Volume 22 Issue 54
Originally issued as F8



Global Journal of human-social science: F
Political Science
Volume 22 Issue 8 Version 1.0 Year 2022
Type: Double Blind Peer Reviewed International Research Journal
Publisher: Global Journals
Online ISSN: 2249-460X & Print ISSN: 0975-587X

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GJHSS-F Classification: *FOR Code: 160699*



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Criterion to Interpretation of Prevision in the Liability

Campos Cuesta, L.P.

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I. Introduction

Responsibility is one of the areas of modern law that has gained more importance due to the constant and incipient appearance of injured events for the person, collectives and groups of various kinds that must be repaired. In the study of this area, conceptual challenges have arisen that have been resolved gradually and front to the modern reality.

Now, with the advance of science, the need to measure risks, identify variables and avoid damage or mitigate them, tools appear for the interpretation of structural, determinant, and transversal elements such as prevision, predictability or unpredictability identified in the process of defining the existence or not, of responsibility for causing damage.

This article, based on the existence of the transversal concept in liability such as forecasting, will make an approach to the interpretation of the circumstances surrounding the origin of thedamage, in order to establish whether through a method of observation, data collection, determination of factors and identification of processes could specify the existence of a criterion that would allow understanding the concept of forecasting in a process of responsibility, that corresponds to the precision and legal certainty required by modern law.

Once the object of this paper has been defined, topics related to the possibility of the existence of a criterion that allows usto interpret the presence or not of the prevision, which for the purposesof the investigation has been called, "Red Point", and whose definition we can advance in the description of types of processes against which the interpreter, could refer in its study for the definition or release of the existence of responsibility.

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II. Summary

1. Identification of prevision as a transversal concept in the structure of responsibility. 2. Proposal for an order for the assessment of the circumstances surrounding the occurrence of the damage. 3. Methodology for determining the existence of the approach criterion. 4. "Red Point" criteria foridentifying prevision, predictability, and unpredictability in liability. 4.1. Linear process. 4.2. Circular Process. Conclusions.

1. Identification of prevision as a transversal concept in the structure of responsibility[1]

Prevision, predictability, and unpredictability, are concepts that have been used transversally and at various stages in the study of liability for the damage caused to the victim, these moments havebeen located in the analysis of the founding elements of current responsibility, namely: in the analysis of damage, in the configuration of diligence or risk and within the elements exonerating from liability, according to the type of liability applicable to each specific case.[2]

These mentions made prevision and its different meanings have a transversal presence in the analysis and structuring of the foundations of responsibility.

Thus, the concept of prevision used in liability has been defined as follows: "it is the *conduct aimed at anticipating the damages that may come from a behavior or an event, in the face of future but normal contingencies that should have been warned*". Definition, which presents the existence of an "anticipation of damages", and[3] of "*future but normal contingencies*", descriptions that show the need to interpret the uncertainty for the right of damages, the context of

[1] CAMPOS CUESTA, L.P., *Impact of the concept of forecasting on the elements of civil liability in Colombia*, Revista de Derecho Privado, Universidad Externado of Colombia, No. 35, July December 2018, 245-259. https://revistas.uexternado.edu.co/index.php/derpri/article/view/5535

[2] In relation to the definition of the elements of liability See HENAO, J. C., *The damage,* Bogotá, Universidad Externado de Colombia, 1998, 84. Regarding predictability in the assessment of diligence, BIANCA, C Massimo; ALPA, Guido; CORSARO, Luigi; FERNANDEZ CRUZ, Gaston; FRANZONI Massimo Pier; MONATERI, Giuseppe; SALVI, Cesare; SCHLESINGER Piero, ". *It is really easy to see that all the impediments that have arisen, external and internal, are ultimately resolved by obstacles to behaviour, which are susceptible to the same objective assessment of predictability and Superability*". *Studies on Civil Liability*, Translation and Editing Leysser L. León, First Edition, November 2001, Peru: ARA Editors. 349.

[3] Ibid., 1. 252.

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imminent events and the reference to the advance of modernity for law in general.

