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The bases of clearing of the owner of source of the raised danger from the duty of harm compensation

Article is devoted to the bases of release of the owner of a source of the increased danger from a duty of compensation of harm. The main problems of compensation of the harm caused by a source of increased danger are considered. The author analyzes the existing civil legislation, brings up a question of value of fault of the causing which have injured in cases to it harm the owner of a source of the increased danger. The subjective bases of liberation of the owner of a source of the increased danger from compensation of harm are investigated. Are exposed to the analysis also various dock-trinalnye of provision on the main issues concerning delicate obligations.

Key words: the Civil legislation, compensations of the harm, compensation of harm, caused spring the heightened danger, release of owner spring heightened danger from compensation harm, the delictual obligation.

In modern conditions in connection with development of numerous technological processes, both in a society, and in a science there is a considerable quantity of sources which create danger, as for harm-doing of the person, and to his property by the corresponding sources. Accordingly, also the quantity of cases of occurrence of obligations, owing to harm-doing by the given objects increases. There is a necessity to establish who will have the duty to bear consequences of such damage: the one who has caused it, the one who has incurred it, or probably any third party which wasn't harm-doer or victim. The appreciable place among set of various legal means by means of harmful consequences can be smoothed down, belongs to the obligation arising owing to a trespass by a source of raised danger. The quantity of infringements of the rights of citizens, despite accepted by a society and the measure state, unfortunately, still remains high.

Thus, the special attention should be given to the mechanisms, procedure and ways of restoration of the broken rights of the victim, compensation of the harm caused by a source of raised danger to that the given kind of obligations is intended to serve.

The problem of compensation of the harm caused by a source of raised danger, is rather original, it is among «private» civil-law problems, however value of its correct statement and the decision is beyond civil law, and its urgency is defined by relative density of corresponding civil-law disputes in judiciary practice. The harm-doing usually is allocated with a source of the raised danger in special infringement that as actually mechanism of a harm-doing, and accordingly conditions of occurrence of the obligation from a harm-doing, possess considerable differences which are reflected for a long time in the civil legislation, as explains necessity of allocation of the specified case for a special version delinquent obligations [1, 5].

The civil-law obligations, as a rule, arise from the contract or other lawful actions. Exactly delinquent obligations concern to obligations, the bases of which occurrence act others, more often wrongful actions. The basis of their occurrence is the harm-doing fact of one person to other person.

According to the Civil Code legal bodies and citizens which activity is connected with the raised danger to associates (the transport organizations, the industrial enterprises, buildings, owners of vehicles, etc.) are obliged to compensate the harm caused by a source of raised danger if won't prove that harm has arisen owing to insuperable force or intention of the victim (art. 931 of CC of the RK) [2, 354].

According to article 919 of Civil Code of the Republic of Kazakhstan: «The harm caused in a condition of necessary defense if its limits haven't been exceeded isn't subject to compensation». Considering the given norm, it is necessary to pay attention that here the legislator doesn't give definition of necessary defense, its limits. Therefore it is logical to address for this point in question mastering to the General part of the Criminal code of the Republic of Kazakhstan. Also it is necessary to note, following logic of the legislator that if limits of necessary defense harm is subject to compensation in full will be exceeded.

A little on other the question on responsibility for the harm caused in a condition of emergency is authorized. The general rule here says that the harm-doer is obliged to compensate such harm. At the same time, it is necessary to note certain exceptions of the rule set forth above which application is given to the discretion of court (art. 920 of CC of the RK).

The law has the legal facts at presence of which the owner of a source of the raised danger can be in corresponding cases is relieved from responsibility for the done harm. The basis of clearing, the owner of a source of the raised danger from a duty to indemnify caused suffered a loss is the concrete legal fact with which norms of the law connect or full dropping of the specified duty, or proportional reduction of its property volume [3, 59].

Proceeding from this definition and sense of the art. 931 and 935 of CC, all considered bases can be subdivided on two groups:

1) The legal facts, certainly, and completely releasing the owner of a source of the raised danger from harm compensation,

2) That which can be the basis for clearing of responsibility at the discretion of court. The intention of the victim and action of insuperable force concern to the first group.

Speaking about intention and rough imprudence of the victim, the legislator means not an internal mental condition of the given person, and quite concrete actions characterized from the subjective side by fault (in the form of intention or rough imprudence) of the victim.

1. The insuperable force is named by one of the first bases of clearing of responsibility before by suffered the owner of a source of the raised danger.

The category of insuperable force is one of the most general legal concepts. The experts of the civil, the criminal, the administrative, and the labor law operate with this concept.

