Revija za evropsko pravo: XVIII (2016) 2-3.

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UDK 347.44(497.1)

UDK 347.426(497.1)

str. 35-51.

CONTRACT AND TORTS ACCORDING TO THE ACT ON OBLIGATIONS OF FORMER YUGOSLAVIA: A COMPARATIVE ANALYSIS

Abstract

In this article, the author maps out the origins and common legal concepts shared by both the Romano-Germanic family of laws and the common law family, implemented in the legal systems that inherited the Act on Obligations from the former Yugoslavia. The article offers a minute and comprehensive analysis of major legal concepts and classifications utilized in contracts and torts such as: the subjective vs. the objective (strict) liability, the proven vs. the presumed liability, the contractual vs. the delictual liability, the material liability vs. the non-pecuniary (emotional) liability etc.

Keywords: contracts, torts, damages, liability, delict, restitution.

1. Introduction

Contract and torts are two separate sources of obligations.[1] There is, however, some intersection between these two, given the concept of contractual liability, as

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[1] The syntagma (phrase) "*the law of obligations*" within the Romano-Germanic family of laws, and thus in legal systems in South-Eastern Europe carries the twofold meaning. On the one hand, it is understood as a collection (cluster) of general legal norms contained within the general legal acts–enactments, regulations, and bylaws–grouping as a separate sub-branch of law within a

distinguished from and together with the delictual (tortuous in the narrower sense), belongs to the larger category of torts. The subject matter of the law of obligations in all contries arising out of the demise fo the former Yugoslavia is regulated by the Act on Obligations or interchangeably used: the Act on Obligational Relationships (hereinafter "the Act on Obligations"; in BSC:[2] *Zakon o obligacionim odnosima*–ZOO) that was promulgated by the Federal Assembly of the former Socialist Federal Republic Yugoslavia in 1978.[3] The whole concept of

wider branch called *civil law* or *private law*. The main purpose of the law of obligations is to regulate a relation between a creditor and a debtor, a so-called obligational (creditor/debtor) relation. In an obligational relation (e. g., contractual, arising out of tort, or unjust enrichment etc.) the creditor has a right to require a specific course of conduct from the debtor, i. e., *giving* (transferring title to) real or personal property (Latin – hereinafter *L.* "*dare*, *do ut* des"), *performing a specific behavior* (service; *L.* "*facere, facio ut facias*"), *refraining from performance of a specific behavior* (*L.* "*non facere*"), of which the debtor is otherwise legally entitled to perform, or to *suffer creditor's or someone else's behavior*, of which the debtor is otherwise legally entitled to put a stop to. On the other hand, *the Law of Obligations* (N. B., written in capital letters) is a scientific legal discipline exploring and evaluating both obligational relations and *the law of obligations* as a separate sub-branch of law regulating them. As such, both obligations (creditor/debtor) and *the law of obligations* as a sub-branch of civil law play an outstanding role in an everyday life in every market economy including that of countries from former Yugoslavia. In absence of legally enforceable obligations, enforcement of market transactions taking place daily in a civilized society would almost be rendered impossible. The Law of Obligations, both as a scientific discipline and as a branch of law, is the central legal concept within the lager legal province (classification, category) of civil law belonging to Romano-Germanic families of laws, in contrast to the common law which has not created this classification during the centuries of its formation. For a civil law jurist, it is very difficult to comprehend that in the common law there is no such thing as law of obligations, and that the notion of *the obligation* (*obligatio*) has no adequate equivalent in the common law, and thus it is not easy to translate it precisely into English language. However, that does not mean that the common law has not created rules, legal institutions, and conceptions that serve the same functions that obligations serve in civil law legal systems. These common law rules can be found in separate branches of law such as – law of contracts, law of torts, law of unjust enrichment, quasi-contracts etc.

See about this in: R. David & J. E. Brierly, *Major Legal Systems in the World Today*,2nd ed., Stevens & Sons, 1978, p. 80.

[2] BSC is an acronym that stands for: Bosnian-Serbian-Croatian language accepted by the international community in Bosnia and Herzegovina, referring to the former Serbo-Croat language, which is now (debatable from the perspective of the Linguistics) divided into three or even for "different" national languages (Montenegrin has recently become a separate official language).

[3] Although a vast number of legal experts from the former Yugoslavia participated in the preparing the text of the Act on Obligations (resulting *inter alia* in a wealth of synonymic terms and expressions), significant part the draft of this enactment relied upon the "*Outline of the Act on Obligations and Contracts*", drafted by Professor of Law at the Belgrade School of Law, Mihailo Konstantinović. This *Outline* at the time provoked a wide professional and academic debate

contracts and torts in countries inheriting the Act on Obligations of former Yugoslavia is based upon the general prohibition of behavior causing (generating) damages, or the general duty of care (*neminem laedare*).[4] This principle is uttered in the "*Basic Principles*" of the Act on Obligations in the following wording:

"Everybody is obliged to refrain from acts which may inflict damages onto other."[5]

As such, this principle cannot be opted out by parties to obligation, as being part of domestic *ius cogens*. All rules further elaborating the basic principle of the general duty of care are set out in the SECTION 2 of the Act on Obligations, placed under the heading "*Causation of damages*".

