

Liability of the Custodian or Custodian Body for the Damage Caused by the Persons Totally Divested from the Ability to Act Due to Mental Disability

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Abstract

Liability of the custodian or custodian body for the damage caused by the persons totally divested from the ability to act due to mental disability is a kind of liability for the damage caused by the actions of the other person. In this case, his/her custodian or custodian body that is liable for his/her supervision shall be liable even for the damage caused by the person with mental disabilities. Obligation for supervision and care of the custodian or custodian body for the person with mental disabilities shall be the reason based on which they should respond in cases when the person with mental disabilities causes a damage to the third person. In order this kind of liability to come into consideration, in advance, there should be met some conditions as follows: 1. The damage is caused, 2. The damage is caused by the person that is incapable to judge and by the person who is under custody, 3. The damage has been caused since the custodian has not exercised adequately the supervision function as required according to the Law, decision of a body or any contract. These conditions should be fulfilled together in order that this kind of liability to come into consideration. Theoretical treatments regarding these kinds of liabilities, not in all cases, have brought the due clearance. In theoretical treatments of various authors that have treated this kind of liability there are presented dilemma which require a different analysis and approach in order that there to be identified some cases that have been left untreated until nowadays. Those authors, in their theoretical treatments, have ascertained that the custodian or custodian body shall be released from the liability for the damage caused by the person with mental disabilities or with mental slowdown development or any other circumstance according to which they could not judge his/her actions, if they can prove their innocence whether they have exercised adequately the supervision towards the person with mental disabilities or with mental slowdown development but the same authors have not given further explanations that who will be liable in such

cases if the person with mental disabilities does not have economic conditions to make the compensation of the damage.

This issue is regulated with legal framework of some countries treated in this paper. We have done this comparative analysis between the legal framework of these countries with the purpose of identifying the similarities and differences between them in regulating this liability.

Even that there are some differences in legal determinations, we should say that Kosovo, Croatia, Serbia, Albania, France, Italy, Germany and Spain have approximately similar regulation regarding this liability since all these countries cover this kind of liability with their legal framework.

Keywords: Damage, Liability, Supervision, Person with disabilities, Custodian

Introduction

Liability of the custodian or custodian body shall be an obligation in case there has occurred a failure during their custody to the person with mental disabilities who has caused damage to another person. The determination of the liability in such cases is of a big importance either to the person with mental disabilities or to the person to whom the damage has been caused. Taking into consideration the fact that the person with mental disabilities is totally divested from the ability to act, the determination of the liability in such cases is important since such determination releases such a person from the obligation to compensate the damage he/she has caused to the other person. Moreover, the determination of the liability, in such cases, is important even for the person to whom the damage has been caused since he is enabled to get compensated regarding the damage that has been caused to him/her without his/her fault. In this paper there will be treated the case of the liability of the custodian or custodian body for the damage caused by the person with mental disabilities to another person. In this paper there will be treated the cases of legal systems of countries of Europe and in this case there will be identified their similarities and differences in addressing this matter.

Meaning

This kind of liability is part of the liability for the damage caused by the actions of other persons.

Prior of talking about this kind of liability, we should emphasize that in such cases the custodian or custodian body plays the crucial role. The custodian body exercises the supervising function through which it takes care for the personality, wealth, rights and interests of the persons that are not capable of taking care after themselves (Podvorica, 2011, 260, Aliu & Gashi,

2007, 267, Mandro, 2009, 491, Podvorica, 2006, 255). Hence, in our case, the persons with mental disabilities that have no capability to act and that are not capable to take care after themselves are put under custody and in such cases the custodian shall be liable for supervision of such category of persons. It is important to note that within the competences of the custodian body there shall be the representation of these persons in cases when there is necessary the protection of various interests related to their representation. Representation shall mean carrying out various actions by a certain action in a good and interest to another person either natural or legal person, while in our case we have to do with the representation of the person with mental disabilities as well as without capability to act (Latifi, 2009, 128, Kadriu, 2008, 395, Gams, 1972, 227). When we note the ability to act, we shall understand the ability of the person that independently can be holder of the rights and obligations (Latifi, 2009, 85). In our case, this category of persons has no ability to act due to mental disability or mental slowdown development and this is the reason they have been put under custody. Hence, the custodian or custodian body shall be liable for any action undertaken by such a category of persons.

According to this kind of liability, the custodian or custodian body that is assigned based on the Law, decision of a body or any contract shall liable for the damage caused by the person who is totally divested from the ability to act due to mental disability or mental slowdown development or due to any other reason he/she is not capable to judge (Alishani, 2002, 493). In such cases, the custodian or custodian body shall be liable for the supervision of the person totally divested form the ability to act. Based on this, there may be ascertained that the custodian or custodian body shall be liable in case of the cause of damage by the such persons, since the custodian or custodian body are supervisors of such persons that under the mental disability condition undertake actions which are considered invalid in the meaning of liability since such persons have not had the mental clarity to understand the unlawful action and in this manner the liability shall be conveyed to their supervisors (Nuni, 2012, 337). However, even that these persons are liable for the supervision of the persons with mental disabilities or mental slowdown development in case of causing the damage, if they prove that they have undertaken all actions for an adequate supervision but have failed to prevent the cause of the damage, they will not be liable for such a case. For this reason, this kind of liability shall be considered as a conditioned liability, since it creates the opportunity to the supervisors to prove their innocence (Tutulani – Semini, 2006, 256). In other words, in this case the basis of the liability shall be according to the supposed guilt since if the custodian proves that he/she has exercised the supervision properly and

the damage has been caused, then he/she will be released from the liability for the compensation of the damage (Dauti, 2013, 191).

