at this point, the will to commit the wrongful act, although fully formed, has not got yet legal bearing, merely being an inner psychological process, until the resolution is objectively manifested, by the commission of a wrongful act, to which the law attaches legal consequences: the creation of the legal relation of tortious liability in which the tortfeasor will be held liable to reparation for the injury caused by his action.

¹ G. Antoniu, **Vinovăția penală**, Academiei Publishing House, Bucharest, 1995, p. 212.

² Gh. Mihai, **Fundamentele dreptului. Teoria răspunderii juridice**, vol. V, C. H. Beck Publishing House, Bucharest, 2006, p. 205.

³ M. Costin, **Dicționar de drept civil**, Bucharest, 1980, p. 67.

In terms of law, what counts is the external outcome of this mental process, the will materialized in committing the wrongful act. By such an act, practically speaking, the will to act turns into guilt – an element of the tortious liability for one’s own acts.

Within this complex mental process, commonly called guilt, reason is, actually, the link between the different mental sequences where the solutions, the lawful or unlawful potential means by which an individual can achieve his purpose are by turns displayed. These possible ways of acting initially appear to an individual as the pieces of a puzzle, the whole picture of which being obtained by the direct contribution of reason, capacity by which the individual discerns, i.e.: pierces, judges, considers the content of each of the solutions found, their positive or negative effects, their lawful or unlawful character, thus managing to create real scenarios for action, and then choose freely, knowingly, accurately, one of the solutions that he is going to materialize, thus committing the act.

In this way, reason, the basis of the ability to bear tortious liability, is a *sine qua non* requisite of guilt.

It is therefore easy to understand why an individual who is not endowed with reason cannot be held liable for an act: because such person does not understand the antisocial and, therefore, unlawful character of his act, not being able to foresee its damaging consequences and, accordingly, to choose wisely between a lawful and an unlawful act. Absent such capacity, the development of the inner volitional process is deeply affected, the act that has been committed becoming the manifestation of a decision to act made erratically, consequent upon illogical correlations and based on an erroneous representation of the distinction between what is good and bad, lawful and unlawful. Or, such a decision, materialized by the commission of the wrongful act, cannot turn into guilt, as none of its elements – the intellectual and the volitional factor - do not meet the minimum standards of the intellectual-cognitive processes.

As legal scholars have pointed out, individuals who are not endowed with reason cannot be held responsible for their acts because they do not have, when committing the act, “will sufficiently guided by reason, in order to be able to distinguish, discern, what is social from the antisocial, the good from the evil”⁴.

These are the reasons why we adopt those views expressed in legal literature according to which the ability to bear tortious liability is not a separate condition of civil liability, but is actually a premise of guilt.

The lack of the ability to bear tortious liability supposes the tortfeasor’s complete lack of reason, which, in order to free him from liability must be simultaneous with the unlawful act that causes an injury. The partial lack of reason affects neither the existence nor the extent of civil liability⁵.

As we have shown above, the issue of reason and, as such, of the ability to bear tortious liability reduces to a matter of proof. The existence or the lack of reason constituting, in legal terms, a matter of facts, it is to be determined by any means of proof. Among these means, an important part is undoubtedly played by the medical-psychiatric expertise, which is not though itself an absolute proof, the judge being eventually the only sovereign in assessing, concretely, on a case by case basis, the existence of reason or the

⁴ M. Eliescu, **Răspunderea civilă delictuală**, Publishing House of Academiei Republicii Socialiste România, Bucharest, 1972, p. 224.

⁵ L. Pop, **Drept civil. Teoria generală a obligațiilor. Tratat**, Ediția a II – a, Publishing House of the Foundation „Chemarea”, Iași, 1998, p. 222.

lack thereof, at the time when the wrongful act was committed and, consequently, the guilt of the tortfeasor.

In general, the burden of proof is on the injured party, according to the *eius incumbit probari, qui dicit, non qui negat* rule, but due to the peculiarity of the object of proof in this case - the mental process developed by the tortfeasor, before causing an injury - the injured party faces a too difficult, sometimes impossible task.

That is why, for the purpose of easing the burden of proof that falls on the injured party as a *probatio diabolica*, civil law has traditionally established the rule of the individual's ability to bear tortious liability, turning lack of the ability to bear tortious liability into an exception. An individual who is not totally devoid of reason is, accordingly, presumed by civil law to be fully endowed with reason to a degree corresponding to the type of person who serves as a standard of the degree of care that must be proven by any member of the society.

In this way, the entire burden of proof of the fact that an tortfeasor was endowed with reason at the time when the injury was caused is taken from the injured party, beneficiary of this rebuttable legal presumption, under which the one who has caused an injury is presumed to have the ability to bear tortious liability, being able to free himself from liability only if he proves that when having committed the wrongful act he was devoid of reason, being in a state of lack of the ability to bear tortious liability.

2. Regulation of the ability to bear tortious liability in the Civil Code. The drafters of the current Civil Code have also included the provisions concerning the ability to bear tortious liability in the regulation of tort liability for one's own acts.

This is regulated by the Arts. 1366-1368 of the Civil Code.

The first legal text sets the framework of the tort liability of minors and persons interdicted for their own acts. According to para. 1 of Art. 1366, the minor under the age of 14 or the person interdicted is not liable to reparation for the injury he caused by his act, unless it is proved that he was endowed with reason when he committed the respective act. It is thus worth noting that the solution adopted by the editors of the new Civil Code regarding minors under the age of 14 is identical to that enshrined in our legislation nearly six decades ago, under Art. 25 para. 3 of the Decree no. 32/1954, instituting, in this respect, a *rebuttable legal presumption of lack of reason* that can be overturned by evidence to the contrary. *The innovation* consists however in *the extension of this solution to the mentally disordered persons interdicted*, whose ability to bear tortious liability was not envisaged by our country's former legislation. Consequently, regardless of his age, the person interdicted enjoys the rebuttable legal presumption of lack of reason, falling on the injured party to prove the fact that, when committing the unlawful act, the tortfeasor was endowed with reason. Para. 2 of the same legal text concerns minors who have reached the age of 14 and who have caused an injury to another person, against whom the legal rule analysed establishes a rebuttable legal presumption of reason, falling on them, in order to free themselves from liability, to prove that, when committing the unlawful act, they were totally devoid of reason.