About the instruments for interpreting or identifying the occurrence of damage or its exemptions from liability and in order to understand the study of future contingencies, the Colombian high courts have established some parameters aimed at clarifying what is meant by normality, reasonableness, or probability, in order to explain the events in which the lack of prevision in responsibility would be configured. Thus, the Civil Cassation Chamber of the Supreme Court of Justice, "*... He has pointed out that events 'occurring in the ordinary course of life' are normally foreseeable, or the '... normal circumstances of life´, or what is not´... likely enough that the debtorshould reasonably have been wary of it.*[4,5,6]

For its part, the third section of the Council of State, referring to the precedent of civil jurisprudence, explained that, in order to determine the unpredictability of an event in the definition of contractual liability, three criteria that it called "substantive" had to be taken into account: "*1) The one referring to its normality and frequency; 2) Concerning the probability of its realization, and 3) That concerning its unexpected, exceptional and surprising character*"[7]; that for the specific case, it was not the object of consideration since it indicated "the *plaintiff did not demonstrate the reality of the facts he invoked, nor their abnormal, strange and unforeseeable nature*".

In relation to the responsibility of the Colombian State for failure of service derived from violent acts of third parties, the Council of State has indicated that the context must be identified in three dimensions to determine whether exposure to an exponential or extraordinary risk was foreseeable, this depending on the specific legal vulnerability of an individual or group. understanding as predictability, its greater risk of suffering damage and affectations, namely: "*i) distal context that refers to the existence of underlying and structural causes; ii) proximal context, understood as the level of exposure to variable pressures from the first contextual dimension and, iii) situational context, related to the degree of sensitivity to risk or evident fragility*".[8]

The ruling explains that these three contextual criteria taken from the vulnerability test of the individual or group, are adjusted to build predictability in cases of responsibility of the Colombian State in the internal conflict, in which "*beyond* the *existence of areas exposed to the risks of conflict, it is the specific situations of the individual or collective that qualify vulnerability. In turn, vulnerability translates into (a) SIC a considerable exposure to risk, which is foreseeable before the authorities responsible for guaranteeing security conditions*." [9]

Together with these classifications, high corporations have generally attended to the analysis of what they have called "the *circumstances of time, manner and place*" in which the events occurred, or the damage occurred, intended for application in the study of each specific case, considered for the evaluation of the evidence of the elements of responsibility and in a practical way in the determination of the existence of a cause stranger. For the verification of the implementation of the study of the circumstances in which the events occurred,[10] about 38 judgments were identified in the last 10 years in which they explicitly referred to this rule, in some of them to its evidentiary insufficiency and in others regarding the definition of the existence or not of a strange cause or the presence of a failure in the service.[11]

[4] Supreme Court of Justice, court judgement, May 31, 1965, G.J. CXI-CXII.

[5] Supreme Court of Justice, court judgement, 13 November 1962, and 20 November 1989.

[6] Supreme Court of Justice, court judgements, July 5 1.935, and October 7 1.993.

[7] Council of State, Chamber of Administrative Litigation, Third Section, Counselor Rapporteur: Ramiro Saavedra Becerra, July 22, 2009, File: 14389.

[8] Council of State, Administrative Litigation Chamber, Third Section, Subsection B, Reporting Counselor: Ramiro Pazos Guerrero, August 3, 2017, File: 44302. This in relation to the reading made by the instance regarding the context of the armed conflict, in which it says it surpasses "*...the threshold of ordinary risks that generally loom over the inhabitants of the country or of a given area, so that a special level of protection can be demanded from the State, on the understanding that the damage – under such conditions – becomes foreseeable*".

[9] Ditto 8, 30.

[10] Council of State, Chamber of Administrative Litigation, Third Section, Counselor Rapporteur: Mauricio Fajardo Gómez, February 9, 2011. In this case it was concluded that the victim's conduct "*constituted a sudden and sudden event for the Administration, to which it would not be legally admissible to demand the impossible, that is to anticipate the design, personal and untimely, of the deceased, who in a reckless manner and ignoring the orders of his superiors and military instructions accessed in a deceptive way to the pipe where he lost his life.*"

