# ESTABLISHING CIVIL LIABILITY AND EQUALITY OF CREDITORS

Article

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# Theoretical Aspects of the Basic Conditions for Liability: Restorative and Punitive Approaches under Russian Law

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***Abstract***: The concept of liability is a key one in jurisprudence. Its universal significance in civil law lies in the ability to monetize negative property results and impose financial consequences on the party involved. In criminal law, it is used to punish the offender. This paper analyzes fault as the most important element of the said legal institution and discusses the role of cause-and-effect relationship. The aim of this publication is to draw a sectoral comparison between important conditions of liability. The developing economic turnover in the Russian Federation requires to ensure the reproduction and multiplication of monetary values. The effectiveness of legal techniques, particularly in establishing fault, constitutes an initial condition for civil liability and cause-and-effect relationship between misconduct and an offence still determines the use of the full range of opportunities provided by law. In criminal law, the fault is a necessary basis for any criminal sanction, including a fine. The paper elucidates the concepts of fault and cause-and-effect relationship as a separate, stand-alone issues important for imposing criminal punishment, and showing the significant difference between these legal categories in civil and criminal law.

***Keywords*:** civil sanctions; criminal; liability; damages; fault; cause-and-effect relationship; loss; reimbursement

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## Contents



## I. Introduction

At the dawn of modern civilization the primary penalty was a response to non-compliance with legal prescriptions and functioned as a fine imposed as the remuneration for loss (Dmitrieva, 1997, pp. 9–10). As society developed, reparation was divided into criminal and civil law one as a response to personal offence as a consequence of non-fulfillment of property duties, both contractual and non-contractual.

However, the use of penalty, on the one hand, always resulted in the restoration of financial standing and, on the other hand, it led to the situations of abuse. As a result, another method of protecting rights has become more prevalent, i.e., reimbursement of losses when fault is proven. It was widely accepted in legal doctrine that the concept of fault is consistent across all branches of law. We justify the increasingly different understanding of the forms of fault and cause-and-effect relationship in private and penal law as a reflection of the increasing complexity of the regulation of diverse social relations subject to legal protection.

## II. Domestic Guilt Concept

The analysis of the fundamental provisions of the doctrine of *culpa* in the Soviet past helps to understand that its underlying understanding in the new economic realities should be different. At that time, *guilt*, in accordance with the popular belief, was identified with the anticipation of public danger of civil-law violation (Matveev, 1955, pp. 32–35). However, such an assertion is now considered obsolete. Accordingly, what was the cornerstone of this legal construction before, no longer exists. The hypothetical degree of awareness of the negative social impact cannot create an idea of the type of fault admitted — carelessness or intentionality. This understanding lacks the volitional moment. The attitude towards the consequences is the most important for punitive reaction as they are expressed in losses, damages, costs, expenses, expenditures, and harm. Conscientiousness or purposefulness are manifested in the behavior of a person who fails to fulfil what is prescribed, promised or established by the regulation. Therefore, the unilateral overperformance of contractual obligations still may be considered a "culpable activity". However, it does not violate the subjective civil rights of the counterparty and does not entail liability. Most importantly, such intent to act beyond the contract can be legalized by the subsequent agreement of the parties. At the same time, an outcome involving socially dangerous criminal consequences cannot be subject to adjustment. One can recall here the maxim of the Soviet civil jurisprudence school: "There is no fault without wrongfulness" (and hence no responsibility) (Agarkov and Genkin, 1944, p. 324). We believe that the opposite thesis appears to be indisputable: "There is no wrongdoing without fault" (Matveev, 1955, p. 107; Kaspar, 2017, pp. 37–39).

The general legal concept of guilt is disclosed in the doctrine as a mental attitude to wrongful behavior and its consequences (Naumov, 2004, p. 228). However, there are at least three circumstances, noted only in Soviet times, which influenced the formation of the subjectivist concept of *culpa*.

Firstly, any failure or violation of civil law resulted in social damage. Today, of course, it is impossible to make such an assessment. Only

individual provisions of law can speak of a contradiction with the public interest, public morality and notions of justice.

Secondly, Soviet law did not distinguish between public and private norms (Stuchka, 1921, p. 111; Goykhbarg, 1924, p. 52), which is a fundamental distinction in modern law. The concept of fault, defined as the intention to cause harm to the state and public interests is relevant in public law.

The third factor that strongly influenced the content of the legal categories was the task of civil law aimed at that time to produce correct and acceptable members of socialist society and economic relations (Ioffe, 1975, p. 117; Matveev, 1955, p. 241). However, this is no longer relevant to modern civil jurisprudence.

The Soviet doctrine of fault was influenced by ideologists from another unexpected side: scientific studies and major works invariably had to criticize the Western European and American concepts of the analyzed legal institution, which were based on the "objective" criterion by treating property as a "good master" or taking care of it as "one's own business" (Matveev, 1955, p. 200). The supporters of these modes of evaluation were opponents of our legal scholars during the exchange of opinions and in the discussion of problems at various events, so that the subjective theory of fault was fueled by this as well. At the same time, there were borrowings (certainly not ideological ones). In particular, we are talking about adopting the idea of foreseeable consequences as condition of recovery (Matveev, 1955, p. 59), not subsequently reflected in the Civil Code provisions.

Based on the former thesis that fault for legal regulation in all sectors has common features in the form of a desire for harmful consequences or a general expectation thereof, it had created the necessary prerequisites for collection. In the first place, the psychic concept of fault prevented the creation of a chain of sanctions and recourse claims in order to compensate for the mutual damage caused by the indiscipline of "allied contractors" whose non-performance did not enable a particular production obligation to be fulfilled.