Of course, it remains true *as regards the ability to bear tortious liability, that the rule is the ability*, and this refers to all individuals, *except those in whose case the legislature has chosen to regulate specifically*, establishing, in the form of rebuttable legal presumptions, certain incapacities to bear tortious liability: *minors under the age of 14 and persons interdicted*.

The category of people devoid of reason, that is unable to bear tortious liability, also includes, according to the provisions of para. 1 of art. 1367 of the new Civil Code,

those who were even temporarily in a state of disorder of the mind that made them unable to understand the consequences of their acts, when they committed the unlawful act. The state of disorder of the mind must be accidental and not be caused by the tortfeasor by drunkenness from the use of alcohol, drugs or other substances (see para. 2 of the same legal text). This legal rule regulates a case of exemption from liability based on the absence, at the time when the injury was caused, of reason of the tortfeasor, due to a “disorder of the mind”, “even temporary”, such as “to make (him – E/N) unable to understand the consequences of his act”.

The presence of this legal text in the Civil Code is but a triumph of the doctrine of subjective tortious liability for one’s own acts, always based on the tortfeasor’s guilt, seen both as a *sine qua non* requisite of this liability, and as the idea behind the accountability for one’s own acts in our legal system.

Following a systemic and comparative analysis of the provisions of Art. 1366 and Art. 1367 of the Civil Code, we can unequivocally conclude that, in these two legal texts, the legislature refers to distinct causes for the lack of reason, reason why the legal treatment of the persons mentioned by the two articles is different, even diametrically opposed. Thus, while Art. 1366 para. 1 refers to minors under the age of 14 and persons interdicted, both categories encompassing persons deemed to be, as a rule, permanently devoid of reason and, implicitly, lacking the ability to bear tortious liability, Art. 1367 deals with persons whose lack of reason is not notorious, not being, theoretically, permanent, but, on the contrary, accidental and, sometimes, even temporary.

The distinction between the two categories of persons is clear. The first - represented by *minors under the age of 14 and mentally disordered persons interdicted* - benefits from the presumption of the lack of the ability to bear tortious liability. The second category - encompassing the *persons who, at the time when the injury was caused, were in an even temporary state of disorder of the mind, making them unable to understand the consequences of their acts* - does not enjoy this presumption, *these persons being, on the contrary, deemed to have been endowed with reason, at the time when the wrongful act was committed, on the basis of a rebuttable legal presumption*. It is their duty, in order to free themselves from liability, based on Art. 1367, to prove the opposite: their lack of reason caused by a disorder of the mind.

This category of persons, against whom acts the presumption of the ability to bear tortious liability, includes, first, all mentally disordered persons not interdicted, and, second, any mentally healthy person who, fortuitously, when committing the unlawful act, was not able to understand its consequences, due to a disorder of the mind, even if temporary, i.e. only at the moment when the injury was caused. The formula used by the legislature – “disorder of the mind” - is quite generous, and can include within its scope, as we have already shown, both short-term mental alterations - which can last just as long as the wrongful act which was committed - and long-term ones, especially as the legislature specifies *expressis verbis* that this disorder can be “even temporary”.

The cause of the lack of reason and, implicitly, of guilt, obviously concerns pathological changes, “negligence” caused by mental deficiencies, lasting or not, as well as non-pathological or transient mental disorders, which, when the injury was caused, have affected the tortfeasor’s ability to understand the consequences of his acts⁶.

⁶ G. Viney, P. Jourdain, **Traité de droit civil. Les conditions de la responsabilité**, sous la direction de J. Ghestin, 2^e édition, Librairie Générale de Droit et Jurisprudence, Paris, 1998, p. 536, no. 591.

The question that arises is however whether, among these causes, determining the state of a disorder of the mind up to the point where the tortfeasor is unable to understand the consequences of his acts, we may also include physical conditions causing a temporary loss of consciousness. These are the so-called “force majeure causes of internal origin”⁷, such as a heart attack, an epileptic seizure, which, in our opinion, should be included among those covered by the provisions of Art. 1367 of the Civil Code. We should not, therefore, distinguish – in applying the *ubi lex non distinguit, nec nos distinguere debemus* principle – among the causes that determine “that state, even if temporary, of disorder of the mind which made (the tortfeasor – E/N) unable to understand the consequences of his act”, only their effect bearing importance: depriving him of his reason at the time when the injury was caused. Of course, however, we should exclude from the sphere of cases envisaged by the drafters of the Civil Code in Art. 1367 the physical problems that have no bearing on the individual’s mental capacity⁸; here are to be included all the diseases, the exclusively physical infirmities that do not affect the tortfeasor’s ability to discern, either by their intrinsic or extrinsic symptoms, caused by drugs or drug substances that are part of their treatment.

In order to exonerate from liability, the individual in such a state - of a “disorder of the mind” – will have to prove that it was specifically at the moment when he committed the unlawful act that he was totally devoid of reason, and, thus, unable to understand the consequences of his act. It is not sufficient to prove a usual or frequent disorder of the mind.

Further, in order to allege in such a case an irresponsibility, it is not enough to establish that, at the time when the injury was caused, the tortfeasor suffered from a certain lack of reason or a certain pathology of consciousness or will; he has to prove a total, absolute unconsciousness as the legal text refers to the “lack of reason” characterized by “the inability to understand the consequences of his acts”; a semi-insanity or mental retardation will not, accordingly, be able to exempt the tortfeasor from liability, as it only entails a partial lack of reason, not a total one⁹.

