Varađanin Tanja[*]
https://orcid.org/0000-0003-0070-3446
Stanković Marija[**]
https://orcid.org/0000-0001-7171-4439
Stanković Marko[***]
https://orcid.org/0000-0002-4238-479X

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DIFFERENCES BETWEEN CIVIL AND CRIMINAL LIABILITY

ABSTRACT: Liability denotes the capacity of a legally competent person to distinguish permitted from prohibited acts and accordingly to be held accountable for them. Beyond the term "liability" itself, there are numerous distinctions between civil liability and criminal liability. Practically, the purpose of liability is diametrically opposed. To be liable means to bear the appropriate consequences for one's conduct. Accordingly, whether referring to civil liability or criminal liability, the essence of both legal responsibilities lies in enduring the consequences arising from the actions of the liable party. The aim of this paper is to comprehensively and systematically, yet concisely and authentically, highlight the fundamental and most significant differences between these types of liability, also addressing, within civil liability, the distinctions between contractual and tortious (non-contractual) liability. Through reasoned explanations, derived conclusions, and detailed analysis of statutory provisions and judicial decisions, the key differences among these liabilities will be elucidated—an endeavor important for both theoretical scholarship and judicial practice.

[*] LLD, Assistant Professor, University Business Academy in Novi Sad, Faculty of Law for Commerce and Judiciary in Novi Sad, Novi Sad, Serbia, e-mail: tanja.varadjanin@pravni-fakultet.info
[**] LLD, Assistant Professor, University Business Academy in Novi Sad, Faculty of Law for Commerce and Judiciary in Novi Sad, Novi Sad, Serbia, e-mail: marija.stankovic@pravni-fakultet.info
[***] LLD, Associate Professor, University Business Academy in Novi Sad, Faculty of Law for Commerce and Judiciary in Novi Sad, Novi Sad, Serbia, e-mail: marko.stankovic@pravni-fakultet.info

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1. Introduction

Civil liability and criminal liability are two distinct forms of legal responsibility that may arise either concurrently or independently of one another. In earlier times, civil and criminal liability were understood as stemming from a single basis of responsibility, but this view has gradually been abandoned. According to Professor Dr. Jovan Jakšić, the wrongdoer was originally subjected to private vengeance, that is, the talion system; this was later replaced by a system of compensation, whereby, instead of physical retaliation against the offender, the injured party demanded a monetary sum depending on the circumstances of the case (Radišić, 2021, p. 207). Subsequently, the state assumed the role of determining the amount of compensation, whereby, over time, punishment and indemnification became progressively separated (Radišić, 2021, p. 207).

The distinctions between civil liability and criminal liability are both numerous and significant. Linguistically, they share the term "liability," which in its broader sense conveys a negative connotation for the person in question. To be liable means to bear the appropriate consequences. Accordingly, whether one refers to civil liability or criminal liability, the essence of both types of legal responsibility lies in enduring the consequences that constitute discomfort or hardship for the liable party.

Modern conceptions regard civil liability primarily as an obligation to compensate for damage, as derived from the statutory definition in Article 154(1) of the Law on Obligations (1978) (hereinafter "LOO"): "Whoever causes damage to another person is obliged to compensate it, unless he proves that the damage occurred without his fault." This provision merely specifies what is to be understood by "damage," without offering a conceptual definition a common approach, as most jurisdictions do not define "damage" per se within civil law. The divergence between criminal and civil liability also manifests in the nature of the norms they protect, since these norms are constructed through different regulatory methods (Salma, 2007, p. 455).

The objective of this paper is to comprehensively and systematically yet concisely and authentically highlight the fundamental and most significant differences between these two forms of liability, while also tracing, within the scope of civil liability, the distinctions between contractual and tortious (non-contractual) liability.

