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THE ENVIRONMENTAL CIVIL LIABILITY OF THE CARGO CARRIER AND THE ENVIRONMENTAL MORAL DAMAGE

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ABSTRACT

The purpose of this article is to analyze the environmental civil liability of the cargo carrier and the (im)possibility of occurrence of environmental moral damage in this type of contract. Since ancient times, the human being – a thinking animal – has needed to move and to move his objects, for his survival and that of his own. To this end, over the years, it has become necessary for Civil Law to regulate this modality of mobility through a transport contract. From this point of view, but without intending to exhaust the subject, the transport contract is focused on from the perspective of environmental law. The environmental civil liability of those who transport objects and people will be investigated, focusing on the possibility of applying, or not, environmental moral damage in such a contract.

Keywords: Transport contract, Environmental civil liability, Cargo transport, Environmental moral damage.

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Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

The present work aims to investigate the legal treatment of the transport contract in our country, and, through this, to analyze the environmental civil liability applicable to this contract, focusing, in the end, on the possibility of occurrence of environmental moral damage in this type of contract.

This is an important inflection point since the vast majority of transport modes are used throughout the Brazilian territory to transport things or people. Our country is crossed by highways and railways, and we still have a lot to advance in waterways.

The methodology used for the development of the research was based on descriptive and analytical methods, which allowed the development of the theme of environmental civil liability as an instrument of defense of the environment in a sustainable development bias. The general and specific objectives are, respectively, to analyze, in the Brazilian social context, the legal treatment applicable to the transport contract, focusing on the environmental civil liability applicable to the cargo carrier and the application of environmental moral damage to this type of contract.

THEORETICAL APPROACH

The purpose of this article is to analyze the environmental civil liability of the cargo carrier and the (im)possibility of occurrence of environmental moral damage in this type of contract. Since Antiquity, human beings have needed to move their things[2]. To this end, Civil Law needed to regulate this human action, through the transport contract.

According to Maria Helena Diniz, the old Civil Code, dated 1916, did not provide for the transport contract, since when it was drafted, in the last decade of the nineteenth century, public transport was beginning its development in the country[3]. Currently, this type of contracting is governed by the Civil Code and Federal Law No. 9,611/98, which deals with multimodal cargo transportation. It is also possible to mention Federal Law No. 11,442/07, which regulated the road transport of cargo, and, in the context of maritime transport, Federal Law No. 9,432/97 (Waterway Transport Ordinance Law) and Law No. 10,233/2001, which creates the National Waterway Transport Agency and the National Council for the Integration of Transport Policies.

[2] VENOSA, Sílvio de Salvo. Civil law: civil liability. Vol. 4, 15. ed. São Paulo: Atlas, 2015.
[3] DINIZ, Maria Helena. Brazilian Civil Law Course: civil liability. 7. ed. São Paulo: Saraiva, 2007.

Revista ARACÊ
ISSN: 2358-2472

Carlos Roberto Gonçalves defines the transport contract as one by which someone is bound, in return for remuneration, to transfer people or goods from one place to another[4]. Sílvio de Salvo Venosa, on the other hand, clarifies that distance is not a preponderant factor for the characterization of this type of contracting, conceptualizing the transport contract as being the type of legal business by which a subject assumes the obligation to deliver something somewhere or travel an itinerary to somewhere for a person[5].

For Mendonça and Keedi, transport can be explained as the activity of circulating goods from one point to another in a municipality, state, or country and can, therefore, be national or international[6].

It is also important to mention that in the maritime transport modality, there is the figure of the charter contract, conceptualized as follows:

> The charter contract is the agreement by which the owner (charterer) of a ship undertakes, in return, the freight, to transport, or to enable the charterer to transport, goods on a given ship.[7]

Given this, the transport contract can be conceptualized as that contract in which the carrier must take the cargo or person to its recipient, taking all precautions to avoid and reduce the risks of damage and loss of what is transported, by what is provided for in articles 730 and 749 of the Brazilian Civil Code.

