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LEGAL GROUNDS CIVIL LIABILITY OF THE CARRIER UNDER THE CONTRACT OF TRANSPORTATION OF THE PASSENGER

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The topic of the article is devoted to topical issues of civil liability of the carrier under the contract of the carriage of passengers. The urgency is due to several factors, including irresponsible violations passengers rights on the part of carriers that caused deficiencies and gaps of positive law and special traditions of transport, which contain a limited civil liability carriers.

Despite the existence of fundamental research Kanzafarova I.S. "Theoretical foundations of civil liability in Ukraine" theory of civil law continue discussion about essence of civil liability as such (contract and tort) essentially contractual liability as a consequence of an obligation or a separate accessory obligation which has perform the debtor. Its requires careful, researches of civil liability of carriers for breach of contract of the carriage the passenger in the context of transportation the different types of transport, as the latter has its own characteristics, due to the technological specifics of different types of transport and the level of regulatory carriage of passengers by different types of transport.

Key words: contract, passenger transportation, civil liability, illegal behavior, blame, necessary causation, compensation, damages, moral damages.

Абрикосов Д.С. ПРАВОВЫЕ ОСНОВАНИЯ ГРАЖДАНСКО-ПРАВОВОЙ ОТВЕТСТВЕННОСТИ ПЕРЕВОЗЧИКА ПО ДОГОВОРУ ПЕРЕВОЗКИ ПАССАЖИРА / Запорожский национальный университет, Украина

Тема статьи посвящена актуальным вопросам гражданско-правовой ответственности перевозчика по договору перевозки пассажира. Актуальность обусловлена рядом факторов, среди которых безответственные со стороны перевозчиков нарушения прав пассажиров, что, в свою очередь, обусловлено недостатками и пробелами позитивного права и особыми традициями транспортной сферы, содержащими ограничение гражданско-правовой ответственности перевозчиков.

Несмотря на наличие фундаментального исследования Канзафарова И.С. «Теоретические основы гражданско-правовой ответственности в Украине», в теории гражданского права продолжаются дискуссии относительно сущности гражданско-правовой ответственности как таковой (договорной и деликтной), сущности договорной ответственности как следствия невыполнения обязательства или отдельного акцессорного обязательства, которое должен выполнить должник. Требует тщательного исследования гражданско-правовая ответственность перевозчиков за нарушение условий договора перевозки пассажира в разрезе перевозки отдельными видами транспорта, поскольку последняя имеет свои особенности, обусловленные технологической спецификой различных видов транспорта и уровнем нормативного регулирования перевозок пассажиров различными видами транспорта.

Ключевые слова: договор, перевозки пассажира, гражданско-правовая ответственность, противоправное поведение, вина, необходимая причинная связь, компенсация, возмещение, ущерб, моральный вред.

Абрикосов Д.С. ПРАВОВІ ПІДСТАВИ ЦИВІЛЬНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ ПЕРЕВІЗНИКА ЗА ДОГОВОРОМ ПЕРЕВЕЗЕННЯ ПАСАЖИРА / Запорізький національний університет, Україна

Тема статті присвячена актуальним питанням цивільно-правової відповідальності перевізника за договором перевезення пасажира. Актуальність зумовлена рядом факторів, серед яких безвідповідальне з боку перевізників порушення прав пасажирів, що зумовлене недоліками та

прогалинами позитивного права та особливими традиціями транспортної сфери, які містять обмежену цивільно-правову відповідальність перевізників.

Не дивлячись на наявність фундаментального дослідження Канзафарової І.С. «Теоретичні основи цивільно-правової відповідальності в Україні», у теорії цивільного права тривають дискусії щодо сутності цивільно-правової відповідальності як такої (договірної та позадоговірної); щодо сутності договірної відповідальності як наслідку невиконання зобов'язання чи окремого акцесорного зобов'язання, яке має виконати боржник; її підстав, зокрема цивільно-правова відповідальність перевізників за порушення умов договору перевезення пасажира в розрізі перевезення окремими видами транспорту, оскільки остання має свої особливості, зумовлені технологічною специфікою різних видів транспорту та рівнем нормативного регулювання перевезень пасажирів різними видами транспорту.