2. Subjective versus Objective Liability

Relying upon the test (criterion) of fault, this Act foresees two kinds of liabilities for damages:

(1) The one predicated upon fault of the person causing the damages, dubbed otherwise *subjective liability*.

(2) The other based on causation itself that arises irrespective of the perpetrator's liability, dubbed otherwise *objective liability*.[6]

Subjective liability, or that based on fault is to be distinguished from *the objective liability*, prescribed by law in respect of *those possessing so-called a dangerous thing* (object) *or undertaking a dangerous business* (the one that incurs higher risk of causing injures compared to regular business or possessing a regular thing), under which the tortfeasor cannot exculpate himself by proving the injury took place without his fault. In a few terse provisions the Act on Obligations has encapsulated several decades of the gradually developing case law on the matter that had preceded its promulgation. Namely, it has instituted a so-called

among Yugoslav legal experts. Before the enactment, in many cases the courts applied the solutions offered by the Outline (*http://sr.wikipedia.org/wiki/Mihailo_Konstantinovi%C4%87*, last visit on Nov. 5, 2013).

4 This is clearly different from the traditional common law approach rooted in ancient forms of action ("*The forms of action we have buried, but they still rule us from their graves*" – Maitland, Cambridge, CUP, 1909. *See* in: *http://legacy.fordham.edu/halsall/basis/maitland-formsofaction.asp*, last visit on Jan. 29, 2015). Compare: F. Henry Lawson, *Tortious Liability for Unintentional Harm in the Common Law and the Civil law*, 1, B. S. Markesinis ed., 1982, p. 98.

5 The Art. 16 of the Act on Obligations.

6 *See* the Arts. 154, 158, 173 of the Act on Obligations.

"*presumption of causation*", under which the possessor of the dangerous thing or the one that performs a dangerous business shall be deemed liable for damages "*originating*" from a dangerous thing or business, which requires a lesser degree of causation than the term "*caused*" – meaning it is enough to prove a certain connection (link) between the injury and a dangerous thing or business, for him to be liable, unless he demonstrates that "… *the damages originate from a cause situated outside the* (dangerous) *thing* (or occupation)*, whose effects could not have been foreseen, avoided or removed*".[7]

3. Proven versus Presumed Liability

When it comes to subjective liability (based on the perpetrator's fault), the Act on Obligations has abandoned the traditional doctrine of *proven fault* inherited from the Austrian ABGB in favor of the contemporary doctrine of *presumed fault*, equally applied both in respect of contractual liability and delictual (tortuous) liability. This is how the position of an injured party has dramatically improved in terms of burden of evidence distribution in case of a possible litigation. Now, the injured party is under the duty to prove just the so-called *objective elements of liability* for damages caused:

(1) The injury.

(2) The tortfeasor's behavior (active or passive).

(3) The causal relation between these two elements.

The tortfeasor is under burden to prove that he was not guilty, i. e., that the resulting damages cannot be ascribed to his fault, as generated by *casus fortuitous* (accident) or *vis major* (act of God).

4. Material versus Non-pecuniary (Emotional) Liability

The Act on Obligations further distinguishes between *material (proprietary) v. non-pecuniary* (psychological, emotional) injuries and ensuing liabilities. When it comes to sanctioning the former, relying on the Romano-Germanic tradition, this enactment has promulgated *the principle of integral restitution* (*restitutio in integrum*[8]) requiring that the injured party be restored to the same position as if

[7] A show case for objective liability (the Art. 173): "Explosive material is a thing that creates an increased threat to the environment and therefore the person to whom the material belongs shall indemnify the explosion even where on here side there is no guilt for the damages caused."

[8] *See* about this in more depth in: J. Orsborn, *The Principle of Restitutio in Integrum in the Law of Contract Damages*, Thesis (MJur) – University of Auckland, 1992.

injuries have never been inflicted at all, all according to the market prices at the time the judicial decision (if litigation took place), preferring natural restitution[9] and specific performance over monetary damages in the process.[10] In contrast to this approach, the non-pecuniary (emotional) damages are to be sanctioned according to *equity*. This is how the drafters of the Act on Obligations codified the decades' long case law that had crystallized around the concept of non-economic, psychological damages, which is defined as: "*inflicting onto other physical or psychological pain or fear*".[11]

5. Contractual versus Delictual (Tortuous) Liability

One of the most important divisions in the law of obligations is the one distinguishing between contractual versus delictual liability, the test being the source of obligation from which the liability has originated. A party who breached an obligation shall suffer contractual liability, while if a party inflicts injuries onto other related to no prior obligation between them whatsoever, she shall be held delictually liable.

