‘Babeș-Bolyai’ University
Faculty of Law

DOCTORAL THESIS

The Victim’s Contribution to the Harmful Outcome in Criminal Law

(Table of Contents and Abstract)

Doctoral Supervisor:
Professor Florin STRETEANU, PhD

Doctoral Student:
Ioana CURT

Cluj-Napoca
2020

Table of Contents

KEYWORDS

victim; victim's behaviour; victim's conduct; causation; equivalence theory; objective ascription theory; victim's exclusive fault; contributory negligence; tolerated risk; equal risk; unprotected risk; culpable risk; exhausted risk; participation in self-endangerment; consensual endangerment of another; victim's consent.

ABSTRACT

Modern criminal law has emerged as the consequence of a historical evolution from private justice to the current form, where the State has acquired the monopoly of holding a person criminally liable. And with this process, the owner of the protected legal good has been cast to the side. In the past few decades, there has been a rediscovery of the victim and of its role in social sciences, including in various areas of criminal, procedural and substantive law. The push for this 'resurgence' has mainly been victimology, as a subfield of criminology.

The shift towards victim rediscovery also had reverberations in the general theory of criminal offences. In foreign doctrine and case law (particularly in Germany, Spain, Portugal, Italy, Switzerland and the South American countries), this laid the foundation for an ample reshuffling of the underlying traditional paradigm, which was halted in the idea that the roles played by the offender (invariably deemed responsible) and by the victim (permanently innocent) were fixed and utterly segregated. Starting from the existence of a constellation of cases where the victim, whose role is customarily negligible, takes centre stage, understanding to adopt a behaviour that seemingly goes against its own interests, either concurrently with the offender's action or omission, or subsequently to its completion, it has become apparent that both victim and offender have developed into characters who, like two poles that traditionally repel each other, sometimes end up attracting one other.

This study sets out to analyse how the offender's criminal liability might be affected by the victim's behaviour that played a part in causing the harmful outcome. Put differently, we are targeting specifically the conduct which contributed to the origins of the risk that eventually led to the harming of a legal good held by the victim. The centre of interest is made up of the

commissive result offences, especially those against the life, body or health of a person. Since such offences can also be committed by omission, we've emphasised, here and there, the particularities derived from this form of the actus reus. Although our intention was far from circumscribing the theme hereof to acts committed by negligence, we must concede that most of the discussions actively gravitate to them.

As to the subject matter of our analysis, Romanian authors haven't tackled its implications, other than perhaps in a tangential manner. However, that is not the case with the foreign specialised legal literature, where this matter was treated extensively, as it surely deserved. Nevertheless, it should be made clear that although the solutions identified by the foreign authors bear a rough similarity, there is still a lack of consensus regarding the basis and criteria which should be considered in this type of situations.

With respect to the approach adopted by our national courts, a cursory review of their case law reveals that the statements of reasons, supporting their rulings, rarely contain any trace elements of the causation theories proposed by the legal doctrine. And even fewer references to the victim's behaviour and its implications, despite the fact that our courts have continued to hear cases which are similar to those extensively treated by the foreign doctrine.

The idea of the research behind this matter began with the finding that many of the principles governing the victim's contribution to the harmful outcome are rather obscure at present, being given little focus. In light of this situation, there was a clear need of a more thorough study, which would allow us to identify a well-established set of criteria that could be applied to every such case, as a warranty against the courts' random assessment of those cases where the victim's conduct did have a contribution to the final result.

The configuration of a social interaction requires not only the offender's involvement, but also the victim's, and their interaction can take on different dimensions. The behaviour of the victim, who contributed – either simultaneously with the offender's action / omission, or subsequently, after its completion – to the outcome, may be, in reality, displayed in various forms. In this context, any reference to the victim's behaviour should be understood in a broader sense, incorporating the actions whose results are perceivable in the surrounding reality, as well as the mere contributions of an intellectual nature. Using this last observation as a guide mark, we've proceeded to organise this thesis in two main parts.

The stated purpose of this paper is to identify some ascription patterns or bases that allow for a coherent consideration of the victim's contribution to the harmful outcome, in terms of judicial practice. Consequently, since a universally valid recipe is not available, given the many shapes and forms of the victim's conduct, the solutions we're proposing in our research relate to the different traits of the crime, depending on the existence, or lack thereof, of a subjective link between the victim and the offender – hence, the two-part structure of this thesis. Furthermore, having regard to the additional delimitation criteria set forth in each part, ie the time-dependant component treated in Part I, and the distinction between the act of the principal and the act of participating tackled in Part II), the range of available solutions enabling the consideration of the victim's relevant behaviour includes, with regard to the deed (at least apparently) attributed to the offender, and not necessarily in this order, the lack of a typical action or omission, the absence of a causal link or the lack of the deeds' unlawfulness character. The solutions we're putting forth herein are in contradiction to the prevailing opinion of our courts' view, which, in such cases, resort to the absence of mens rea as a trait of the offence.