Автор дає визначення цивільно-правової відповідальності як охоронного, додаткового (акцесорного) зобов'язання (правовідношення), що виникає внаслідок порушення правової норми (закріпленої в актах цивільного законодавства чи договорі), змістом якого є обов'язок порушника через застосування системи цивільно-правових засобів впливу на нього (його поведінку) відновити матеріальний стан потерпілої внаслідок правопорушення особи, або компенсувати завдані їй збитки.

Можна констатувати, що наразі досить часто мають місце порушення прав пасажирів перевізниками. При цьому компенсаторна функція цивільного права, що повинна мати прояв у цивільно-правовій відповідальності, де-факто не діє. Попри наявне нормативне регулювання перевезень пасажирів, формалізоване в Правилах перевезень пасажирів різними видами транспорту, механізм правового регулювання досліджуваних правовідносин є неефективним.

Транспортні статути та кодекси, правила перевезень пасажирів окремим видами транспорту не містять підстав, розмірів та меж відповідальності перевізника. У кращому випадку, за скасування рейсу пасажирові буде повернуто вартість квитка. За втрату чи пошкодження багажу відшкодовується його оголошена чи дійсна вартість.

Виняток склали новий Повітряний Кодекс України від 19 травня 2011 р. [1] та Правила повітряних перевезень пасажирів і багажу від 30.11.2012 р. [2], які були прийняті відповідно до вимог Регламенту (ЄС) Європейського Парламенту та Ради від 11 лютого 2004 року «Про запровадження загальних правил компенсації та допомоги пасажирам у разі відмови у перевезенні та скасування чи тривалої затримки рейсів» [3], Монреальської конвенції про уніфікацію деяких правил міжнародних повітряних перевезень 1999 року [4]. Вони закріпили підстави, розміри та межі цивільно-правової відповідальності перевізника перед пасажиром.

На переконання автора, підставою для відповідальності за порушення умов договору з перевезення пасажира слід визнати склад правопорушення, який полягає в невиконанні або неналежному виконанні договірних зобов'язань (відміна рейсу, неподання транспортного засобу, запізнення відправлення транспортного засобу чи його прибуття до пункту призначення, невиконання умов щодо безпеки та комфортності перевезення, завдання шкоди життю та здоров'ю пасажира).

Автор підтримує позицію щодо недопустимості встановлення обмеженої відповідальності перевізника за договором перевезення пасажира, оскільки це спричиняє невиправдане послаблення відновлювальної функції цивільно-правової відповідальності, порушення принципу рівності сторін (ставить у беззахисне положення пасажира) і принципу справедливості як основних принципів цивільного права.

Ключові слова: договір, перевезення пасажира, цивільно-правова відповідальність, протиправна поведінка, вина, необхідний причинний зв'язок, компенсація, відшкодування, збитки, моральна шкода.

Background is due the growing role of contracts to regulate civil relations, and relations of passengers in particular However, analysis of civil cases decided by the courts of Ukraine indicates exaggeration of the role of self-regulation of contractual relations with separate types passenger vehicles. It can be noted that at present often have been the violation of the rights of passengers by carriers. Thus the compensatory function of civil law, which must be a manifestation of civil liability, doesn't work. Despite existing regulation carriage of passengers, formalized in the Rules of passenger different types of transport, the mechanism of regulation of legal subjects is ineffective.

This preliminary conclusion is due to the inefficiency of the structural element of the mechanism and regulation, namely the protection of violated civil rights and interests. Thus performance of subjective rights depends on the efficiency of their protection in case of violation.

Most of these Regulations contains neither the size nor reason, nor the limits of civil liability, or the mechanism of its imposition.

This requires the study and analysis of positive law, which carried the legal regulation of transport of passengers, research and intelligence relationships with passengers.