The given problem deserves independent profound research. It is necessary to notice that more correct, those statements which authors consider the insuperable force as the objective factor which causally has been not connected with activity of the owner of a source of the raised danger are. At the same time opinions according to which actions of the «third parties» which are not consisting with harm-doer and victims in certain legal relationship concern to insuperable force category are represented unreasonable.

Great bulk of the phenomena concerning to the insuperable force, it is necessary to see in any spontaneous phenomena as development of the last in a certain measure though is expected by a science, but practically it is not supervised yet.

It is represented expedient to agree with opinion of authors which understand as insuperable force the objectively-casual, causally not connected with actions of the owner of a source of the raised danger and owing to it the unpreventable circumstance which is a consequence of these or those phenomena [4, 56].

The characteristic of the insuperable force in the new CC has undergone some changes: if on former CC the insuperable force was considered as event, that is as the circumstance which is not dependent on will of people now it is qualified as circumstance that allows to bring under concept of insuperable force not only natural, but also the social phenomena (military operations, social and economic and international conflicts etc.). It is necessary to mean that insuperable force represents itself as external circumstance in relation to harmed activity. If it is a question about any internal in relation to the activity which has harmed, circumstance (for example, about impossibility quickly to extinguish a car great speed) it won't be considered any more as insuperable force [2, 355]. Harmful properties of the source of the raised danger aren't the insuperable force.

2. Intention of the victim. Article 935 of CC defines consequences of cases when of harm occurrence it is guilty not only harm-doer, but also the victim. Article 453 of CC of KazSSR spoke about influence on harm compensation only to rough imprudence of the victim and didn't mention its intention. Unlike it p.1 of art. 935 of CC provide that the harm which has arisen owing to intention of the victim isn't subject to compensation. In this case it doesn’t matter, harm is done by usual actions or the activity creating raised danger to associates. The intention of the victim is understood as the realized desire of the person that harm has been done to it. Thus the person should understand value of the actions and must be capable to supervise over them.

The approach of harm caused by deliberate actions of the victim, rather seldom, but should be considered among the bases of clearing of the owner of a source of the raised danger from responsibility. Actually the majority of considered cases are in a direct connection with alcoholic intoxication of the victim, and also some special factors causing mental depression (for example, the big personal grief). It is clear that in similar cases the owner of a source of the raised danger should be relieved from responsibility before suffered, and in case of destruction of the last — before those to whom he has been obliged to deliver the maintenance. Thus it doesn’t matter, what concrete motives of fulfillment of such actions by victim.

The rough imprudence of the victim, a wrongful taking a source of the raised danger the third party, a property status of harm-doer and harm-doing in an emergency condition concern to the second group of the

bases at presence of which the court can relieve from the owner of a source of the raised danger of responsibility for the done harm.

3. The rough imprudence of the victim it is such behavior when he ignores safety rules elementary and obvious to all [5, 37].

Now two opposite points of view were outlined in interpretation of positions of the law about rough imprudence of the victim as the basis of clearing of responsibility in the cases provided by art. 931.

According to representatives of one group of the theory and practice, art. 935 can be applied simultaneously with art. 931 in full; the basis of clearing of harm compensation in such cases can be not only insuperable force and intention of the victim, but also and rough imprudence of the last [6, 118].

The essence of the opposite concept is reduced to the following. In art. 931 the legislator, speaking about the subjective bases of outright release of the owner of a source of the raised danger from harm compensation, names only intention of the victim. As to rough imprudence it shouldn't be carried to such bases as in art. 931 it isn't specified. The admissibility of application of art. 935 in full to the facts of harm-doing are excluded by the owner of a source of the raised danger. Article 935 giving possibility to release the harm-doer from a duty to compensate harm in view of rough imprudence admitted by the victim, isn't subject of wide-spread interpretation. The rough imprudence admitted to victims at causing to it of harm by a source of raised danger, can form the basis only for corresponding decreasing of the size of harm subject to compensation, but not for refusal in such compensation in general. Other interpretation of the art. 935 would be in the contradiction from art. 931 which doesn't provide possibility of clearing of responsibility on compensation of the harm caused by a source of raised danger, on the bases of rough imprudence of the victim » [7, 109].

It is thought that such detailed statement of statements of supporters of the second of named above the points of view is caused by that the given concept is disputable. Correct the opinion of those authors which consider is represented that rough imprudence of the victim can not only partially reduce the size of compensation, but also to be the basis to outright release of harm-doer from responsibility [8, 79].

Validity of such interpretation of the art. 931 and art. 935 of CC is seen from the following.

