Historical background of the factors of attribution of civil liability, starting with Napoleon's Civil Code of 1804 and its reception in the Colombian Civil Code of 1873. The special case of the objective regime for hazardous activities[1]

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Abstract

Gaius' inclusion of the figure of quasi-crime had a great impact on the subsequent conception of the glosadors and the natural law regarding civil liability; the difficulties in differentiating this figure from crime contributed to the subjective conception of responsibility, embodied in Napoleon's Civil Code. French doctrine and jurisprudence created an objective liability factor based on the risk of the fact of things. This did not happen in the same way in Colombia; Don Andrés Bello's code was not a copy of the French Code, its author took into account other sources and did not incorporate into the code a general rule of responsibility for the fact of things. In light of the historical account of the receipt of the factors for attribution of civil liability, it is impossible in Colombia to support the theory of risk in article 2356 CC col.

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1. The role of the concept of quasi-delict in the evolution of the factors of attribution of civil liability

In order to understand the process of reception of Roman law on the subject of subjective and objective attribution factors of civil liability in European law and later in Latin American law, it is necessary to refer to the normative compilation made by Justinian, called *Corpus Iuris Civiles,* from the post-classical period (6th century between 529 and 556 AD). This work reflects the evolution of Roman law in relation to what is currently conceived as civil liability, as previously regulated in the law of the XII Tables or *"decenviral law" (*450-451 BC), and later

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in the *Lex aquilia* (286 BC), a plebiscite attributed to the tribune Aquilio Digesto, 9, 2,1-1[3].

From this evolution, we will focus on the incorporation of the concept of quasi-delict, because from there begins an evolution in relation to the sources of obligations and the factors of attribution of civil liability. Thus, this figure was conceived as one of the causes creating obligations, but its inclusion, according to the interpretation given by Justinian to the category of the *variae causarum figurae* of *Gaius*, brought many problems when it came to distinguishing it from the notion of crime[4]; for this reason, and with the aim of considering both figures as autonomous sources, it was decided to assimilate the crime with the wrongful acts caused with malice, and the quasi-delict with the wrongful acts caused with fault[5].

Gaius is credited with the inclusion in his institutions of a new category of *causae obligationum* - although some sectors dispute the authenticity of the work in which he incorporated it -, to the *summa divisio* of contract and crime, which he called *variae causarum* figurae - various species of causes[6]. What is relevant about this new source is that it was not intended to generate causes of obligations similar to contracts - *quasi ex contractus* - and similar to crimes - *quasi ex delicto* -, but on the contrary, it was intended to be an open category to cover all the facts that, without falling into the category of contracts or crimes, gave rise to the birth of an obligation.

Within this category of quasi-delicts, *Gaius* considered some cases arising from lawful acts such as *negotiorum gestio*, guardianship, legacy and *solutio indebiti*; and included others whose origin was illicit acts, such as the *iudex qui litem suam fecit* (case of the judge *who* makes his cause his own), the illicit regulated in the edict of *effusis vel deiectis* (responsibility of the inhabitant for the things that were thrown or poured out of the buildings), the regulated in the edict of *positis vel suspensis* (popular action on the things in the buildings that threaten the risk of falling); finally, he also took into account in this category the *actiones adversus nautas caupones et stabularios* (liability for theft or damage caused to the things of guests in ships, lodgings and stables), as can be seen in the Digest 44,7,5,4-6[7].

The four illicit events considered by *Gaius* gave rise to the obligation to pay a *poena*; this was made effective through tort actions despite not having the category

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[3] Di Pietro, Alfredo, *Derecho privado romano*, Buenos Aires, Abeledo Perrot, 2018, p. 311; Solarte Rodríguez, Arturo, *Los actos ilícitos en el derecho Romano*, in „Vniversitas", Pontificia Universidad Javeriana, Bogotá, Vol. 53, No. 107, 2004, p. 714.

[4] Schipani, Sandro, *De la Ley Aquilia a Digesto 9. Perspectivas sistemáticas del Derecho romano y problemas de la responsabilidad extracontractual*, in „Revista de Derecho Privado", Universidad Externado de Colombia, Bogotá, No. 12-13, 2007, p. 275.

[5] Sánchez Hernández, Luis Carlos, *La responsabilidad civil extracontractual sin culpa. La tutela de la seguridad de los transeúntes en el Derecho Romano y la moderna responsabilidad por actividades peligrosas*, Bogotá, Universidad Externado de Colombia, 2019, p. 198.

[6] Ibid, p. 53.

[7] García del Corral, Ildelfonso L., *Cuerpo del derecho civil romano*, Barcelona, Jaime Molinas Editor, 1889, Available in: Biblioteca Jurídica Digital Antonio Reverte, University of Murcia, Spain http://bib-antonioreverte. um.es/Obras/GCo rral_Corpus.xml [Accessed 8-07-19].

of crimes[8]. The above has given rise to discussions on the difference between the figures of crimes and quasi-delicts, with several theories being tested, among which stand out those that support the difference in terms of origin, as the former come from civil law and the latter from praetorian law; a second theory has indicated that the divergence arises in the type of predictable liability, as in crimes there is liability for one's own act, while in quasi-delicts it is given for the act of others; the third theory identifies crimes with malice and quasi-delicts with fault.

A last view of the subject that opposes the previous ones is presented by Sánchez[9], for whom the real difference between these two categories is to be found in the criterion of imputation -for our case attribution factor-, applicable to these events, since quasi-delicts actually regulated assumptions of liability without fault. In this sense, Guzmán indicates on the meaning of the word quasi, and in particular on the name given to the category of wrongs committed without fault that „the "quasi", therefore, is the express and official announcement of a catacresis. Something similar happens with the *obligationes ex maleficio* and *quasi ex maleficio*. For Gaius, wrongful acts committed with malice and exceptionally with fault give rise to *obligationes ex delicto*; but - he verifies - there is a series of wrongful acts of what we call strict liability, which also give rise to obligations. However, although each tort has its own name, at the systematic or category level, all of them lack their own name; therefore, Gaius generically called them *obligationes quasi ex maleficio"*.[10]

However, the idea of assimilating the crime with the wrongful acts caused with malice, and the quasi-delict with the wrongful acts caused with negligence, was perpetuated with the interpretation given to the Roman texts by the glossators in the School of Bologna - 11th century AD -, in the era of *ius commune*; this school reinterpreted the regulation of the *Lex Aquilia*, leaving aside the typicity of the torts of Roman law, to open its field of application by recognising in the *Aquiline* tort a general rule of liability with fault. As a consequence of the above, it became necessary to locate the events previously referred to as liability without fault, and it was decided to include them in the category of quasi-delict, but under its new interpretation. In this way, quasi-delicts became cases where it was mandatory to analyse the subjective element[11].

Already in the 17th century AD, the school of rationalist legal naturalism had a strong influence on the modern conception of liability for wrongful acts; in the work of *Hugo Grotius* - father of this school -, *maleficium* was considered as one of

[8] Sánchez Hernández, Luis Carlos, *La lex aquilia: la estructura del damnum iniuria datum y su evolución a través de la interpretatio prudentium y la actividad pretoria*, in „THĒMIS-Revista De Derecho", Pontificia Universidad Católica del Perú, Lima, No. 73, 2018, Lima, p. 188. Available at: http://revistas.pucp.edu.pe/index.php/themis/article/view/20898 [Access: 10-10-19].

[9] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 61.

[10] Guzmán Brito, Alejandro, *El significado de "quasi" en el vocabulario de los juristas romanos*, in „Revista de Estudios Histórico-Jurídicos", Pontificia Universidad Católica de Valparaíso, Valparaíso, N° 38, p 90, 2016 Available at: http://www.rehj.cl/index.php/rehj/article/view/827/743 [Accessed 8-07-19].