Last but not least, we should also mention the provisions of para. 2 of Art. 1367 of the Civil Code, which, referring to the cause of the tortfeasor’s lack of reason while committing the unlawful act, sets out the requirement of an involuntary, accidental, fortuitous event - the state of disorder of mind which made him unable to understand the consequences of his act must not have been caused by the tortfeasor, due to drunkenness caused by alcohol, drugs or other substances; otherwise, the one who caused the injury will be kept liable, and sanctioned for his previous mistake – *culpa remota* - that he had committed when he had been endowed with reason: the causing of a state of disorder of the mind in order to commit the wrongful act¹⁰; in such a case, the suppression of reason is predictable and deliberate or consciously accepted, in no case accidental, thus calling for the application of the *nemo auditur propriam turpitudinem allegans* principle¹¹.

Therefore, *de lege lata*, as a rule, in case the tortfeasor lacks the ability to bear tortious liability, at the time when he committed the unlawful act, he may not be held

⁷ *Idem*, p. 537, no. 591.

⁸ *Ibidem*.

⁹ French Court of Cassation, 2nd civil chamber, decision of 15 December 1965, in *Juris Classeur Périodique*, 1966, no. 15.

¹⁰ M. Eliescu, *op.cit.*, p. 231.

¹¹ I. Turcu, **Tendințe noi ale practicii judiciare în legătură cu fundamentarea răspunderii civile fără culpă a persoanei lipsite de discernământ**, in *Revista română de drept*, no. 2/1980, p. 29.

responsible, and the injured party may not hold him liable to reparation for the injury suffered.

3. The subsidiary obligation to compensate the injured party. This statement only partially corresponds to reality as, *by exception*, at least one category of injured parties – that of those suffering damage caused by minors or persons prohibited for whose acts are held liable the persons referred to by Art. 1372 of the Civil Code - will have its damage repaired by property belonging to other persons (that of those to be held liable to reparation) than the tortfeasor.

However, in cases in which there is nobody to be held liable to reparation for the injury caused by the tortfeasors lacking reason at time when the injury was caused - for example, minors under the age of 14 who are not under parental authority or alienated or mentally deficient persons – injured persons are in an extremely unfavourable situation, having to bear themselves the injury so caused.

There have been proposed several solutions to this problem in the French literature of the last decades of the last century.

One of these was based on the idea of equity, according to which the individual totally devoid of reason when he committed the unlawful act may be held liable to a complete or partial reparation if, based on the circumstances of the case, and, especially, on a comparison between his and the injured party's material conditions, the tortfeasor proves to hold sufficient possessions to cover the injury caused¹².

The French legislative reform of 1968 – The Act of January 3 concerning protected adults – i.e. persons interdicted - overturned the traditional rule, confirming the idea presented above; according to Art. 489-2, the individual who caused injury to another, where he was under the influence of a disorder of the mind, shall be no less liable, as such, to reparation. Scholars have held the view that this text introduces a liability for one's own acts without fault, transgressing the idea of imputability, objectively founded only on the tortfeasor's antisocial behaviour¹³; conversely, case law has not found in this legal text a new ground for the tort liability for one's own acts, considering that Art. 489-2 applies to all liabilities provided under Art. 1382 et seq. of the French Civil Code, and does not institute a particular liability¹⁴ and, moreover, it does not apply, as the text states, exclusively to protected adults, but to all mentally ill persons¹⁵, even not interdicted or minor¹⁶, little children and, thus, totally devoid of reason¹⁷, as well as servants of the mentally disordered¹⁸. The main difficulty we face still resides in understanding the phrase

¹² G. Marty, **L'expérience française en matière de responsabilité civile et les enseignements du droit comparé**, in *Mélanges offerts à J. Maury*, II, Paris, 1960, p. 188.

¹³ J. F. Barbieri, **Inconscience et responsabilité dans la responsabilité civile**, in *Juris Classeur Périodique, édition Generale*, 1982, I, no. 3057; J. Flour, J. L. Aubert, É. Savaux, **Droit civil. Les obligations. 2. Le fait juridique**, 12^e édition, Editura Sirey, Université, Paris, 2007, p. 102, no. 101; G. Viney, P. Jourdain, **op.cit.**, p. 533, no. 589.

¹⁴ French Court of Cassation, 2nd civil chamber, decision of 4 May 1977, in *Recueil Dalloz*, 1978, no. 393, annotated by R. Legeais.

¹⁵ French Court of Cassation, 2nd civil chamber, decision of 21 April 1982, in *Recueil Dalloz*, 1982, no. 403, annotated by Chr. Larroumet.

¹⁶ French Court of Cassation, 1st civil chamber, decision of 20 July 1976, in *Juris Classeur Périodique, édition Generale*, 1978, II, no. 18793, case 1, annotated by N. Dejean de la Bâtie.

¹⁷ Plenary session of the French Court of Cassation, decision of 9 May 1984, in *Bulletin cass. ass. plén.*, no. 1, as well as in *Recueil Dalloz*, 1984, no. 525, annotated by J. Cabannes.

¹⁸ French Court of Cassation, 2nd civil chamber, decision of 3 March 1977, in *Bulletin civil*, II, 1977, no. 61, *precum* și în *Recueil Dalloz*, 1977, nr. 501, annotated by Chr. Larroumet.

affected by a disorder of the mind. Court practice has shown that the phrase characterized a state located between a simple loss of consciousness, but more serious than it, and the complete loss of reason, but not reaching it¹⁹; the quick shift from consciousness to unconsciousness does not even though constitute a disorder of the mind, and an individual in such state cannot be held liable to reparation under Art. 489-2, the same supreme court ruled, in the same case, in which a man, victim of a heart attack, fell and while falling trailed a woman, who was thus injured, and who later sued for damages for the injury so incurred.

Another proposal aimed at creating, on the one hand, a system of compulsory insurance against civil liability for all persons who, being interdicted and benefiting from legal protection (we are referring to mentally ill persons interdicted), cause injury to others and, on the other hand, a security fund, intended to cover losses suffered by victims of unlawful acts committed by those who, even though not benefitting from legal protection, are still totally devoid of reason at the time when the unlawful act was committed; it was shown that such a solution could avoid the injustice created by the recognition of the existence of a principle of liability regarding those who, when committing the unlawful act, were totally devoid of reason²⁰.