Flávio Tartuce teaches that the transport contract will be bilateral or synallagmatic, since it generates duties for both poles of the contract; either for the carrier, who must transport the thing or person from one place to another and ensuring the integrity of what is transported, or for the passenger or shipper, who is obliged to pay the contracted [8]price. Carlos Roberto Gonçalves, in turn, completes the classification of the transport contract, asserting that it is a kind of consensual, onerous, commutative, and non-solemn contract.[9]

Sílvio de Salvo Venosa says that the onerous nature is not essential to the transport contract, and this type of contracting may remain configured even if it takes place free of charge. Maria Helena Diniz disagrees, understanding the essentiality of the onerous nature

[4] GONÇALVES, Carlos Roberto. Brazilian civil law: civil liability. 3rd ed. São Paulo: Saraiva, 2008.
[5] VENOSA, Sílvio de Salvo. Civil law: civil liability. Vol. 4, 15. ed. São Paulo: Atlas, 2015.
[6] MENDONÇA, Paulo C.C.; KEEDI, Samir. Transport and insurance in foreign trade. São Paulo: Aduaneiras, 2000.
[7] CAMPOS, Ingrid Zanella Andrade. Maritime civil liability for environmental damage caused by oil pollution. In: BARBOSA, Mafalda Miranda; MUNIZ, Francisco. Civil liability: 50 years in Portugal, 15 years in Brazil. Salvador: Juspodvim, 2017.
[8] TARTUCE, Flávio. Manual de Direito Civil: volume único. Rio de Janeiro: Forense, 2011.
[9] GONÇALVES, Carlos Roberto. Brazilian civil law: civil liability. 3rd ed. São Paulo: Saraiva, 2008.

Revista ARACÊ
ISSN: 2358-2472

of the transport contract. For the scholar, the onerous nature of transport contracts is to be explained as follows:

> Onerousness, because there are advantages for both parties. Such an onerous nature is essential to it, as the transport service is an economic activity for profit. If it is free, there will be a contract, but the carrier's liability will obey a different rule, it being understood that, in the event of damage, the presumption of guilt will be only *juris tantum*.[10]

It is a known fact that some types of contract, due to the nature of the contracted commercial activity, carry in their essence the element of "risk". The transport contract is one of these examples. This is because the contracting is subject, on these occasions, to the danger of material losses of what is transported, due to the transport itself. Whether in maritime (water), land, or air transport, all modalities have the element "risk" as intrinsic to the contracting itself.

In the case of land or air transport, the main risk is the occurrence of accidents that lead to the partial or total loss of cargo. In addition, in land transport, the risk is also found in the occurrence of organized criminal activities specialized in the theft of transported cargo. In maritime transport, the main risk is marine pollution[11]. In the view of José de Aguiar Dias[12], the carrier has absolute knowledge of the characteristics inherent to its activity, which is why the carrier must assume responsibility for the risk voluntarily contracted by it when the transport contract is formalized. The risk theory of economic activity or business risk theory also helps in understanding that the risk of the activity must be borne by the carrier.

For these reasons, it is found that the civil liability of the carrier is objective, only exempting itself from the obligation to indemnify if force majeure is verified, under the terms of article 734 of the Brazilian Civil Code. In this vein, it is worth mentioning article 7 of Federal Law No. 11,442/07, which regulated the road transport of cargo and provided that the carrier assumes responsibility for the proper execution of the service and losses resulting from damage. It can be inferred, therefore, that the civil liability of the carrier, when a

[10] DINIZ, Maria Helena. Brazilian Civil Law Course: civil liability. 7. ed. São Paulo: Saraiva, 2007.
[11] Marine pollution was defined by the Montego Bay Convention, in its article 1, Decree 1,530, of June 22, 1995, and should be understood as: "The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, whenever it causes or may cause harmful effects, such as damage to living resources and marine life, risks to human health, obstacles to maritime activities, including fishing and other legitimate uses of the sea, alteration in the quality of sea water, in terms of its use and deterioration of recreational places".
[12] DIAS, José de Aguiar. Civil liability. 5. ed. Rio de Janeiro: Forense, 1997.

Revista ARACÊ
ISSN: 2358-2472

transport contract is awarded, does not depend on the modality, always responding objectively, except in cases of force majeure.