Should be noted that researching on civil liability studied such scientists as: M.M. Agarkov, O.C. Joffe, S.S. Alekseev, A.O. Sobchak, R.O. Halfina, D.V. Bobrova, T.V. Bodnar, V.I. Borisova, M.I. Braginsky, S.M. Bratus, V.V. Vitryanskyy, V.P. Gribanov, O.V. Dzera, I.V. Zhylinkova, V.M. Kossack, I.S. Kanzafarova, N.S. Kuznetsova, V.V. Lutz, R.A. Maidanyk, N.O. Saniahmetova, M.M. Sibilov, I.V. Spasibo-Fateevf, R.O. Stefanchuk, E.O. Haritonov, A.I. Kharitonova, J.M. Shevchenko et al.

Special studies of civil liability in Ukraine are not available currently. Some refinement are in the writings Nechypurenko O.M "Civil legal regulation Carriage Taxi" (2008) [5] A.O. Minchenko "The contract of carriage passengers and luggage by rail in Ukraine" (2011) [6].

Paryshkura V. is notes that the main obligations of the state is to affirm and ensure human rights and freedoms. The implementation of this institute is done including through institution of civil liability [7, 66].

The lack of unity among the scientists of civil law on the legal nature of civil liability and civil liability for failure to perform or improper performance of the contract of carriage passenger a particular mode of transport makes the need to apply primarily to general theoretical and general provisions of civil law.

At one time Halfina R.O. said that using legal standard that establishes responsibilities have an impact on the motivation of behavior through prevention of the relationship [8, 56]. There are differences between the rules that establish liability for violation of obligations. Arise in making lawful acts and regulations which establish liability for damage. She said that in the first case, the legal relationship existing between the parties to the contract (obligation), in another connection occurs only after damage, and in addition does not exist [8, 60].

This statement makes sense, especially when establishing specific separation of civil liability for contractual and non-contractual (damage). However, for example, the contract of carriage passenger damage caused to the life or health of the latter is recovered under the provisions of Chapter 82 of the Central Committee of Ukraine (damages), which implies that the non-contractual liability may arise during the execution of a contract.

A.B. Hrynyak analyzing the contractual responsibilities of contract obligations defined the latter as a kind of civil liability. The last, in his opinion, should maintain its value decisive factor in preventive legal impact on the behavior of its sides [9]. The same role in liabilities for passengers.

Analysis scientist's works in the area of civil law, which engaged in the research of civil liability, indicates that currently there are different approaches to understanding essence. This requires the expression of the author's position on this issue.

E.O. Kharitonov said that quite often civil liability is defined as the obligation that existed previously (scripting contractual obligations), or first emerged as a result of the offense, and executed under coercion [10, 467; 11, 103].

There is classic definition, according to which civil liability is a form of state coercion, which consists of collecting property infringer Court of sanctions to impose on his property unfavorable consequences of his behavior and aim at restoring the economic status of the injured person [12, 431].

O.A. Pushkin of his time pointed out debatability of the problems of determining essence of civil liability. He disagreed with the position of SN Bratus, who claimed that civil liability for violation of the obligation includes all coercive means of influencing the debtor, including those that encouraged it to the real performance of the obligation. The voluntary fulfillment obligation that may be imposed by a court for an offense is not a liability [11, 43].

In confirmation of his arguments Pushkin O.A pointed out that firstly, in this sense responsibility loses its specific signs, and secondly, civil liability for obligations must always compensatory, and therefore can be implemented without affecting jurisdictional bodies, because of the possibility of coercion and only awareness violator of his misconduct [13, 415].

However, in Ukraine among scientists of civil law expressed a new position regarding the nature of civil liability. For example, V.D. Primak believes that the responsibility is additional or new, unfulfiled obligation on the debtor's obligation, through its property to restore the broken property status of the creditor (the victim) or compensate moral damage the last [14, 47].

In the opinion of Shyshka R.B., civil liability for violations of the obligations arises from the contract escalation accessory obligation as a result of violations of contractual obligations in civil liability.