Since 1977, French law – the Code of Criminal Procedure, Arts. 706-3 et seq. - has created a special mechanism for compensation of the victims of crimes committed by those totally devoid of reason when they committed the unlawful act; this mechanism reflects, in part, G. Viney's idea, that we have shown above, of the partial socialization of delinquency related risks, the state being thus obliged to compensate the victims of the bodily harm resulting from the commission of certain crimes, when the tortfeasor is unable to repair the injury caused²¹. In such a solution, however, the nature of the compensation received by the victim does not have the character of damages, but of an aid granted by the state²².

In what concerns domestic case law, we could find in the practice of the Supreme Court, a first ruling, of 1972, holding that a minor who was not endowed with reason and who burned a large area of forest, thus causing significant damage to public wealth, was to be held liable, according to the principles of equity, to reparation, taking also into account that he had sufficient possessions to that effect²³. Over nearly 15 years, in a case where the physical integrity of an individual was injured by a tortfeasor who was not endowed with reason, the same equitable considerations grounded the decision to hold liable to compensation the individual who caused the injury, according to his material condition, "being against the principle of equity that the injured party ... fully suffer the injury incurred"; to that effect, it was held that one has to check "the material condition of the

¹⁹ French Court of Cassation, 2nd civil chamber, decision of 4 February 1981, in *Recueil Dalloz*, 1983, no. 1, annotated by P. Gaudrat.

²⁰ G. Viney, **La réparation des dommages causés sous l'empire d'un état d'inconscience: un transfert nécessaire de la responsabilité vers l'assurance**, in *Juris Classeur Périodique*, 1985, I, no. 3189.

²¹ French case law has applied in numerous decisions of this kind the legal provision in question. For the most recent, see: French Court of Cassation, 2nd civil chamber, decision of 3 March 1993, in *Bulletin civil*, II, no. 84; Colmar Tribunal of Grand Instance, decizia din 2 iulie 1992, in *Recueil Dalloz*, 1993, no. 208, annotated by Cl. Lienhard.

²² Cl. Lienhard, **Natura indemnizației instituite de către lege, care nu are caracterul unor daune-interese, ci al unui ajutor acordat de către stat**, commented above.

²³ Supreme Tribunal, civil division, decision no. 175/1972, in **Culegere de decizii 1972**, p. 151 – 153.

defendant, his revenues and maintenance needs, establishing, according to these elements, the obligation to repair, as appropriate, all or part of the loss suffered by the applicant²⁴.

It is, accordingly, worth noting that, based on the idea of equity, our country's case law upheld the idea of holding liable to reparation, directly and immediately, the tortfeasor who is not endowed with reason, if and to the extent to which his material condition allows it and, simultaneously, justifies such measure. It was considered that the solution offered by such case law should, doubtlessly, be also recognized by the future Civil Code²⁵.

The predominance of the reparatory function of tortious liability over the preventive-educational one, that has already manifested in the 1864 civil law, is even more apparent in the ideology of the current Civil Code which, based on the principle of equity, which has already, in the past decades, as we have shown, grounded several rulings of the courts²⁶, rather considers the legitimate interests of the injured party than punish a wrongful action of the tortfeasor, in a time when one is more and more often stating that "nowadays damage is in the heart of civil liability, it is a cardinal notion". Thus, according to Art. 1368 of the new Civil Code, entitled "The subsidiary obligation to compensate the victim", we legislatively solve the problem of holding liable to reparation a tortfeasor who is not endowed with reason for the injury he caused to another person.

According to the Civil Code of 1864, but also to the Civil Code in force, the liability for the damage caused by such authors lies with other people, subject to meeting the conditions expressly stipulated by the law²⁷. In such a situation, in which the liability of the person who, according to the new regulation, had the duty to supervise the author of the damage may be engaged, and the liable person is solvent, the victim will see the damage repaired, the purpose of liability being reached.

The situation is totally different when the liability of the person civilly liable for the damage caused by the person whom they had to supervise cannot be engaged, case in which the victim is faced with the necessity of bearing the burden of the damage experienced.

The solution to this difficult problem is offered, unfortunately only partially, by the text of art. 1368 of the current Civil Code, which states: "(1) The lack of reason does not exempt the author of the damage from the payment of compensation to the victim whenever it is impossible to engage the liability of the person who had, according to the law, the obligation to supervise him/her. (2) The compensation shall be determined in an equitable amount, taking into account the pecuniary condition of the parties".

The legislative novelty embodied within this legal text echoes art. 345 of the project of the Romanian Civil Code of 1971, the idea being animated both then, and now, by the inequity to which the classical solution - that the damage is fully borne by the victim

²⁴ Supreme Tribunal, civil division, decision no. 1033/1987, in *Revista română de drept*, no. 3/1988, p. 68.

²⁵ L. Pop, *op.cit.*, p. 224.

²⁶ Supreme Tribunal, civil division, decision no. 1033/1987, in *Revista română de drept*, no. 3/1988, p. 68; Bucharest Tribunal, civil decision no. 1900/1985, in *Revista română de drept*, no. 1/1986, p. 70.

²⁷ Art. 1000 para. 2, 4 and 5 of the Civil Code of 1864 referred to the liability for the damage caused by minors, that was borne by their parents, and to the liability of minor students or apprentices, that was borne by their teachers and masters. Art. 1372 of the current Civil Code establishes that the liability for the damage caused to another by a minor or a person interdicted is borne by the person who, under the law, according to a contract or a judicial decision, is forced to supervise the author of the respective damage.

itself – was leading, inequity which was expressed, in the socio-political context of the 1970s, through the formula “it would be contrary to the rules of social cohabitation that the victim would be the only one to bear the damage”. The judicial practice’s immediate reaction to the emergence of art. 345 from the project of the Romanian Civil Code of 1971 consisted, as we have already mentioned, in the adoption, starting with 1972, of some bold judicial solutions in comparison with the traditional exclusively subjective foundation of tort liability for one’s own act - based on the idea of guilt of the author of the deed, as a *sine qua non* condition for the engagement of their liability - solutions that forced people who lacked reason at the time when they committed the illegal deed to bear, sometimes partially and sometimes in full, the damage caused. All solutions adopted in this manner were based on the idea of equity.