[11] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 204.

the sources of obligations, understood as any fault in doing or not doing, contrary to what men should commonly do, generating an obligation to repair if with such fault damage has been caused; with the above, a kind of general clause of civil liability begins to be recognised, which covers all damage committed with fault without the need to make the distinction between crime and quasi-delict[12].

Following these postulates, another natural law author - *Samuel Pufendorf* - coined the precept of the duty not to cause damage, explaining later that the obligation to make reparation arises for contravening this duty when three conditions concur: 1) that the damage was prohibited by natural or positive law, 2) that this damage had been caused with fault and 3) that the victim had not consented to the damage; in other words, for the author, a damage can only be imputed to someone when he causally generated it, and there is a subjective factor of attribution, since only those acts governed by the intellect or the will can be imputed as his work[13].

Thus, the first European codifications were influenced by the ideas of the glossators and the natural law authors, leaving aside the typicality of Roman law, and considering the existence of a kind of general clause of liability based on fault; this meant that - from a practical point of view - the distinction between crime and quasi-delict was lost, since what was relevant was to corroborate whether damage had been caused, either by malice or negligence, in order to understand that this damage was covered by the general rule that obliged the person who had caused it to make reparation.

Having understood the above, we will now review the reception of these different views of the subjective and objective factors of attribution of liability in Napoleon's Code of 1804, with emphasis on the interpretation of the doctrine and jurisprudence with respect to paragraph 1 of its article 1384; we will then examine the way in which these advances were taken up in the Colombian Civil Code of Don Andrés Bello, with special mention of the rule contained in its article 2356 of liability for dangerous activities.

2. The primacy of the subjective conception in the reception of the factors of attribution of civil liability in Napoleon's Civil Code of 1804

The French civil codification of the early 19th century (21 March 1804) originated in a revolutionary, individualistic environment, which went against absolutism, and which sought to find, on the basis of natural law ideas, certain general legal principles applicable to all men at all times and in all places[14]. Although at the time of the issuance of the French Code, the word civil liability was not yet well established, and therefore, it was not enshrined with this title in the Code nor

[12] Ibid, p. 210.
[13] Ibid, p. 211.
[14] Schipani, Sandro, *Las macrocategorías de las instituciones y los principios generales del derecho;* version by Hinestrosa, Fernando. Bogotá, Universidad Externado de Colombia, 2019, p. 89.

was it established as an autonomous branch, Viney[15] considers that some common features were taken into account which help to understand the bases of the finally codified regulation on crimes and quasi-delicts.

The ideological bases that guided the regulation of civil liability in the French codification can be summarised, according to Viney[16], in three fundamental ideas: a) universalism, b) individualism and, c) moralism; the first of these is explained insofar as the code enshrined a clear opposition to the typicality that came from Roman law with regard to this matter, passing to the consecration of some general rules of open texture; the second idea is reflected in the little regulation given with regard to collective liability, due to the social and economic structure of France at the end of the 17th century, where the economy was governed by individual relationships and there was an emerging capitalism, so that it was the individual relationships and the need to make the economy grow that were the relevant interests worthy of protection in the event of a possible occurrence of damage; and finally, moralism was represented in the idea of generating a reproach, which is why it was sought to link civil liability to moral liability, and the codifiers had to resort to the concept of fault to turn it into the structural axis of this matter.

Regarding this last characteristic, it must be said that the iusnaturalist currents of *Grotius* and *Pufendorf*, had an influence on the drafting of the code[17]; also the ideas of Christianity played an important role in Western European countries in all areas, having an effect in the legal field thanks to the work of Catholic theologians - mainly St. Thomas -, who, although they recognised the rules that came from Roman law, tried to interpret them and give them a new vision based on the principles of the Gospel[18].

Although the imprint of Roman law on the French Civil Code of 1804 is verifiable, its influence is limited to a Roman law modified by the interpretations of the iusnaturalists and Catholic theologians, so that in the codification we see a merged version of this law[19]. In the case of civil liability, the French Code has a conception of its rules based on a moral vision of responsibility in order to create a better society[20]. This is why Viney states that it was "as a result of a *symbiosis between Roman solutions and the great principles of Christian morality* that the modern conception of liability finally enshrined in the Code of 1804 was to be born"[21].

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[15] Viney, Geneviève, *Treatise on civil law. Introduction to civil liability* [Trad. Montoya Mateus, Fernando]. Bogotá, Universidad Externado de Colombia, 2007.

[16] Ibid, p. 37.

[17] Aedo Barrena, Cristián, *¿Siguió el código civil francés el pensamiento de Domat en materia de culpa (faute) extracontractual?*, in „Revista Chilena de Derecho", Pontificia Universidad Católica, Santiago de Chile, Vol. 44, Nº 3, 2017, p. 645. Available at: http://revistachilenade derecho.uc.cl/es/numeros-anteriores.html [Accessed: 6-08-19].

[18] Viney, Geneviève, *op. cit.,* p. 32

[19] Aedo Barrena, *op. cit*., p. 635.

[20] Schipani, Sandro, *op. cit.* (2019), p. 87.

[21] Viney, Geneviève, *op. cit.*, p. 32.

This influence is reflected in the doctrine of the French jurist Jean Domat, which served as the basis for the codification of 1804; Domat raised the need to differentiate civil and criminal liability, enshrining for the first time a general rule of fault liability in harmony with the iusnaturalist current, moving away from the typicity of Roman law; this author did not differentiate between crime and quasi-delict, which led to the enshrinement of a general rule of fault liability in article 1382 of the French Civil Code[22].

In this regard, Henri, Leon and Jean Mazeaud tell us that „...the jurists established *a general principle of civil liability,* very broadly formulated by Domat (Loix civiles, lib. II, tit. VIII, sec. IV): "*All losses, and all damages* which may occur by the act of any person, whether it be imprudence, carelessness, ignorance of what ought to be known, or other similar faults, however slight they may be, must be repaired by him whose imprudence or other fault has given rise to it. For it is a damage which he has done, even though he may not have intended to injure...-II. Failure to pay an obligation is also a fault which can give rise to damages, for which he will be liable.[23].

In this way, it can be argued that the reception of the rules of Roman law in relation to the so-called subjective and objective attribution factors in the original drafting of the French Civil Code of 1804, were marked by the reinterpretation of these factors in the light of the natural law doctrine and Christian morality; this vision allowed to leave aside the particular events of liability without fault of Roman law, to subsume them within the general rule of liability for fault[24]. In this way, articles 1382 to 1386 (CC Fr.), are a reproduction of the universal rule of liability described by Domat, where the existence of fault is required as an indispensable presupposition to structure liability. In other words, there is no doubt that the subjective factor of liability in its modalities of malice or fault, was the one chosen by the drafters of the French Civil Code of 1804[25].

In this regard, Tamayo Jaramillo states that „the drafters of the Napoleonic Code adopted the philosophical principle according to which man is only liable when, by abusing his sphere of freedom, he has contravened the existing rules of law. Until the middle of the last century, this principle could be maintained and corroborated by another general principle of law, according to which the plaintiff must prove the fault imputed to the defendant. Consequently, articles 1382 and 1383 of the Napoleonic Code enshrined tort or tortfeasor's liability, and the philosophical basis of liability remained malice or fault. This general principle would be developed by articles 1384 to 1386 inclusive of the French Civil Code."[26]

Despite this subjective conception of liability having been established in the Code, the evolution of society, its culture, its technification, its economy, and the

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[22] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 219.