The main difference between these two categories is in the nature of sanction incurred: the debtor (the wrongdoer) under contractual liability is required to recover *foreseeable damages*,[12] unless he acted in gross negligence or with malicious intention – malice, in which case he shall be under the duty to recover the whole

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[9] Compare how the concept of natural restitution is firmly established in German law under §249, para. 1 of the BGB.

[10] See: J. Oosterhuis, Specific Performance in German, French and Dutch Law in the Nineteenth Century: Remedies in an Age of Fundamental Rights and Industrialisation, Martinus Nijhoff Publishers, 2011, p. 8.

[11] The Art. 200, para. 2 of the Act on Obligations:

(1) The non-pecuniary damage, in terms of the Act on Obligations, shall mean the physical pain, mental pain and fear. Therefore, an injured due to injury of (intangible) rights of personality monetary damages may be awarded only where the consequences and injuries manifested in one of the forms of non-pecuniary damage.

(2) And where some form of non-pecuniary damage emerged, an injured may be awarded financial damages only where the intensity and duration of pain and fear, or other circumstances the case justify it in order to recover his compromised mental balance.

(Conclusion No. 1, adopted at the conference of the Supreme Courts of the former Yugoslavia, Ljubljana on Oct. 15 and 16, 1986 – *Bulletin of the Supreme Court of RBiH* 1/87, pp. 53).

[12] T. L. Stark, *Negotiating and Drafting Contract Boilerplate*, ALM Publishing, 2003, pp. 223–224.

(integral) damages – exceeding those foreseen at the time of contract formation.[13] This implies the debtor has to place the creditor (injured) into the position as if the obligation (e. g., contract) had been properly performed, thereby fulfilling his *positive contractual interest* (differing form the *negative contractual interest*, which implies no prior relation between the parties involved[14]). In case of delictual liability, however, the tortfeasor is under the duty to recover *(integrally) all damages he inflicted*. In addition, if the injuries are a consequence of an intentional criminal offense, the damages shall include personal, emotional or affectional value of the objects damaged or destroyed.

Litigations over claims arising out of civil liability, particularly those relative to contractual damages, are the most commonplace in everyday life of the regional judiciaries. As explained earlier, civil liability may emerge and exist as a source of obligations autonomously and independently of other sources. As such, it is categorized as: delictual/tortuous liability. The tortuous (delictual) liability, thus, represents an independent source of obligations, in contrast to contractual liability that is chronologically preceded by a prior source of obligations. Contractual liability hence always arises as a remedy (consequence, legal sanction) for non-performing a preceding obligational relationship, which may be a contract, a *negotiorum gestio*, a negotiable instrument etc., thus functioning as a sort of material sanction for failure to live up to a (contractual) duty.

Both jurisprudence and comparative laws differ over two approaches as to how to regulate the relation between *tortuous v. contractual liabilities*: i. e., whether to implement either the dualistic concept or the monistic concept of civil liability.[15] According to the former, a legislator ought to differently regulate a category of contractual liabilities versus tortuous and also by separate sources of law, while the latter proffers that those two categories be dealt from within the same source of law, thus sharing the same legal principles, and treating differences by means of spelling out various exemptions.

The Act on Obligations adheres to a monistic approach, stipulating that damages from the contractual liability are to be regulated "*in accordance with the provisions of this Act relative to compensation of tortuous damages*". In other words, functioning as rules by default, prescriptions on the tortuous liability are to be implemented

[13] It is said the concept of forseeable damages has originated from the common law, incepted in the seminal British case of *Hadley v. Baxendale* of 1854 (*see* in: M. A. Eisenberg, The Principle of Hadley v. Baxendale, *California Law Review,* No. 80-3/1992, pp. 563–564.

[14] About this division see in: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CC0334:EN:HTML (last visit on Dec. 20, 2013).

[15] *Leksikon građanskog prava*, Nomos, Beograd, 1996, pp. 72–73.

as subsidiary (and, of course, *mutatis mutandis*) onto cases arising out of the contractual liability.[16]

Although being regulated in a monistic approach, the differences between these two types of civil liability are not negligible and can be summarized as follows:

(1) Under the tortuous (delictual) liability, an injured party has the right to be compensated *the entire (complete) damages (losses)*, including those that were caused by a tortuous behavior, but could not have been foreseen at the time this behavior had been perpetrated. In contrast, the contractual liability entitles a creditor to seek from the defaulting debtor *only damages foreseen at the time of contract formation*, i. e., those that parties predicted as a possible consequence of a breach of contract, taking into account facts and circumstances contracting parties were aware or should have been aware of in the course of dealing. Hence, the scope of indemnification arising out of the tortuous liability is wider than that of the contractual liability, unless a debtor who is answerable according to contractual liability acted in bad faith (with malicious intent or gross negligence), in which case he shall be under the duty to recover the entire damages (both foreseen and unforeseen).