Germano Schwartz teaches that contemporary society has risk as its greatest characteristic, which should be observed through the risk variable[13]. Among the risks inherent to the transport activity is, undeniably, the risk of producing environmental damage. This is because, for example, episodes of fuel spills and other materials transported on highways near watercourses or even oil spills in the marine biome by ships are not rare. When the environmental damage is consolidated, a new legal relationship is born. It is no longer a question of the civil liability of the carrier as a result of the transport contract, but of the civil liability of the carrier for the environmental damage caused.

In the field of maritime transport, the International Convention on Civil Liability for Damage Caused by Oil Pollution, dated 1969, is cited[14]. This international regulation provided for the strict liability of the ship's owner for any incident, except in cases in which the pollution damage resulted from an act of military or civil war, hostility, insurrection or a natural phenomenon of an exceptional nature that is inevitable and irresistible (a factor that is close to the "force majeure" that we have in national legislation); of an act or omission performed by a third party to cause damage; or if the damage is the result wholly of negligence or harmful act by a government or other authority responsible for the maintenance of lighthouses and other navigational aids.

At the national normative level, the theory of integral risk is in force, according to which civil liability for environmental damage is objective, and it is inappropriate for the carrier causing the environmental damage to invoke exclusions of civil liability to remove its obligation to indemnify, in line with what is reported in Theme 681 of the Superior Court of Justice. Strict liability is based on the notion of social risk, which is implicit in certain activities, such as transportation. Thus, as Paulo de Tarso Sanseverino teaches[15], strict liability is an imputation attributed by law to certain persons to compensate for damages caused by activities carried out in their interest and under their control, without any inquiry being made about the subjective element of the agent's conduct or that of his agents. To this end, the causal relationship between the damage suffered by the victim and the risk situation created by the agent is sufficient.

[13] SCHWARZ, Germano. The legal treatment of Risk in the Right to Health. Porto Alegre: Livraria do Advogado, 2004.
[14] It was introduced into Brazilian law by Decree No. 83,540/1979.
[15] STJ, REsp 1.373.788-SP, Rel. Min. Paulo de Tarso Sanseverino, judged on 05.06.2014. Newsletter 544.

Revista ARACÊ
ISSN: 2358-2472

Based on José de Aguiar Dias' view, cited above, it can be stated that the obligation to indemnify is objectively imputed to those who know and dominate the source of origin of the risk, and, given the social interest, must answer for the harmful consequences of their activity regardless of proof of guilt.

Délton Winter de Carvalho, however, advocates the thesis that:

> The objective application of civil liability in the event of environmental damage is not limited, however, to potentially polluting activities (risk activities), but is focused on any activity that, directly or indirectly, causes degradation to the environment due to its express normative provision (article 14, paragraph 1, of Law No. 6,938/81).[16]

The theory of integral risk, which informs the civil liability of the carrier for the environmental damage caused, does not accept the exclusions of fact of a third party, fault of the victim, fortuitous event, or force majeure. In this context, it is possible to verify that the carrier must know and assume the risks of its economic activity, given that, in the face of the occurrence of environmental damage as a result of its enterprise, it will not be able to resort to the causes that would normally shake the causal link.

According to the lesson of Délton Winter de Carvalho, strict civil liability has as its main structural characteristic the possibility of attributing the obligation to repair or indemnify the damage caused without proof of fault in the conduct that caused the injury.[17]

Thus, it is possible to conclude, albeit concisely, that the carrier's civil liability for the environmental damage caused is objective and does not admit the invocation of exclusions of liability, except in cases of maritime pollution by oil spill, in which case the exclusions listed in the International Convention on Civil Liability for Damage Caused by Oil Pollution apply.