[23] Mazeaud, Henri, Léon and Jean, *La responsabilité civile. Quasi-contracts.* [Trans. Alcala-Zamora y Castillo, Luis]. Buenos Aires, Ediciones jurídicas Europa-América, t. II, v. II., 1978, p. 15.

[24] Brun, Philippe, *Responsabilidad civil extracontractual*, version by Gutierrez Tellez, Cynthia and Cardenas Miranda, Eduardo. Lima, Pacífico Editores S.A.C., 2015, p. 161.

[25] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 230.

[26] Tamayo Jaramillo, Javier, *Tratado de responsabilidad civil*, Bogotá, Legis, t. I., 2011, p. 817.

problems of industrialisation, led the French doctrine and jurisprudence to rethink some of the rules established in this code, with the aim of making room for other attribution factors other than fault and malice, opening the door to objective factors, as we will review below.

3. The reinterpretation of Article 1384, paragraph 1 of the Civil Code of 1804, to make room for a general rule of strict liability for the fact of things

The original conception of the drafters of the French Civil Code of 1804 (CC Fr.) was to make fault and malice the only factors of attribution of civil liability; general rules were established, and particular cases of application of the general rule for special events such as damage caused by animals or by the ruin of buildings. Thus, this form of regulation is reflected in the articles that regulate liability for one's own actions, for the actions of others, and for the actions of things, always following the rule of the necessity of fault and leaving aside the objective factors of attribution of liability, which had no place in the original sense of the codified rules.

For Viney "...the preparatory works reveal indisputably that for the authors of the Civil Code the rules given by articles 1384 to 1386 were nothing more than particular applications of the principle of liability for fault established in articles 1382 and 1383"[27].

Roman law had already foreseen events of damage from things, and these rules were received by the French Code in special provisions, such as article 1385 on the fact of animals and article 1386 regarding the ruin of buildings; nevertheless, these assumptions continued to be considered in Napoleon's codification as events that fit within the general rule of the necessity of fault, that is to say, under the criterion of the subjective factor of attribution[28].

Despite the above, French jurisprudence began to reinterpret article 1385 (CC Fr.), which regulated liability for the actions of animals, to extract from it a presumption of fault on the part of the owner or the person using the animal that caused the damage; in this way, the owner or the person using the animal was liable for the consequences caused by the animal without being able to rely on noxious abandonment to exonerate himself; he was only allowed to prove diligence and care in order to be exonerated. The above interpretation later took a turn in the face of the multiplication of accidents with horse-drawn carriages; indeed, jurisprudence in order to protect the victims decided to see in article 1385 the existence of a presumption of fault that did not admit proof to the contrary; thus, the defendant in these cases could now only be exonerated if he provided proof of an extraneous cause[29].

It is clear that it was intended to remain under the influence of fault, but in practice this attribution factor was not necessary to sue, nor did it serve to defend;

[27] Viney, Geneviève, *op. cit.*, p. 41; in the same sense: Tamayo Jaramillo, *op. cit.*, p. 820.
[28] Mazeaud, Henri, Léon and Jean, *op.cit.,* p. 217.
[29] Ibid, p. 219.

despite the above, Gallic jurisprudence in its beginnings did not admit the presence of an objective attribution factor behind this interpretation of Article 1385 of the 1804 Code in the resolution of cases.

With the advent of machinery and industrialisation, accidents increased and the search began to find a way to apply the same rule of damages for animals to these cases; therefore, from 1880[30], a whole doctrinal trend began in search of a factor of attribution of liability other than fault, applicable to these accident events, based mainly on the potential risk of things. This trend arose as a result of the fact that accidents at work and damage to means of transport showed that the fault rule was insufficient to provide an adequate response to the needs of the victims, since it was very difficult for them to prove the subjective element in order to obtain compensation.

Henri, Leon and Jean Mazeaud comment that in 1871 there was an accident due to the explosion of a boiler, where it was not possible to protect the victims on the basis of the general rule based on proof of fault; an attempt was made to resort to article 1386 (CC Fr.), without a positive result, since the rule referred to a specific case of ruin of buildings. This led the public prosecutor Faider to propose to the Brussels court to apply a new system to deal with these cases, which consisted in seeing in Article 1384 (1°) (CC Fr.) a general rule of liability for the acts of inanimate things.

This new thesis sought to use a system similar to that applied on the basis of Article 1385 (CC Fr.) for damage caused by animals, all with the aim of relieving the victims of the burden of proof of fault; despite the novelty of the proposal, the Brussels Court rejected it on the grounds that there was already a rule for liability for damage caused by things, and that was article 1386 (CC Fr.), even if it referred to the ruin of buildings; the court considered that if the legislator had wanted to establish a special rule for damage caused by things - other than buildings - he would have provided for it.[31]

As can be seen, the case discussed by these authors begins to outline the course that was later to be adopted by the French courts, as regards the recognition of the existence of a general rule of liability for the acts of inanimate things based on the 1st paragraph of article 1384 (CC Fr.), which reads as follows: "One is liable not only for damage caused by one's own act, but also for damage caused by the act of the persons for whom one is responsible or by the things one has in one's custody".

Faced with the winds of change, the doctrine did not remain oblivious and took for itself this new vision of the subject; it was *Laurent* who in his book on the principles of civil law assumed the position of considering this thesis as valid, and began to proclaim that article 1384 (CC Fr.), enshrined a different principle to that enshrined as a general rule based on the fault of articles 1382 and 1383 of the code[32].

For its part, the Court of Cassation had the opportunity to rule in the Teffaine judgment (Cour de cassation, chambre civile, 16 juin 1896), in which it judged the

[30] Brun, Philippe, *op. cit.*, p. 318; Tamayo Jaramillo, *op. cit.*, p. 818; Viney, Geneviève, *op. cit.*, p. 43.
[31] Mazeaud, Henri, Léon and Jean, *op. cit.,* p. 219.
[32] Tamayo Jaramillo, *op. cit.*, p. 819.

damage caused by the death of a worker who was on board a ship and had died as a result of the explosion of a boiler due to a construction defect; in this judgement, it was decided to accept the new trend, declaring the liability of the shipowner, based on the 1st paragraph of article 1384 (CC Fr.), without having required the plaintiffs to prove fault, as with this new rule, the high court understood that the existence of the defect of the thing and the material causation of the damage was sufficient.

Subsequently, a new case of damage caused by the explosion of another boiler allowed the Court in 1897, in its admission chamber, to pronounce again on the subject; on this occasion it held that the presumption of article 1384 (CC Fr.) admitted the proof of the absence of fault in order to destroy it. However, the doctrine led by *Saleilles* and *Josserand*, appropriated the jurisprudential precedents on the interpretation of paragraph 1° of article 1384 (CC Fr.) and began to propagate the thesis that this rule established liability based on the theory of risk, an objective attribution factor totally unrelated to the issue of fault.[33]

The evolution on this subject continues in the Gallic jurisprudence, with a decision of the Court of Cassation in 1908 where it begins to consider that the presumption emanating from the 1st paragraph of article 1384 (CC Fr.), falls on the owner of the thing regardless of the existence or not of a defect; it is also emphasised that this liability can only be excluded if the owner proves not to have had the thing under his care or that of his dependents at the time of the damage, or, if he proves a foreign cause.

In 1920, the Court of Cassation, in another pronouncement, specified that the presumption of fault applied does not arise from the existence of a defect in the thing, but from its safekeeping; this evolution continued with the case heard for the first time by the Court of Cassation on 21 February 1927, known as the *Jand'heur* ruling, in which the damage caused to the child Lisa Jand'heur by a lorry belonging to the Maison Bumsel company was judged, when it seriously injured her when backing up.