As far as can be seen, "state tribunals" have refused to award damages in the absence of clear fault, which was presumed under the 1964 Civil Code of the RSFSR and therefore the defendant had to prove

its absence. This situation did not suit the law enforcement authorities either and their approach was changed through a more diverse perception of such a basic notion as fault. However, this did not lead to a uniform judicial practice, since the subjectivity of courts played a significant role in the judgments concerning the losses. However, for example, at the level of the RSFSR state tribunals it was established that liability should arise because the buyer, for example, "did not raise the issue of amending the terms of the supply contract in good time with the plaintiff" (Novitsky, 1952, pp. 118–125).

It was also noted in a number of cases that, despite the principle of culpable liability, penalties envisaged by the relevant contracts could also be imposed without fault. As a result, in 1971 Professor V.V. Ovsienko advocated in his dissertation the introduction of the principle of liability without fault in relations between "socialist organizations". Some academic persons also supported the objectification of *culpa*.

The relationship between wrongfulness and fault is a topic of ongoing debate in Soviet scholarship. In this case, one of the most important perspectives is the merger of these concepts. We believe that this reveals a methodological fallacy of reasoning, which is that the categories already activated today, not only in theoretical discourse but also in law, cannot be identical because they constitute fundamental legal institutions with their own specific role. Illegality, as recognized by authoritative Soviet scholars, influenced the understanding of fault in the interests of ideology. It was explicitly stated that guilt depends on the "foundations of the system" (Matveev, 1955, pp. 169–172). From this follows a simple conclusion that today, when the political foundation of society is radically different, it is wrong to assume that *culpa* in civil law is a personal mental attitude to the actions and their consequences.

Ultimate *guilt* is not only a phenomenon of the conscious, it is also subjectively manifested in the desire for non-compliance with what is proper at the moment (Safferling, 2008, pp. 212–215). By the way, two prominent Soviet civil law theorists characterized fault as a deviation from the generally accepted legal norms (Matveev, 1955, pp. 199–200) and as a failure to observe the standards of conduct (Matveev, 1955, p. 292). However, their views were not dominant.

The desire for consequences differs between criminal and civil law. In criminal law, the will to cause harm is a crucial factor, whereas in civil law it is not. The intention of knowingly causing harm is important for theology because it is sinful. However, a confession is rather necessary in this case, not a legal response. Curiously enough, this is supported by a study conducted by G.K. Matveev, Doctor of Laws and Professor at Kiev State University, the main author of the universal concept of responsibility in Soviet civil law. According to Matveev, the offender's psyche is the main determinant of fault that leads to the conclusion that an excused ignorance of the regulation consisting in normative instructions absolves him from responsibility (Matveev, 1955, p. 261). Therefore, the psychic theory of subjective fault in civil law in its natural manifestation has an insurmountable practical drawback, because it proves to be powerless in matters of establishing *culpa* when *de facto* there is no idea of legal regulation.

The appropriate qualification for conduct that does not conform to the letter of contract is negligence in varying degrees. It is important to note that civil law culpability arises only from a lack of care and diligence. The term "care" is particularly significant as it refers to the creation, preservation, transfer and enhancement of civil assets. However, it refers to a failure to use one's best endeavors in the case of slight negligence, a lack of ordinary care in the case of gross negligence and the presence of deliberate acts in violation of prohibitions, not necessarily associated, however, with a desire to cause damage to other subjects, in the case of intent. It is appropriate to mention the word "fiction" here in relation to the awareness of the regulation but not the consequences of misconduct.

The defendant's carefulness requires ascertaining the details in an ideal situation. Diligence is demonstrated by avoiding any behavior that may lead to negative consequences.

## III. The Notion of Causation

In our view, the understanding of cause-and-effect relationship in civil law needs to be revised. The premise of risk liability should be adjusted. The question of reimbursement should hardly be made rigidly

dependent on proof of cause-and-effect relationship. Scholars who have studied it have repeatedly discussed the link between a wrongful act and harm or damage (Sadikov, 2009, p. 56). However, conduct is not always the cause of violation of a right. Moreover, the property burden and the consequences of danger are most often assumed on the condition of universality, i.e., without any reservations about causality and significance of special circumstances.

The cause-and-effect relationship is significant due to judicial interpretation. Article 401 of the Civil Code of the Russian Federation, which refers in detail to damages, does not mention it. Articles 15 and 393 of the Civil Code only provide a doctrinal explanation of the role of causality through the use of the participle "caused". Special rules of law explicitly refer to it only occasionally. For instance, Art. 720(5) of the Civil Code states that the contractor must bear a burden of defects and should pay for an expert examination to identify the defects if there is a "causal link" between them and "the contractor's actions". Similar provisions are not found elsewhere in the Civil Code.

In the practice of state courts, a claim for damages may be denied not only due to the lack of a cause-and-effect relationship and the defendant's explicit harmful actions or failure to perform an obligation, but also due to the failure to prove it. Cause-and-effect relationship is a common topic in books, dissertations and articles (Antimonov, 1948; Baibak, 2014; Evteev, 2005; Egorov, 1981; Novitsky, 1952, pp. 300–319; Yagelnitsky, 2016; Rümelin, 1900, p. 174). According to the apt acknowledgement of European civil law scholars, this subject had previously created a "crowded dissertation market" (Antimonov, 1948, p. 66). T.M. Yablochkov said that "the doctrine of the essence of causality is one of the most difficult questions of law, both criminal and civil" (Yablochkov, 1910, p. 60).