2. The Legal Nature of Civil and Criminal Liability

The prohibition on causing damage is a cornerstone principle of civil law. It is explicitly enshrined in Article 154 of LOO, which provides that "whoever causes damage to another person is obliged to compensate it." The statutory framework of civil law does not offer a conceptual definition of "damage," but only specifies what it encompasses. Damage is neither exhaustively enumerated nor are specific prohibited acts listed; rather, it is defined in broad terms. Nevertheless, the civil-law incrimination is not imprecise: its scope, although stated generally, is regarded as determined within sufficiently exact boundaries in the context of the prohibition on causing damage (Salma, 2007, p. 458). This primarily refers to damage as (a) diminution of another's property (actual loss) and prevention of its increase (loss of profit), and (b) the infliction of physical or psychological pain or fear on another person (non-material damage) (Article 155 LOO).

There are two categories of civil liability: contractual liability and non-contractual (tortious) liability. Although our law distinguishes non-contractual from contractual liability for damage, it brings them closer by providing that most of the provisions governing compensation for non-contractual damage apply mutatis mutandis to compensation for contractual damage (Knežević, 2010, p. 54). Contractual liability arises from breach of a contractual obligation, whereas non-contractual liability stems from the general principle prohibiting one party from causing damage to another. In contractual liability, a legal relationship existed between the parties prior to the damage, while in non-contractual liability no pre-existing legal relationship is required between the tortfeasor and the injured party (Radovanov, 2008, p. 230).

By contrast, criminal liability is founded on the fundamental maxim *nullum crimen, nulla poena sine lege*, meaning that criminal offences and their penalties are exhaustively prescribed by law, thus limiting the scope of criminal liability (Radišić, 2021, p. 207).

Accordingly, civil and criminal liability are treated as two distinct forms of legal responsibility. They may arise in parallel from the same event resulting in the cumulation of delicts and of liability (Radišić, 2021, p. 207). A common example in theory and practice is theft, which gives rise to both criminal and civil liability: the offender is prosecuted criminally, and because the act diminishes someone's property, the same act also grounds a civil claim for compensation. Likewise, certain events may not constitute criminal offences yet still cause damage, thereby generating civil-law liability (Radišić, 2021, p. 207).

In legal doctrine, the principal differences in civil liability are identified with respect to (a) the incrimination or unlawfulness of the tortfeasor's act, (b) the degree of liability, (c) the prerequisites for liability, and (d) the consequences following the commission of a criminal offence or civil tort.

Within the sphere of contractual versus non-contractual liability, differences manifest in the basis of liability, the identity of the liable subject, statutory regulation, underlying principles, the extent and scope of compensable damage, and the applicable statutes of limitations for claims.

3. Liable Parties

Having previously addressed incrimination, this section offers only a brief overview and highlights the fundamental distinction between civil liability and criminal liability in the context of the principle of enumeration. Accordingly, criminal liability is narrower in scope, since criminal offences are exhaustively defined by statute. Under Article 14(1) of the Criminal Code (2005) (hereinafter "CC"), a criminal offence is an act that (a) is prescribed by law as a crime, (b) is unlawful, and (c) is committed with culpability. There can be no criminal offence if unlawfulness or culpability is excluded, even if all statutory elements are otherwise met (Article 1(2) CC).

By contrast, civil liability is broader: the range of civil delicts is far greater and is not confined to an exhaustive list (Radovanov, 2008, p. 232). Civil liability arises not only from breaches of legal provisions but also from violations of moral norms or customary practice.

In contrast to civil liability, criminal liability is governed by the rule that, "if there is no unlawful act punishable by law, then there can be no criminal liability" (Radovanov, 2008, p. 232). Civil liability, however, does not necessarily require the unlawfulness of the act. Thus, pursuant to Article 154(2) of the LOO, one is liable for damage caused by things or activities that pose an increased risk to the environment regardless of fault (objective liability).

Within civil liability, contractual and non-contractual (tortious) liability differ in that non-contractual liability is governed by imperative norms, whereas contractual liability is regulated by dispositive norms (Radovanov, 2008, p. 230). As Antić observes, "the key distinction between contractual and non-contractual liability for damage lies in the character of the norms that govern the field of liability" (Antić, 2014, p. 457). Non-contractual liability arises from the failure to observe a legal obligation that is, conduct contrary to a legal norm causing damage to another (Loza, 1981, p. 164). Contractual

liability, by contrast, results from breach of a pre-existing contractual obligation, causing harmful consequences to the other contracting party (Loza, 1981, p. 164). In statutorily permitted cases, contracting parties may, by virtue of dispositive norms, either tighten or entirely exclude civil liability for example, Article 486(1) of the LOO allows the parties to limit or exclude the seller's liability for material defects in the sold item.