The same idea is evoked, at first sight, by the text of art. 1368 of the Civil Code, in its para. 2, which provides that “the compensation shall be determined in an equitable...”, thus making this idea – of equity – the foundation of the subsidiary obligation of compensation of the victim by the author of the damage who was deprived, at the moment of the action, of reason.

The title of the analysed article evokes, *expressis verbis*, the idea of subsidiarity, referring, as we have already seen, to the “subsidiary obligation” that is incumbent to the author of the illegal deed to indemnify the victim of the damage. This means that there is, necessarily, a principal obligation, which is borne by someone else, in relation to which the tortfeasor’s obligation is a secondary obligation; we refer here to the obligation to repair the damage caused to the victim by the author without reason, obligation which falls in the responsibility of “the person who had, according to the law, the duty to supervise” the tortfeasor.

The referral made by the legislator is, *prima facie*, easy to decipher: art. 1372 of the new Civil Code refers, at the same time, to the “obligation to supervise” (expressly mentioned by art. 1368), which is incumbent to a person “according to the law, a contract or a court decision” and to minors and persons placed under interdiction, as tortfeasors who, at the moment when the damaging deed was committed, had no reason. Thus, the texts of art. 1368 and art. 1372 are in close correlation; the same conclusion is presented by para.2 of art. 1372: “the liability subsists even if the tortfeasor, lacking reason, is not responsible for his/her own acts”, transforming the liability of the person whose obligation was to supervise a principal liability, independent of the one belonging to the tortfeasor, incapacitated due to his/her lack of reason. Therefore, first if all, for the illegal damaging deed of the latter, it is called to answer the person who, according to the law, a contract or of a court decision, had the obligation to supervise the tortfeasor; only in the case in which the liability of the person responsible for the supervision cannot be engaged, the very tortfeasor will be held responsible, tortfeasor who, even if deprived of reason at the moment when the damaging deed had been committed, shall be forced to compensate the victim “in an equitable amount, taking into account the pecuniary condition of the parties”. Certainly then, art. 1368 refers to the provisions of art. 1372, and the persons concerned, first of all, by the provisions of art. 1368, as forced, in subsidiary, to compensate the victim, are the minors and those placed under interdiction, lacking reason at the moment when the damaging deed had been committed.

A question still remains: these two – minors and persons interdicted - are the only categories of persons referred to by the provisions of art. 1368 of the new Civil Code?

There are opinions in the specialized books of authority according to which the answer to this question is an affirmative one²⁸.

The provisions of art. 1373 of this normative act, in the matter of the liability of principals for their agents' torts, after, at para. 1, stating the following: "the principal is obliged to repair damage caused by their agents whenever the deed committed by the latter relates to the duties or purpose of the assigned functions", at para. 2, when defining the principal, it points out that: "principal is the person who, under a contract or according to the law, exercises direction, supervision and control over the person who carries out certain functions or assignments in its own interest or in the interest of another". Therefore, apart from those persons who are responsible for the supervision of minors and persons interdicted, principals also have, amongst other things, the power to supervise their agents, being, at the same time, bound to repair the damage caused by these agents. To the extent that, at the moment when the illegal deed was committed, the agent was deprived of reason, on the one hand, and, on the other hand, the principal's liability for the damage caused by their agents cannot be engaged, can we apply the provisions of art. 1368 of the current Civil Code, according to which the agent is bound to indemnify the victim in an equitable amount, taking into account the pecuniary condition of the parties? We do not see, *prima facie*, any impediment for the application, in the present case, of the respective legal provisions.

Moreover, in our opinion, with the introduction of the legal provisions of art. 1368, the craftsmen of the Civil Code wanted to bring to an end the unfair situation in which was found the victim of a damage created by a person without reason at the time of the illegal deed, damage for which no other person is responsible; in this respect, we fail to understand why they have imagined the obligation of the tortfeasor to indemnify the victim exclusively as a subsidiary obligation, which arises only in the case in which "one cannot engage the liability of the person who had, according to the law, the obligation to supervise" the author deprived of reason at the time of the illegal deed; in other words, we consider as legitimate the following question: why, under the principle of equity, expressly claimed by the legislator in the contents of para. 2 of art. 1368, there has not been given the opportunity, even partially, to see their damage repaired to the victims of the damage created by other categories of persons who, at the time of the illegal deed, lacked reason, other than minors, persons interdicted and, as previously shown, in our opinion, the agents as well? In such context, what happens to the victims of the damage caused by the unlawful deeds of persons who are incapacitated at the time of the deed and for whom there are no persons to be held civilly responsible to the compensation for the respective damages? We refer here to all the categories of persons aimed at by the provisions of art. 1367 of the Civil Code, which refers to "the liability of other persons without reason". The solution offered by the legislator does not include the latter category of persons – in which are comprised, as already pointed out, mentally ill persons of age, not placed under legal interdiction as well as all persons of age, psychically healthy, but who, at time of the illegal deed, were accidentally deprived of reason - leaving victims of the damage caused by their deeds to bear alone, and in full, the damage. This is because by limiting to the authors of the illegal deeds that are liable in subsidiary, only in the case in which "one cannot engage the liability of the person who had, according to the law, the obligation to supervise them", the legislator implicitly excludes those who are bound in principal. Obviously, the latter,

²⁸ L. Pop, **Tabloul general al răspunderii civile în textele noului Cod civil**, in *Revista română de drept privat*, nr. 1/2010, p. 163.

under the provisions of art. 1367 para. 1, are not liable for the damage caused because, at the time of the illegal deed, they were without reason, and, therefore, not guilty. However, from this point of view, their legal position is identical to that of those who, at the time of the damaging deed, were minors or placed under interdiction. Hence, the following question arises: if the legal situations are identical, why do the solutions offered differ? Shouldn't, under the general principle of law *ubi eadem este ratio, ibi eadem solutio esse debet*, the victims of the damage caused by the persons aimed at by art. 1367 of the Civil Code enjoy the same legal solution, provided by art. 1368 of the same legislative act, as the victims of the damage caused by the illegal deeds of minors and persons interdicted? In our opinion, the only pertinent answer to this question is an affirmative one.