The presumption of culpability of debtors increases the desire to recover primarily contractual damages. But such claims in litigation still cannot overcome the barriers erected by the concept of cause-and-effect relationship. The doctrine holds that if a necessary and legitimate causal connection exists between the debtor's conduct and the result in question, the debtor foresaw or should have anticipated the situation. If

this cannot be established, the responsibility is subject to the discretion of the court (Egorov, 1981, p. 127).

Well-known authors speak in favor of limiting the natural-scientific understanding of causality and argue that this is the main function of the legal concept under discussion (Egorov, 2006, p. 75). The amount of reimbursement may be ruinous for the delinquent or for the party failing to perform the contract. Thus, some doctrines of cause-and-effect relationship are based on the idea of changing the principle of full property recovery, fundamental to the civil law of the Russian Federation.

The defendant is not bound by the duty to fully reimburse for the result of the negligence (fault) of the creditor, who takes care of his property himself. The negligence and intent of the victim is the opposite of the principle of complete satisfaction, i.e., no more compensation than is actually due.

The legal regulation is linked to the business community's insistence on maximum freedom in the allocation of risks in contractual relations. This is expressed in the extreme in the possibility of being held liable for the consequences of force majeure, which is expressed in the formula "unless otherwise provided for in the contract". Article 401(3) of the Civil Code states that, by default, the merchant — a party to the contract — shall be exempt from liability due to a failure to fulfil his obligations under circumstances which are extreme and unavoidable under the circumstances.

The exemption from consequences of an accident or a force majeure event is a dispositive general rule. Its purpose is to establish discretion with regard to the choice of imposed risk of property loss. In this way, a high level of business activity is maintained in the property environment. The entrepreneur is prepared to "proceed with the project" because significant dangers can be transferred to the counterparty whose liability will be enforced.

Whether the damages were caused by the defendant or in fact arise from other influences is for the court to decide. The jurisdictional body does not, strictly speaking, need theories of cause and piling up constructions which in certain cases obscure the case and reduce the effectiveness of the legal defense. Apart from the question of whether

there is a connection between the damage and the behavior of the debtor, it is also important to determine who and how much is at fault to quantify the amount to be reimbursed.

As already stated by some legal scholars (Novitsky, 1952, p. 366; Ioffe, 1955, p. 310; Agarkov, 1945), causality determines the extent of damage and not whether it is caused at all (Baibak, 2014; Egorov, 2006, p. 75). Meanwhile, the courts analyze causality not for the purpose of determining the amount of damages, but for the purpose of denying reimbursement. The Supreme Court of Arbitration and the Supreme Court of the Russian Federation have repeatedly used the following formula: to recover damages, it is necessary to establish their dependence on the facts of the violation of a subjective right.[1]

The court practice has for many years been focused on a causal link being proved by the plaintiff as a strict condition of liability, although in reality it is primarily a factor for reducing the amount awarded.

In the opinion of authoritative legal scholars, causality is only an objective course of event. It must be typical and regular. It must be proven by the plaintiff and it is left to the court to evaluate the arguments presented. This brings us to the theory of adequate causality (Serakov, 2014).

The fact that, according to a number of authors, causality should be deprived of the volitional component, can be explained by the Soviet legal tradition. Its representatives proceeded from a strict distinction between the concept of fault as psychic, i.e., purely subjective, attitude to their action (or inaction) and independent course of occurrences (Ioffe, 1975, p. 128).

It has been argued that the Marxist-Leninist theory of the objective connection of phenomena could not always be used to establish causality as a condition arising also from behavior and having a subjective or human nature in many episodes (Novitsky, 1950, pp. 72–74). It was also correctly assessed that, unlike the chronological connection in the commission of an evil deed in criminal law which results in felonious consequences, in a property dispute causality has to be traced by going

[1] Ruling of the Supreme Court of the Russian Federation dated 4 December 2012 No. 18-KG12-70. (In Russ.).

from the incurred loss to its cause, i.e., in reverse order, moving from a later phenomenon to an earlier one. This is a methodologically rational way of establishing the influence of extraneous circumstances on the increase in losses.

We have noted above that in contractual relations causality is obvious in most cases. M.I. Braginsky and V.P. Gribanov write about it (Braginsky, 2011, pp. 718–719; Gribanov, 2001, pp. 330–333).

The statutory provisions do not presume a lack of cause-and-effect relationship, such as in the case of presumption of fault. Proving allegations is governed by the rules of CPC and APC (Art. 56 of the CPC, Art. 65 of the APC), but sometimes assistance of the court is needed. Establishing a causal chain is not always straightforward and often requires both forensic examinations and the determination of legal consequences to prove.

A common doctrine is that cause-and-effect relationship is justified by the interdependence of facts according to general philosophical laws. This often results in a loss of defense by clearly injured parties who have had the misfortune to suffer harm from an offender but who are unable to reliably prove that the source of the harm was solely the defendant's conduct.

Meanwhile, global legal practice has been steadily redefining the relationship in question. If it remains a genuine condition of responsibility, then proving its essence or lack thereof should be handled by an entity providing specialized services of medical, educational or consultative nature or working in a special field in which the client is not competent due to lack of relevant knowledge and training (Yagelnitsky, 2016, pp. 32–33).