First, it is necessary to pay attention that neither in art. 931, nor in art. 935, as well as in all other articles chapter 47 of CC of the RK, aren't made any direct or even indirect instructions concerning possibility or necessity of restrictive interpretation and application of art. 935 to cases of harm-doing by the owner of a source of the raised danger.

Secondly, positions of art. 935 are the general norm, and as specified above withdrawals in ch. 47 of CC it is not established, so far as action of given article extends on all without an exception the facts of harm-doing provided in the given chapter.

Thirdly, art. 935 text contains the positive and directly expressed instruction concerning necessity (in the presence of certain conditions) clearings of harm-doer from a duty of its compensation. These instructions can't be ignored. The law establishes that «the size of compensation should be reduced or harm compensation should be refused» when rough imprudence of the victim promoted to occurrence or harm increase. Imperative character of the given instruction of the law doesn't cause doubts. Owing to it, and also in the absence of any withdrawals stipulated by the law, art. 935 entirely extend on the facts provided by art. 931 of CC.

Fourthly, establishing the norm concluded in art. 935, the legislator recognized that a harm-doing can have both guilty and innocent character. Demanding the account of fault of the victim, the law at the same time attaches essential significance and fault of harm-doer. In other words, the law demands known measuring of behavior of the persons participating in the fact of harm-doing, as in a role of harm-doer and the victim.

The resulted positions shouldn't be understood in the sense that rough imprudence of the victim is considered in the legislation the same unconditional basis to clearing of a duty of compensation of harm what it was in earlier operating civil codes of 20th years. The position of CC establish more flexible regulation, and it allows court to pass more exact decision, proceeding from the account of all specificity of the fact of harm-doing and features of behavior of harm-doer and the victim. The width of a range of application of art. 935 shouldn't cover, of course, and that fact that under the current legislation rough imprudence isn't the absolute basis automatically releasing harm-doer from responsibility. The given grounds are both conditional and relative, however both that and another doesn't transform rough imprudence only into the basis of the mixed responsibility as harm is caused by the owner of a source of the raised danger.

For recognition of actions of the victim as made as a result of rough imprudence (regardless to degree of last) presence of certain objective and subjective conditions (elements) is necessary. With reference to the

objective side of behavior of the victim to which person or property the damage is caused it is necessary for to pay attention to following moments [9, 47].

First, roughly careless action only then can be considered as the basis for art. 931 application in aggregate from art. 935 when, actions of the victim are in a causal relationship with the come harm. At its absence, naturally, can't be and speeches about the account of fault or other subjective moments characterizing behavior of the specified legal subject. So, one of the most widespread reasons of approach of harm is fulfillment by victims of the most various imprudent actions as a result of alcoholic intoxication. However from this it is not necessary to do a conclusion that any action, any behavior and a condition of the victim is in a causal relationship with the come harm.

Secondly, for reference of roughly careless actions of the victim to number of the bases for application of art. 935 of CC it is necessary, that along with a causal relationship the given actions were unlawful for otherwise they in general can't be carried to number of the guilty. Thus, of course, it is not necessary to represent the case so that the victim, certainly, should break norm of civil law as there is a speech about property occupier's liability of a source of the raised danger; no, actions of the victim norms administrative, the labor law etc. can be broken.

Thirdly, at the question decision about relevancy of actions of the victim to number roughly careless essential value has the account concrete actual (instead of assumed) conditions in which there was a victim, and its dynamics. The matter is that the same action in various conditions, in the presence of unequal conditions of its formation and development can receive far not an identical legal estimation. In one cases action of the victim can be recognized by made on «simple imprudence», in others in connection with specific conditions it can be qualified as «roughly careless» [10, 119].

Thus, definition of a sort of imprudence of behavior of the victim assumes an establishment of a causal relationship with the come harm and unlawfully signs in actions of the given legal subject. For definition of degree of rough imprudence by the most essential the correct analysis of actual conditions in which harm has been done is.

Considering specified objective conditions and specificity of a subjective element of behavior of the victim, roughly careless actions of the last can be subdivided on following three degrees:

I degree — the victim knows about existence of danger of harm-doing or other belittling of its blessings, but, nevertheless, insufficiently clearly realizes possible consequences of the behavior in these or those concrete conditions. For rough imprudence of I degree it is characteristic that the victim, having admitted certain infringement, appears in a fright or confusion condition and, losing correct orientation in the surrounding validity, undertakes actions which it never would make, being in a quiet condition. The person starts to rush about, will disorient the behavior of the driver which takes measures to liquidation of formed emergency conditions. Quite often suffered, leaving from one source of the raised danger, encounter another or from confusion fall, therefore receive physical injuries out of direct (mechanical) communication with a source of the raised danger.