In this judgement, some rules are proposed that serve to interpret in due form the presumption of paragraph 1 of article 1384 (CC Fr.), which will be taken into account from now on by the case law; one of the most important points to the impossibility of destroying the presumption with the proof of diligence and care, as only the proof of the extraneous cause is allowed; this rule generated much confusion, as it continued to speak of a presumption of fault. Another novelty in this ruling was the express reference to the need for the thing with which the damage was caused to be dangerous; this last consideration led different sectors to interpret the new rules of liability for the fact of things, on the understanding that exoneration was allowed by proving diligence and care, unless the damage was generated with a thing classified as dangerous, in which case this form of exoneration does not apply.

In order to dispel the aforementioned doubts, the Court of Cassation, in its assembled chambers, revisited the matter and issued the judgement of 13 February 1930 (Cour de Cassation, Chambre réunies, Arrêt du 13 Février 1930, *Jand'heur*), in

[33] Ibid, p. 820; Mazeaud, Henri, Léon and Jean, *op. cit.,* p. 221.

which it established that the presumption arising from paragraph 1 of Article 1384 (CC Fr.), cannot be destroyed by proof of diligence and care; in this sense, in order to be exonerated, proof of an extraneous cause is required. In addition, a change is made with respect to the type of presumption contained in the article, as there is a change from a presumption of fault to a presumption of liability; it is also reiterated in this ruling that proof of a defect in the thing is not necessary, as liability is given by reason of the guarding, not the action of the same; last but not least, the requirement of the dangerousness of the thing with which the damage is caused for the presumption to operate is removed.

All of the above has made this judgement worthy of being considered as the most important jurisprudential precedent in relation to the correct interpretation of the rule of liability for the fact of things, emanating from paragraph 1° of article 1384 (CC Fr.), being followed from now on by French doctrine and jurisprudence without many changes[34].

In short, the evolution of civil liability in French law with respect to the factors of attribution of liability originally enshrined in the Civil Code of 1804, began with the inclusion of the primacy of the subjective factor of malice and fault; from the process of mechanisation and industrialisation, accidents and the production of damage multiplied, which led to a rethinking of the rules of subjective liability to provide a real response to the victims of this damage, which, more often than not, remained without reparation due to the difficulty of proving fault in these cases. This is why the reinterpretation of the doctrine and jurisprudence of article 1384, paragraph 1 (CC Fr.) made it possible to resort first to a presumption of fault and then to a presumption of liability in order to alleviate the burden of fault for the plaintiffs; this vision of the subject allowed *Saleilles* and *Josserand to* disseminate the establishment of the theory of risk, so that it would later be considered as an objective factor of attribution of liability, even if at the time, French case law insisted that their interpretations remained within the field of the subjective regime of liability.

Having seen how the factors of attribution of liability were received in the Civil Code of 1804, and its subsequent evolution with the French doctrine and jurisprudence, we will now review how this phenomenon was received in the Colombian Civil Code of Don Andrés Bello, to determine whether it was a copy of the French civil code, or whether it had other sources.

4. Was the process of adoption of the Colombian Civil Code of 1873 by Don Andrés Bello a process of copying or transferring Napoleon's Code of 1804?

In order to understand how the phenomenon of adoption of the Colombian Civil Code (CC Col.) came about, we must start from the development in this matter in European Law, especially the example of the French Civil Code of 1804, since it

[34] Brun, Philippe, *op. cit.*, p. 320.

is certain that most of the Civil Codes of the early 19th century followed this line. Nevertheless, we will have to take a historical look at the rules that governed Colombia before and after its independence, in order to have an overview of the sources used by Don Andrés Bello for the elaboration of the Civil Code of Chile, which later became, with some modifications, the Colombian Civil Code of 1873.

Before Colombia gained its independence in 1819, it was part of the Kingdom of New Granada, which belonged to the Spanish crown; therefore, Spanish and Indian laws prevailed in its territory, the most important of which were the *Siete Partidas, the Nueva Recopilación de Castilla, the Novísima Recopilación and the Recopilación de Indias*[35]. This subjection to Spanish laws and to the laws of the Indies was present in all the American kingdoms of the Crown, in such a way that the codified law for this period was represented in the text of the *Seven Partidas* of Alfonso X "the Wise", a normative text "whose most direct and important sources were Roman law, compiled in the *Corpus Iuris Civilis*, and the interpretation of the same by the Glosa, as well as the municipal charters and the canon law represented especially by the Decretals of Gregory IX"[36].

Thus, the law in Colombian territory at that time was represented by two major bodies of law; on the one hand, the *law of the Siete Partidas*, which were in a way an extension of Roman law after having been interpreted by Italian jurists, especially by the glossators; on the other hand, there was the Indian law, constituted by laws emanating from the kingdom of Castile for the American colonies, and by the norms issued by the authorities settled in the place and who had that power, such as viceroys, governors, audiencias and cabildos[37]. This Indian law was mostly dedicated to public law issues and scarcely to civil law; therefore, in this matter it was the law of the Siete Partidas, and later the laws of Toro, which were considered the common law applied and studied in the American lands[38].

After Colombia gained independence from the Spanish crown, it was decided with the Constitution of 1821 to maintain in force the Spanish norms applied up to that time, but on the condition that they did not oppose the new precepts of the constitution; this led to the issuing of new laws to eliminate certain figures that did not fit in with the new reality. An example of this was General Francisco de Paula Santander's proposal in 1822 to issue a Civil Code and a Criminal Code, for which a commission was created, but which in the end did not produce any results[39]. Later, Simón Bolívar set up another commission in 1829, but this time to study Napoleon's

[35] Hinestrosa, Fernando, *El Código Civil de Bello en Colombia*, in „Revista de Derecho Privado", Universidad externado de Colombia, Bogotá, No. 9, p. 5, 2005. Available at: https://revistas.uexternado.edu.co/index.php/derpri/article/view/ 582/549 [Access: 31-07-19].

[36] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 253.

[37] Guzmán Brito, Alejando, *El código civil de chile y sus primeros interpretes*, in „Revista Chilena de Derecho", Pontificia Universidad Católica, Santiago de Chile, Vol. 19, Nº 1, 1992, p. 84. Available at: http://revistachilenadederecho.uc.cl/es/ [Accessed 8-07-19].

[38] Ibid, p. 85; Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 361.

[39] Mayorga García, Fernando, *Pervivencia del derecho español durante el siglo XIX y proceso de codificación civil en Colombia*, in „Revista Chilena de Historia del Derecho", Santiago de Chile, No. 14, 1991, p. 297. Available at: https://historiadelderecho.uchile.cl/ [Accessed 8-07-19].

Code and bring it to our territory; Bolívar's idea was promoted by the antecedent of the initiative in Chile of Don Bernardo O'higgins, who in 1822 tried to translate and bring the French civil code to that land, considering it a known code in Hispanic America. There is no record of the results of the commission created by Bolívar for this task[40].

On the initiative of Don Manuel Ancizar, who had been a diplomat in Chile and was a friend of Don Andrés Bello, a copy of the code drawn up by him for Chile in 1855 was requested; Bello transferred the request to the Chilean Ministry of Foreign Affairs, which answered the request affirmatively, sending two copies that were to be in force as of 1856[41]. By that time, the Constitution of the Republic of New Granada of 1853 was already in force, with which several states were created and had the autonomy to dictate their own constitution and codes[42]; in response to this, the state of Santander decided to issue its own code in 1858, adopting the Chilean Civil Code with variations and additions. The other states acted in the same way, issuing their own civil codes, but following the parameters of the Chilean Civil Code.