In order the liability of the custodian to come into consideration regarding the damage caused by the person who is incapable to act due to mental disability, in advance, there should be met some conditions as follows:

1. The damage is caused,
2. The damage is caused by the person that is incapable to judge and by the person who is under custody,
3. The damage has been caused since the custodian has not exercised adequately the supervision function as required according to the Law, decision of a body or any contract (Alishani, 2002, 493).

These elements of the liability of the custodian for the damage caused by the person with mental disability are in a way similar to the elements of the custodian's liability for the damage caused by the minor child. The difference is at the entities since in the first case the entity are the minor children while in this case the entities are the persons with mental disabilities regardless of age.

The damage is caused – the cause of the damage shall be the first element which prevails all other matters related to the liability for the caused damage. It can not be discussed about the liability if the damage to another person has not been caused previously (Millosheviq, 1972, 147). However, in order it to be considered as damage, it should derive as a consequence of an unlawful action based on which there has occurred even the cause of the damage by the person with mental disabilities (Tutulani – Semini, 2006, 253).

A person who as a consequence of an unlawful action causes damage to another person shall be liable for the compensation of that damage; hence in our case, this is reflected in the failure of the custodian during the exercise of the supervision to the person with mental disabilities or mental slowdown development. Hence, if the custodian or custodian body do not supervise properly the person with mental disabilities or mental slowdown development who conducts an unlawful action through which there is caused damage to the other person, then they are obliged to compensate that damage.

The damage is caused by the person that is incapable to judge and by the person who is under custody – This element is related to the cause of the damage by the person who is incapable to judge and that person should be under custody. Based on this element, the damage relates to the person who is incapable to act and who is under custody, since if one of this two

conditions is missing then the custodian or custodian body will not be liable for the damage caused by the person with mental disabilities. Taking into consideration the abovementioned, then there comes into consideration the second element of the custodian's liability for the damage caused by the person with mental disabilities or mental slowdown development. It is essential that the three elements that characterize this kind of liability to be present since otherwise there will occur circumstances, manner as well as other entity for the liability for the damage caused by the person with mental disabilities or mental slowdown development.

The damage has been caused since the custodian has not exercised adequately the supervision function as required according to the Law, decision of a body or any contract – This element is characterized by the action or non-action of the custodian or custodian body in the case of exercising the supervision towards person with mental disabilities or mental slowdown development. Based on this element, in order to come into consideration the custodian's liability for the damage caused by the person with mental disabilities or mental slowdown development beside the above two elements that related to the cause of the damage as well as the person that has caused the damage that was the person with mental disabilities or mental slowdown development, shall be even the negligence or inadequate of the custodian or custodian body during the exercise of the supervision towards such a person. Hence, in order the liability of the custodian to come into consideration regarding the damage caused by the person with mental disability or mental slowdown development, there should be necessarily met the three above-mentioned elements since these elements include entirely the circumstances that should exist in order the custodian or custodian body to be liable. It is worth to note that in such cases the liability of the custodian or custodian body shall come into consideration if they are engaged based on the Law, decision of a body or any contract (Alishani, 2002, 493). In other words, obligation of the custodian or custody body to supervise the person with mental disabilities or mental slowdown development should have any legal basis, either by Law, or by decision of a body or any contract.

Theoretical treatments regarding these kinds of liability not in all cases have given the proper clarity. By theoretical treatments of the abovementioned authors that have treated this kind of liability there are presented dilemma which require a different analysis and approach in order that some cases that have remained untreated till now to be identified. Authors in their theoretical treatments have ascertained that the custodian or custodian body shall be released from the liability for the damage caused by the person with mental disabilities or mental slowdown development or any circumstance according to which they could not judge his/her actions, if they

can prove their innocence whether they have exercised adequately the supervision towards the person with mental disabilities or mental slowdown development.

Dilemmas are presented in case:

If the custodian or custodian body are released from the liability, then which entity should be liable in such cases in order to compensate the caused damage if the damaging person has not economic conditions to realize the compensation of the damage caused by him/her?

Such a respond has not occurred in any of the publications of the authors referenced in compilation of this paper and there can be freely ascertained that the non-determination of the liable entity for such cases has put a huge gap in the theory according to which the damaged person is seriously taken a chance to be compensated when the damage is caused in such circumstances mentioned above. This will also be in contradiction with the general rules of the justice according to which the person which is damaged can not remain uncompensated.

Moreover, based on analysis performed in the theoretical treatments regarding the custodian or custodian body's liability for the damage that has been caused by the person with mental disabilities or mental slowdown development or any other circumstance according to which he/she could not judge his/her actions, we have come into conclusion that beside the Serbian author Lubiša Millosheviq and Albanian authors from Kosovo Dauti & Berisha & Vokshi & Aliu, all other authors do not mention cases how there should be acted if the custodian due to the poverty is not able to compensate for the damage caused by the person with mental disability for whom he/she is liable for his/her supervision. In this aspect there are given explanations by the Serbian author Lubiša Milloshevic and the authors from Kosovo Dauti & Berisha & Vokshi & Aliu who have treated this matter quite enough. They have emphasized that the person with mental disabilities or mental slowdown development even if unconsciously has caused the damage, there may be required from him/her to make the compensation if he/she has enough wealth and if the custodian has no possibility to make the compensation of the damage due to poverty (Milloshević, 1972, 174, Dauti & Berisha & Vokshi & Aliu, 2013, 187). Such a thing may be required by the person with mental disabilities by taking into consideration the liability based on justice according to which every damage caused to any person should be compensated.