(2) In most of comparative laws, when it comes to tortuous liability, a torfeasor's guilt is not presumed, since it (the *onus probandi*) is upon the plaintiff to prove it does exist. In contrast, all comparative laws relieve a plaintiff of this duty by assuming a debtor's guilt for non-performing a contract, where, in turn, he is under the burden to prove the opposite. In contrast to this dualistic approach, the Act on Obligations institutes a modern solution by treating the distribution of the burden of proof in the same manner: *in both cases the fault is assumed*, meaning that both debtors and tortfeasors are under the burden to demonstrate that the damages at hand were not attributable to their blame.

(3) Contractual liability *may be limited or excluded in advance by exemption clauses*, except for (malicious) intent or gross negligence.[17] Also, a contractual provision determining a maximum amount of compensation arising out of contractual

[16] The Art. 269 of the Act on Obligations. The rules devoted to contractual liability are placed within the Arts. 262 and 269 of the Act on Obligations, while tortuous liability is treated by the whole s. 2, entitled: "*Causing damage*".

[17] The Art. 265, para. 1 and 2 of the Act on Obligations:

And where an agreement stipulates a debtor's limited liability for compensating damages, a lender has the right to full compensation, if impossibility to perform a duty is caused intentionally or by gross negligence of his debtor.

(The decision of the Supreme Court of Croatia, Rev. 1097/88, of Jun. 22, 1988 – *Psp* 46 – 65).

liability is lawful, unless such an amount is not manifestly disproportionate, or something else is foreseen by the law in such a case. In contrast to its contractual counterpart, *the tortuous liability cannot be limited or exempted in advance*,[18] given the general principle of general duty of care (the prohibition of tortuous behavior– *neminem laedare*[19]) is imperative (mandatory) by nature.

(4) Although lacking contractual capacity, *a minor may be liable for damages arising out of tortuous behavior*. In contrast, in order to be contractually liable, a debtor ought to be endowed with partial contractual capacity at least. In other words, tortuous (delictual) and contractual capacity are acquired by natural persons at different ages.

(5) The duty to recover tortuous damages is due (mature) from the moment of its occurrence, implying that the statute of limitations begins to run the next day from the occurrence of damages respectively. The statute of limitations for the duty to compensate a contractual liability shall commence on the first day after the maturity of a non-performed duty.

6. Damages for Contract Invalidity (Resulting from: Avoiding a Contract, or Declaring It Null and Void or Non-existent)

The Act on Obligations expressly provides for the liability for contract invalidity: i. e., for avoiding an agreement, or declaring it null and void, or nonexistent, if this can be ascribed a party's fault. For all kinds of contract invalidity analyzed above, this enactment stipulates almost identical provisions regarding a party's liability for it. When it comes to liability for causing the agreement to be null and void it specifies:

A contractor who is guilty for concluding a null and void agreement is liable to his counterpart for the damages he suffered as a result of nullity and voidness, if the latter was not aware the cause for voidability existed (at the time of contract formation: GT).[20]

In respect of liability for avoiding an agreement, this enactment lays down the following:

[18] The Art. 265, para. 3 and 4 of the Act on Obligations.

[19] About this principle under the Italian law *see* in: *http://www.simone.it/newdiz/newdiz.php?dizionario=1&id=1151*, last visit on Sep. 21, 2013.

[20] The Art. 108 of the Act on Obligations.

A contractor, on whose part is the cause of voidability, is liable to his counterpart for the damages he suffers for their agreement being avoided, if the latter was not aware the cause for voidability existed (at the time of contract formation: GT).[21]

There is yet another provision relative to avoiding an agreement by a party with limited contractual capacity. If such a party induced his counterpart into signing an agreement through cunning, by reassuring him to possess the required contractual capacity, she shall be liable for damages resulting from avoiding such an agreement.[22]

From the wording and diction utilized in the cited provisions, one can infer the following distribution of *onus probandi* between parties involved, which might take place if litigation transpires as a result of concluding an invalid agreement. This *onus probandi* requires that a party suffering damages for contract invalidity is required to prove the following facts before a court of law:

(1) The (delictual/tortuous) damages that emerged as the result of invalidation, e. g., for costs and other expenses (*damnum emergens* – costs for air tickets, hotel bills, bookkeeping fees etc.) incurred for negotiating such an agreement, and lost opportunities for, e. g., missing to conclude another agreement with someone else (*lucrum cessans*).