## IV. Floating Factors of Liability

In some countries, courts award damages even in the form of costs incurred by the plaintiff prior to the occurrence of the inevitable damage. The causal chain need not be traced in cases of cumulative or alternative infliction of loss where the actual involvement of each person in the injurious act is unclear. For example, pharmaceutical companies produce a drug that causes damage to health and the victims

purchase it from one manufacturer or another at different times. The weakening or at least differentiation of the concept of causality as a condition of responsibility can be traced in the fact that more and more legal scholars nowadays talk about the need not only for a different approach to its establishment than the mere proof by the plaintiffs, but also about its rebuttable presumption (Oliphant, 2011, pp. 1609, 1615).

In the field of non-contractual damage, provided there is fault, causality has long been defined by the general philosophical criteria of necessity and sufficiency (Egorov, 1981, p. 127). But it is necessary, as a minimum, that the fact producing the effect stands out in the series of phenomena occurring simultaneously and is characterized by subjective sufficiency. Harmful behavior must be damaging. It is presumed to be the direct result of these actions and not of any other cause. An unpleasant but illustrative example of subjective sufficiency of damages would be an injury which caused irreparable harm to health or death because the victim had an infirmity or disability of which the tortfeasor was unaware. There is an analogy with the widely commented thesis about foreseeability of harm as a basis for its compensation (Baibak, 2014, p. 54). But it is only at first glance. Foreseeability of damage is applied to the average person and exists hypothetically. This understanding of causality devalues the possibility of protection.

The category *conditio sine qua non* (necessary condition) has a strong epistemological basis. In our jurisprudence, thanks to the flamboyant statement of G.F. Shershenevich, it is not historically welcomed. According to the famous lawyer, this theory is too harsh for the criminal law and too unfair for the civil law. In accordance with this methodology, parents of criminals should be subjected to reprisals for crimes committed by their sons and daughters (Shershenevich, 1995, pp. 265–266). But G.F. Shershenevich obviously said this in jest. After all, procreation is by no means a reprehensible activity and does not automatically lead to crimes. *Conditio sine qua non* for civil and criminal law is neither strict nor liberal, but simply a fair theory of the unity of cause and effect. It seems that on the basis of judicial discretion (*ad arbitrium)* it may have to be applied by examining the extent of the damage and the volitional activity of the causer separately in each individual case.

The most clear and undisputed lack of a causal link is also evident in the issue of indemnification for damage caused by a source of increased danger. A construction crane falls, a fire breaks out, and the contents of a warehouse perish because of ordinary, not extraordinary, wind gusts. All losses must be paid by the originator of the hazardous activity irrespective of whether or not the disaster could have been foreseen. He is responsible for the damage as such due to all events and actions other than force majeure.

Damage must be reimbursed in full. The degree of fault, whether there is one cause or several, whether there has been harm — these three basic questions are of course at the discretion of the judge. But it is one thing when it is not limited to anything and the jurisdictional body decides to reject the claim because the claimant "has not proved cause-and-effect relationship" and quite another when only the amount to be indemnified is determined.

The idea that the answer to the question of cause-and-effect relationship cannot be simplified to "either... or...", but rather should include requirements and identify the structure of each type of loss, is not a new one, but it has not been consistently expressed in our literature (Karapetov, 2014).

In a fast-paced and ever-changing business environment characterized by diverse and dynamic transactions, there has been a tendency to rely on easy-to-understand regulatory standards as opposed to formalism and a tendency to dismiss claims on grounds of lack of evidence, and to enforce claims rather than impose additional procedural and substantive conditions, in the face of the growing complexity of legal relationships. These developments have also reflected a change in the approach to cause-and-effect relationship. In the developed jurisdictions, the courts have increasingly started presuming its existence, as in the Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated 26 October 2002. They leave out the rule that the plaintiff has to justify causality, which is often beyond his control, and that the court must passively observe, deciding whether his arguments are sufficiently persuasive.

Among other things, the defendant has the right to justify the lack of possibility to influence the events that led to the losses in general. The authors speak about the distinction and relaxation of the requirements

for proving causality as evidence of progressive legal development (Baibak, 2014, pp. 15–16). Causality may be potential. Moreover, the requirement of causality in some areas of activity should be replaced by "sufficiency of its substantial degree" (Koziol, 2012, pp. 134–168).

If causation cannot be seen and proven with certainty, then losses must be recovered at least in part. For instance, if a newborn baby is found to have irreparable malformations, and the doctor was found to have made a gross error in the treatment, but the mother's illness could also have caused the damage, the orthodox domestic approach requires the mother to prove a causal link between the medical staff's actions and the harm. And if she fails to do so, the claim will be dismissed. But the advanced standards of applying the rules of causality are incompatible with a decision which deprives the injured party of protection in such an important area as health in the provision of certified services. Cause-and-effect relationship in the circumstances named must be presumed.

In the resolution of other tort claims, the impact of the conduct of the tortfeasor is considered detrimental if his activities were dangerous and the damage resulted from an act sufficient to constitute a tort.[2]

The new approach has led to a special application of the rule on joint infliction of damage. Not only do those who literally caused the damage to property by acting simultaneously and/or in concert become jointly liable, but so-called cumulative tortfeasors who appeared after the formation of the damage, as well as those from whom the risk of loss was substantially anticipated, also become liable. A particular application of this method would be imposition of liability on a defective supplier who failed to fulfil his obligations, but whose damage to the buyer could only hypothetically have occurred, because of an earlier non-delivery from another entity he would not have been able to proceed with a product in demand anyway, i.e., the behavior of the defaulting party was subjectively sufficient to cause harm.