With Law 84 of 1873, the unitary Republic of the United States of Colombia was constituted, and the Chilean Civil Code was adopted as the Civil Code for the entire territory of the union with some variations[43]. After some political changes that led to the constitution of Colombia in 1886, the Civil Code of the Union (Law 84 of 1873) was adopted as the National Code, through Law 57 of 1887; it was later reaffirmed with Law 153 of the same year, thus leaving in force the Colombian Civil Code that is currently in force with some subsequent modifications[44].

From the above account it can be established that the Colombian Civil Code of 1873 was based on the code of Don Andrés Bello of 1855 for Chile, and that this in turn had among other sources the French Civil Code of 1804[45]; however, we cannot conclude that the Colombian Civil Code of Bello was a copy or translation of the Code of Napoleon as some people think. This is so if we take into account that, by the time the Civil Code was issued in Chile, some issues in French law had already been decanted in relation to what was prescribed in its Code, and therefore, Andrés Bello paid more attention to these interpretations than what was expressed in the Code itself. In addition, he took into account other sources for the elaboration of his code, such as the law of the *Siete Partidas*; therefore, the work done by Bello was not a simple translation of the French Code into Spanish in order to incorporate it in Latin America. In this sense, Botero states that „and let us not lose sight of the fact that Bello's code, although it participated in the codifying ideology of French formalism, had in its essence elements so *suigeneris* that they never cease to surprise.

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[40] Hinestrosa, Fernando, *op. cit*., p. 6.
[41] Mayorga García, Fernando, *op. cit.*, p. 299.
[42] Hinestrosa, Fernando, *op. cit*, p. 7
[43] Ibid, p. 7
[44] Mayorga García, Fernando, *op. cit.*, p. 309.
[45] Mirow, M.C., *The Power of Codification in Latin America: Simon Bolivar and the Code Napoleon*, in „Tulane Journal of International and Comparative Law", New Orleans, vol. 8, 2000, p. 84. Available at: https://law.tulane.edu/jicl [Accessed 8-07-19].

One of them was the very wide variety of sources used by Bello, among them the 1804 code and the French exegetical literature, but also *scholasticism* (fundamentally the *Second Scholasticism or Salamanca School*), Roman law Christianised in the Middle Ages (which Bello admired so much), Castilian law (especially *Las Partidas*), other civil codes of the time (such as that of Louisiana of 182519) and German scientific doctrines, especially Savigny [1779-1861]20 , known to Bello when he lived in Europe, so that the backbone of the Colombian EXÉGESIS, if we can call it that, was not French purity, but a mixture as interesting as it was audacious, of positions that in the Old World were opposed to each other."[46]

Having understood the process of adoption of the Colombian Civil Code of 1873 and its sources, we will now review how the issue of subjective and objective factors of attribution of liability was received in this code; this will help us to determine whether it can be classified as a system equal to the one adopted by the Napoleonic Code and later by the French doctrine and jurisprudence.

5. The reception of the subjective and objective factors of attribution of civil liability in the Colombian Civil Code of Don Andrés Bello of 1873

In this part of the paper, we intend to review whether Colombia followed the trend of the drafters of the French Code of erecting malice and fault as the only factors susceptible of generating liability, or whether there is a way to support the existence of a different system of attribution factors. This is due to the fact that by the time the Colombian Civil Code was issued, Don Andrés Bello was already aware of the evolution of the French doctrine and jurisprudence in relation to this issue. Likewise, this analysis will allow us to identify whether the regulation given by Bello was influenced by what already existed for the region in the law of the *Siete Partidas*.

In order to answer the above concerns, we must take as a starting point the fact that the regulation on civil liability established in the Civil Code of Chile of 1855 (CC Ch.), followed the trend of accepting the advances of Roman law in this area[47]. This implies considering that this code enshrined a general rule of liability for the commission of a crime or a quasi-delict, following the French model in the general aspects of requiring a fault to engage liability; this idea had already been taken up in Indian law[48], as can be seen in Volume IV, Part VII, Title XV of the Siete Partidas, which indicates that *„Title XV of the damages that men, or beasts, do to the things of another, of whatever nature they may be*. Damages are done by men to one another in themselves or in their things, which are not robberies, nor thefts,

[46] Botero Bernal, Andrés, *Andrés Bello's Civil Code and the Exegetical Movement in Colombia*, in „Comparative Law Review", Perugia, vol. 9, No. 1, 2018, pp. 162. Available at: http://www.comparativelawreview.unipg.it/index.php/ comparative/article/view/141 [Accessed 8-07-19].

[47] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 364.

[48] Velásquez Posada, Obdulio, *Responsabilidad civil extracontractual,* Bogotá, Editorial Temis, 2009, p. 184.

nor furies. But they occur *at* times by occasion, and at times through the fault of another. Onde pues pues que en los títulos ante deste fablamos de los Robos, e de los Furtos, queremos aqui_dezir de los otros daños. E mostraremos que cosa es Daño. E quantas maneras, son del. E quien puede de mandar ende emienda. E before whom. E a quales. E como deue ser fecha emienda del, despues que fuere aueriguado".

One of the points where Bello departed from the French system was in having taken into account the classification of crime and quasi-delict according to the conception of the interpreters of Roman law who assimilated them to the concepts of malice and fault respectively; he also departed from the Gallic Code in that he consecrated some events of liability for quasi-delicts that had been previously regulated by Roman law where fault is not necessary to engage liability[49]. In this respect, Barrientos indicates that „on such bases it is not surprising that in the *Draft Civil Code* of 1853, the only one in which there is a note referring to a source for the current article 2314, Andrés Bello wrote the following note: "L. 6, tít. 15, Part. 7", the heading of which contains, precisely, a general statement: "Como aquel que ficiere daño a otro por su culpa, es tenudo de facer emienda del", i.e., it is this principle taken from the Alfonsine law that the codifier considers as coinciding with the general clause of liability contained in the current article 2314 of the *Civil Code*. The law of *Partidas*, in this case, has operated as one of its inspirational sources, although it has not influenced as a model of drafting, and thus, his note to the aforementioned article 2478 of the *Draft* of 1853 emphasised that it did not innovate in any way in relation to the current law and that, in practice, it meant a simple stage in the evolution of the current law, it meant a simple stage in the evolution of the tendency of the Common Law to formulate a general rule of liability on the basis of the extensive treatment of the tort of the *Lex Aquilia* which, moreover, Andrés Bello himself had followed in 1843 and 1849 in his *Instituciones de Derecho Romano* when, regarding the tort, with reference to the *Digest* (9.2), to the *Code* (3.35) and to the *Siete Partidas (*7.15), he had written: "The action of the Aquilian law is brought against the tortfeasor not only for malice but also for even the slightest fault; therefore this law belongs not only to crimes, but also to quasi-crimes"."[50]

The Colombian Civil Code followed in terms of civil liability what was established by Don Andrés Bello for Chile, without making major modifications, and continued with the trend of demanding a moral reproach regarding the conduct of the perpetrator in order to establish his responsibility[51]; a general principle of the necessity of guilt is then adopted to generate responsibility[52], based on the regulation

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[49] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 377

[50] Barrientos Grandon, Javier, *De la presunción general de culpa por el hecho propio. A propósito de los artículos 2314 y 2329 y de nuestro "código civil imaginario* in „Revista Chilena de Derecho Privado", Universidad Diego Portales, Santiago de Chile, No. 13, December 2009, pp. 17. Available at: http://www.rchdp.cl/index.php/rchdp/issue/view/21 [Access: 6-10-19].

[51] Velásquez Posada, Obdulio, *op. cit.*, p.186

[52] Sarmiento García, Manuel Guillermo, *Estudios de responsabilidad civil,* Bogotá, Universidad Externado de Colombia, 2009, p. 200.

of the subject that already existed in the law of the Siete Partidas, especially the partida 7ª, title XV "De los daños, que los omes, o las bestias, do en las cosas de otro, de qual natura quier que sean", in which the damages caused with fault are regulated[53].