(2) The counterpart's behavior prompting a plaintiff into signing an invalid agreement, or for counterpart's failing to warn the suffering party.

(3) The causal relationship between the damages and the counterpart's behavior.

Should a party, suffering the damages, succeed in proving these elements of liability, the only way the other party is to exculpate herself is to prove (because the opposite is presumed) that the suffering party was aware of the cause of invalidity at the time of contract formation. This is how the Ihering's doctrine of negative contractual interest has been consequently worked out by framers of the Act on Obligations regarding liability for damages resulting from contract invalidity.[23]

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[21] The Art. 115 of the Act on Obligations.

[22] The Art. 115 of the Act on Obligations.

[23] R. von Ihering, Culpa in contrahendo oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten und Vertragen, *Jahrbucher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, 4. Band, Berlin, 1861.

7. Concrete versus Abstract Damages

This division has a special significance for business transactions, although it is applicable for transactions among non-business persons as well. The test for this division is the way, i. e., the technique of quantifying damages by reference to a transaction which the injured party makes in substitution of a breached agreement.

The concrete damage is the one that is determined in each individual case. It takes place where a debtor compensates a creditor by replacing or repairing (i. e., by way of natural restitution) the damaged or destroyed thing (item), or by compensating a value of costs this creditor incurred by repairing or replacing them.

Compensating the *abstract damages* takes place in cases of contractual liability where an injured party resorts to a so-called *purchase for covering* or *sale for covering*, where a buyer (a consumer) or a seller (a vendor) first rescinds an agreement for non-performance (or substantially defective performance) and then buys/sells a subject matter commodity at a market place. The abstract damages in this case would represent the balance (difference) in the market value (the price) between the goods undelivered and those goods fetched by a buyer or seller to replace those undelivered. This damage is compensated (covered) by monetary restitution of the balance in respective prices. A creditor, who resorts to this remedy, thus unilaterally rescinding an agreement and seeking compensation for damages, is under the burden to prove the following facts in perspective litigation:

(1) To demonstrate the very existence of the agreement.

(2) The debtor's failure to perform.

(3) That he suffered the damages.

(4) The balance (difference) between the price determined by the agreement at hand and that of the real market price paid at the date of termination.

The Act on Obligations explicitly stipulates this technique of indemnifying a creditor:

1. When a sale is rescinded due to a breach of contract by a contractor, and the purchased commodity has the current (market) price, the other party may claim the balance (difference) between the price determined by the agreement and the current (market) price at the date of rescission of the contract in the market place in which the transaction has taken place.

2. If the market place in which the transaction has taken place has no current price of the commodity's worth, in order to calculate the amount of

compensation, one has to take into account the current price from the marketplace that could supplant the former, to be added up by the balance (difference) in transportation costs.[24]

When it comes to compensation of contractual damages, rather than relying on the principle of natural restitution (concrete damages), a purchase to cover or sale to cover (abstract damages) is the norm under the common law[25] and Scandinavian laws as well.[26] Under the influence of the common law, this approach has been adopted both under the ULIS and the CISG.[27] Under the Swiss law, the concept of abstract damages is within the purview of trade (business) contracts exclusively, while the BGB foresees this way of determining damages only in case of fixed contracts (where a deadline is an essential element of an agreement).[28]

8. Restitution

Unlike the common law and other comparative laws that rely upon monetary compensation as the sole remedy of indemnifying an injured party for damages she suffered,[29] deeply rooted in the tradition of Roman law, the Act on Obligations relies upon the doctrine *natural restitution* both in the domain of (tortuous/contractual) liability for damages, and that of the unjust enrichment. When it comes to the unjust enrichment, natural restitution takes place particularly where legal grounds terminate subsequent to what a party has

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[24] The Art. 524, para. 1 and 2 of the Act on Obligations. The division between concrete and abstract damage was expressly foreseen by the General Usages. Specifically, where a buyer canceled an agreement due to delay (default) of a seller, he could request of him "… *the difference between the agreed price of a good and that of the average price on the marketplace of the delivery on the first working day after the subsequent deadline that the buyer left the seller to perform his duty and, in case there is no such a deadline, because the seller notified him that he would not perform, then the first working day after the deadline of delivery*". *See* the General Usages of Trade in Goods no. 211). Reciprocal rights are recognized to a seller in case of buyer's delay (default) or his unexcused absence under the General Usages of Trade in Goods no. 212.

[25] K. Owens, *Law for Business Studies Students*, Cavendish Publishing Limited, London, Sydney, 1997, pp. 297-315.

[26] *Pravna enciklopedija*, Savremena administracija, Beograd, 1989, pp. 57.