The first and second wrongdoers are jointly and severally liable. Thus, in cases of guaranteed full reimbursement, the court shifts the burden

[2] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 dated 26 January 2010 "On the application by the courts of civil legislation governing relations under obligations resulting from injury to a citizen's life or health". (In Russ.).

of proving the efficacy and intensity of cause-and-effect relationship, as far as possible, to the relationship between the defendants. It does not make compensation strictly dependent on the existence of a causal link to the conduct of each wrongdoer. This undoubtedly indicates a weakening of the role of causality within a civil violation which gives rise to damage and allows for a more active use of this civil remedy.

There has thus been a tendency to diminish the role of causation as an important condition of liability. This is reflected in the emergence, development and increasing application of the doctrine of loss of chance in circumstances where there is absolutely no real damage. Importance is attached to any degree of probability, because it is the loss of income itself which is recovered even though it might not have occurred. Illegality, of which fault is an inherent feature and characteristic — already a sufficient ground for the recovery of damages for loss of chance — is presented as a new approach and a recent theory. It is regarded as leading to a better regulation of liability. The active discussion of this thesis, which has come down to us from the Western legal literature, reflects above all the need to rethink the nature and role of cause-and-effect relationship.

The logic of the lost chance doctrine goes back to an English precedent from 1911[3] in which unearned profits were awarded for default and calculated against the likelihood of gain. A female bidder was negligently omitted from the selection process among three others due to the negligence of the organizers. Because of this, she received compensation in the amount of 25 % of the expected profit (Baibak, 2015, pp. 64–65). Foreign literature provides another illustration of a breach of contract leading to liability despite the absence of a continuous causal link and a substantial risk of failure to achieve a result. This involves the poor performance of a lawyer's representational duties and his failure to file an agreed appeal against an unfavorable court judgement in a timely manner. If the professional duties had been performed properly, the client would have benefited, but only by exercising legal options in the course of the challenge.

Following the Anglo-Saxon line of reasoning, Russian legal scholars write that chance as an antipode of risk becomes an important

[3] Chaplin v. Hicks, [1911] 2 KB 786 (CA).

commercial value to be taken into account (Baibak, 2015, pp. 63–73). This position is reflected in the Principles of International Commercial Contracts 1994 (hereinafter referred to as the UNIDROIT Principles, PICC).[4] But this logic does not suit the continental legal scholar, because chance or risk can in no way become an object of civil rights without being a property value. The emergence of the chance theory reflects the following course of reasoning of legal scholars. Firstly, they want to extend the concept of "subjective right" to include a claim based on expectations of not explicit but probable acquisitions. Secondly, they seek to weaken the causation factor by introducing into the latter the notions of risk, danger and chance, which in this context are one and the same. Thirdly, such legal scholars would like to strengthen the role of fault coupled with subjectively sufficient causality by assuming that in several circumstances leading to losses liability should arise and that there is no need for the so-called single necessary condition test, in the absence of which there would be neither damage nor loss of profit.

It seems to us that in reasoning about causation it is necessary to distinguish between criminal, tort and contractual relationships. In constructions of property liability we cannot but observe the gradual disappearance of cause-and-effect relationship in question. Failure to understand this undermines or significantly devalues the institution of loss and damages. When an ordinary contractual monetary obligation is not fulfilled, payment is awarded without any preconditions. Another case is the cancellation of a materially breached transaction in order to be released from the buyer's contractual counterclaims. It is not logic that in that case a painstaking, reliable, documented proof of a direct, genuine, real and necessary causal link (*causa proxima, non remota spectatur*) is for some reason required for even partial recovery of damages. It is precisely because of this requirement that the claim of such nature is not widely used. However, the viability of turnover, especially commercial one, depends directly on this.

As mentioned above, we do not believe it is correct to completely equate cause-and-effect relationship in torts, in contractual obligations and in the commission of crimes. In these cases its significance is

[4] Art. 7.4.3(2) of the UNIDROIT Principles (1994).

different. In the case of harm, it forms an obligation and must be more explicit. There has not yet been a relationship between the creditor and the debtor and it is the task of the court to determine whether this should have arisen. If the harm was caused by a source of increased danger, it is not necessary to establish a breach of the law. In a contractual relationship between merchants, it is more important to determine who bears the negative consequences of the failure in performance. Moreover, in the case of transactions, it is more often inaction that is wrongful, whereas in torts, on the contrary, as a rule an active behavior of tortfeasor is necessary. Therefore, apart from questions of the extent of lost profits, the role of cause-and-effect relationship in contractual relations should be less important. If the entrepreneur has not fulfilled his obligations, the consequences of the companion's loss may fall on him without fault, and he is responsible for the case not only because of possible wrongdoing. In criminal law theory, cause-and-effect relationship is seen as creating the objective side of the crime, the configuration of consequences and, together with the fault, is considered as the degree and content of public danger.

Courts in the Russian Federation still have not realized what has long been noted in doctoral dissertations by legal scholars of the Soviet time: causality creates "not only qualitative, but also a precise quantitative dependence between the breach of obligation and the ensuing negative economic result" (Ovsienko, 1971, p. 326).

The polemics of causality in the 1950s are interesting. L.A. Luntz and I.B. Novitsky in their work said that causality should be necessary, but not accidental (Novitsky, 1950, pp. 300–319). In response, Professor O.S. Ioffe wrote "Necessity… equals regularity. Therefore, the very essence must be embodied in what is necessary as in what is regular… which is almost never the case with unlawful behavior". And further, "…recognition of only the necessary causal link as sufficient… should lead to irresponsibility…" (Ioffe, 1955, pp. 221–222).