II degree of rough imprudence is characterized by that the victim knows and realizes possibility of approach of known negative consequences of the actions in the presence of certain conditions, but believes that these consequences won't come. The given degree of rough imprudence of the victim is the most widespread, often meeting in the facts of harm-doing by source of the raised danger.

III degree of rough imprudence is characterized by that the victim knows and realizes possible consequences of his behavior in the circumstances and, nevertheless, purposely ignores them though doesn't wish approach of property harm, or belittling of other blessings. Last of the specified moments («unwillingness») rough imprudence differs from intention at which the person wishes approach of certain consequences. In such cases the behavior of victims not only promotes, but in essence is the reason of harm occurrence. Rough imprudence of III degree entirely relieves from owners of sources of the raised danger of responsibility.

Rough imprudence I of the specified degrees should involve, as a rule, an establishment of the mixed responsibility, and III — outright release from a duty of compensation of harm. As to rough imprudence of II degree it depending on concrete circumstances of the case can be the basis and to outright release of harm-doer from a duty of its compensation and to an establishment of the mixed responsibility [11, 86].

Thus, the main condition at definition of the person responsible for harm (harm-doer or the victim), arisen owing to action (inactivity) of the victim, should be not mental relations of the last to the behavior, and external displays of its mental activity which in the ratio with guilt or innocence harm-doer and define on whom and in what measure will be assigned burden of property responsibility in each specific case.

Considering a question on value of fault of the causing which have suffered in cases to it of harm the owner of a source of the raised danger, it is necessary to notice that the deliberate behavior of the victim (as also insuperable force) is the absolute basis to outright release of the owner of a source of the raised danger from a duty of compensation of the caused harm.

Simple imprudence in behavior of the victim has no value for the decision of a question on compensation of harm as art. 931 of CC. Such fault of the victim is legally indifferent.

Rough imprudence of the victim is the relative basis to clearing of the owner of a source of the raised danger of compensation of the harm caused to it. It makes various impacts on considered infringement depending on a number of additional factors. So, if in harm-doing there is a fault of the owner of a source of the raised danger, in the presence of rough imprudence the court should reduce suffered the size of compensation depending on degree of their fault only. At rough imprudence of the victim and absence of fault of the owner of a source of the raised danger the court not only should reduce the size of compensation, but also has the right to release completely harm-doer from responsibility if acts don't provide other. One of such exceptions is provided in CC: at harm-doing of life and to health of the citizen, full refusal in harm compensation isn't supposed.

The property status of the harm-doer can be considered by the court:

a) Only in respect of reduction of the size of compensation, but not clearings of responsibility;

b) Only when the owner of a source of the raised danger is the citizen, but not the legal body;

c) In actions of the owner there is no intention (p.5 of art.935 of CC).

The wrongful taking a source of the raised danger as the basis of clearing of responsibility has been originally recognized by legal practice, and now has received fastening in the law. According to norm of p. 3 of art. 931 of CC the owner of a source of the raised danger isn't responsible for the harm caused by this source if will prove that the source has left its possession as a result of illegal actions of other persons. Responsibility for the harm caused by a source of raised danger, in such cases the persons who have illegally taken hold of it bear. Apparently, given norm of CC has fixed a principle of responsibility by actual harm-doers, wrongfully taken hold of a source of the raised danger, by rules about responsibility for the harm caused by a source of raised danger. If along with illegal behavior of the third parties leaving of a source of the raised danger was promoted also by guilty behavior of its owner (for example, inadequate protection, staying of ignition keys in the lock of the car and etc.) responsibility for the done harm can be assigned as to the person wrongfully using a source of raised danger, and on its owner. In this case responsibility for harm is assigned to each of them in a share order, depending on degree of fault of everyone [2, 355].

Emergency as a condition at which harm-doing to the victim isn't considered illegal and at which presence the court taking into account circumstances of case can release the harm-doer from a duty to compensate harm in full or in part, to the full extends and on harm-doing a source of the raised danger. For example, it is very frequent in order to avoid arrival on pedestrians or collision with other motor vehicles drivers meaning go on a harm-doing to other persons. In one cases courts regard their actions as made in an emergency condition, and in others — as harm-doing a source of the raised danger that attracts different legal consequences.

If all conditions for recognition of a condition of emergency it is available, including intention of actions of the person who have harmed has no value, than harm — a source of the raised danger is particularly done or not. Even if harm is caused the victim by special harmful properties of a source of the raised danger, but in an emergency condition, should be applied art. 920 instead of art. 931 of CC corrected. [2, 354]

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