Brazilian legislation does not include in its normative texts the express provision of the concept of environmental damage. An express normative provision about the concept, in addition to being incompatible with the dynamics of technological evolution and its harmful potential, would run the risk of limiting the scope of incidence of the right when it is too restrictive[18]. To this end, it is necessary to use the concept of environmental damage established more objectively by the Lugano Convention of the Council of Europe:

[16] CARVALHO, Délton Winter. Future Environmental Damage: civil liability for environmental risk. 2nd ed., rev., current. and ampl. Porto Alegre: Livraria do Advogado, 2013.
[17] CARVALHO, Délton Winter. Future Environmental Damage: civil liability for environmental risk. 2nd ed., rev., current. and ampl. Porto Alegre: Livraria do Advogado, 2013.
[18] CARVALHO, Délton Winter. Future Environmental Damage: civil liability for environmental risk. 2nd ed., rev., current. and ampl. Porto Alegre: Livraria do Advogado, 2013.

Revista ARACÊ
ISSN: 2358-2472

> Damage means: a) death or bodily injury; b) any loss or damage caused to property other than the facility itself or property located at the site of the dangerous activity and located under the control of the operator; (c) any loss or damage resulting from the alteration of the environment, in so far as it is not considered to be damage within the meaning of points (*a*) or *(b*) above, provided that the remedy for the alteration of the environment, after the loss of earnings from that alteration has been implemented, is limited to the cost of the restoration measures which have been carried out or will be carried out; (d) the cost of the safeguard measures; and any loss or damage caused by such measures, to the extent that the loss or damage referred to in points (*a)* and *(c*) of this subparagraph originates or results from the properties of hazardous substances, genetically modified organisms or micro-organisms, or originates from or results from tailings.[19]

Among the categories of environmental damage that can result from transport activity is environmental moral damage. A kind of collective moral damage, it is an autonomous category of damage related to the unjust and intolerable violation of fundamental values of the collectivity[20].

Specifically about moral damage resulting from an act harmful to the environment, according to MORATO LEITE, "it must be considered sufficient to prove the non-patrimonial damage to the proof of the harmful fact – intolerable – to the environment. Thus, given the factual evidence of intolerable environmental degradation, it must be presumed that there is a violation of the collective ideal related to environmental protection and, therefore, the disrespect for the fundamental human right to an ecologically balanced environment."[21]

On the other hand, part of the doctrine and jurisprudence understands that, for environmental moral damage to be configured, damage that may cause social unrest or relevant changes to the local community must be required. It so happens that this understanding is not followed by the Superior Court of Justice since the Citizen Court has a backwater jurisprudence in the sense that collective moral damage is assessable *in re ipsa*, dispensing with the demonstration of concrete damages and aspects of a subjective order.[22] Therefore, since environmental moral damage is a kind of collective moral damage, there is no need to speak of proof of social unrest to demonstrate the occurrence of environmental moral damage, since "collective moral damage arises directly from the offense to the right to

[19] MACHADO, Paulo Affonso Leme. Brazilian environmental law. 9. ed. rev. atual. and ampl. São Paulo: Malheiros, 2001.
[20] STJ, Special Appeal 1737428/RS, Judge NANCY ANDRIGHI, THIRD PANEL, judged on 03/12/2019, DJe 03/15/2019.
[21] LEITE, José Rubens Morato. Environmental damage, from the individual to the collective off-balance-sheet. Theory and practice. 5th ed. Editora Revista dos Tribunais, 2012, p. 288.
[22] STJ, REsp 1726270/BA, Rel. Minister NANCY ANDRIGHI, Rel. p/ Judgment Minister RICARDO VILLAS BÔAS CUEVA, THIRD PANEL, judged on 11/27/2018, DJe 02/07/2019.

Revista ARACÊ
ISSN: 2358-2472

a balanced environment. In certain cases, it is recognized that moral damage arises from the simple violation of the protected legal good, being configured by the offense to the values of the human person".[23]

In short, it can be concluded that the prevailing jurisprudence in the Superior Court of Justice has reiterated that, for the verification of collective environmental moral damage, it is "unnecessary to demonstrate that the community feels the pain, the repulsion, the indignation, as if it were an isolated individual", because "the damage to the environment, as it is a public good, generates general repercussions, imposing collective awareness to its repair, to safeguard the right of future generations to an ecologically balanced environment".[24]

An example of the occurrence of environmental moral damage involving a transport contract is the environmental accident resulting from maritime transport, which, due to the leakage of a polluting substance, contaminates the waters and makes it impossible for fishermen in a certain region to survive. A similar case occurred in Brazil when the environmental accident at the Port of Paranaguá with the ship N/T Norma occurred. On October 18, 2001, environmental pollution was caused by a naphtha spill due to a breakdown in the vessel. Artisanal fishermen in the region of the Port of Paranaguá were prevented from fishing and providing for their families.