One of the most salient differences between civil liability and criminal liability lies in the identity of the liable party. In criminal law, liability is strictly personal and individual (Radišić, 2021, p. 208): no one other than the perpetrator of a criminal offence may be held criminally responsible. Only the person who committed the offence can incur liability (Đurović & Dragašević, 1980, p. 140). In order to hold someone liable for a criminal offence and impose a criminal sanction (penalty), it is necessary to establish the elements of criminal liability, namely, capacity and fault. "Thus, on the basis of fault a unique relationship is formed between the criminal offence, its perpetrator, and the criminal sanction; and, when capacity is also demonstrated, a complete criminal-law relationship is achieved" (Čejović & Kulić, 2014, p. 236).

In civil liability, the responsible parties vary according to whether the claim is contractual or tortious. Under contractual liability, only legally competent persons can be held liable, since one prerequisite for a valid legal transaction is the parties' legal capacity. In tortious liability, however, even persons lacking legal capacity may be held liable for damage.

In the realm of non-contractual liability, i.e., tortious liability (terms used synonymously), the LOO prescribes cases of vicarious liability for the acts of another, as well as special instances of liability. As a general rule, the tortfeasor is liable for damage arising from his own actions. Nevertheless, the LOO provides for situations in which one person may be held liable for the acts of another (Section 3 LOO).

According to Oliver Antić, whose view is grounded in the provisions of the LOO, the classification of vicarious liability encompasses liability for the mentally ill and those of impaired mental development; parental and guardianship liability; liability for agents; liability of legal persons toward third parties; and employer liability. What is common to all forms of vicarious liability is that they constitute objective liability in a broader sense (Antić, 2014, p. 486). Accordingly, there arises a separation between the tortfeasor and the party liable for another, such that three distinct roles emerge: the injured party, the tortfeasor, and the vicariously liable person (Antić, 2014, p. 486). Non-contractual liability is broader than contractual liability because, in contractual liability for breach of a contractual obligation, namely for

non-performance or delay in performance, the other contracting party alone is liable, whereas under non-contractual liability the circle of potentially liable persons is wider.

In conclusion, the liable subjects under civil and criminal liability are strictly prescribed by law, with clear, exact, and fundamental differences between them.

4. Degree of Liability – Fault

Fault (lat. culpa) is understood broadly as "guilt." Civil law distinguishes between liability based on fault (subjective liability) and liability irrespective of fault (objective liability). The subjective theory seeks to explain why the tortfeasor caused harm, focusing on the tortfeasor's internal attitude toward the injurious act. In contrast, the objective theory compares the tortfeasor's conduct to the legal norm and assesses whether that conduct deviates from what is expected.

In both legislation and legal doctrine, fault is further classified as presumed fault versus proven fault (Radovanov, 2008, p. 262). This distinction underpins another difference between contractual and non-contractual liability: contractual liability operates on the basis of presumed fault, whereas non-contractual (tortious) liability incorporates both presumed and proven fault.

Under criminal law, fault requires the perpetrator's psychological concurrence with the criminal act and a specific mental attitude toward its consequences (Čejović & Kulić, 2014, p. 172). In criminal proceedings, fault must be proven, and the accused enjoys a presumption of innocence until proven otherwise.

A key distinction between civil and criminal liability lies in the degree of fault. Legal doctrine divides fault into intent (*dolus*) and negligence (*culpa*). "*Dolus is further subdivided into dolus directus and dolus eventualis"* (Antić, 2008, p. 456). Direct intent exists when the tortfeasor desires the harmful consequence and is fully aware of it. Conditional intent (dolus eventualis) arises when the tortfeasor foresees the possible harmful outcome, does not wish it, but nevertheless accepts it and persists in the dangerous conduct (Antić, 2008, p. 456).