[11] Within the judgments of the Council of State, Chamber of Administrative Litigation, Third Section, observed are those of dates: February 10, 2011, and March 10, 2011 of the Counselor Rapporteur: Ruth S. Correa. P.; 14 March, 27 June and 24 July 2013, 30 April 2014; Counselor Rapporteur: Mauricio Fajardo; November 26, 2015, March 7, 2016, December 19, 2017, Counselor Rapporteur: Guillermo Sánchez Luque; February 25, 2016 Counselor Rapporteur: Olga M. Valle de la Oz; June 13, 2016 Counselor Rapporteur: Hernan Andrade Rincón; May 2, 2018 Counselor Rapporteur: Jaime O. Santofimio; December 10 and August 2, 2018 of the Counselor Rapporteur: Martha N. Velásquez R; May 18, 2019 Counselor Rapporteur: María A. Marín; June 28, 2019, January 31 and July 6, 2020 of the Counselor Rapporteur: Jaime Rodríguez Navas; October 3, 2019 of the Counselor Rapporteur: Carlos A. Zambrano B.; March 5, 2020 of the Counselor Rapporteur: Alberto Montaña P.; September 6, 2021 of the Counselor Rapporteur: Freddy Ibarra M.

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In accordance with the evidence, jurisprudential pronouncements frequently refer to the casuistic analysis of the circumstances in which the damage occurs, or in the study of the elements of responsibility, despite this there is no deepening with respect to the legal parameters in which the factors of time and place will be valued, despite being considered decisive circumstances for the attribution of the claimed responsibility.

In this way, currently the analysis of prevision as a transversal element of civil and state liability in Colombia, is valued in its modality of predictability and unpredictability within the circumstances of time, manner, and place in which the events occur. Due to its importance and frequent use, we deal with its interpretation and the importance of its order in the analysis.

2. Proposal for an order for the assessment of the circumstances surrounding the facts and the occurrence of the damage

In the analysis of the identification of damage and its attribution of responsibility, attention has been directed to the determination of the circumstances of time, manner and place in which the damage occurs and for which the study of the specific case is carried out; Although, from the information collected, these circumstances are mentioned casuistically and by way of example, the general content of its description could be subject to interpretation in the sense of obtaining an order in its assessment that allows the analysis of the case[12]; a prioritization is proposed in the elements of evaluation of the circumstances that occurred at the time of the damage.

In this prioritization in the order of the evaluation of the circumstances, I would begin with the assessment of the temporal circumstances, marked by the reference processes, to which, we will refer later, and in which temporary factors related to seasonal, historical, social cycles, trends, among others, will be taken into account, which will have an important impact when assessing normality, future circumstances, anticipation of damage or consolidation of prevision.

In this analysis of future but normal contingencies, the determination of temporal processes would be followed by the evaluation of the spatial environment or place, its geographical background and the most relevant cartographic references that start from the evidence provided by the plaintiffs as evidence; in order to finalize with the way in which the damage existed, for the precision of which greater value will be given to the factors that determine the particular way in which the circumstances were presented in each case.

In this sense, the circumstances of time will be taking more and more relevance to the extent that it will allow us to approach the understanding of the existence of normality and with it, the presence of the configuration of predictability or unpredictability in liability cases.

3. Methodology for determining the existence of the approach criterion

The methodology applied for the selection of information in this research was based on the implementation of tools for observing trends, parameters, historical events, facts of nature, public acts, and other notorious events, as well as through the collection, analysis, and classification of data.

This search for information arose from the need to understand the uncertainty, to catalog imminent events that would possibly generate risk of harm to the person, to observe human acts of repetitive characteristics when present in everyday life, which are not exempted or accepted as damages that must be assumed by the victim and that continue to be subject to reparation. As well as the need to have objective criteria that grant legal certainty to liability trials, thereby making use of tools that are part of the advances of today's society and which can strengthen the right of damages in the contextual definition of its structural elements.

In this way, it was possible to establish the existence of a criterion that would allow an approach to the determination of the prevision, predictability and unpredictability used in liability trials and as a response to each specific case; which would be based on the identification of the different processes that are being carried out or are in progress at the time of the occurrence of the damage, the deployment of the behavior or the occurrence of the external event, as the case may be.

4. "Red Point" criteria for identifying prevision, predictability, and unpredictability in liability

As we saw at the beginning, the transversal concept of prevision in liability contains two determining temporal elements in its very definition, the anticipation of damages and the determination of future but normal contingencies, of which, studied in the light of the methodology applied and in the search to grant tools that allow obtaining legal certainty in liability trials in matters related to forecasting, it was possible to identify the existence of a criterion that has been called "Red Point".