[27] *See* the Arts. 75 and 76 of the CISG (*http://www.cisg.law.pace.edu/cisg/biblio/saidov6.html*#4, last visit on Sep. 21, 2014).

[28] Pravna enciklopedija, *ibid*.

[29] An exemption to monetary compensation under the common law is in the case of a continuing tort, or where harm is merely pending (threatened). In these cases, the common law courts are sometimes willing to grant an injunction, as in the English case of *Miller v. Jackson* ([1977] QB 966).

received from its performance, either where an agreement has been rescinded or declared void, or nullified by a judicial decision.

When it comes to compensating damages, the purpose of recovering a loss of property is the *integral/complete reinstatement* (*restitutio in integrum*) of the damaged property into such a state as if the damages had never occurred in the first place.[30] The Act on Obligations, therefore, stipulates the following:

Taking into account circumstances that have arisen after causing damages, a court shall award compensation in the amount needed to bring an injured party's financial situation to the condition as if it there had been no harmful acts or omissions.[31]

It is thus only natural that the duty to reinstate the damaged property is *to be borne by a torfeasor/debtor*. The law therefore requires the *loss be shifted* (transferred) from the injured party's property to that of the tortfeasor/debtor. In other words, the purpose of compensation as well as the entire institution of civil liability is to *reallocate damages* from the injured party's property to the one of the tortfeasor/debtor, hence achieving a *full-scale compensation*. Only if full restitution is impossible, i. e., it is not achievable to have the losses be *naturally recovered to the previous situation*, the damages shall be compensated according to their *market value in money* (*pretium communis*).[32] These are to be established *according to objective criteria*, rather than according to subjective criteria, i. e., to the value an injured party attaches to the lost property (*pretium singulare*).[33]

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[30] From the holding of judgment:

A creditor who is belatedly paid a monetary claim may, in addition to the default interest rate, request the unpaid ballance to the full damages, but only if specified and established. (The decision of the Supreme Court of the FBiH, no. 215/97, of Apr. 28, 1998).

[31] The Art. 190 of the Act on Obligations.

[32] K. Larenz, *Lehrbuch des Schuldrechts*, Band I: Allgemeiner Teil, 14, Auflage, München, 1980, p. 385. These notions were first coined by medieval theologians. *See* in: Luis de Torres, *Disputationum in secundam secundae D. Thomae: De iustitia*, vol. 2, Cardon, 1621, p. 762.

[33] The sole exception in the field of tort law being the case of so-called *affective value* to a thing (an item, say, an old family photograph) given by an injured party that has been destroyed or damaged as a *result of a criminal offense committed with intent*. *See* the Art. 189 of the Act on Obligations. The similar rule is placed within the §1331 of the ABGB. Compare the cases where this rule was implemented on the bases of the Act on Invalidity of 1946: the decision of the Supreme Federal Court of the former Yugoslavia, Gž. 1351/70, of Aug. 2, 1971, *ZSO*, book 17, volume. 1, decision no. 25.

Therefore, the Act on Obligations in the section under the title: "*Reinstating of the earlier situation* (*restitutio in integrum* – GT) *and monetary compensation*;" mandates the following:

(1) A liable person is under the duty to reinstate what had existed before the damages occurred.

(2) If reinstating the previous situation does not remove the damages completely, a liable person is under the duty to give the rest of the damages in money.

(3) Where reinstating an earlier situation (state – GT) is impossible, or where a court considers it is not necessary for a liable person to do so, a court shall order a liable person to pay an appropriate amount of money in compensation to the injured party.

(4) A court shall award to the injured a monetary compensation if she so requests, unless circumstances of the case justify reinstatement of the earlier situation.[34]

Although natural restitution is promulgated a paramount principle, it should be noted that, in practice, injured parties usually unilaterally request monetary compensation instead, and courts usually fulfill those requests. Monetary compensation is awarded in all cases where individual things (items), owed from an agreement, or in cases where an owner (holder) was deprived of their possession in an illegal manner, perished accidentally (or due to a *force majeure*).

It is also worth noting that the Act on Obligations expressly provides for that the duty to compensate damages is due (or becomes mature) from the "*the moment the damages occurred*".[35] Yet, in order to protect injured parties from inflation, "*The amount of compensation is determined at the time the court reached the decision, except in cases where the law mandates something else*."[36]

9. Conclusion

Sharing the common roots of western legal concepts, the whole notion distinguishing between of contracts and torts in countries inheriting the Act on Obligations of former Yugoslavia is based upon the general prohibition of behavior causing (generating) damages, or the general duty of care (*neminem laedare*). This Act foresees classifications similar to all paradigmatic comparative legal systems. For example, relying upon the test (criterion) of fault, the Act on

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[34] The Art. 185 of the Act on Obligations.