Furthermore, what happens with the victims of the damage caused by the illegal deeds of minors or of persons interdicted in the case in which, although the liability of the persons who had the obligation to supervise them is engaged, the damage remains unrepaired due to the insolvency of these civilly liable persons?

Unfortunately, those who envisaged the current Civil Code did not consider these issues, flagrantly departing from the provisions of art. 345 within the project of the Romanian Civil Code of 1971, which stated that the person without reason can still be bound to make a reparation if nobody had the duty to supervise them, if the compensation could not be obtained from the person bound to supervise them or if it would be contrary to the rules of social cohabitation that the victim bears himself/herself the loss. Here's how all these problems that have been raised above have acquired a unitary solution, based on the same principle - that of equity - but, unfortunately, not within the content of the new Civil Code, but in that of the project from 1971 of the Romanian Civil Code.

The legislative gap opens the way for discrimination between the two categories of victims, a thing which flagrantly breaches the provisions of art. 16 para.1 of the Romanian Constitution, which states, regarding the equality of rights amongst of the citizens of our country: "Citizens are equal before the law and public authorities, without any privilege or discrimination".

Thus, under the principle of equity, upon which, in fact, the legislator expressly bases, in the content of art. 1368 para.2 of the Civil Code in force, the solution chosen, we consider that there should have been bound to compensation of the victims all those persons who, at the time of the illegal deed, were without reason, regardless of the cause for this lack of reason, and, therefore, are not responsible for such damage. Obviously, from such a solution are excluded those persons who have caused themselves this condition of lack of reason, and who, according to the principle under the principle *nemo auditur propriam turpitudinem allegans*, are liable for the damage created by their wrongful act, according to the provisions of para.2 of art. 1367 of the Civil Code. The legal text of art. 1368 of this legislative act should therefore be applied both to the categories of persons covered by art. 1366, and to those considered at art. 1367.

The traditional conception, that of the subjective foundation of tort liability for one's own act, based on the proven guilt of the tortfeasor committing the illegal deed, maintained by the drafters of the new Civil Code - "If the law does not provide otherwise, the person is only responsible for the actions committed intentionally or with negligence" (art. 16 para.1); "He who causes damage to another by means of a wrongful act, committed intentionally or with negligence, is bound to repair it" (art. 1357 para.1) - imposes guilt as a *sine qua non* condition of tort liability for one's own act. In this way, the person who is not guilty is also not liable. And, amongst others, not guilty is also the person who, at the time of the damaging action, lacked reason, therefore being incapable of tort. Thus, as a

natural consequence of the subjective foundation of tort liability for one's own act appear the provisions of art. 1366 and, respectively, those of art. 1367 para.1 of the Civil Code in force, which exclude from among the persons liable for the damage caused by their own illegal deeds those who lacked reason at the time of the action. This is nothing but a pure application of the principle of liability for fault, set out in art. 16 para.1, in conjunction with art. 1357 para.1, in the matter of civil liability in tort for one's own act.

In art. 1368, the drafters of the current Civil Code establish an exception to this principle, which they base *expressis verbis* at para.2 of this legal text, on the idea of equity, thus stating that the compensation which will be required from the author of the damage, who lacked reason at the time of the action, "shall be determined in an equitable amount, taking into account the pecuniary condition of the parties".

"Equity" evokes an opposition against the rigidity of law, namely of the legal act. It presupposes the search for a balance between individual rights, balance which operates through equality. Simultaneously, equity involves, using a mathematical formula, proportionality between two terms²⁹. Understood in this way, equity appears as an anticipation of the natural law, namely of the law inferred from the nature of things, which is the same everywhere (this nature of things)³⁰.

Equity aims to partially or totally remove the rule of law, to moderate its application according to the individual circumstances of each case. It can take two forms: objective equity and subjective equity³¹. The "objective equity" is system of normative rules created by judges in parallel with another pre-existing system, which has become too rigid. The purpose of the rules created by case-law is to adapt the pre-existing system to the social or moral changes. The "subjective equity" could also be called "judgment in equity". In such a case, the judge does not establish normative rules, but only dismisses the rule established by the pre-existing system in the case brought before the court. The judge proceeds in this way in order to straighten a great injustice that the application of the rule imposed by the pre-existing system would generate³². Therefore, equity is simply a relief valve by means of which the law eliminates its stiffness, which the law uses in order to breathe³³.

The text of art. 1368 of the Civil Code paves the way for the action of the "subjective equity", allowing the court to assess, on a case by case basis, the possibility of forcing the person who committed the illegal prejudicial deed, being deprived, at the time of the action, of reason, to pay compensation to the victim. This is done in order to rectify, as far as possible, the injustice which, in the case pursued before the court, would get created by the strict, rigid application of the rules of liability in tort, under which the tortfeasor is not liable for the damage caused because at the time of the harmful deed s/he was incapable of tort, and therefore the victim is left to bear the entire loss. By means of the relief valve opened by the legislator, the person entitled to do justice has the possibility, under equity, to dismiss the application of the inflexible rules of tort liability and offer the victim the opportunity to see, at least partially, their damage covered.

²⁹ J. Carbonnier *apud* A. Tamba, **Izvorul obligației persoanei lipsite de discernământ de a repara prejudiciul pe care l-a cauzat: „culpa fără imputabilitate” sau echitatea?**, in *Revista română de drept privat*, no. 6/2007, p. 194.