This can be seen clearly reproduced in the wording of article 2341 (CC Col.) which regulates civil liability for one's own act for having committed a crime or fault that has caused damage; this article is essentially the same as article 2314 (CC Ch.), except that in the Colombian code reference is made to the crime and the fault that produces the damage, instead of the denomination of crime and quasi-delict that is found in the Chilean Code[54].

Thus, there is no doubt that, in Colombia, the factors of attribution of civil liability chosen mainly by the codifier were fault and malice; despite the above, it cannot be thought that the whole regime of civil liability foreseen in articles 2341 to 2360 (CC Col.), are structured under the idea of a subjective regime of liability. In fact, Don Andrés Bello, following the line drawn by the law of the Siete Partidas - both in Chile and in Colombia -, consecrated some events that had previously been foreseen as quasi-delicts in Roman law, and moved away in this point from the Code of Napoleon; thus, he transferred to the civil code "El edicto de ferris y la Actio de *effusis vel deiecitis",* events in which in Roman law the proof of fault was not necessary.

These particular events can be considered as cases of strict liability based on risk or danger, as they regulate liability for damage caused by a fierce animal of which no usefulness is reported, and liability for damage caused by things that fall or are thrown from a building, as can be seen from Articles 2354 and 2355 Inc. 1° (CC Col.).

We believe that it is possible to see in these particular cases an incorporation of objective factors of liability such as risk or danger, in so far as proof of fault is not required to engage the liability in these cases, neither of the keeper of the fierce animal, nor of the person or persons who inhabit the part of the building; Furthermore, in none of the cases is it possible to exonerate oneself by proving the absence of fault, which corroborates the presence of a factor other than fault, which in this case is objective, where only the demonstration of the occurrence of an extraneous cause as a defence of the defendant is admitted.

Despite this interpretation, some sectors of Colombian doctrine consider that article 2355 (CC Col.) is structured in a presumption of fault, since it allows the defendant to exonerate himself if he proves that "the act is due to the fault or bad intention of some person exclusively"[55]. We do not agree with the above assessment, as we believe that the article does not raise the possibility of proving diligence and

[53] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 253; Velásquez Posada, Obdulio, *op. cit.*, p.186.

[54] Mantilla Espinosa, Fabricio, *El principio de la responsabilidad por culpa del derecho privado colombiano*, in „Opinión Jurídica", vol. 6, No. 11, Universidad de Medellín, Medellín, January-June, 2007, p. 132. Available at: https://www.udem. edu.co/index.php/quienes-somos/21-derecho/ investigacion/1402-ediciones-anteriores [Accessed 8-09-19].

[55] Velásquez Posada, Obdulio, *op. cit.*, p. 560.

care to rebut the presumption of fault - which would turn this case into a case of subjective liability -, but rather, it allows the proof of the exclusive fault of the third party to be exonerated, this ground being one of those belonging to the genus "extraneous cause". Consequently, under this view, if fault does not play a role in order to sue, nor can it be proved against, we are still facing a case of liability without fault based on risk, as it was regulated in Roman law[56].

Finally, we must highlight the tendency of the majority Colombian doctrine and jurisprudence to consider the events regulated in articles 2354 and 2355 (CC Col.) as typical events of liability for the fact of things - the first of animate things and the second of inanimate things -; this position seems to be in line with French law with respect to what is regulated in paragraph 1° of Article 1384 (CC Fr.). However, such a view of the subject does not turn out to be entirely true, inasmuch as, unlike Napoleon's Code, Don Andrés Bello did not consecrate a general principle of liability for the fact of things, on the contrary, he only stipulated some particular cases of this type of liability, one of them being that regulated in the 1st subsection of article 2355 (CC Col.).

In addition to the above, the aforementioned article envisaged the possibility of the intervention of human conduct as the cause of the damage, since the factual assumption also covers damage caused by the action of "throwing" things from a building; likewise, according to the factual assumption established in the rule, the liability falls on those who inhabit the part of the building from which "the thing fell or was thrown", but not because of the relation of the guardianship or custody that the inhabitant has with the things that generate the damage - as it happens in French law - but because of the danger that it implies for the rest of the persons that someone inhabits a building; in these terms, we agree with Sanchez for whom it is impossible to speak of a liability for the fact of things in Colombia, as conceived by the case law in France based on the reinterpretation given to paragraph 1° of article 1384 (CC Fr.)[57].

In conclusion, although the Colombian Civil Code has as its main liability regime the subjective one, whose attribution factors are fault and malice, it is also true that when Bello departed from Napoleon's Code and followed the line of heading 7, title XV of the Law of the *Seven Partidas*, he included in his code some events of quasi-delicts that generate liability without the need for proof of fault, and because of the danger or risk involved in the activities included in them, it is plausible to sustain in such cases the liability of the parties, included in his code some events of quasi-delicts that generate liability without the need for proof of fault, and because of the danger or risk involved in the activities included in them, it is plausible to sustain in such cases, the presence of an objective factor of attribution of liability.

Having understood the above, we will now review the special case of article 2356 (CC Col.) which corresponds to article 2329 (CC Ch.) to determine whether it is possible to argue, as some sectors of Colombian doctrine and jurisprudence have

[56] Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 481.
[57] Ibid, p. 482.

done, that this precept is the gateway to risk theory in our legal system, as it regulates liability for dangerous activities.

6. The special case of the application of risk as an objective factor of liability in the Colombian Civil Code, based on the historical analysis of article 2356 C.C.

To address this point, we must reiterate that the Chilean Civil Code, and consequently the Colombian Civil Code, does not enshrine a general principle of liability for the fact of things, as was found in French jurisprudence in paragraph 1 of article 1384, which reads as follows: "one is liable not only for the damage caused by one's own act, but also for the damage caused by the act of the persons for whom one is responsible or for the things that one has in custody".

The above prescription on liability for damage caused by things under the guardianship or care is not reproduced in the text of Andrés Bello; consequently, it is impossible to transfer to Chile and Colombia the evolution given on this matter in the French doctrine and jurisprudence, since Bello enshrined in his codes some specific cases of liability for the fact of animate and inanimate things and not a general rule.

In spite of the above, an interpretation has been generated in our environment of article 2356 (CC Col.) or article 2329 (CC Ch.), which sees in this article the enshrinement of liability for dangerous activities, which has led it to become the gateway to the theory of risk in our environment; the above position is based, as was the case at the time in French law, on the idea of the existence of an alleged general principle of liability for the fact of things. This view has led to a doctrinal and jurisprudential debate, in relation to the factors of attribution that the rule enshrines, to determine whether it is fault or risk, as well as with respect to the type of liability regime applicable to the cases described therein, subjective or objective.

In order to analyse whether this interpretation is correct, let us first review what is expressed in article 2356 (CC Col).

As a general rule, any damage that can be attributed to the malice or negligence of another person must be compensated by that person.

They are especially obliged to make this reparation:

1. Whoever recklessly fires a (sic) firearm.
2. Whoever removes the slabs of a ditch or pipe, or uncovers them in a street or road, without the necessary precautions to prevent those who pass there by day or night from falling.
3. Whoever is obliged to construct or repair an aqueduct or fountain, which crosses a road, has it in a state of causing harm to those who travel on the road.