The identification of the red point criterion considered the psychological assimilation of the red dot

[12] Judgment of October 11, 1990, file 5737, the Chamber said: "*... Responsibility is not automatically declared each time a person is affected in such property (sic) since the determination of the fault that occurs in the fulfillment of such obligation depends in each case on the assessment reached by the judge about the circumstances of time, manner and place, how the facts have happened (sic) as well as the resources available to the Administration to provide the service, so that he can deduce that the fault was presented and that it has no justification whatsoever, all within the idea that 'no one is forced to the impossible.*"".

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with a warning and danger signal[13], taken for example at traffic lights; as well as the way in which the risks would be cataloged once their imminence and severity have been announced.[14]

This criterion arises from the observation of the conditions of normality accepted at a certain time and place as daily or routine,[15] embodied, for example, in ancestral traditions, urban or rural, the celebration of religious days, or commemoration of events of historical remembrance, for example, dates of independence, Holy Week, among others.

These conditions of normality for liability are observed under the determination of factors that will support the definition of the imminent approximation of the damage; these factors allow the understanding of the conditions in which time could be valued. Among these we find, attending ofcourse to each specific case, for example, the arrival of the rainy season in a tropical climate or thepresence of this in a desert climate.

The factors for the understanding of the imminence of the damage through the activation of the Red Point criterion, at the time of analyzing the specific case, will allow to give support to the decisions that will assess the existence of an anticipation or the presence of the future contingency through the reference of external factors identified and related to the analysis of the case. To clarify how to identify the proposed criterion, to determine external factors and to specify the wayin which anticipation has been assessed, we will mention some examples analyzed in Colombian law:

In 1994 the Colombian state analyzed the lack of prevision along with the irresistibility regarding the declaration of the existence of force majeure due to the eruption of the "Nevado del Ruiz" volcano on November 13, 1985, that caused the disappearance of the municipality of Armero in the department of Tolima, which had a population of more than 25,000 inhabitants. In this case, the configuration of unpredictability was considered, since days before the event, between[16] October 8 and November 10, 1985, the emission of ashes and gases were substantially reduced[17].

In this case, it is evident how the beginning of the natural phenomenon was foreseen by the authorities who decided to rule out the evacuation and instead, carry out preventive information activities, although the responsibility was not declared, serves as an example to examine the Red Point criterion, in the case it was proven that on March 9, 1985, Jean Jacques Wagner, Didier Mayer Rosa, Hans Mayer and John Tomblin, representative of UNDEO, Civil Defense and Ingeominas, considered that the volcano "*was not in a normal situation and, therefore, recommended its permanent observation*".[18] From the identification of the state of abnormality and the beginning of volcanic activity, the process of estimating future contingencies began, within which was the possibility of a volcanic eruption, in this case, the analysis of the Red Point begins with the declaration of the abnormality and ends in the moments before the damage. In the process it was indicated that around 5:00 p.m. on November 13, 1985 "*... by melting and fracturing of the ice cap...*" *sulfur odors are recorded in Lebanon, Anzoátegui and ash fall* in Armero" and at " *21:20, theavalanche is unleashed in the vicinity of the crater*", in this case the Red Point criterion allows evidence that it was foreseeable at 5:00 p.m. the beginning of the avalanche, once the ice cap, that took more than [19] 3 hours to reach the town of Armero.

In another example, in Colombia the largest hydroelectric project in the country and one of the largest in Latin America is being advanced, which consists of the construction of the Hidrohituango Hydroelectric Power Plant fed by energy from the use of the waters of the Cauca River, during theexecution of the project failures were evident in the stability of the dam, that forced the total damming of the riverbed and the evacuation of the surrounding populations near the affluent, considering that they were facing imminent damage to the loss of life of their inhabitants. In this project, an analysis of future contingencies was carried out that showed the imminence of damageto people and their property, which, although it did not materialize, required the representatives of the work to deploy activities aimed at addressing the situation directly and in advance of the realization of the damage, this urgency to focus on the stability of the dam and the advanced state of its failures were determining external factors for the consolidation of Red Point that prevented the greatest damage.[20]

In summary, the Red Point criterion locates the exposed context or staging – in the immediate future in which the high probability of concretion of the damage

[13] https://www.sciencefocus.com/the-human-body/why-are-warning-signs-red/ Accessed 11 December 2022.

