

# THE TORT LIABILITY IN PORTUGAL: THE FAULT REQUIREMENT – THE PARTICULAR CASE OF PUBLIC SCHOOLS

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## Abstract

The Law 67/2007 of December 31<sup>st</sup> has changed the arrangements liability of the state bringing numerous innovations in the Portuguese legal system over the past diploma. We will analyze synthetically, one of the requirements for the Portuguese state will be sentenced - the concept of fault.

This concept appears now clearly enshrined in Portuguese administrative law, contrary to the previous regime which referred to the civil law and the concept of *bonus pater familiae*. We will try to understand it with the Law of The Tort Liability of the State and trying to understand if we have in Portugal the objectification or subjectivation of the fault.

We will conduct a review of certain decisions of the Portuguese courts on this matter, essentially trying to understand how the courts decided under the previous law and decide how to the present law.

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**Keywords:** Tort liability, fault, public schools

## Introduction

The Law 67/2007 of 31<sup>st</sup> December (RCEE), which repealed the DL 48051 of November 21<sup>st</sup> of 1967 has changed the rules on civil liability of the Portuguese state.

The Law had brought numerous innovations in our legal system over the past diploma. We will analyze synthetically, given the time constraints and the objective of these meetings, the concept of guilt under the new law and we are going to try to understand the practical applicability of the concept of jurisprudence established under the school accidents.

## The fault at subjective responsibility

The concept of fault appears to us expressly enshrined in article 1<sup>h</sup> RCEE. Indeed, as Margarida Cortez alert, the legislature limited to refer to Article 487 of the Civil Code, i.e., the fault was appreciated given the diligence of a *bonus pater familiae*. The author has considered inappropriate that reference, since the acts which form the basis of liability are functional and not personal acts, i.e., the agent acts as proprietor invested organ.

See, for example, that for civilists experts, "the fault can be defined as the judgment of censure to the agent for taking the conduct adopted, where according to the legal command would be forced to adopt different behavior. It should therefore be understood as the omission of care which would be payable in accordance with the standard of conduct that the law imposes agent. "

The problem lies in combining the provisions of article 10 RCEE with article 7 RCEE concerning the liability for unlawful acts.

The responsible for compensating is the public administration in situations of mild guilt, provided that the employee has acted in the exercise of its functions and because of them. And in this circumstances there's no right of return - this will only happen in situations

where the official has acted with gross negligence - in these circumstances the employee acted with gross negligence or willful misconduct.

### **Particularly, the presumptions of guilt for violation of due diligence**

The portuguese jurisprudence that earlier accepted that the presumptions of guilt predicted to be applicable to administrative liability in article 493 of the Civil Code.

According to the rules of common experience damage from things come from lack of proper supervision. In addition there is the need to ensure the right to compensation for the injured party against the extreme difficulty of proving the negative facts that substantiate the violation of dutiful care and convenience to encourage compliance with the due diligence that belongs to the public administration.

The Central North Administrative Court - Ac. 31.05.2013 came to consider the organization of a study visit with 388 pupils aged between 10 and 15 years on average in the mines of Ramalhão area, in the hills of Marão in Amarante is a dangerous activity - due to natural means chosen, by age and number of students involved.

In this case it would be up to the state to rebut the presumption that he employed all measures required by the circumstances in order to prevent them.

However, in this case during this tour a student of 14 years old with his friend moved away from the rest of the group at lunch time and decided to take the "Mine Source Figueira / Stoned".

The student ended up falling into the same pit and had suffered head injuries traumatic injuries that will come to cause death four days later. It happens that during the absence of the two pupils nobody noticed that they were not with the group and they were absent from the group for over 40 minutes until the alert was given by the lowest deceased friend. In the specific case it was necessary that the school rebuts the presumption, which failed to do, not least because the school could not prove the number of teachers and staff affected to such activity; failed to demonstrate that it could not be avoided, and, any case, the output of the deceased from the place of lower concentration of students in a release. The decision has considered verified the assumptions of tor liability: i) relevant fact: the pursuit of a dangerous activity undertaken by the school; ii) unlawful translated in breach of due diligence and advise the ride 388 minors in that location with mines open air, resulting in a wrongful or negligent actions; iii) causation - if not for the unfortunate and reckless choice school, the accident would not have occurred.

In cases of drop beacons on school grounds, the Portuguese Supreme Administrative Court (STA), most recently, considered that the failure to comply with a dutiful care, diligence and vigilance is attributable. to the State is the thing to watch Live a detectable hazard and whose degree exceeds sociologically acceptable risks.

The STA considered that "(...) A soccer goal placed in a sports venue of a high school for use by students, can't be considered a dangerous equipment, because it is not fixed to the ground, if, by their characteristics of heavy structure iron, requires no such attachment to maintain balance and stability under conditions of normal use (...), so that (...) the absence of such a fixation of this goal to the ground did not match the violation of technical rules to be observed by the responsible school, which did not assume, therefore, a unlawful conduct by omission (...).

### **Conclusion**

i) The article 10 RCEE has established the objectification of the fault in article 10 RCEE.

ii) the establishment of presumptions of light trespass, pursuant to article 10, n<sup>o</sup>2 RCEE in cases of breach of the obligations of surveillance beyond

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