As a general observation, throughout our research we've found that our courts of law, taking inspiration from civil law, have created a binary system that corresponds to a bona fide 'jurisprudential theory', embraced by some parts of the doctrine. In the first category of judgments (which deem the result to have been caused by the 'victim's exclusive fault'), the accused is cleared; his/her criminal liability may be incurred where the court believes that the harmful outcome was generated by a 'conjunction of faults', ie of both parties involved. This 'theory' seems to have a broad scope of applicability, and is being used in the hypotheses where there is no subjective link between the victim and the offender – when the former's contribution to the outcome is simultaneous or subsequent to the latter's conduct (discussed herein in Part I), as well as in those hypotheses when the victim accepts – along with the offender – the risky activity which translates into the harming of its legal goods (further discussed in Part II of our thesis). At the same time, with respect to the grounds for acquittal in the 'victim's exclusive fault' hypotheses, the rulings issued by our courts sway from finding there was an absence of the alleged author's mens rea (which stands as the dominant opinion) or an absence of a causal link (rather isolated opinion for the time being) to holding the occurrence of an act of God as grounds for acquittal (a minority, albeit still present opinion).

We believe there are several reasons why courts should give up resorting to such delimitation. First and foremost, in the absence of a set of guidelines to steer the court through the analysis it undertakes when establishing whether a certain case fits into one or the other of the two 'elements' making up the system, the assessment of the importance of each party's contribution to the outcome oftentimes seems rather arbitrary, and proof for this is precisely the divided case law in this matter. Similarly, we've noticed that the demarcation line between these two categories is rather 'permeable', allowing the shift from one category to the other with a casualness which promotes an arena of considerations based on equity. These failings have also been perceived in the trend displayed by some courts to equate the absence of the offender's 'mens rea' to the non-violation of a legal provision. Such an automatism may be considered dangerous, and has led, quite a few times, to the delivery of some judgments to convict in hypotheses that actually called for exoneration.

Part I of this thesis examines those hypotheses where the victim contributes to the harmful outcome, without having any subjective connection to the offender. Such contribution is manifested by the existence of a prior cooperation or arrangement to engage in a joint, risky activity. Throughout this part, we focused on attempting to convince the reader that the solution to this issue should be sought in the domain of causation, which eventually establishes to what extent the offender's behaviour is sufficiently 'linked' to the aftermath, in order to guarantee the necessary juncture for them to become criminally liable. In terms of causation, there are two major advantages of taking into account the victim's contribution to the harmful outcome. On the one hand, we would be complying with the order of gradually verifying the traits of the offence, as stipulated by the lawmaker in article 15 of the [Romanian] Criminal Code, according to which the analysis of an offender's level of mens rea occurs (or should occur) subsequently to the investigation into the deed's typicity, while on the other hand, we would be avoiding the difficulties related to the evidentiary proceedings which, as we well know it, are rather inherent when subjective processes are involved.

Chapter I explains how the causal link fits within the offence's overall architecture. We present the relevance of causation within the structure of an offence, as well as some of the most important theories based on which the analysis may be carried out (the equivalence theory and the objective ascription theory). In most cases, the existence of this causal link is clearly proven and resolved *sub silentio.* Nevertheless, there are situations where causation

requires a separate review; such is the case when the victim, with its own risky behaviour, brings about the harmful result. In these instances, using the equivalence theory is fated to fail, since it would lead (at least in its traditional form), in all cases, to the alleged offender becoming criminally liable. On the other hand, we believe that the objective ascription system is already 'fitted' with all the necessary tools to introduce a satisfying – coherent and, at the same time, predictable – solution in the matter of the victim's contribution to the outcome. The end of this chapter presents a distinct section, dedicated to the degree of receptivity by our judicial practice of the theories described herein. We are at a moment in time where Romanian courts are timidly beginning to adhere to the new theories on causation, thus pulling away from the anachronistic equivalence theory. Notwithstanding the doctrinaire proposals, for the time being, the innovation current is not strong enough to prompt discussions about an actual turnaround of the case law.

The next two chapters of Part I are structured according to the specific moment in time when the victim's relevant conduct occurs, namely concurrently with or, on the contrary, after the offender's action or, as applicable, omission.

The hypotheses where the victim's conduct occurs simultaneously with its endangerment by the offender, having direct repecurssions on the intensity of such state of danger, are analysed in ***Chapter II*** (**Confluence of Risks – The Effects of the Victim's Concurrent Contribution on the Offender's Criminal Liability)**. The subject matter of the study incorporates the hypotheses in which the victim's and the offender's parallel conducts converge toward a harmful otucome, without losing their individualised features.