As a conclusion we could say that theoretical treatments and legal determination that have put gaps which will be necessary to be fulfilled in the future since in practice they can bring situations not favourable to

persons that have suffered the damage and that are taken a chance not to be compensated for the damage they suffered.

Legal framework regarding the liability of the custodian or custodian body for the damage caused by the persons totally divested from the ability to act due to mental disability

Countries that have been analyzed in this paper, in their legal framework have established rules based on which there is determined the liability of the custodian or custodian body for the damage caused by the persons totally divested from the ability to act due to mental disability. Below, we are going to treat each country in the aspect of this liability, in order to identify the way of regulating this matter.

Kosovo case

Republic of Kosovo has regulated this matter in details with the Law on Obligational Relationships. According to this Law, there is determined that regarding the damage caused by the person with mental disabilities or mental slowdown development or any other circumstance that make him/her incapable to judge his/her actions, his/her supervisor shall be liable. It is worth to note that the supervisor should be obliged according to the Law, decision of the competent body or contract (LORK, §146.1). In such cases supervisors may be released from the liability only in they prove that they have exercised the supervision adequately but could not prevent the cause of the damage or if the damage would be caused regardless to the supervision (LORK, §146.2). In such cases the obligation to prove their innocence is on the custodian or custodian body or on each person that according to the Law or decision of the competent body or any contract is obliged to supervise the persons with mental disabilities or mental slowdown development. Such a determination as in the case of paragraph 2 of Article 146 of LORK is set by all legislations of countries which are object to be treated in this paper which means that all the abovementioned states have set very similarly the way of release from the liability of the persons that are liable for the persons that need their care and supervision. As a conclusion we should notice that in the Law on Obligational Relationships in the Republic of Kosovo there has not been determined the solidary liability for this kind of liability when the person that have caused the damage is the person with mental disabilities or mental slowdown development or any other reason due to which the person has no ability to judge.

Even that for this kind of liability there has not been determined the rule that guarantees the solidary liability, this matter has been covered by the liability based on justice. Regarding this, Kosovo in LORK has determined that in cases when the damage has been caused by the person who is not

liable for his/her actions and if the compensation of that damage can not be made by the person who has been liable for the supervision of the person with mental disabilities, then the court may, when required by justice, judge the damaging person and compensate the damage totally or partially if the damaging person is in a good financial situation (LORK, §151).

Moreover, Albanian authors of Kosovo have treated one element according to which in cases when the person with mental disabilities or mental slowdown development causes a damage to a third person and towards whom there has not been assigned the custodian or supervising person, then the municipality shall be liable for this damage since it has not assigned the supervisor to such a person who has caused the damage (Alishani, 2002, 493). Besides the theoretical treatments regarding this matter, such a determination is not included in the legal framework of any of the states that we are going to mention regarding this kind of liability and related to this we can say that theoretical treatments exceed the limit in which the laws or civil codes of the countries mentioned and that are going to be mentioned regarding this kind of liability stop.

Croatia case

Republic of Croatia has, very similarly to Kosovo, determined the liability of the supervising person for the cases of the cause of damage by the persons with mental disabilities or mental slowdown development. (COARC, §1055). Croatia has, by the Civil Obligations Act, determined that the persons that are incapable to act due to mental disability or mental slowdown development or for any other reason due to which they are not able to act shall not be liable for the damage caused. A different determination can be noticed in cases of persons with temporary mental disabilities that will be liable for the damage they have caused to another person. These persons will not be liable for such a damage only if they prove that the incapability has not been caused by their fault. (COARC, §1050. 1 and 2). Based on these provisions, Croatians have clearly determined that the persons with temporary mental disability shall be liable for the damage caused, unless they prove that their incapability has been caused by other persons. Based on this legal determination, there shall be released from the liability only the person with permanent mental disability or the person with temporary mental disability if his incapability has not occurred by his fault but by the fault of other persons. In cases when the temporary mental disability of the person that has caused a damage to another person occurs as a consequence of the actions of another person, then regarding the caused damage there shall be liable the person from whom there has been caused the incapability of the person that has caused the damage. (COARC, §1050.3). In such cases of the cause of damage, the

supervisors shall be released from the liability if they prove that they have exercised the supervision adequately but did not manage to prevent the cause of the damage (COARC, §1055.2).

Even in Croatia, similarly as in Kosovo, regarding this kind of liability there has not been determined the solidary liability expressively.

A distinction between the Civil Obligations Act of Croatia and Law on Obligational Relationships of Kosovo occurs at the liability based on justice. In this case, Croatians have, by the Act, determined only the cases when the minor may be liable for the damage he has caused if the parent or other supervisor is at the financial situation due to which can not compensate the damage, but not in cases of the cause of damage by the person with mental disabilities. Even that Croatia has not determined expressively these cases by the law, it can, by an analogy, be based on rules that have been determined in cases of liability of the minors for compensation of the caused damage when the supervisor is at financial situation due to which can not compensate the damage. This can be realized due to the fact that both these two kinds of liability are included within the liability based on justice.

As a conclusion we can say that Croatia has a legal determination similar to Kosovo regarding the liability of the supervisor for the damage caused by the person with mental disabilities or mental slowdown disability. In this aspect, there are noticed some distinctions that are characterized by the advantages as well as disadvantages between these two countries.

Serbia case

Serbia has, as well in a similar way as Kosovo and Croatia, regulated the matter of liability for the damage caused by the persons with mental disabilities or mental slowdown development.