By contrast, negligence may be gross or ordinary. Gross negligence occurs when the tortfeasor fails to act as a reasonably careful person would and behaves in an extremely careless manner (Đorđević & Stanković, 1974, p. 325). Ordinary negligence exists when the tortfeasor fails to act

as a reasonably careful person but without reaching the threshold of gross negligence (Đorđević & Stanković, 1974, p. 325).

In civil liability, the tortfeasor may be held liable for negligence per se, whereas in criminal liability negligence gives rise to liability only if expressly provided by law. In criminal law, the mental element manifests either as intent or as negligence (Čejović & Kulić, 2014, p. 172). Under Article 25 CC, an offence is committed with intent when the perpetrator is aware of and wills the act, or foresees its possibility and reconciles with it. Under Article 26 CC, an offence is committed by negligence when the perpetrator either foresees the possibility of committing the offence but recklessly assumes it will not occur or when the perpetrator fails to foresee the possibility, despite it being objectively foreseeable under the circumstances.

Accordingly, intent in civil liability and intent in criminal liability are similarly defined, while a major difference lies in the treatment of negligence: Article 22(2) CC provides that criminal liability for negligent offences exists only where the law so provides.

Finally, another distinction from criminal liability is the existence of an institute of divided liability in civil law. Conversely, under Article 33 CC, criminal law prescribes that where two or more persons jointly commit an offence whether by acting with intent together or by one person's intentional act materially contributing to the offence they are each punishable as principals. Thus, under the Code, an accused cannot be partially guilty: one either is guilty of the offence or is not, even when multiple persons participate in its commission.

5. Sanctions

One of the fundamental differences between civil liability and criminal liability lies in the consequences that follow the occurrence of a harmful event whether a civil tort or a criminal offence. Criminal law places emphasis on the degree of fault, whereas civil law determines the amount and scope of damages regardless of fault.

"In criminal law, the measures applied against perpetrators of criminal offences are called criminal sanctions." Under Article 4(1) of the CC, criminal sanctions are exhaustively listed as penalties, warning measures, security measures, and educational measures. The Code also prescribes the purpose of criminal sanctions, namely the protection of individuals and other fundamental social values to the extent necessary to suppress offences. The aim of a particular sanction depends on its type, and the court assesses each

case individually. Individualization of criminal sanctions means tailoring the sanction to the particular characteristics of the offender and the offence, with a view to fully achieving the purposes of criminal sanctions (Čejović & Kulić, 2014, p. 287). Thus, factors such as the length of imprisonment or the amount of a fine hinge significantly on the offender's mental attitude toward the offence whether they were aware of and willed the act and its consequences (Salma, 2007, p. 458).

By contrast, LOO is founded on the principle of full compensation for damage (Salma, 2007, p. 458). The quantum of damages equals the amount of compensation. Historically, the measure of compensation depended on the form of fault: if the tortfeasor caused damage intentionally, they were liable for both actual loss and loss of profit; if the damage was caused by negligence, liability was limited to actual loss and did not extend to loss of profit.

Modern doctrine has abandoned this fault-based assessment and holds that the quantum of damages is determined independently of the degree of fault. Article 155 LOO specifies what constitutes "damage," entitling the injured party to compensation for both material and non-material harm. The injured party may claim actual loss and loss of profit. Compensation for material damage is principally awarded in natura, or, if that is not possible, in monetary form. If the injured party suffers complete or partial incapacity for work, loses earnings accordingly, incurs permanently increased needs, or has their prospects for further development and advancement destroyed or diminished, the liable party must pay an annuity as compensation (Article 195(2) LOO). By contrast, non-material damage is ordinarily quantified in monetary terms. However, Article 199 LOO provides that, in cases of infringement of personality rights, the court may order, at the tortfeasor's expense, publication of the judgment or correction, withdrawal of the offending statement, or other measures necessary to achieve the purpose of compensation.

In the context of contractual liability, the creditor is entitled to actual loss and loss of profit, provided that the debtor, at the time of contracting, ought to have foreseen those losses as possible consequences of breach (Radovanov, 2008, p. 231).