Throughout this chapter we've identified several tendencies in the judicial practice that could be seen as questionable. Firstly, it happens quite often that a subject's criminal liability is automatically incurred when they violate a legal provision, even when, rather than stipulating a coercive rule, such provision is merely a guideline. Moreover, once the breach of a specific prohibitive legal provision is found, the courts' predilection is to proceed with holding the offender criminally liable, while ignoring evidence (and more often than not, such evidence is on file) in support of the fact that the result would have been equally, and most certainly, caused in the hypothesis where the offender had adopted an alternative, lawful behaviour. A third issue that we identified refers to those situations where the offender violated a legal norm that called for a specific duty of prudence, but the purpose of the violated norm doesn't

'cover' the harmful outcome. All these shortcomings could be easily avoided if the courts examined the hypotheses in which the victim contributes to the outcome, acting concurrently with the offender, through the lens of the objective ascription theory. The tolerated risk, the equal risk and the unprotected risk all have the capacity to provide an answer in the three aforementioned sets of hypotheses.

Furthermore, in the hypotheses where it is confirmed that both offender and victim, with their concurrent conducts, had an equal contribution to the harmful outcome, we've reached the conclusion that the courts should focus on the fact that the victim also contributed to the outcome, and should therefore convert these circumstances into an instrument which can be truly – not just formally – used to determine the amount of civil damages, respectively to personalise the punishment.

Chapter III **(Sequence of Risks – The Effects of the Victim's Subsequent Contribution on the Offender's Criminal Liability**) focuses on the constellation of cases where the victim's participation in self-endangerment or self-harming occurs after having been endangered by the offender. Throughout this chapter, besides presenting the positions adopted by the doctrine and the case law in this mattter, we further introduce a solution that emerged also under the objective ascription theory, ie the culpable risk criterion.

A first section of the chapter deals with the situations where there is an identity between the legal good that is affected by the initial risk and the legal good that is eventually harmed (this happens for instance when the victim of an assault fails to follow the treatment course prescribed by the doctor, which causes the initial injuries to worsen). The prevalent orientation shown by our courts is to extend – without exception – the offender's liability over the graver outcome. Here and there though, one may come across judgments which seem to suggest a change in the prevously mentioned views, by stipulating that in such situations, the chain of causation is actually broken. In our case, we believe that to the extent to which the victim is a responsible subject and adopts, while being aware of the exposure, a conduct – be it commissive or omissive – which involves disregarding the essential and elementary measures for neutralising the initial risk (concretely available), then the graver outcome cannot be ascribed to the offender because a culpable risk becomes incidental in this situation.

The chapter further examines the hypotheses where the victim chooses to add a new risk in its attempt to avoid the materialisation of the initial risk (this happens for example when the victim of an attempted rape jumps off a moving train). Our conclusion is that most of the time, in these situations, the victim doesn't voluntarily assume the action that caused or worsened the result, but nonetheless carries it out in order to eliminate an imminent aggression towards its own person; the culpable risk is therefore not applicable here. Nonetheless, by way of exception, we believe that where the victim, using its faculty for self-preservation, understands to expose itself to an obviously greater danger than the one generated, *in concreto,* by the offender, then such behaviour will be identified as being voluntary, leading to the offender's release from liability for the graver outcome. This section of the chapter also discusses the approach of the 'provoking dangerous rescue acts', which are incidental to the situation where the victim, while attempting to eliminate a pre-existing hazard generated by the offender and without being constrained by the idea of an immediate aggression, is injured or dies as a result of the rescue act in which it had engaged willingly.

The next section tackles the hypotheses where the victim's contribution to the harmful outcome overlaps the offender's omission. In these particular situations, we stressed the fact that the culpable risk defence cannot be upheld when the offender has a guardian duty towards the victim, whose self-endangering behaviour has a decisive contribution to the harmful outcome.

And lastly, our personal input to the development of the objective ascription theory is set forth in the section dedicated to the 'exhausted risk' criterion. We've chosen to include hereunder those cases where, in a first stage, the offender did endanger a legal good held by the victim, but this risk, along with its direct effects wore out, objectively speaking, before the victim proceeded to engage in a conduct which went against its own interest, and which caused the final result. Therefore, since in these situations the victim's conduct didn't occur because of the initial risk, but maybe (possibly) against its background, the element of coercion will be absent. Consequently, as long as it's confirmed that the risk has been exhausted, an aspect also perceived by the victim, then any possible reaction on the latter's behalf which leads to the harming of its own legal goods will in no way generate circumstances where the author of the initial risk may be held liable for that.

Part II of this paper sets forth an analysis of the victim's contribution to the harmful outcome, through tangible or intangible actions, by virtue of a subjective connection with the offender. Hence, we're looking at the 'interactive' conducts where the victim accepts, along with the offender, the risky activity which will eventually cause the victim's legal goods to be harmed.