In other words, voluntary compliance violator statutory or contract obligations accessory is not civil liability because there is no state coercion (which is based on a court decision on a particular dispute).

R.B. Shyshka explained his position. "Tort has a specific composition (corpus delicate civiler), which is currently shared by tort violations of obligations as well as to civil liability as an obligation of the offender to feel the negative consequences or personal property provided for by law and / or contract. This leads to a number of inconveniences in theoretical understanding of these categories and more practice. There are publications where all these categories are mixed and voluntary compliance accessory obligation that arose from the offense, shall be construed as civil liability. With that disagree categorically because legal responsibility for its substance is applied to the offenders penalties provided by law that are provided to enforce the state and is the legal relationship between the state and its agencies and the offender, in respect of which legal sanctions are applied [15, 105].

To uncertainty serves incompleteness as the positive effects of regulation offenses in chapters 51 and especially 82 CC of Ukraine. The first three articles of Chapter 51 starting CC, including art. 611, not mentioned anywhere as a result of such prosecution. It seems that all the Art. 611 CC of Ukraine consequences themselves as civil liability is regulated separately. But this is not so: they are accessorial obligations and failure this obligation grows in the civil sanction. While some of them are not by their nature, including a change of contract, termination liability as a result of unilateral waiver of liability if it is established by contract or law, or termination of the contract. They apply only to contract and regulated at the level of the consequences of breach of contractual obligations. There are cannot to be common to all obligations consequently» [16, 512].

In other words, in civil law at the legislative level, there is a paradox. Civil Code of Ukraine does not contain a definition or civil legal relationship, or civil liability. I. Zhylinkova noted that despite scientific applications category relationship, it is used in the Civil Code of Ukraine twice – in determining liability (Part 1 of Art.509 CC of Ukraine) and representation (Part 1 of Art.237 CC of Ukraine). However, in Book 1 of the CC are three components of this relationship: persons, objects of civil rights, civil rights and obligations [17, 11]. However art.11 CC of Ukraine affirms that the grounds of civil rights and obligations are contracts and other legal documents. In theory of civil law they are the bases of civil legal relations, the contents of which are components of rights and obligations.

As rightly observed Shyshka R.B. from civil liability is stored this situation. Chapter 51 Civil Code of Ukraine does not define civil liability, while at the same time her art. 611 CC of consolidating the legal consequences of violations of the obligation (including contractual), among others, provides for the payment of liquidated damages and damages for losses sustained, that the theory of civil law recognized forms of realization of civil liability.

A.B. Hrynyak in his study found that currently exists in the doctrine of the four views on the concept of civil liability, namely 1) as a sanction for the offense [18, 8; 19, 8]; 2) as a security relationship, the elements of which are the appropriate subjects, objects and content of [20, 19; 21, 111]; 3) civil liability determined by the category "duty» [14, 47]; 4) as a system of civil remedies [22, 100].

In these points of view, we believe that perceived characteristics of civil liability as an integrated legal phenomenon, which has its own characteristics, role and importance in the legal regulation of relations. That is, these positions do not contradict but complement manifestations of civil (including contractual) liability.

In other words, civil responsibility contains all of these characteristics. E.O. Kharitonov agreeing with the understanding of civil liability as a duty, said his features, as opposed to the usual obligation prescribed by law or contract, obligation, responsibility rests with the offender contract. That’s why it is formulated by the relevant legal regulations or in the contract – to those of its paragraphs, which provides the consequences of failure or improper fulfillment of contractual obligations [10, 468].

In concise form specified provides a reasonable grounds for determining civil liability as security, additional (accessory) commitment (relationship) resulting from the breach of legal provisions (fixed in acts of civil law or contract) whose content is the responsibility of the offender through the use of

civil remedies influence on him (his behavior) to restore the financial status of the injured person as a result of the offense, or to compensate for damage caused to her.