From the outset, the first thing that stands out is the purpose of the rule to regulate some factual assumptions in which damage has been generated that can be attributed to the "malice or negligence of a person"; with the aim of making it more

operative, they provide some enumerative and non-exhaustive examples of situations that give rise to this liability, mentioning in each one of them conduct that clearly fits with the idea of fault. Thus, in the first numeral, an assumption of fact is brought where one acts with imprudence; in the second, the example mentions not having taken the necessary precautions; and in the third numeral, reference is made to constructions or repairs that have been left in a state of causing damage to those who travel along the road[58].

In order to better understand its structure, it is relevant to try to elucidate the source of this rule, and for this reason, we highlight what is expressed by Botero, who in making the historical analysis of the article, concludes that this regulation does not have its origin in the French civil code, as it is not a copy of paragraph 1 of article 1384 (CC Fr.) which enshrines the principle of liability for the fact of things, nor is it a reproduction of any other rule of this Code[59].

If this is so, then what was the source followed by Don Andrés Bello to establish Article 2329 of the Chilean Civil Code, which would in turn become Article 2356 of the Colombian Civil Code? The answer to this question is provided by Barrientos, who in his historical analysis of the origin of this article indicates that the origin of this rule and that of article 2314 - article 2341 (CC Col.), can be found in the law of the Siete Partidas (Seven Partidas). „It has been anticipated that article 2493 of the *Draft* of 1853, current article 2329 of the *Civil Code*, contained the following note referring to the *Siete Partidas*: "LL. 6, 7, 8, etc., tit. 15, P. 7". It is recalled here that paragraph 1 of the aforementioned article 2493, now 2329, stated: "As a general rule, any damage that can be attributed to the malice or negligence of another person must be compensated by that person". Note that Andrés Bello points out in the note the reference to *Siete Partidas* 7.15.6, that is, to that law which, with a general rubric, dealt with: "Como aquel que aquel que ficiere daño a otro por su culpa, es tenudo de facer emienda del" and in the body of which the following passage was found: "Tenudo es de fazer emienda, porque como como quier que el non fizo a sabiendas el daño a otro, pero acaesció por su culpa" in which, as has been said in dealing with the sources of the current Article 2314, the Spanish-Indian legal literature had found the foundation of a general clause of liability, since both rules have the same source, only that they differ in their operative field, Andrés Bello uses it in Article 2314 to found the general rule of liability for the commission of unlawful acts that cause damage and that have a penalty assigned by law, and in Article 2329 to found the rule of liability for any damage caused by an act attributable to malice or negligence that is not covered by the single notions of crime or quasi-delict and that was in line with the tradition of extending the tort of the *lex Aquilia*, from which the aforementioned law of *Partidas* originated”[60].

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[58] Ibid, 2019, p. 514.

[59] Botero Aristizabal, Luis Felipe, *El oscuro origen de las actividades peligrosas en el derecho colombiano: ¿Es necesaria una relectura del artículo 2356 del Código Civil?*, in „Responsabilidad civil, derecho de seguros y filosofía del derecho, estudios en homenaje a Javier Tamayo Jaramillo”, Aramburu Calle, Maximiliano (Coord.), Medellín, Diké, t. I, 2011, p. 431.

[60] Barrientos Grandon, Javier, *op. cit*., p. 55.

From this perspective, it is corroborated that articles 2314 and 2329 (CC Ch.) and articles 2341 and 2356 (CC Col.) are not a copy of the Napoleonic Code; moreover, they cannot be seen as a repetition of the same rule in a body of law, since the historical reason for both provisions is given by the concept of liability for crimes and quasi-delicts according to the legacy of Roman law at the time the code was issued.

Thus, it was considered that crimes - public and private - were previously typified and had a sanction in the law -thus there was no clear separation of civil law and criminal law-, in such a way that Don Andrés Bello wanted to shape in the code the tendency that came with the *Lex Aquilia* to generate liability not only when it was a question of the commission of a crime or quasi-delict previously typified and sanctioned by criminal law - what is regulated in articles 2314 (CC Ch.) and 2341 (CC Col.) -, but also in those damages attributable to the malice or negligence of a person that, despite not being previously typified or sanctioned from a criminal point of view, should in any case be subject to reparation - regulated in articles 2329 (CC Ch.) and 2356 (CC Col)[61].

Under these terms, the idea of the author Botero is correct, for whom the general rule of civil liability in Colombia for damages committed by malice or negligence is not found in article 2341 (CC Col.) as it has always been considered, but precisely in article 2356 (CC Col.); this if one takes into account that the latter rule opens the spectrum of liability to situations that are not previously classified as crimes, but which, having been caused with malice or negligence, must also be repaired. On the contrary, article 2341 (CC Col.) is a rule of more restrictive application, as it would only apply to those cases of wrongful acts with fault or malice that are also classified as crimes[62].

Although we consider the above vision of the subject to be correct, we must recognise that Colombian jurisprudence, and subsequently the doctrine, do not agree with this position; on the contrary, they have tried to see in article 2356 (CC Col.), a repetition of article 2341 of the same Code, and for this reason, they see it feasible to give it a different interpretation to the point of enshrining a whole theory of liability for dangerous activities; they do so under the argument that they are copying the evolution of the subject in French law, in order to make room for the theory of risk in our legal system, although without expressly recognising it.

In this way, the Supreme Court of Justice in a judgement of 14 March 1938, with the report of Magistrate Ricardo Hinestrosa Daza, held that in article 2356 of the Colombian Civil Code, there was no application of the theory of risk, but there was a presumption of liability that implied a presumption of fault that does not admit proof to the contrary, leaving only the defendant the possibility of exonerating with proof of the extraneous cause. The idea of the presumption of liability arising from article 2356 (CC Col.) was upheld in other judgments[63].

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[61] Ibid, p. 59.
[62] Botero Aristizabal, Luis Felipe, *op. cit.*, p. 437.
[63] Judgment of 18 April 1939. M.P.: Pedro A. Gómez Naranjo; Judgment 12 January 2018. M.P.: Ariel Salazar Ramírez. SC002-2018.

In other rulings, the impossibility of applying the theory of risk and with it an objective regime of liability in Colombia has been reiterated due to the absence of a normative text that allows it; nevertheless, it is insisted on seeing in the aforementioned article 2356 (CC Col.) a case of presumption of fault that does not admit proof to the contrary, where only the extraneous cause can exonerate, as was stated in the ruling of 18 November 1940 with the report of Magistrate Liborio Escallón; this last thesis is the one that has been maintained by the majority in civil jurisprudence, with which it is intended to sustain a supposed regime of subjective liability, with a judicial and not legal presumption of fault, which paradoxically does not admit proof to the contrary.[64]

For its part, the Colombian Council of State has not been oblivious to this evolution, and has adopted the theory of liability for dangerous activities, indicating in its beginnings that this is based on a presumption of failure of service that admits proof to the contrary[65]; then it shifted its position and assumed that, being a dangerous activity, an exceptional risk is generated, and this type of event should be analysed under an objective liability regime where only the extraneous cause exonerates[66].

This last idea of the contentious judge seems in principle to be the same as that of his civil counterpart, however, although in practice for the plaintiff and the defendant in both jurisdictions the burden of proof is the same, in that fault must not be proved to engage liability and proof of diligence and care is not admitted to exonerate oneself, the difference lies in the regime and attribution factor that is involved in each of these positions.