[14] https://www.britannica.com/dictionary/red-alert#:~:text=Britannica%20Dictionary%20definition%20of%20RED,%5Bcount%5D. Accessed 11 December 2022.

[15] https://dictionary.cambridge.org/es/diccionario/ingles/normality Accessed 11 December 2022.

[16] https://volcano.si.edu/volcano.cfm?vn=351020

[17] Council of State, Third Section, C.P: Julio Cesar Uribe Acosta, June 24, 1994.

[18] Ditto 17, 28.

[19] Ditto 17, 40.

[20] https://www.bbc.com/mundo/noticias-america-latina-44160611

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is foreseen or visualized-. For its precision, two types of processes have been identified, which are part of the criterion and will allow to identify the context in which responsibility is evaluated: the linear process and the circular process.

a. *Linear process*

The linear processes identified respond to the description of events consecutively, chronologically, and ascending, from the oldest to the most recent, in which a milestone is referred to in the moments prior to the realization of the damage.

To identify the presence of Red Point in the linear process, the following example is analyzed: On the night of October 31, 2022, the traditional Halloween celebration was held in the Itaewon neighborhood of the capital of North Korea, Seoul, presenting a human avalanche that caused the death of about 154 people; in this case it was evidenced or the beginning of the linear process three years before with the popularization of the party internationally that according to The Korea Herald[21], presented an attendance of 30,000 people, this year, after the pandemic period, the authorities showed failures in the forecast of the avalanche, because according to witnesses, Security forces "*did not lead the crowd appropriately as they left the station*" and the crowd reached 130,000 people gathered. In this case, the Red Point was activated and evidenced the failure, at the moment in which the Korean authority allowed the entry of more people to the subway station, once the neighborhood of Itaewon had already lost the flow of mobility, this or prior to the beginning of human losses.

Another case of analysis in the linear process is the nuclear accident that occurred at 01:24 on April 26, 1986, which caused the explosion of reactor four of the Chernobyl nuclear power plant, according to the ABC report during the safety test that "*intended to check if the core could be cooled in case the external power supply was lost*"[22] showed design errors and operator failures that caused the reactor to explode. In this case, the analysis of the Red Point begins in the hours prior to the test and extends until the moment of the explosion of the reactor and the exposure of its core.

In these two examples something similar happens, and it is the existence of a specific moment prior to the structuring of the responsibility indicated in the timeline, in which the appearance of connectors that evidenced the possibility of the realization of certain damages to the person refers. Thus, within the study of prevision, predictability, and unpredictability in liability, this is understood as a moment in time in the linear process that is presented as highly probable or possible for the responsible the realization of the damage.

b. *Circular Process*

As a result of the monitoring of events presented between 2016 and 2022, the possibility of establishing the presence of at least 2 types of circular processes linked to the definition of normality considered when analyzing the circumstances of time, place, and manner in which the event or damage occurred was identified. These are the processes derived from phenomena of nature and social interaction, which evidenced the presence of repetitive factors or similar to previously existing moments, which could have been noticed by decision makers in different sectors such as: environmental, defense, economic and health, once exposed the connectors that activate the cycle.

These events reported as cyclical mark their beginning and end due to the generalized alteration of daily life or global customs, they develop under the existence of the marking of repetitive factors, but they differ or stand out by the anticipated response and different from that presented in the previous cycle.

The cyclical process derived from natural phenomena marks its beginning and end according to the stationary stages of summer, autumn, spring, and winter repeated in 365 days, in tropical countries by the summer and winter seasons, accompanied by the variation in the frequency of rainfall in each of them, and in places ruled by the seas, the gravitational force of the moon, among others. For the precision of the opening of the cycle and its development, it is necessary to observe external factors connected to the natural sciences, statistical records of past seasons, technical expertise,[23] among others.

Within this circular process, the example of the phenomena of the nature of the hypothetical claims of responsibility of the State for failures in the provision of the medical assistance service derived from the expansion of a pandemic, for isolation actions or the omission of pertinent measures for the protection of the life and health of people is proposed.