Based on the Law of Contracts and Torts in Serbia, persons with mental disabilities or mental slowdown development or any other circumstance based on which they are incapable to judge their actions, shall not be liable for the damage caused to another person (LCTS, §159.1). In such cases, as a final fact there shall be taken the incapability of the person to judge his own actions. This legal determination comes into consideration only in those cases when his incapability has derived as a consequence of an action against the will of the person that has caused the damage since otherwise if the person that has caused the damage has brought himself to an unconscious state, he/she will be liable by himself/herself for that damage. Moreover in cases when the incapability to judge has derived as a consequence of an action of another person, then the person who has been the causing person of the incapability to judge shall be liable for the caused damage in these cases (LCTS, §159 (2 and 3)). Beside legal determinations, this matter has been treated by many Serbian authors who have noticed

similarly that persons with mental disabilities should not be liable for the damage they have caused to another person but their supervisor should be liable for such a damage (Shemiq, 1996, 1250, Millosheviq, 1972, 174).

Beside the provisions according to which such persons are released from the liability for the caused damage, Serbia has, by the Law on Contracts and Torts, determined the provisions based on which there are obliged certain entities to supervise the persons with mental disabilities and to be liable for the actions of such persons (LCTS, §164.1). According to these provisions, the person who is supervisor of the persons with mental disabilities shall be liable for the damage caused by such persons. Supervisor should, in such cases, have legal relations with the persons under his/her supervision. Legal relation should be created by the legal determination, decision issued by the competent body or any contract based on which the supervisor is obliged to supervise such persons. The supervisor shall be realised from the liability is he/she proves that he/she has exercised the supervision adequately and is not guilty for the damage caused (LCTS, §164.2). In the Law of Contracts and Torts of Serbia similarly to Kosovo and Croatia the solidary liability has not been determined expressively to such entities, and we shall consider this as a gap in the legal framework of these countries. However, regarding this, Serbia has, similar to Kosovo, determined the cases when regarding the damage caused by the person with mental disabilities for whom the supervisor is liable, and can not compensate the caused damage due to financial situation, then the court may, by analyzing the economic conditions of the person that has caused the damage, decide the compensation to be made from his/her property (LCTS, §169).

In this manner there has been established the legal security based on which the damaged person would realize the compensation of the damage caused to him/her by the person with mental disability or mental slowdown development or any circumstance based on which such a person is not able to judge his/her actions.

Regarding this matter, it is important to emphasize that the provisions based on which there are released from the liability the persons that are incapable to judge their actions shall be put within the provisions regulating the obligation based on fault, while the provisions based on which there are determined the entities liable for the damage caused by the persons with mental disabilities are systemized within the chapter regulating the matters of the liability for the others. A totally similar determination as this of Serbia is set even by the Laws of Kosovo and Croatia where there is ascertained the legal heritage from former Yugoslavian system based on which the existing Laws of these countries have derived.

Albania case

Republic of Albania shall regulate this matter slightly differently in comparison to the above-mentioned states. Albania has, by the Civil Code, determined the provisions based on which there are regulated the matters of the damage by the minor persons and persons incapable to act. In this aspect, Albania has determined that the persons incapable to act shall not be liable for the damage they have caused (CCA, §613). Unlike the above-mentioned states, in Civil Code of Albania there is a provision where there are included jointly the minors under the age of fourteen (14) and persons incapable to act, the incapability of whom has derived due to any other reason. Regarding the damage caused by the person incapable to act there shall be liable his/her supervisor that has been obliged to do the supervision. Regarding this matter, by the Civil Code there is determined the legal status between the supervisor and person under supervision. We can say this since the above-mentioned states have expressly determined that the supervisor of the person with mental disabilities should be assigned based on the Law, decision of competent body or any contract, and these determinations are not included in the provisions of the Civil Code of Albania. Beside the provisions that oblige the supervision to be liable for the damage caused by the persons incapable to act due to mental disability, Albania has, by its Civil Code, determined even the provisions based on which the supervisors shall be released from the liability if they prove that the damage has been caused without their fault. The innocence of supervisors comes into consideration if they prove that they have exercised the supervisions adequately but they could not prevent the damage caused by the person with mental disability (CCA, §613). Albanian authors have treated this matter quite enough by identifying this kind of liability as a conditioned liability according to which they may be released from the liability if they can prove that they have exercised the supervisions adequately but have failed to avoid the cause of the damage (Tutulani – Semini, 2006, 256).

Albania has not, like all above-mentioned states, determined expressly the solidary liability in cases of liability for the damage caused by the persons incapable to act. Unlike the above-mentioned states which by certain provisions have charged the parties with better financial conditions to compensate the damage when the responsible party can not compensate the damage due to financial situation, Albania has, by its Civil Code, regulated this matter.

Albania has made an unclear regulation of this matter in Article 616 of the Civil Code by giving the opportunity to the person who at the moment of the cause of damage has had no action consciousness. We affirm that this provision is unclear since it has not determined that in which cases these persons may be liable. According to this provision, the court may reduce the

measure of compensation by taking into consideration the age, consciousness level and economic conditions of the parties except when the party has made himself/herself unconscious. (CCA, §616). Based on this provision, the person who has been under the supervision of another person and has caused a damage shall be liable for such a damage. This determination has not explained the circumstances in which there would come into consideration the compensation of the damage by the incapable person. In this case there is needed more clearness since not in all cases there comes into consideration the compensation of the damage by the person incapable to act.