Today there is a growing and clearer view that causality only rarely requires expert judgement to establish a fact hidden from the surface view. More often causality is seen as a concept which presupposes a legal interpretation.

The category of causation is regulated in sufficient detail in the European Uniform Acts: by three articles in the *Draft Common Frame of Reference* (*DCFR*) and by six ones in the *Principles of European Tort Law* (*PETL*) (Art. VI.-4:101-VI.-4:103 DCFR; Art. 3:101-3:106 PETL). Causality is not mentioned in the Principles *of European Contract Law* (hereinafter PECL) and this is indicative.

The standard which has become widespread nowadays in the laws of Europe, although known in theory as far back as the 19th century, seems to have restricted the role of causality to the question of determining the amount of damages. And this is close to condition of foreseeability in the objective sense (Belov, 2019). In our view, the proponents of this rule did not mean that it would serve as an optimum substitute for causality, which needs to be justified by going into calculations and evidence. It goes without saying that we are talking about different ways of determining the value of losses consisting in a factual approach, where it is the study of events, incidents, or, roughly speaking, the weighing of different opposing influences, and seeking a hypothetical definition of the economic consequences of the realized hazards after the loss has occurred.

However, foreseeability is only relevant in the case of non-observance of contracts as a condition of the liability if there is slight negligence; in all other cases of culpable conduct, it should play no role (PECL, DCFR). The same is provided for under an expansive interpretation of the relevant article of the UNIDROIT Principles. The tendency to weaken the role of cause-and-effect relationship is seen in the fact that PETL (Art. 3:101) clearly establish the pro-creditor principle of the necessity of events for which the debtor is responsible and bears the risk as a condition for damages. The DCFR, on the other hand, no longer stipulates this, but simply states that due to the conduct or influence of the accident the tortfeasor creates the protected loss and that there is a presumption of the occurrence of this loss when the responsible wrongdoers have performed various acts capable of causing the damage (Art. VI.-4:103).

The foreseeability of loss appears to rest on a different logic, depending on whether it arises from the contract or from the infliction of harm. In the case of non-performance of contractual duties, it must

not begin with the preconditions for liability, i.e., non-performance, but with the moment of contract conclusion: in this case the calculation of the debtor is not based on an assessment of the cost of his culpable behavior, but on an analysis of the global risks of entering into contractual relations. This, we believe, further weakens the role of cause-and-effect relationship, as it becomes useless if the loss or damage could not have been foreseen by the debtor.

In PETL — and this is its main feature — causality is a condition for damages (Art. 3:101). Its sufficiency is specifically stipulated in alternative, potential, indefinite, partial cases of harm, where the connection is relevant in relation to the overall property outcome of the accident. The main corrective factor, as already mentioned, is the effect of causation, by virtue of which the damage is determinable and which depends primarily on its foreseeability.

Unlike insurance, where the protection mechanism is triggered by the occurrence of approved events, in damages cases in the ordinary sense the burden of bearing the risk can be inferred from the essence of the will and any other relevant circumstances. For two reasons the foreseeable risk is more important here, because the fault itself and the risk of consequences increases, answering not only the question "who?" but also "how much and to what extent?". Having manifested itself in this capacity, it becomes a factor of cause-and-effect relationship, which, in turn, acts as a quantitative determinant of redress (Kantorovich, 1928, p. 105). It is quite correct to conclude, since none of the theories of causality has been directly legislated (except the formula of necessary condition (*conditio sine qua non*) in torts in PETL (Art. 3:101)), about the not too fundamental importance of this condition for emerging liability, save its size.

The category of cause-and-effect relationship in criminal law has its own significant features, which it is advisable to first briefly enumerate. It is primarily aimed at establishing a criminal law material result arising from a crime, a human act, and never from a natural or other event, as in civil law, where the first thing to be established is the configuration and essence of the violation of a subjective property right, such as loss of profit, loss of opportunity to sell something for higher price, damage to reputation, etc.

## V. Criminal Law Aspects

The criminal sphere explores the chain of cause-and-effect relationship — injury, death, disappearance of property, embezzlement, etc. — as the ultimate chain. Several fundamental implications emerge from the major differences. Firmly adhering to the unshakable positions of materialism, although the Constitution of the Russian Federation already mentions an enduring civilizational value — belief in God, criminal theory, represented by a great number of authorities, still operates with causality as a general philosophical category of determinism, at least always factual. Questions of causality are only rarely raised for the sake of the defense, in the interests of the investigation, and are checked by the courts. The establishment of causality is the prerogative of holders of special knowledge, i.e., experts. Their task is to condition the emergence of material and physical outcomes by the act of a human being. Competent legal interpretations are exactly what is needed to make this determination of causality.

A well-known theorist said "Since the offender never acts independently of the conditions of place and time existing in a particular case, these conditions have a more or less determining influence on the particular course of the causal chain set in motion by the offender in all its individual links, and this causal chain in its outcome depends on these conditions" (Renneberg, 1957, p. 60). This statement of Joachim Renneberg back in 1957 predetermined the features of causality, investigated in the theory. First of all, it can be traced not only in the direct action or omission of the crime but also in the preparations for the crime, e.g., discussions about it. The complicity of several persons in an atrocity — which happens more often than not — requires an examination of the degree of fault of each person in order to determine different sentence for them, taking into account individual mitigating and aggravating circumstances. A causal connection in civil law, on the other hand, where there is a joint infliction of harm or default by tradesmen, entails joint and several liability so that the defendants having discharged the claim, then deal with each other by way of recourse.