We refer to the administrative measures decreed in response to the Covid-19 pandemic as a hypothetical example under study, since it involved the making of a large volume of decisions, as well as the beginning and end of a new normality:

- On March 11, 2020, the World Health Organization (WHO) the COVID-19 pandemic due to the

[21] https://elpais.com/internacional/2022-10-31/la-policia-surcoreana-admite-un-fallo-de-prevision-tras-la-avalancha-de-seul-que-costo-la-vida-a-al-menos-154-personas.html

[22] https://www.abc.es/ciencia/abci-chernobyl-errores-provocaron-explosion-chernobil-201906150101_noticia.html

[23] https://moon.nasa.gov/resources/444/tides/#:~:text=The%20Moon%20and%20Earth%20exert,are%20where%20low%20tides%20occur

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"*alarming levels of spread of the disease and its severity, and also alarming levels of inaction*".[24]

- *Between March 9 and April 11, 2020:* "*Countries that declared national or partial quarantine (byregions) of 14 or more... other states and regions placed restrictions on the entry of foreigners*."[25]
- *From 31 December 2020:* The global vaccination period begins with WHO approval of the "*Pfizer/ BioNTech messenger RNA Comirnaty vaccine*"[26]

This global situation highlighted the importance of making decisions aimed at containing the transmission of the virus and mitigating damage by different states, companies and people from all continents, a period in which the understanding of prevision in responsibility became more relevant due to the prevailing need to respond to the anticipation of damages from future contingencies but normal derived from the declaration of the pandemic.

In this case under study, the exponential expansion of the virus broke the state of health normality known until March 11, 2020, initiating a period of pandemic in which humanity had to efficiently anticipate the challenges posed by isolation and the subsequent reactivation of the economy, this period that would go until the beginning of global vaccination, marked for the liability for damages the importance of specifying the forecast and its understanding with an increasingly changing normality, it was commonly understood that as of December 31, 2020 we were in a new normality in which routine life had to go parallel with the permanence of Covid-19 and its variants. The reaction to the virus or its influence on everyday life, made for the analysis of the right of damages,that the contingencies exposed by the virus ceased to be considered as unpredictable, thus, being able to foresee, could not be considered as an element of exoneration of responsibility *per se.*

Thus, this cycle was assimilated to the one that occurred in the years 1918 and 1919, in which the pandemic was declared by "The Spanish Flu", which, "*spread at great speed throughout the world and in just 18 months infected a third of the world population*", this for its form of contagion, its ease of spread and the ability to saturate health systems, serving as a precedent for the valuation of the anticipation of damages in the years 2019, 2020 and 2021.[27]

On the other hand, the cyclical process derived from social interaction shows its beginning and end by the alteration of normality accepted in a generalized way by the members of the whole society, for example, the cycles marked by the reconstruction of an economic, geographical, and demographic normality after the war period, such as the period of the Cold War -March 12, 1947,to December 26, 1991- assimilated in demands for adhesion claimed by Russia to Ukraine around the reconstitution of the independence states of the Union of Soviet Socialist Republics -USSR-.

These exemplified cyclical processes become a valuable instrument when assessing the existence of liability in the specific case, to determine the debtor's ability to react to the presence of future circumstances and its ability to anticipate damages.

In turn, these circular processes could be shaped by the existence of sub-processes envisioned by external local, social, historical, and cultural factors specific to each country, ethnic group, or group with a traditional collective growth.

III. Conclusions

The concept of prevision as predictability, and unpredictability in liability for the occurrence of damage to be repaired, highlights the importance of studying the interpretation of the normal future with legal implications. What puts the law in activation of its role around the regulation of legal relationships and to contribute to a just legal order, which is manifested through judicial decisions supported by objective factors that provide judgments of responsibility, comprehensivereparation is granted, satisfactory compensation for the damages caused and confidence indecisions adjusted to law and corresponding to reality.

For the interpreter it is a challenge to identify objective connections supported by measurable factors that grant the anticipation of damage, since it is not only necessary to understand the events surrounding the occurrence of damage in an immediate environment, but in the basis of the assessment of the forecast, this must be analyzed with the time conditions, place and manner in which the damage occurs, making use of measurement tools that grant legal certainty to the law of damages.

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