France case

France, has, by its Civil Code determined the liability for actions of the others. Determinations based on Article 1384 of CCF do not include the whole area that belongs to the liability for the actions of the others. Regarding this issue, the French have continuously made changes through which they have covered the areas not covered by Article 1384 of the Civil Code. As presented in the above-mentioned treatments, in France case regarding the liability of the custodian, school or other institution for the damage caused by the minor, there have been made continuous changes by promulgation of various acts that have served on other cases occurred later. Regarding this matter, Plenary Assembly with the purpose of covering better the cases of this kind of liability has been based on the term deriving from Article 1384.1 of the Civil Code that are “A person shall be liable for the damage caused by the persons he is responsible for” (Légier, 2008. 147). Based on these terms there is noticed clearly that all entities that are under the supervision of other persons shall not be liable for the damage they cause since for such a damage their supervisors shall be liable. Regarding this, Plenary Assembly of the Court of Cassation has, by the decision Blicke of 29 March 1991, recognized the liability of an association that was supervising a centre of persons with mental disabilities, where one person of this centre had caused damage to a third person. Assembly had decided on the liability from point 1 of Article 1384 by taking into consideration the fact that this centre was liable to control and organize the manner of living of the person with disability who has caused damage to the other person (Légier, 2008. 148). This decision regarding this matter of the liability that derives from Article 1384.1, later has been used even for other cases. French author Légier notices expressively that the impact of the above-mentioned decision has spread even in other cases such as against a re-education institution or any psychiatric clinic which would take responsibility over the damages caused by the persons they have been liable for, or against a custodian who is liable for the action of the person with mental disability (Légier, 2008. 149). Hence, we should note that his decision based on which the centre for the

care of persons with mental disabilities should be liable for the damage a person with mental disabilities has caused to the third person had served as an example which should be applied even in other cases of this nature that would have occurred in the future and in this way this kind of liability to have been covered by legal framework.

In this aspect, we should say that France differs from the above-mentioned states regarding the regulation of this matter only at the normative definition since in the essence after the issuance of the Blicek decision, this kind of liability belongs to the supervisor of the person with mental disability who has caused the damage.

Regarding the presumption of the guiltiness for this kind of liability, a clear explanation is given by the Court of Cassation through the Jourdain decision (V 1997, 496) according to which in case the damage is caused then this is a full liability since the liable person can not take away from himself/herself the liability by proving that he/she is not the author that has caused the damage. In such cases the liability may not be taken into consideration only in cases of force majeure or when the other person who should be liable is guilty (Légier, 2008, 148). In this aspect, the supervisor should prove that he/she has exercised the supervision adequately but has failed to prevent the damage to be caused.

Hence, based on all what was said above, we can ascertain that France as well, in the essence, regulates the matter of liability for the damage caused by the person with mental disability similar as the above-mentioned states but the difference is on the fact that in France this matter has not been expressly determined in the provisions of Civil Code, respectively in Article 1384 which determines these kinds of liability.

Italy case

Italy has, by its Civil Code, determined cases on the liability for damaging actions. Regarding this, according to Italian Civil Code, the person who at the moment of causing the damage has been without capability to act then he/she shall not be liable for the damage he/she has caused. (ICC,§2046). Regarding such cases, the ability to act shall be the key condition based on which the person may or may not be liable for the damage he/she has caused to another person.

Amongst the persons that are not capable to act shall be minors until the adult age is reached or in case of their emancipation, and persons with mental disabilities or those with mental slowdown development that can not judge their actions and due to this they are not capable to act, either by a decision of the competent body or based on legal determinations. Hence, persons with mental disabilities or mental slowdown development shall not be liable for the damage they cause to another person since they have not

been capable to act at the moment when the damage was caused. They will be considered liable for the damage caused to another person only if they have brought themselves at the incapable state based on which they have not been able to judge their actions and have caused damage to the other person (ICC, §2046). Regarding this kind of liability we can say that Italy has, similar to other above-mentioned states, determined cases of the liability for the persons that are not capable to act and have caused damage to another person. Moreover, Italians have similarly determined the liability of the person who by his fault has brought himself at unconscious state at the moment the damage was caused and regarding this he shall be liable to make the compensation of the damage.

Italy has, by its Civil Code, determined even the provisions which make liable certain entities for the damage caused by the persons incapable to act. In such cases, those persons who have been obliged to supervise the persons that are incapable to act shall be liable for the damage caused by such incapable persons (ICC, §2047). In such cases, obligation for supervision shall be the basis to require the compensation of the damage from the supervisor of the person who is incapable to act. In case there occurs a failure of the supervisor during the supervision of the person who is incapable to act, and such a failure causes damage to another person, then such a supervisor shall be obliged to compensate the damage due to the fact that he has been obliged to supervise the person who has caused the damage. Even in the ICC there has been determined the opportunity of proving the innocence of the supervisor by pretending that he has exercised the supervision adequately but has failed to avoid the causing of the damage. If the supervisor proves such a thing he will be released from the liability caused by the person he has been liable for (ICC, §2047). However, even in Italian Civil Code, as in all above-mentioned countries, exists a gap regarding the determination of the liable person in this case when the supervisor proves his innocence while the person who has caused the damage meets all conditions to be non-labile for the damage he has caused. Hereby, we think that there should be determined the liable entity for such cases that bring us to unclear situation regarding the liable entity for the damage caused by the person incapable to act. Although some countries have an indirect solution for this matter, it will be important that one such provision to be determined expressly in the legal framework regulating this matter which would avoid the dilemmas related to the matter of liability.

Moreover, the Italians have determined the cases when the damaged person can not realize the compensation of the damage from the liable entity that is the supervisor of the person incapable to act. In such cases if the above mentioned situation occurs then the judge may, by taking into consideration the economic conditions of the parties, punish the author that

caused the damage, in this case the person incapable to act, by a reasonable compensation (ICC, §2047). The purpose of the lawmaker, in this case, shall be the full or partial realization of the compensation for the damaged person based on the general rules of justice.