Criminal law has its purpose in the protection of law and order. In comparison to Civil Code the Criminal Code contains far fewer articles, which only cover concepts and institutions, but it mainly classifies criminal offences. The most socially dangerous offences, which may not previously have been such, are gradually being separated from the field of ordinary unlawful acts. For example, hooliganism did not become a crime until the 20th century, whereas before that fights and attacks on physical integrity were punished administratively or privately. Foreign currency transactions, which could always have been treated earlier as illicit trade or participation in the black market, became a criminal offence undermining the economic foundations of the State and attracting the death penalty in the 1960s. In more recent times, imprisonment can follow for unfair competition, cartel collusion, etc.

Hence the peculiarity of criminal law regulation at the level of the special part — the general nature of the notions, giving them greater scope in order to prevent perpetrators from evading responsibility, putting the deed under a suitable legal structure and using articles that refer to different broad situations, such as fraud, misappropriation, abuse of office, etc. This sometimes involves the use of old, long-established terminology to isolate the criminal law context and refer to the relevant qualification.

This is counterweighted by the basic criminal law and criminal procedure checks and balances: the presumption of innocence, the impossibility of objective imputation, a different understanding of complicity, the special role of the causal link and the ban on its predominant objectification, as mentioned above. The differentiation in regulation is imminent. This is reflected in the tendency to separate, to distinguish the basic legal categories in civil and criminal law. This, however, is not noticed by many. In the Soviet civil doctrine the notion of fault in bringing to responsibility was finally returned to civil law only in the 1930s and consisted, as mentioned, in a psychic attitude towards the wrongful result, and also had a general legal content. However, the new formula of fault in civil law became explicit for the first time with the adoption of Part One of the Civil Code of the Russian Federation in 1994.

Proof of taking measures required "by the nature of the obligation and the conditions of the turnover" (Art. 401 of the Civil Code), means projecting the actions committed, as well as refraining from them, onto the prescribed behavior. Assumption or anticipation of a negative result is not laid down here (Braginsky, 2011, pp. 720–721). Thus, there is a clear legislative impetus in the law not only to distinguish between criminal or civil law context of an offence, but also to separate them. In this sense it is not a question of legislative development, but a return to the Russian pre-revolutionary foundations of interpretation of fault.

The famous domestic theorist E.E. Pirvits spoke of two forms of fault — gross and slight carelessness arising from a deviation from the standards of care usually displayed in one's own affairs and the behavior of a "good master" (Pirvits, 1895, pp. 6–8). These criteria have long been accepted in German legal theory, where "fault" is an evaluative abstract concept which is interpreted in an objective sense within civil law (Bley, 1963, pp. 111–112). But what is really expected for development is the transfer of provisions on fault, responsibility, presumptions to the general part of the Civil Code, without which, in the absence of a breach of obligations, the fault is not formally and logically established in accordance with the objective scale for all civil relationship.

In the Soviet period of development of civil jurisprudence the psychic nature of fault in civil law was quite understandably substantiated. However, it should be remembered that the absence of such a fundamental private law principle as freedom of contract was characteristic of that time (Schabo, 2005, pp. 93–94).

Dispositive regulation was poorly represented, and the property turnover was regulated by planning tasks (Bratus, 1985, p. 65). There was no institution of bankruptcy (Melnik, 2008, pp. 156–163), as well as an independent property liability, taking the forms of civil and administrative fines. Therefore, the terminology and the methods of regulation were unified and consisted of an incentive to respect prohibitions and injunctions.

After 1991, one could speak of a revolution in civil law, a return to its market nature, which primarily required a revision of the meanings of the underlying concepts. In Soviet criminal law, the theory of fault

steadily developed and evolved into a coherent concept of the main, necessary component of responsibility. Here there is complete continuity of the current developments of this concept up to the 1990s and its relationship with cause-and-effect relationship, criminal outcome.

Fault is a feature of the subjective aspect of the crime (Safferling, 2008, pp. 7–10). Like objective causality, it is a necessary prerequisite for criminal responsibility. At the same time, these attributes are separate and almost do not interact. This concept rooted and established by much investigative and judicial practice, cannot be shaken.

In the meantime, differences between the concept of civil and criminal fault should be highlighted.

## VI. Renewed Approach to Civil Liability

The new Civil Code of RF introduced the new concept of fault in civil law. For the first time the essence and understanding of *culpa* was passed over to the level of legislator. The mostly authoritative theoreticians pointed out that the guilt as a legal notion is attributable to all branches of law and possesses qualities of generally fundamental category. As opposed to causation, assimilated to objective cause of events dominating reality, the fault was exclusively subjective notion, dependent on psyche of an actor whose illegal behavior has different mode of control, from light negligence to conscious intent. It is interesting to know that the above stated paradigm was applicable to also organizations represented simultaneously by number of human beings in position of directors, employees with power of attorneys, etc.

It was decided that in modern market economy the certain standards of behavior applicable to particular features of each person as basis for their responsibilities should be implemented. The Point 1 Art. 401 of Civil Code asserts that person is considered guiltless if he undertook all measures needed according to conditions of turnover and character of the obligation with all necessary degree of diligence and care to perform the obligation. The general formula opens the direction of development and new understanding of fault and the process of objectivization. Unlike criminal, administrative, other branches of law the affiliated notion of causation should become more susceptible to

individual impacts and effects as each human-being is a master of his reason and endowed with freedom of will.