In the theory of civil law are two main types of civil liability – contractual and non-contractual (from harm). The dissertation I.S. Kanzafarova substantiated that this division into species is of no use, however, is the correct application of the category "legal mode". On this basis, it offered to distinguishing legal and contractual regimes of civil liability. In turn, the legal regime can be general and special. The overall legal regime is valid for all cases of liability other than those for which there are special modes. The general legal regime of civil liability can be divided into: 1) the mode of liability for breach of contractual obligations, 2) mode of liability for damage or property damage, 3) mode of liability for damage or non-pecuniary (moral) damages. Special legal regime is established when the legislators, for whatever reasons, excludes certain cases the responsibility of the application of the general regime. The purpose of the special legal regime may or may limit the liability, or the establishment of a special procedure of imposing conditions, or a combination of these factors [23, 20].

Regarding the liability of the carrier under the contract of carriage of passengers in the research stated that it is limited repeatedly. Of course, the legislation provides for the possibility, in accordance with the principle of freedom of contract, establishing bases and limits of liability under the contract by the parties independently investigated, which is an act of self-control exercised within the limits set by law.

However, due to the specifics of the contract passenger transportation by different modes of transport (road, rail, air, sea, river), except passenger cab (which may be a manifestation of the principle of discretionary at the conclusion of the contract of carriage passenger), the latter is not possible because the passenger transport common use makes regulation of the relations of the public treaty of Accession which passengers (as a side agreement) prevented influence the contract terms.

The legislator instead of resort to the regulatory stabilization (create guarantees the right to freedom of movement of passenger), uses a special mode of responsibility of the carrier (the limited liability).

According I.S. Kanzafarova consolidation of the civil legislation of Ukraine limited liability individual subjects of civil rights leads unjustifiable weakening of Renewable function of civil liability, breach of the principle of equality of arms and the principle of justice as the basic principles of civil law [23, 9].

Besides, the general provisions on civil liability established by chapter 51 of the CC of Ukraine, do not address the possibility of regulatory constraints. De facto, it introduced the head of the Central Committee of Ukraine 64 (Transportation), the analysis of which will be done later. Instead, Art.400 of the Civil Code stipulates that in certain types of liabilities for obligations associated with certain activities may be restricted by law entitled to full compensation (limited liability).

The peculiarity of civil liability for violating the conditions the contract of carriage the passenger is to have an exclusive list of violations of the contract, which comes under the responsibility of the carrier. Thus, the Central Committee of Ukraine in Chapter 64 of the Central Committee of Ukraine (Transportation) provided: carrier liability for the failure of the vehicle (Art.921 CC), the carrier's liability for passenger delay and deadlines for bringing passengers to the destination (Art.922 CC), the carrier's liability for damage caused injury, other impairment of health or death of passenger (Art.928 CC of Ukraine).

The analysis relevant articles of the Civil Code (Art.919, 921, 922) notes that most penalties in the CC is not installed. In articles provided that liability is established agreement of the parties, transport charters and codes. In public contracts, that are the contract of carriage passenger public transport, this "agreement" is not possible.

Transport charters and codes, and other regulations, including the Charter of road transport Ukrainian SSR 1969 [24]. Rules for road passenger transport services on February 18, 1997 [25]; Charter railways of Ukraine dated April 6, 1998 [26], Rules passenger, baggage, freight and mail by railway transport of Ukraine from 27.12.2006 [27] does not contain the grounds and limits size of the carrier's liability. In the best cases, in case of flight cancellation, passengers will be refunded the ticket price. For loss or damage to baggage or refunded announced its real value, or the amount of real damage.

Air Code of Ukraine of May 19, 2011 [1], Rules of Air Carriage of Passengers and Luggage by 30/11/2012 [2] adopted in accordance with Regulation (EC) of the European Parliament and of the Council of 11 February 2004 "On introduction of common rules compensation and assistance to

passengers in the event of denied boarding and cancellation or long delay of flights" [3], Montreal Convention for the Unification of certain Rules Relating to international Carriage by Air 1999 [4], in contrast to other acts which regulate the carriage of passengers by other modes of transport, fixed the grounds, dimensions and boundaries of the civil liability of the carrier to the passenger.