[35] The Art. 186 of the Act on Obligations.

[36] The Art. 189, para. 2 of the Act on Obligations.

obligations differs between two kinds of liabilities for damages, such as subjective liability vs. objective liability. Following suit of other modern codifications, this enactment has abandoned the traditional doctrine of *proven fault* inherited from the Austrian ABGB in favor of the contemporary doctrine of *presumed fault*, equally applied both in respect of contractual liability and delictual (tortuous) liability. The Act on Obligations further distinguishes between *material (proprietary) v. non-pecuniary* (psychological, emotional) injuries and ensuing liabilities. In respect of the former, relying on the Romano-Germanic tradition, this enactment has promulgated *the principle of integral restitution* (*restitutio in integrum*) requiring that the injured party be restored to the same position as if injuries have never been inflicted at all, all according to the market prices at the time the judicial decision (if litigation took place), preferring natural restitution and specific performance over monetary damages in the process. In contrast to this approach, the non-pecuniary (emotional) damages are to be sanctioned according to *equity*.

The Act on Obligations adheres to a monistic approach, stipulating that damages from the contractual liability are to be regulated "*in accordance with the provisions of this Act relative to compensation of tortuous damages*". In other words, functioning as rules by default, prescriptions on the tortuous liability are to be implemented as subsidiary (and, of course, *mutatis mutandis*) onto cases arising out of the contractual liability. When it comes to differing between contractual *vis a vis* delictual (tortuous) liability, the Act on Obligations provides for different nature of sanctions incurred respectively: in line with the root - source originating from the common law, the debtor (the wrongdoer) under contractual liability is required to recover *foreseeable damages,* unless he acted in gross negligence or with malicious intention – malice, in which case he shall be under the duty to recover the whole (integral) damages – exceeding those foreseen at the time of contract formation. Drawing from the doctrine of the famous German scholar Rudolf von Ihering, in indemnifying the injured party, the debtor has to place the creditor (injured) into the position as if the obligation (e. g., contract) had been properly performed, thereby fulfilling his *positive contractual interest* (differing form the *negative contractual interest*, which implies no prior relation between the parties involved). In contrast, in case of delictual liability (that includes the liability for contract invalidity: i. e., for avoiding an agreement, or declaring it null and void, or nonexistent, if this can be ascribed a party’s fault), however, the tortfeasor is under the duty to recover *(integrally) all damages he inflicted*. In addition, if the injuries are a consequence of an intentional criminal offense, the damages shall include personal, emotional or affectional value of the objects damaged or destroyed.

The Act on Obligations further distinguishes between *concrete damages* -- the ones that are determined in each individual case, taking place where a debtor compensates a creditor by replacing or repairing (i. e., by way of natural restitution) the damaged or destroyed thing (item), or by compensating a value of costs this creditor incurred by repairing or replacing them; vs. the *abstract damages*, taking place in cases of contractual liability where an injured party resorts to a so-called *purchase for covering* or *sale for covering*, where a buyer (a consumer) or a seller (a vendor) first rescinds an agreement for non-performance (or substantially defective performance) and then buys/sells a subject matter commodity at a market place.

Finally, unlike the common law and other comparative laws that rely upon monetary compensation as the sole remedy of indemnifying an injured party for damages she suffered, deeply rooted in the tradition of Roman law, the Act on Obligations relies upon the doctrine *natural restitution* both in the domain of (tortuous/contractual) liability for damages, and that of the unjust enrichment.

Zaključak

Obligaciono pravo u zemljama bivše Jugoslavije, koje su bez izuzetaka preuzele Zakon o obligacionim odnosima iz 1978. godine, pravi razliku između ugovorne i vanugovorne (deliktne) odgovornosti, zasnivajući ovu kategorizaciju na na opštoj zabrani prouzorokovanja štete (*neminem laedare*). Navedeni pravni koncepti dio su zajedničke pravne baštine, kako kontinentalnih (romansko-germanskh) pravnih sistema, tako i onih koji pripadaju tradiciji common law-a. Sve klasifikacije prava nadoknade štete, koje predviđaju pravni sistemi bivše Jugoslavije, prisutni su i u paradigmatskim komparativnim pravnim sistemima.

Načelo zabrane prouzrokovanja štete je jedno od najvažnijih načela našeg obligacionog prava. Pored ugovora, ustanova nadoknade štete je najvažnija u materiji obligacionog prava i u praksi predstavlja jedan od najčešćih izvora obligacija. Našim Zakonom o obligacionim odnosima je u "*Osnovnim načelima*" ustanovljena sljedeća prinudna norma: "*Svako je dužan uzdržati se od postupka kojim se može drugom prouzrokovati šteta*".