At Italy case as well as at other above-mentioned states some essential elements related to this liability are characteristic. In all mentioned countries which have treated this kind of liability there are faced some common elements which come into consideration in such cases as 1. cause of the damage, 2. incapability to act due to mental disability or mental slowdown development and 3. supervision of the liable entity. In such cases it is important there to be indicated these three elements since if for one case in which there have not been indicated these three elements then there will not come into consideration the liability of the supervision for the damage caused by persons with mental disabilities treated in this part. Regarding this matter there have been given the due explanations both in theoretical treatments and in legal framework.

Germany case

By the German Civil Code there are determined the provisions based on which certain persons shall be released from the liability for the damage caused to other persons. In such cases person with mental disabilities or mental slowdown development that have not been conscious at the moment when the damage was caused shall not be liable for the damage they have caused (GCC, §827). German lawmakers, similar as lawmakers of other above-mentioned states, have drafted legal provisions based on which persons with mental disabilities or mental slowdown development that have not acted by their will shall not be liable for the damage caused to other persons. In order to be released from the liability for the damage caused, this unconsciousness state of these persons should not have been brought with their actions, since if the unconsciousness state has derived as a consequence of their actions then they shall be liable like they have conducted the action due to carelessness or negligence (GCC, §827). In such cases of liability, unconsciousness of the person in his actions is considered as essential element taken into consideration in the release of such person from the liability.

Beside the provisions through which the unconscious persons are not liable for the caused damages, Germans have, by their Civil Code, determined even the provisions based on which regarding the damage caused by the persons with mental disabilities or mental slowdown development there shall be liable their supervisor (GCC, §832). In our case, the supervisor of such persons may be the custodian who necessarily should have legal relation with the person who is incapable to act either based on the Law,

decision of any competent body or contract. This liability of the supervisor may come into consideration only in cases when he failed to exercise adequately the supervision towards the person with mental disability. In this case if the supervisor proves that he has exercised the supervision adequately but has failed to prevent the causing of the damage he/she will be released from the obligation on compensation of the damage caused by the person that has been under his supervision.(GCC, §832).

In this presentation there is noticed that the legal framework of Germans regarding this matter is totally similar with the above-mentioned states regarding the release from the liability of persons with mental disabilities for the damage caused to another person. Moreover there are noticed similarities in determination of the liability of supervisors for the damage caused by such persons. There are determined identically even the cases of the release from the liability of supervisors when they prove that they have exercised the supervision adequately but have failed to prevent the causing of the damage.

Regarding these cases when the supervisor has the opportunity to prove his innocence by proving that he has exercised the supervision adequately, Germans have, by the Civil Code, determined even the cases when for this damage there may be liable more than one person or in other words existence of solidary liability. We should mentioned the fact that for this kind of liability Germans are the only, unlike all other countries mentioned in this paper, who have foreseen expressly the solidary liability based on which in certain cases parties shall be obliged that together or individually to be liable for the damage caused by the persons with mental disabilities (GCC, §840). There are some advantages to this determination since it does not put any gap or unclearness which would be presented in cases when one party may be released from the liability or in certain cases when it is required by the created circumstances based on which they should be liable together for the compensation of the damage caused by persons with mental disabilities.

Spain case

By Spanish Civil Code there are determined the provisions which regulate the cases of liability that derives from the fault or negligence. Spain has, by its Civil Code, determined the provisions according to which for the damage caused by the person with mental disabilities there shall be liable the custodian who is in charge to supervise such persons (SCC, §1903). In such cases person with mental disability should be under the supervision of the custodian or should live in the custodian centre and from such a centre there should be made the supervisions of such persons (SCC, §1903). Regarding the regulation of this liability, Spain has similarity with all above-mentioned

states since it has identically foreseen that for the damage caused by the persons with mental disabilities there shall be liable the custodian who is in charge to supervise such persons. Unlike other states, Spain has not, by the provisions of Civil Code, determine expressly with the general provisions that the persons with mental disabilities shall not be liable for their own actions, which we meet in legal systems of the above-mentioned states. Although Spain has, by its legal framework, determined that for the damage caused by persons with mental disabilities, their custodian shall be liable, however they have not determined that the person with mental disability shall not be liable for the damage caused to another persons. Moreover, totally similar like above-mentioned states, Spain has, by its Civil Code, determined provisions based on which the custodian or custodian body may prove that they have exercised the supervisions adequately but have failed to prevent the causing of the damage. In such cases they shall be released from the liability for the damage caused by the person with mental disability (SCC, §1903.6). In this aspect, it is worth to mention that in case of release of the custodian from the liability for the damage caused by the person with mental disability as well as economic non-opportunity of that person to make the compensation of the damage, the liable entity for compensation of the damage in the last instance should be the custodian body since this body has assigned the custodian to supervise the person who has caused the damage.