Thus, the Council of State in its evolution has openly admitted the application of the theory of risk as an attribution factor in an objective liability regime without there being a rule that enshrines it, as it considers that the 1991 Political Constitution does not privilege any regime or attribution factor, in such a way that it is the judge, taking into account the circumstances, who decides whether to apply a subjective liability attribution factor such as failure of service or an

[64] Judgment 18 May 1938; Judgment 30 April 1946. M.P.: Ricardo Hinestrosa Daza; Judgement 09 February 1976. M.P.: Germán Giraldo Zuluaga; Judgement 3 November 1954; Judgement 17 May 1982. M.P.: Humberto Murcia Ballén; Judgement 26 May 1989. M.P.: Eduardo García Sarmiento; Judgement 5 May 1999. M.P.: Jorge Antonio Castillo Rugeles. Case 4978; Judgement 26 August 2010. M.P.: Ruth Marina Díaz Rueda; Judgement 18 December 2012. M.P.: Ariel Salazar Ramírez; Judgement 6 May 2016. M.P.: Luis Armando Tolosa Villabona. SC 5885; Judgement 15 September 2016. M.P.: Margarita Cabello Blanco. SC 12994; Judgement 12 January 2018. M.P.: Ariel Salazar Ramírez SC 002; Sentence 7 March 2019.M.P.: Octavio Augusto Tejeiro SC 665.

[65] Judgment of 7 April 1989. C.P.: Carlos Ramírez Arcila. Exp: 5264; Judgment of 31 July 1989.

[66] Judgment of 16 July 1997. C.P.: Ricardo Hoyos Duque, exp. 10.024; Sentence 25 September 1997. C.P.: Ricardo Hoyos Duque, exp. 10.421; Judgement 19 July 2000. P.C.: Alier Eduardo Hernández Enríquez, exp. 11.842; Judgement 11 May 2006. C.P.: Ramiro Saavedra Becerra, exp. 14.694; Judgement 11 August 2011. C.P.: Hernán Andrade Rincón, exp. 19638 - 20293; Judgement 10 September 2014. C.P.: Enrique Gil Botero, exp. 31.364; Judgement 12 October 2017. C.P.: Marta Nubia Velásquez Rico, exp. 51.634.

objective one such as risk or special damage[67]; on the other hand, the Supreme Court in its Civil Chamber, has insisted on the presence of a subjective liability regime in article 2356 (CC Col.) whose attribution factor is fault, only that in these cases it is presumed and does not admit proof to the contrary.

Without wishing to ignore the creative work of the jurisprudence on this issue, and its interest in responding to the needs of the victims, the truth is that from the analysis of the roots of Article 2356 (CC Col.), it cannot be concluded that there was a reception in our country of the theory of risk devised by French law that supports the position taken by Colombian jurisprudence. On the contrary, the historical reading of this precept demonstrates the impossibility of seeing in this rule the consecration of an objective regime of liability.

Nor is it clear from where Colombian case law derives an alleged presumption of liability or fault, and even less so that it is considered as *iuris et de iure as* stated in the Supreme Court ruling of 12 January 2018 (exp. Sc-002). This interpretation is not consistent since, as has been demonstrated, article 2356 (CC Col.) is not a copy of paragraph 1° of article 1384 (CC Fr.), and therefore the doctrinal and jurisprudential evolution of that country could not have been automatically transferred to the Colombian case. In addition, it is evident that the wording of the factual assumptions of the rule does not make use of a presumption of the subjective element, but on the contrary, liability is conditioned to the proof of malice, negligence or imprudence, with which, there is no interpretation that can support the position of the Colombian judge.

From the structure of the rule in question, it is clearly evident that it enshrines a rule based on fault, since liability is subordinated to the effective proof that the damage was caused by "malice or negligence", it being impossible to structure on this regulation an objective factor of liability or a reversal of the burden of proof of fault, by way of a presumption as is done in Colombian case law. Likewise, it is not appropriate to assimilate Article 2356 (CC Col.) with the cases regulated in Roman law as quasi-delicts that gave rise to liability without fault; on the contrary, the events listed in this rule were treated by Roman law not as typical crimes or quasi-delicts, but as events of liability due to fault[68], in such a way that in this way it cannot be argued a history of these assumptions unrelated to fault.

For Barrientos, it is clear that the Chilean Civil Code (2329) does not establish a presumption of subjective attribution factor, but on the contrary, it requires proof of liability in order to declare liability, since „...the subjunctive mood used in the phrase 'that can be imputed to the malice or negligence of another person', explained according to the codifier's own grammatical conceptions, implies uncertainty about the imputation of the damage to the malice or negligence of a person and it follows that the reparation order, to which it is subordinate, can only operate when this uncertainty does not exist, that is, when it has disappeared because

[67] Judgment of 19 April 2012. C.P.: Hernán Andrade Rincón, exp. 21515; Judgment 28 February 2013. C.P.: Danilo Rojas Betancourth, exp. 25.075; Judgment 5 March 2015. C.P.: Danilo Rojas Betancourth, exp. 30.102; Judgement 13 June 2016. C.P.: Carlos Alberto Zambrano, exp. 37.387.

[68] Barrientos Grandon, Javier, *op. cit*., p. 59; Sánchez Hernández, Luis Carlos, *op. cit.*, 2019, p. 514.

it has been proven that the damage could be imputed to the malice or negligence of another person."[69]

The importance of the historical review of the origin of article 2329 (CC ch) is fundamental to understand the roots of our article 2356 (CC Col.); by clarifying this panorama we can realise that the reading of the jurisprudence and the doctrine of seeing in this rule an entry of the theory of risk, or the consecration of the theory of dangerous activities, or the presumption of liability or fault, is mistaken. This being the case, it is only feasible to support these ideas if the origin of the rule is denied, or if it is interpreted in a manner contrary to what it enunciates.

In the first case, it has already been established that the origin of the rule is not to be found in the French Code of 1804, but in the law of the *Seven Partidas, as can be* seen in section 7.15.6, which is entitled "*Como aquel que fiziere daño* a *otro por su culpa, es tenudo de fazer emienda del."In* these cases*, the* liability was based on fault, following the tradition of Roman law.

The other possibility is the *contra legem* interpretation, which we do not share, and for this reason we echo the words of the authors Mantilla and Ternera, for whom „...to attempt to base a special liability regime, equivalent to that existing in French law, on the wording of Article 2356 of the Civil Code, is to completely overlook the differences between the two legal texts. And to attempt to circumvent the requirement of fault by referring to complex and contradictory theories of fault is to directly contradict the legal provision. This incoherence is nothing more than the consequence of the attempt to "transplant" the solutions adopted in foreign law to Colombian law, without first examining whether our legal system could serve as a legal basis. This first *contra legem* interpretation of article 2.356 of the CC has not only led jurisprudence to develop a liability regime with no legal basis, but also, in its eagerness to adapt it to the law, has ended up completely deforming it".[70]

To conclude, it only remains to say that the thesis of the uselessness of article 2356 (CC Col.) because it is considered a copy of 2341 (CC Col.) is not correct, and consequently, does not constitute a sufficient argument to give a free hand to the jurisprudence and doctrine to interpret the rule at their discretion; on the contrary, a review of the history of the origin of these articles reveals the impossibility of basing the existence in Colombia of a theory of liability for dangerous activities on the first of these articles[71] and, however commendable the work of the jurisprudence has been in interpreting the *contra legem* norm to provide a response to the victims, this is still an anti-technical and contrary to history position, which should be subject to review.

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[69] Barrientos Grandon, Javier, *op. cit.*, p. 60.

[70] Mantilla Espinoza Fabricio and Ternera Barrientos, Francisco, *La interpretación contra legem del artículo 2356 del Código Civil colombiano*, in „Cuadernos de análisis jurídico", Universidad Diego Portales*,* Santiago de Chile, No. 1, 2004, p. 217. Available at: http://derecho.udp.cl/investigacion-y-publicaciones-2/publicaciones/cuadernos-de-analisis-juridico/ [Access: 6-10-19].

[71] Botero Aristizabal, Luis Felipe, *op. cit.*, p. 436.

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