Sva pravila, koja se odnose na osnove odgovornosti za prouzrokovanu štetu i nadoknadu štete, razrađena su u odjeljku 2, pod naslovom "*Prouzrokovanje štete*". U Zakonu su predviđene dvije osnove odgovornosti za štetu: odgovornost koja se zasniva na krivici lica koje je prouzrokovalo štetu, tzv. *subjektivna odgovornost* i odgovornost koja se zasniva na samom prouzrokovanju štete, tzv. odgovornost bez obzira na krivicu ili *objektivna odgovornost.*

U materiji subjektivne odgovornosti Zakonom o obligacionim odnosima je u potpunosti napuštena tradicionalna koncepcija tzv. dokazane krivice kako u polju *ugovorne*, tako i u polju *vanugovorne (deliktne*) odgovornosti. Prema tradicionalnom sistemu, u domenu deliktne odgovornosti, oštećeni je bio dužan dokazati ne samo postojanje štete i uzročnu vezu između radnje štetnika i štete, već i krivicu štetnika. Umjesto toga, usvojena je koncepcija pretpostavljene krivice, prema kojoj se krivica štetnika pretpostavlja. Štetnik je dužan dokazati da je šteta nastala bez obzira na njegovu krivicu, tj. da je prilikom njenog nastanka uložio potrebnu pažnju koja se od njega zahtijevala u tom trenutku (pažnja dobrog domaćina, pažnja dobrog privrednika ili pažnja dobrog stručnjaka). Time je osjetno olakšan pravni položaj oštećenog, kome je preostalo dokazati samo objektivne elemente prouzrokovanja štete: samu štetu, radnju štetnika i uzročnu vezu između radnje štetnika i štete.

Zakon o obligacionim odnosima normirao je nove institute koji predstavljaju odgovor zakonodavca na ekonomski i tehnološki razvoj u društvu koje regulira. Tako je Zakonom ustanovljena mogućnost odgovornosti za nadoknadu štete bez obzira na krivicu, koja nastaje samom činjenicom prouzrokovanja štete. Takva odgovornost drugačije se naziva *objektivna odgovornost*, od koje se štetnik ne može osloboditi dokazivanjem da nije kriv za njeno prouzrokovanje. Zakonskim normiranjem ustanove objektivne odgovornost sublimirana je višedecenijska sudska praksa prije donošenja Zakona o obligacionim odnosima, koja je kreirana na slučajevima odgovornosti od opasnih stvari i opasnih djelatnosti. Naime, Zakonom je u korist oštećenih ustanovljena "*pretpostavka uzročnosti*", prema kojoj se lice koje je imalac opasne stvari ili vrši opasnu djelatnost smatra odgovornim, ukoliko šteta "*potiče*"od te stvari ili djelatnosti, "*izuzev ako dokaže da one nisu bile uzrok štete*". Imalac se oslobađa odgovornosti samo onda ako dokaže: "… *da šteta potiče od uzroka koji se nalazio van stvari, čije se djelovanje nije moglo predvidjeti, ni izbjeći ili otklonit.*

Zakonom je, pored odgovornosti za materijalne (imovinske) štetu, ustanovljena i odgovornost za nematerijalnu (neimovinsku, moralnu) štetu. Za razliku od *principa integralne odgovornosti*, koji se primjenjuje u slučaju materijalne odgovornosti i koji podrazumijeva obavezu štetnika da nadoknadi cjelokupnu štetu prema cijenama koje su važile u vrijeme donošenja sudske presude, zakonodavac je u slučaju odgovornosti za nematerijalnu štetu predvidio nadoknadu štete po osnovi *pravičnosti*. Time je kodificirana praksa naših sudova, koja je ipak jedno vrijeme, pod utjecajem marksističke ideologije, bila odbojna prema mogućnosti da se dosuđuje nadoknada za ovakav oblik štete. Nematerijalna šteta se definira kao: "*nanošenje drugom fizičkog ili psihičkog bola ili straha*".

Može se, ipak, primijetiti da je u Zakonu prenaglašena težnja da se zahtjevi za nadoknadu nematerijalne štete svedu u tada prihvatljive granice. Iz navedenih razloga predviđena je zakonska odredba, prema kojoj sud, prilikom odlučivanja o naknadi nematerijalne štete, treba voditi računa "… *o značaju povrijeđenog dobra i cilju kome služi ta naknada*" i o tome "*da se njome ne pogoduje težnjama koje nisu* *spojive sa njenom prirodom i društvenom svrhom*". Restriktivnost citiranih odredbi ne bi trebalo sprječavati sud da primjenjuje ustanovu nematerijalne štete u skladu da društvenim potrebama i svrhom koju treba postići u kontekstu suvremenih društvenih okolnosti.