Spain has not, by the provisions of Civil Code, determined the solidary liability which should come into consideration in all kinds of this liability. Regarding the solidary liability related to this case, except Germany which has determined expressly by its Civil Code, all other states have not determined expressly the solidary liability regarding this kind of liability; hence we should emphasize that Germans are the most advanced regarding the determination of the solidary liability in such cases. In this aspect, the matter of liability in cases when one party can not compensate the damage for which such a party is obliged to do so has been settled by other states based on the general rules of justice by obliging the other party to make the compensation of the damage when such a party has good financial status to do so, by not putting gap in their rules regarding the compensation of damage for this category of persons. In this manner, there shall be completed the obligation to compensate the damage caused by the person with mental disability towards the damaged person, where without his fault, the damage has been caused to. It is logical and right that one party necessarily to be liable for the caused damage since in this way there shall be realized the implementation of provisions on general rules of justice according to which the caused damage by all means should be compensated; hence in this case it should be compensated by the custodian or custodian body. In other circumstances, the damage should be compensated by the causing person of

the damage if has good economic conditions only when the supervisors have proved their innocence. However, if the person with mental disability is guilty for causing the damage but such a person does not have good economic conditions to compensate that damage, then the custodian or custodian body shall be liable. This obligation should derive as a reason of liability for the supervision of the person with mental disabilities.

Conclusion

Based on all what is presented above we can ascertain that all above-mentioned states in this part with their legal framework have determined the provisions based on which they have determined the liable entities for the damage cause by the persons with mental disabilities towards other persons.

Theoretical treatments regarding this kind of liability have indicated that all authors have noticed similarly that this category of persons should be protected due to their mental disabilities from which such persons cannot control their actions. Exclusion from this should occur only if they by their consciousness have caused the situation by bringing themselves into unconsciousness when the damage was caused.

Regarding the legal framework of the states that have been object of treatment for this kind of liability, we should emphasize that those states have determined the liability of certain entities based on the provision of the laws on obligations and civil codes.

Kosovo, Croatia and Serbia have, in a completely similar manner, regulated the liability for the persons with mental disabilities. Besides the determinations generally, in their laws they have determined provisions based on which the persons with mental disabilities are excluded from the liability. Moreover, in such situations these countries have determined even the provisions based on which supervisors of persons with mental disabilities shall be liable for the damage caused by such persons. Supervisors shall be assigned based on the decision of the competent body, legal obligation or any contract. In order to complete the similarities in the framework of these states we should indicate that these states have completely similarly determined the opportunity of the supervisor to prove his innocence by proving that the damage has been cause without their fault

Republic of Albania, regarding this kind of liability, has similarities as well as differences when compared with the above-mentioned states. Initially it differs from other states since in one common provision it has set the minor under the age of fourteen (14) as well as persons incapable to act due to mental disabilities. We shall consider as inappropriate this determination of the Republic of Albania since there are not similar the cases of liability for the minors and persons incapable to act due to mental disability. We state this since it is necessary a completely different approach

to the care and supervision towards normal minors compared to the care for persons with mental disabilities that belong to abnormal persons; hence for this reason we consider that inclusion of them in a common provision is not appropriate. Similarities of Albania with the above-mentioned states shall be identified at the determination of the liability of supervisors for the damage caused by the persons incapable to act. Legal determination based on which the supervisor may prove his innocence for the damage caused by the person with mental disability causes unclarity at Albania case. We state this since the provisions of Civil Code have put gap in this matter by not determining the liable entity if the custodian proves his innocence but the disabled person does not have economic conditions to make the compensation of the damage. We think that in this case there should exist a provision based on which in the last instance the custodian or custodian body shall be liable for the damage caused by the person with mental disability. We shall state this taking into consideration the fact that the supervisors are obliged to supervise the persons with mental disabilities. For this reason we shall state that they can not be absolved completely, in cases when the damage is caused by the persons with mental disabilities, due to the obligation for supervision.

Besides this, another unclarity which is created based on the provisions of the Civil Code of Albania is the case of determination of the liability of persons that at the moment when the damage is caused they have not been conscious for their actions. In this case, it is not specified when these persons should have been liable for the damage caused despite the fact that they have not been conscious for their actions; hence in this aspect we shall consider that Republic of Albania in the provisions of the Civil Code should include expressly the cases when such persons should be liable for the damage caused since the current content of this provision is not sufficient and creates unclarity.

France case is a more different example from the above-mentioned cases. We say it is a more different example due to the normative determination, since in France this matter has not been determined by the Civil Code but by decisions of the Court of Cassation. Based on the decision (*Blieck*) Plenary Assembly of the Court of Cassation has decided on the liability of a centre for the care of persons with mental disabilities for the damage caused to another person by a mental patient. From this case (*Blieck*) legal framework in France has, as a source of the law for such cases, this decision they should refer to in. Hence, France although has not determined this matter by the Civil Code, we can say that it has similarities with the above-mentioned states regarding the regulation of the liability of the supervisor for the damage caused by the persons with mental disabilities. Moreover, even at case of presumption of the innocence of supervisor, France through the decision of the Court of Cassation in the case (*Jourdain*)

has ascertained that the liable person can not be absolved from the liability by pretending that he is not the author of the caused damage. In order to be released from the liability, Court has noted that the entity should prove that the damage has been caused by force majeure or there exists another person liable for the damage caused by such persons. Hence, though these cases France is good enough in regulating the liability for the damage caused by the persons with mental disabilities.

Italy has regulated this matter by the Civil Code. Italians have regulated the liability of the supervisor for the damage caused by the persons with mental disabilities in a provision according to which the supervisor of persons incapable to act shall be liable for the damaging actions of such persons. Within this incapability to act, they have set the minor until the adult age or their emancipation and person with mental disabilities or mental slowdown development. In this aspect, Italy does not differ at all from the states we have mentioned till now. Moreover, according to the provisions of the Civil Code they have let the possibility to the supervisors to prove their innocence whether they have exercised the supervision adequately but have failed to prevent the damage to be caused. Hence, we should state that Italy is on the side with states mentioned till now regarding the regulation of liability for the damage caused by the person with mental disability.