Thus, according to Chapter 4 of the Rules XXVII air transportation of passengers and baggage Ukraine, the carrier cannot exclude or limit its liability for damage caused to the life or health of the passenger the amount of $ 113,100 SDR per passenger (1 SDR = 0,42 EUR).

The carrier's liability for damages due to delay is limited to 4694 SDRs per passenger with respect to (luggage – 1131 SDRs).

If passengers denied boarding against their will, the carrier must pay compensation of 250 euros – for flights up to 1,500 km, € 400 – from 1500 to 3500 km, 600 euros – more than 3500 km.

M.O. Sergeeva [28, 5] noted that the relationship of the maritime transportation of passengers, in addition to the National Legislation, regulated by international treaties and conventions including the Athens Convention on the carriage by sea of passengers and their luggage 1974 (Ukraine joined in 1994) and the Convention on limitation of liability for maritime claims 1976.

However, on the domestic transportation in Ukraine, there are rules of national law.

Despite these breakthrough to establish size and extent of liability of carriers under the contract of carriage of passengers by air, the last remains limited, due to traditions transport the protection of the state transportation system. Such restrictions are unjustified in the present conditions, when the means of civil law allow otherwise (and not because of restrictions on the rights of passengers) to ensure stability of the economic activity and transport activity and not to break civil law principles of equality, justice, and his compensatory regenerative function.

Previously, we determined that the negotiated civil liability is a contractual obligation accessory (relationship), which has the same mechanism of regulation (composed of the same basic elements – a legal provision, the legal fact relationship).

Contractual liability participant's contractual relationships arising under specified grounds and conditions.

In the civil law doctrine has long been a dominant position on recognition basis of civil liability in tort composition.

According to B.S. Antymonov, negotiated liability has several grounds: the existence of contractual obligation that meets the requirements of the law and violation of the obligation, that default or inadequate execution [29, 29].

This position is supported by E.A. Kharitonov, who noted that liability for violation of obligations is incurred for committing the tort, which acts as unlawful behavior [10, 475].

A.B. Hrynyak noted and supported the position of V.V. Luts that the legal basis of civil liability are law, in fact – the composition of tort [30, 86]. And we it supported.

The specified provides sufficient grounds for determining civil liability as security, additional (accessory) commitment (relationship) arising from violation of legal law rules (fixed in acts of civil law or contract) whose content is the responsibility of the offender through the use of civil remedies influence on him (his behavior) restore the financial status of the injured person as a result of the offense, or to compensate for damage caused to her.

We support the position I.S. Kanzafarova regarding the inadmissibility of establishing a limited liability individual subjects of civil law (in this case – the carriers) as this leads unjustifiable weakening regenerative function of civil liability, breach of the principle of equality of arms and the principle of justice as the basic principles of civil law.

The basis for liability for breach of contract of carriage of passengers should admit the offense, which is the non-performance or improper performance of contractual obligations (flight cancellation, failure of vehicle, delay sending the vehicle or its arrival at the destination, default conditions for security and Superior transportation, damage to life and health of passengers).

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CONTRACT OF FREIGHT FORWARDING SERVICES: CIVIL NATURE AND ESSENCE

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The article investigates relationships freight forwarding services and control of contractual construction. The author comes from a position that the basis for the legal regulation of relations is a specific type of relationship. According to the author, as the subject of civil law in recent times introduced rightly, except property and personal non-property relations, organizational relationship, in determining the legal nature and essence of the contract freight forwarding services should pay attention to the last.

Contract of freight forwarding services is an independent civil contract (sui generis), fixed in a separate chapter of the Civil Code of Ukraine, because it has its own unique thing to him – execution or arranging certain legal services in it and / or the actual nature associated with shipping. In the transport process, it has an auxiliary character, since it contributes to the goal of a contract of carriage.