Unlike civil law, criminal law does not recognize liability without fault. The guilt effects and defines the mode of punishment in criminal law, in civil law it happens only when specified in the law, such as in the case of infliction of moral damage, etc. The fault in criminal law is dependent on psyche and not objectified by a standard of conduct as in civil doctrine (Matveev, 1955, pp. 285–287; Kaspar, 2017, pp. 34–35). C*ulpa* consisting in negligence means real forecast of criminal results (Ugrekhelidze, 1976, p. 21) as opposed to civil law (Braginsky, 2011, pp. 720–721).

The dogma of guilt according to penal standards is premised on Marxist dialectics and philosophical determinism. In private law this concept appears to be outdated because the person has autonomy of will and he may mitigate the damage (Braginsky, 2011, pp. 720–721). When imposing punishment on accomplices of a crime, the degree of their participation in the emergence of a criminal result is determined in criminal law. In civil law, joint infliction of harm causes joint and several liability, and the degree of fault is important only at the level of recourse claims against each other (Epikhina, 2018, pp. 88–128). In criminal law there can be no more complicity after the moment of committing a crime (Malinin, 1999, pp. 270–271). In civil law, ordinary property damage to things may be of a sequential nature and would constitute joint infliction of damage, since repeated infliction of damage worsens the condition of an already damaged tangible object (Bley, 1963, p. 153). Inaction often does not need to establish a causal link in criminal law, or as the advanced theorists of criminal law science say, inaction is acausal (Malinin, 1999, pp. 219–248). In civil law, on the contrary, inaction is the main manifestation of fault, especially in contractual relations, and it is always necessary to establish its connection with the violation of subjective rights (Matveev, 1955, pp. 29–30).

A criminal offence is always accompanied with immoral behavior or a breach of morality. In civil law, fault appears apart from the latter. In criminal law there is a presumption of innocence and in civil law there is a presumption of fault (Sintsov, 2015, pp. 23–24), i.e., the

opposite assumption. The fault in criminal law is strictly separated from cause-and-effect relationship, it does not mitigate or affect it. In civil law, fault enhances or mitigates causality (Pirvits, 1895, pp. 128–132). The fault is a necessary precondition for socially dangerous behavior. There is no such concept in civil law that operates the standards of good faith, probity, care, diligence, etc. should apply. In civil law, fault is expressed in the omission of expected actions that manifest a lack of due care and diligence (Shershenevich, 1995, p. 36), whereas in criminal law — in the willingness and foreseeability of a criminal results. The carelessness in commercial law is characterized by a lack of care and diligence (Agarkov and Genkin, 1944, pp. 322–323). The fault in penal law originates in the mental area and then manifests itself externally (Naumov, 2004, p. 223). The *culpa* in punitive regulation may imply the wish for a bad outcome: murder, robbery, etc. The fault in civil law may mean a conscious ignoration of norms, prescriptions, prohibitions, contractual conditions.

## VII. Conclusion

The formula of Clause 1 Art. 401 of the Civil Code of the Russian Federation on the essence of fault, in force since 1995 in the Russian Federation, was ignored by representatives of Civil Law. This concept continues to be regarded as only a psychic attitude to the offense and its consequences. Meanwhile, the second paragraph of Clause 1 Art. 401 of the Civil Code of the Russian Federation ("A person shall be presumed innocent if, with the degree of care and diligence which was required of him given the nature of the obligation and the circumstances of the turnover, he took all measures to properly perform the obligation") implies the objectification of this condition of responsibility and a radical change in its meaning.

In criminal law, fault and cause-and-effect relationship are the main objects of proof, a necessary condition for responsibility and the central issue of any criminal procedure. In this field, the concept of fault also undergoes a natural legal evolution, but in criminal law it is much better developed than in civil law.

The paper compares such fundamental notions of civil law as liability and obligations. The acting Civil Code paradigm states, as amended and supplemented in 2015, that they might be no longer confused and should be regulated separately, which reflects logical development of civil law in line with European tradition. Long before it was set forth at the international level in Principles of European Contract Law in 2002. The legislative basic thereof was created by key formulas of Civil Code in Art. 307 in 1994. In 1940, M.M. Agarkov in his conceptual book "Obligations under Soviet Civil Law" said that differentiation between "Schuld" — "Debt" and "Haftung" — "Liability" had no significance for Soviet Civil Law (Agarkov, 1940, p. 45). This publication aimed at analyzing that principle renewed and revised by fundamental Civil Code provisions pinpoints that old dogma is worth to be reconsidered exclusively on the ground of new provisions of Civil Code of RF.

In present time the renewed and more precise significance should be attached to notion of obligation as duty to make a specific action with property objective embracing also personal values in the context of any economic aspirations in society. Unlike indications of earlier laws the obligations and corresponding rights to demand performance thereof should only emerge from limited number of grounds subject to extension only by Civil Code provisions. There are deals, torts, unjust enrichments, gestions, judicial acts, law enforcement resolutions. As a response to the isolation and closed nature of civil turnover, in which each asset should be traced through its transformation, reproduction, forms of essence evolution with uninterrupted identification of its owner, the obligation should be concreate, uniformly understood by its parties and as a rule should lead to conversion with the accrued value. According to the modern statutory paradigm in CC RF obligation right as asset enjoys legal regime different from those of corporate, restitutory and other relative rights as opposed to absolute rights.

Therefore liability claims should be based on other grounds, have different nature, aim and mode of settlement in contemporary Russian civil law.

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