6. Concluding Remarks

It is concluded that the differences between civil liability and criminal liability are highly demanding, inexhaustible, and complex; they can always be analyzed in greater detail. Both forms of liability may arise in parallel or independently of one another.

Today, we witness an increasing frequency of parallel legal liabilities due to technical-technological developments and innovation projects. Likewise, traffic accidents the most common grounds for both civil and criminal liability occur ever more often. A single course of conduct may give rise to criminal liability while simultaneously constituting the basis for a civil claim for damages.

Pursuant to Article 13 of the Law on Civil Procedure (2011), a court deciding on civil claims is bound, with respect to the existence of a criminal offence and the offender's criminal liability, by the final judgment of the criminal court in which the accused is convicted.

A noteworthy and frequent example in case-law is driving with an intoxicated driver. As held by the Appellate Court in Belgrade, case no. Gž. 5085/2012 of 6 December 2012:

"The injured party who consented to be driven, knowing that the driver was intoxicated, contributed to the occurrence of harmful consequences in the traffic accident caused by the intoxicated driver."

The reasoning continues:

"According to the facts established at first instance and the records in the criminal file, the traffic accident was preceded by socializing between the prosecutor and S. S., during which both consumed alcohol immediately before the incident. Given that the prosecutor who testified as the injured party undoubtedly knew that S. S. had consumed alcohol and did not possess a driving licence, by agreeing to ride with him in that condition he consciously assumed the risk of possible harmful consequences. Accordingly, the degree of the prosecutor's contribution to the resulting harm is assessed at 40 percent."

Thus, the civil court and the criminal court weigh the relevant circumstances differently in order to reach the most just and correct decision. These circumstances vary according to each individual case.

Accordingly, if the criminal court convicts multiple persons equally for the same offence that also caused damage, the civil court is not bound by that decision when determining the amount and scope of damages. It is entirely possible for a person to be acquitted of criminal liability yet still held civilly liable for the property damage suffered. In relation to a civil claim for damages arising from a criminal offence, the criminal court may either rule on the claim itself or refer the injured party to file a separate civil action.

Varađanin Tanja
Univerzitet Privredna akademija u Novom Sadu, Pravni fakultet za privredu i pravosuđe u Novom Sadu, Novi Sad, Srbija

Stanković Marija
Univerzitet Privredna akademija u Novom Sadu, Pravni fakultet za privredu i pravosuđe u Novom Sadu, Novi Sad, Srbija

Stanković Marko
Univerzitet Privredna akademija u Novom Sadu, Pravni fakultet za privredu i pravosuđe u Novom Sadu, Novi Sad, Srbija

RAZLIKE IZMEĐU GRAĐANSKOPRAVNE I KRIVIČNOPRAVNE ODGOVORNOSTI

APSTRAKT: Odgovornost predstavlja sposobnost poslovno sposobnog lica da razlikuje dozvoljene od nedozvoljenih radnji i da shodno tome, za njih i odgovara. Osim reči „odgovornost" razlike između građanskopravne i krivičnopravne odgovornosti su mnogobrojne. U praktičnom smislu, smisao odgovornosti je dijametralno suprotan. Biti odgovoran znači snositi odgovarajuće posledice za svoje delacije. Shodno tome, bilo da je reč o građanskopravnoj odgovornosti ili pak o krivičnoj odgovornosti, suština obe pravne odgovornosti jeste u trpljenju posledica koje su nastale delacijom odgovornog lica. Cilj rada je da se na sveobuhvatan i sistematski način, koncizno i autentično ukaže na osnovne i najvažnije razlike predmetnih odgovornosti provlačeći, u okviru građanskopravne odgovornosti, i pojedine razlike između ugovorne i deliktne (vanugovorne) odgovornosti. Argumentovanim objašnjenjima i izvedenim zaključcima, kao i detaljnom analizom zakonskih rešenja i rešenja iz sudske prakse, ukazaće se na ključne razlike predmetnih odgovornosti, a što je od važnosti kako za teorijsku, tako i za sudsku praksu.

Ključne reči: *građanskopravna odgovornost, krivičnopravna odgovornost, ugovorna odgovornost, vanugovorna odgovornost.*

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