³⁰ M. Djuvara, **Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv**, All Beck Publishing House, Restitutio, Bucharest, 1999, p. 387.

³¹ J. Carbonnier *apud* A. Tamba, **Izvorul ...**, p. 194, no. 29.

³² A. Tamba, **Izvorul ...**, p. 194, no. 29.

³³ **Idem**, p. 195, no. 30.

The doctrine has tried to qualify the legal obligation to compensate the victim, an obligation borne by the author of the damage, a person without reason, unless the conditions are met for another person to answer for the latter's deeds.

Several solutions have been proposed for this purpose.

Thus, it was considered that we are in the presence of subsidiary liability³⁴, based either on "objective guilt" or on "guilt without imputability"³⁵.

Another opinion held that the obligation to compensate, borne by the tortfeasor who lacks reason, is based on the principle of social equity and commutative justice³⁶, afterwards mentioning that it is a case of tort liability, as it arises through the execution of an illegal deed by a minor or a person interdicted, which leads us towards subsidiary tort liability with an objective character, having as a basis the idea or the principle of equity or the idea of warranty which is founded on equity³⁷.

Others consider that it is not tort liability, but an obligation to repair which has as independent source equity or, in other words, the obligation to compensate the victim is not based on civil liability, but simply on equity³⁸.

We tend to agree with this last opinion, but still making the following comments, as arguments that justify the adopted view.

As we have already noticed, at art. 16 para.1, the Civil Code states the principle of the civil liability based on the tortfeasor's guilt, circumscribing it, in the provisions of art. 1357 para.1, to tort liability for one's own act, showing, in this regard, that "he who causes damage to another by means of a wrongful act, committed intentionally or with negligence, is bound to repair it". Tort liability for one's own act appears, in this way, as a subjective liability, based on the idea of guilt, which constitutes, simultaneously, a *sine qua non* condition for engaging the liability of the tortfeasor.

As a corollary of this principle – that of the subjective tort liability for one's own act – appears the following idea: the person without reason at the time of the illegal damaging deed, incapable of tort, cannot be blamed for the execution of illegal harmful deeds and, therefore, is not liable in tort.

The idea is enshrined *expressis verbis* in art. 1366 and art. 1367 of the new Civil Code, the first legal text referring to minors and persons interdicted, and the second to persons of age with mental illnesses, not placed under judicial interdiction, as well as to all persons of age without mental health problems but who, at the time of the illegal harmful deed, were in a state, even if temporarily, of disorder of the mind, which prevented them from realizing the consequences of their actions (i.e., they were deprived of reason).

We could reconsider this corollary as a rule in this matter and, why not, as a principle, since it is simply a mirror image of the principle of tort liability for one's own act based on the tortfeasor's guilt. Thus, as long as the principle in its pure form establishes

³⁴ S. Neculaescu, **Reflecții privind soluțiile noului Cod civil în materia răspunderii civile delictuale**, in *Noul Cod civil. Comentarii*, coordonator M. Uliescu, Academia Română, Institutul de cercetări juridice, Departamentul de Drept privat „Traian Ionașcu”, Universul Juridic Publishing House, Bucharest, 2010, p. 176.

³⁵ G. Viney, P. Jourdain, **op.cit.**, p. 531–532, Ph. Brun, **Responsabilité civile extracontractuelle**, Editura Litec, Paris, 2005, p. 177.

³⁶ L. Pop, **On Interpretation and Enforcement by the Courts of Justice of the Civil Law Provisions in Accord with the Socialist Equity Standards**, in *Studia Universitatis „Babeș-Bolyai”*, *Jurisprudentia*, no. 2/1988, pp. 30-31.

³⁷ L. Pop, **Tabloul ...**, p. 165, quoting C. Stătescu, C. Bârsan, with whose opinion he agrees.

³⁸ A. Tamba, **Izvorul ...**, p. 194, no. 30.

that: “only the person who is guilty is also liable”, its inverted image reveals that “the person who is not guilty is also not liable”. Or, as we have already established, the person without reason cannot be considered guilty for their deeds, and therefore is not liable for the damage caused by them.

In consideration of the above, we affirm that the theses according to which the obligation to compensate the victim, which is borne by the person without reason – author of the damage, is a one in tort, engaging in the burden of the tortfeasor an objective liability in tort, flagrantly defeat the principle of the liability in tort for one’s own act based on the tortfeasor’s guilt, establishing a case of liability in tort for one’s own act which has an objective foundation since it is based on grounds other than the guilt of the author of the illegal deed.

However, in this way we arrive at a paradoxical situation: for the same illegal harmful deed, the person without reason at the time of the illegal deed is not liable, on the one hand, under art. 1366 or art. 1367, and, on the other hand, is held liable, under art. 1368.

Moreover, by analyzing the name of art. 1368 of the Civil Code – “The subsidiary obligation to compensate the victim” – we notice even from the part of the legislator a certain departure from the idea of liability. While the title of art. 1366 and that of art. 1367 refer to “The liability of the minor and of the person interdicted” and “The liability of other persons without reason”, the title of art. 1368 refers to “the obligation to compensate”. In the same line, the text of art. 1366 and that of art. 1367 refer to “liability for the damage caused”, while art. 1368 uses the phrase “payment of compensation”.

Also, while the texts of art. 1366 and, respectively, art. 1367, introduce principles of exemption from liability, mandatorily applicable whenever the tortfeasor was, at the time of the illegal harmful deed, without reason, the provisions of art. 1368 do not establish a rule of liability in the matter, with general applicability, a rule that would paralyze, by means of its effects, the dispositions of art. 1366 and art. 1367, but only opens, for the court of justice, the way towards equity, on whose foundation to support their solution to force the tortfeasor to pay compensation to the victim, on a case by case basis. Thus, the judge is not obliged, whenever ascertaining the state of solvency of the tortfeasor, to force the latter to repair the damage caused to the victim, but, on the contrary, the person entitled to do justice is sovereign in deciding, in the particular case brought before the court, if, given the pecuniary state of the parties, it is equitable to place in the burden of the tortfeasor the obligation to pay a compensation to the victim of the damage. That being so, the solution is, *de facto*, at the light and wisdom of the judge, to whom the legislator has conferred only the faculty to be able to take into consideration this solution.