At the time, the Superior Court of Justice understood that, in the case of a professional fishing worker who remains, due to the fact, without the possibility of carrying out his work, there is a real moral shock that deserves to be repaired.[25] In the specific case, it was an individual action handled by a fisherman individually. However, in some situations, when there is a group of fishermen who are victims of an environmental accident arising from a transport contract, there is nothing to prevent the occurrence of collective environmental moral damage.

Finally, it is imperative to highlight that although environmental moral damage has an in *re ipsa nature*, it does not mean that there is no need to prove the causal link between the conduct and the compensable environmental moral damage. It should be said that the recognition of strict liability for environmental damage does not dispense with the demonstration of the causal link between the conduct and the result. Therefore, although

[23] STJ, REsp 1.410.698/MG, Rel. Minister HUMBERTO MARTINS, SECOND PANEL, DJe of 06/30/2015.
[24] STJ, REsp 1.269.494/MG, Rel. Minister ELIANA CALMON, SECOND PANEL, DJe of 10/01/2013.
[25] STJ, Special Appeal 1114398/PR, Appeal of Justice SIDNEI BENETTI, SECOND SECTION, Official Gazette of 02/16/2012

Revista ARACÊ
ISSN: 2358-2472

fault or intent is not investigated in cases of environmental moral damage – including those resulting from transportation activities – the causal link between the conduct and the harmful result must be evidenced.

FINAL CONSIDERATIONS

In a contemporary society marked by risk, transport contracts are not far from this. The "risk" variable is intrinsic to the type of contract itself and known by the carrier. Because of this, the carrier's civil liability is objective, only exempting itself from the obligation to indemnify if force majeure is verified, under the terms of article 734 of the Brazilian Civil Code.

From an environmental point of view, civil liability for environmental damage is objective, not admitting the allegation of exclusions of liability. The only exception is in cases of maritime pollution by oil spill, in which case the exclusions listed in the international convention on the matter apply.

It can be inferred, therefore, that the transport activity is inserted in the contemporary risk society, placing the one who exploits the economic activity in the position of guarantor of environmental preservation, always being considered responsible for the damages linked to the activity[26]. Both the civil liability arising from the transport contract and the civil liability arising from any environmental damage caused are objective. Therefore, it is necessary to raise awareness of this business category so that it is aware of the responsibilities arising from both the established contract and any environmental damage caused during the charter, given that the Superior Court of Justice is admitting liability not only for material environmental damage, but is also recognizing the possibility of the existence of environmental moral damage.

[26] STJ, Special Appeal 1612887/PR, Judge NANCY ANDRIGHI, THIRD PANEL, judged on 04/28/2020.

Revista ARACÊ
ISSN: 2358-2472

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13. Brazil. Superior Court of Justice. (2015). *REsp 1,410,698/MG* (Justice Humberto Martins, Rapporteur). Second Panel. *DJe*, June 30, 2015.

14. Brazil. Superior Court of Justice. (2018). *Special Appeal No. 1,726,270/BA* (Justice Nancy Andrighi, Rapporteur; Justice Ricardo Villas Bôas Cueva, Judgment). Third Panel. Judged on November 27, 2018. *DJe*, February 7, 2019.

15. Brazil. Superior Court of Justice. (2019a). *Special Appeal No. 1,737,428/RS* (Justice Nancy Andrighi, Rapporteur). Third Panel. Judged on December 3, 2019. *DJe*, March 15, 2019.

16. Brazil. Superior Court of Justice. (2019b). *Special Appeal No. 1,612,887/PR* (Justice Nancy Andrighi, Rapporteur). Third Panel. Judged on April 28, 2020.

Revista ARACÊ
ISSN: 2358-2472

17. Tartuce, F. (2011). *Manual de direito civil: Volume único*. Forense.

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