Germany is the best indicator of the regulation of this liability in comparison with the states mentioned in this case. With the provisions of the Civil Code, they have determined that the persons that at the moment the damage was caused they have not had the due consciousness shall not be liable for the caused damage. Hence, through a general provision, Germans exclude this category of persons from the liability. With another provision, Germans shall, regarding the damage caused by such persons, set their supervisors liable entity. This liability of supervisors derives due to legal obligation, decision of the competent body or contract. Completely similar as other states, in Germany as well according to provisions of Civil Code the supervisors have the possibility to prove their innocence if they have exercised the supervision adequately but have failed to prevent the damage to be caused. Exactly in this case there is presented the superiority of German framework in comparison to the legal systems of other states mentioned in this part. We shall state this since regarding such cases, Germany by its Civil Code has determined the provisions which expressly determine the solidary liability of the entities in this case. Regarding this matter, Germany is the only state that has determined expressly the solidary liability of the entities for this kind of liability, and due to this we shall state that Germany has the most advanced and detailed regulation in comparison with other states mentioned in this part. Through solidary liability, there is created the possibility of compensation of damage by the

party which has better economic status in comparison to the liable party which does not have economic conditions to make the compensation of the damage to the damaged person.

Spanish legal system has regulated this matter through the provisions of the Civil Code. Completely similar as other above-mentioned states, Spain as well has determined the provision based on which for the damage caused by the person with mental disability there shall be liable the custodian or custodian body that takes care about the supervisions of such person. In this aspect, there is no difference at all between the mentioned states and this makes us understand that the continental system in general has similarities in regulating this matter but the differences are noticed in some elements that comprise this kind of liability. Moreover, the Spanish legal system has let the possibility of absolvment of the custodian or custodian body if they prove that they have exercised the supervision adequately towards the person with mental disability but have failed to prevent the damage to be caused. Regarding the regulation in principle of this matter, Spain does not differ at all from none of the above-mentioned states, but the differences appear at the general determinations based on which the persons with mental disabilities are released from the liability of their actions. This provision is determined expressly in some of the states mentioned above, hence, we can state that Spain as well has similarly determined the liability of the supervisor for the damage caused by the persons with mental disabilities.

Based on that mentioned in this part, we can ascertain that all mentioned states have almost similar determination regarding the regulation of the liability of the supervisor for the damage caused by the persons with mental disabilities. As a conclusion, we can state that all legal systems mentioned in this part have determined expressly the liability of the supervisors regarding the damage caused by persons with mental disabilities but some of those systems have a more advanced regulation since they have foreseen more cases related to this liability including even the determination in expressive way of the solidary such as Germany case. Viewed as a whole, this matter is covered quite enough by legal frameworks in all legal systems mentioned above since by legal provisions there are determined the liable persons in case the damage is caused by such persons. Some of the legal systems which in their provisions have unclerness in certain cases, there would be necessary for them to take concrete actions on amending and supplementing those provisions in order to eliminate the unclerness and legal gaps with the purpose of a better regulation of this matter and protection of such persons that need continuous supervision.

Abbreviations

LORK Law on Obligational Relationships in Kosovo

COARC Civil Obligations Act in the Republic of Croatia
LCTS Law of Contracts and Torts in Serbia
CCA Civil Code of Albania
CCF Civil Code of France
ICC Italian Civil Code
GCC German Civil Code
SCC Spanish Civil Code

References:

Podvorica Hamdi, (2011), E Drejta Familjare, Prishtinë
Podvorica Hamdi, (2006), E Drejta Familjare, Prishtinë
Aliu Abdulla & Gashi Haxhi, (2007), E Drejta Familjare, Prishtinë
Mandro-Balili Arta, (2009), E Drejta Familjare, Botimi i Parë, Tiranë
Latifi Juliana (2009), E Drejta Civile – Pjesa e Përgjithshme, AlbPaper, Tiranë
Kadriu Osman, (2008), Hyrje në të Drejtën Civile, Shkup
Gams Andrija, (1972), Hyrje në të Drejtën Civile, Prishtinë
Alishani Alajdin, (2002), E Drejta e Detyrimeve, Pjesa e Përgjithshme, Botimi i dytë, Prishtinë
Nuni Ardian, (2012), E Drejta Civile, Pjesa e Përgjithshme, Tiranë
Tutulani – Semini Mariana, (2006), E Drejta e Detyrimeve dhe Kontratave, Pjesa e Përgjithshme, Tiranë
Dauti Nerxhivane, (2013), E Drejta e Detyrimeve, Botim i plotësuar dhe përmirësuar, Pjesa e Përgjithshme, Prishtinë
Dauti Nerxhivane, (2016), E Drejta e Detyrimeve, Botim i plotësuar dhe përmirësuar, Pjesa e Përgjithshme, Prishtinë
Millosheviq Lubiša, (1972), E Drejta e Detyrimeve, Prishtinë
Dauti Nerxhivane & Berisha Ruzhdi & Aliu Abdulla & Vokshi Adem, (2013), Komentari – Ligji për Marrëdhëniet e Detyrimeve – Libri I,
Légier Gérard, (2008), E Drejta Civile - Detyrimet, Botimi i 19-të, Përktheu Edmond Xhabija
Shemiq, (1996), Pravni Zhivot
Law on Obligational Relationships in Kosovo No 04 / L – 077
Civil Obligations Act in the Republic of Croatia No 35 / 2005,
Law of Contracts and Torts in Serbia 1997
Civil Code of Albania
Civil Code of France
Italian Civil Code
German Civil Code
Spanish Civil Code