We dedicated ***Chapter I*** to the great German law scholar C. Roxin, who, as early as 1973, introduced the concept of **delimitation between the participation in voluntary self-endangerment and the consensual endangerment of another.** The author 'pinpointed' the exoneration from liability solution to the level of typicity; the criterion used was that the outcome can(not) be subsumed under the purpose of the legal norm that was violated. Despite the fact that we arrive at a different conclusion in this regard, we chose to expound on this construct because it carried considerable influence in this matter. Both doctrine and jurisprudence integrated the concepts of participation in self-endangerment and of consensual endangerment of another (but not the delimitation criteria proposed by the founder of this distinction).

Having detailed the initial construct, we carry on with the second section of this chapter, where we review other delimitation proposals between the two 'blocks' of conduct, and then focus on the one with the best chances to be applied in our law system. Alongside another sector of the doctrine, we reached the conclusion that the distinction must be made using, by way of analogy, the rules that exist in terms of participating in intentional offences. Therefore, where the victim's contribution corresponds to act of the principal (and by correlation, the third party's behaviour corresponds to one of the forms of participation), then we are in the presence of a case of participation in self-endangerment. On the other hand, in the hypothesis where the behaviour of the person who facilitates the endangerment of the victim's legal goods corresponds to the act of the principal, then we are in the presence of a case of consensual endangerment of another. In this latter category we also included the situation where, due to their contributions, both parties have become joint principals of the offence.

We go on to explain our own stance regarding the participation in voluntary self-endangerment. Since in these cases the victim is harmed by means of its own risky activity, an outcome to which another person contributed (with acts that correspond to participation), then, in principle, the latter will not be held liable. The main argument behind it is derived from the principle of limited dependence of the accessory liability on the principal offence.

Since self-endangering and self-harming are not typical acts, then criminal law doesn't concern itself either with the aiding and abetting of such behaviours. However, this conclusion subsists only to the extent to which the risk is consciously accepted by the owner of the legal good, who must be a responsible subject and, moreover, must fully understand the inherent exposure brought on by their conduct. Furthermore, with respect to omissive behaviours, we found that the (pre-existing) guardian duty of the person who facilitates the victim's self-endangering will most likely make them the target of the ascription of responsibility for the outcome. Another limitation in this matter may be derived from the law maker's volition, tending to sometimes autonomously incriminate certain aiding and abetting behaviours in respect to the victim's voluntary self-endangerment, as is the case with inducing or abetting suicide or drug trafficking, followed by the victim's death. And the last section of this chapter is dedicated to our doctrine and the courts' view on this issue.

Chapter II extensively tackles the matter of the existence of a **justificatory defence of the victim's consent**. Following some brief explanations concerning the possible functions that the consent of the owner of the safeguarded legal good might have, we then focus on the conditions for its validity. At times, these are (perhaps too) restrictive, and we found that the hypotheses, in which a valid consent, supported by a justification, may be issued, are consequently quite rare. The hard-shelled nucleus of this issue is formed by the possibility to dispose of the harmed legal good.

We also prepared a distinct section in this chapter, dealing with the issue of consent for offences by negligence, where we advocated for the opinion which upholds that consent works in the event of such acts also. In this particular instance, consent doesn't actually refer to the outcome, but to the risk-generating behaviour. We then concluded that to the degree to which the victim allows itself to be put in danger by another person, while consciously accepting such risk-generating behaviour, eventually leading to one of its available legal goods being harmed (such as physical integrity), and especially where the victim is fully aware of the exposure involved, then the courts of law should hold the justificatory defence, which supports the victim's consent, and consequently release from liability the person who committed the risky activity. Notwithstanding the above, the examination of our courts' view on the matter reveals that most of them are still far from reaching the point where they can deliver such judgments.

And lastly, we note that the general theory of criminal offences – standing as the backbone of criminal law – has undergone certain material changes in the past decades, which have been promoted and recorded both by the foreign specialised literature (in particular German literature), as well as, recently, by our country, with the entry into force of the current version of our Criminal Code. Assigning responsibility is a rather delicate matter, especially if one of the persons that could be potentially held accountable is precisely the owner of the protected legal good. In the end, it's quite natural for paradigm shifting events to draw some level of unskillfulness on the part of the actors performing on the judicial scene; the same it is for the evolution of institutions and, ultimately, for a consistent and homogenous judicial practice to (also) rely on the solutions put forward by the great criminal law scholars of all times. Particularly for this reason, throughout this thesis, we've endeavoured to shine a light on the shortcomings identified in our national doctrine, and specifically in our case law, while sprinkling, here and there, relevant bits of comparative law, on which we ultimately based the solutions we put forward herein. Our hope is for this paper to be a humble first step towards drawing out into the light victims and their contributions to harmful outcomes.