Conversely, if we accepted the idea that Art. 1368 establishes an objective tort liability for one’s own acts against the tortfeasor who, at the time when he committed the unlawful act, was totally devoid of reason, it would mean that, according to the analysed article, the court would be obliged, every time the one who caused an injury is found to be solvent, to hold him liable to reparation. Or, such an approach would defeat the very principle of equity, if we only considered the case where, although solvent, the tortfeasor is short of possessions, while the victim, by contrast, is little affected by the injury suffered, as he is well off financially. We believe that this was not the intention of the legislator. On the contrary, the solution is, as we have already shown, to leave at the judge’s discretion the decision to hold the tortfeasor liable to reparation for the injury caused to another person, on a case by case basis.

That being so, we are rather inclined to argue that the tortfeasor's liability to reparation to the injured party does not arise from the commission of a tort as, in accordance with Art. 1366 or Art. 1367, the tortfeasor will not be punished for his acts, not being held liable for the injury he caused.

If, as a rule, the injured party's claim taking the form of "the right to reparation" is born, according to Art. 1381 para. 2 of the Civil Code, "on the day when the injury was caused, even though this right may not be immediately exercised", where the wrongful act is committed by a person who, at the material time, was totally devoid of reason, no right to reparation for the injured party will arise against the tortfeasor (but only against the one called to repair the injury) on the day the injury was caused, as the tortfeasor cannot be held responsible for his acts. Against the one who has committed the unlawful act, and has been, at the material time, totally devoid of reason, the claim consisting in "the right to reparation" will only be born on the date when a final court decision finds it equitable, according to the parties' material condition, that the tortfeasor is liable to reparation to the injured party. However, in the first case, the right of claim entails a corresponding obligation to reparation, and, in the second, the obligation to pay an indemnity. These are born simultaneously with the rights of claim that are grounding them.

That being so, in the first case, the obligation to repair the damage arises on the date when the tortfeasor committed the unlawful act, finding its source in the injury he caused; as such, starting from the date when the unlawful act took place, by voluntarily repairing the damage, the tortfeasor, in his capacity as debtor, will make a valid payment, accordingly, extinguishing his obligation; should he not voluntarily be carrying out this obligation, the injured party will be entitled to bring the case in front of the court which shall determine the existence of the latter's right of claim and deliver judgment holding the tortfeasor liable to reparation of the injury caused by his unlawful act; such judgment will be one of condemnation, that, after ascertaining the existence of the injured party's right to reparation, from the very day when the injury was caused, imposes the tortfeasor to repair it.

In the second case, liability to reparation is incurred by the tortfeasor who, at the material time, was totally devoid of reason, on the date when the court decision that holds him liable, according to the provisions of Art. 1368 of the Civil Code, is final. His liability finds its source in the court decision itself delivered in accordance with the principle of equity; the judgment ordering reparation is affirmative, creating a legal status formerly inexistent, giving rise to the injured party's right to claim reparation, respectively, the tortfeasor's corresponding liability to pay compensation; this is due to the fact that the judge is sovereign in deciding whether or not, according to the principle of equity, the offender is to be held liable to reparation to the injured party, after having assessed the remoteness of damage, as well as the parties' financial condition; until the judgment is final - the date on which it becomes irrevocable - there can be no right of claim for the injured party, just as there can be no corresponding obligation on the part of the tortfeasor; this is why, if, prior to this date, the tortfeasor pays the injured party an amount with a view to compensation, we deem it to be an undue payment, subject to refund, according to the provisions of Art. 1341 of the Civil Code.

At the same time, in accordance with the provisions of Art. 1385 para. 1 of this enactment, "damage shall be fully compensated, unless the law provides otherwise". Thus, the measure of damages depends on the remoteness of the damage, and cannot be, theoretically, larger or lesser than it. The compensation referred to by Art. 1368, that may be claimed against a tortfeasor who is not endowed with reason, is to be paid in "an

equitable amount”, and not based on the remoteness of the damage, thus happening that it be lesser or equal, at the most, compared to it. The remoteness of damage will be considered, in this case, only for one purpose: setting the maximum limit of damages, in order to prevent unjust enrichment of the injured party.

The difference between the two obligations - the one to repair and the other to pay compensation - is obvious.

Equally obvious is the difference between the rules of tortious liability for one’s own acts and those of subjective equity: while the first has as a purpose the restoration to the original condition, before an injury occurred, regardless of the parties’ financial condition, the second aims at striking a fair balance between the tortfeasor and the injured party, an equitable situation, conversely taking into account the parties’ material resources.

That being said, we will conclude this discussion by considering, as other legal scholars³⁹ have already shown, that the tortfeasor’s liability to compensate the injured party has its source in the doctrine of “subjective equity”, professing that the judge may compel an individual who is totally devoid of reason to compensate the injured party, thus defeating the rule according to which lack of reason removes liability to reparation of an injury.

Should an individual who is totally devoid of reason be held liable to reparation to the injured party, the court, in order to assess the damages, will take into consideration, according to the provisions of para. 2 of Art. 1368 of the Civil Code, *two criteria: the remoteness of the damage suffered by the injured party* (so that the damages do not exceed it) and the *parties’ material resources*. Then, according to the material condition of the tortfeasor, who is devoid of reason, compensation will be established as an equitable amount. The phrase “compensation of an equitable amount” should not necessarily lead us to the idea of a partial reparation. In all cases in which a person totally devoid of reason is financially well off, allowing for the complete reparation of the damage, without interference with his normal living and professional training conditions, he will be held responsible as such⁴⁰.

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³⁹ **Ibidem.**

⁴⁰ L. Pop, **Tabloul ...**, p. 164.

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