CIVIL LIABILITY FOR PROFESSIONAL MALPRACTICE

-PhD Thesis Summary-

***Key words*:** civil liability for professional malpractice, professional/specialist – physician, lawyer, public notary, legal expert, arbiter, architect, carrier, specific obligations.

The evolution of the legal system in modern society has led to the enrichment and refinement of the science of law.[1] No doubt, this caused a vast and complex process of transformation of the institution of civil liability, to correspond with the needs of ensuring an efficient protection to victims of illegal acts, from the first moment of prediction of any possible risk of damage, up to their full compensation.

In this context, there has been a *specialization of civil liability applicable to the exercise of professions and professional malpractice*, regarding both the recipients of benefits and third parties, against the deterioration of these liabilities and the prevention of damage against innocent victims. Gradually, it shaped itself as a distinct, autonomous liability hypothesis, acquiring new meanings, compared to traditional guidelines[2]. It has been found that all criteria delineating the two forms of civil liability – contractual and tort liability - are insufficient compared to what professional liability actually means. Professional's civil liability can't be labeled strictly as contractual or tort liability, given that it is fundamentally based on specific ethical practice of a profession.[3] In these circumstances, a new argument materialized to justify the employment of such a liability – deontology and professional ethics –which places the professional's liability

[1] Ph. le Tourneau, *Droit de la responsabilité et des contrats*, Dalloz action, 2010-2011, Paris 2010, p. 975.

[2] Y. Avril, *Responsabilité des avocats*, Editura Dalloz Référence, Paris, 2008.

[3] Y. Avril, *Le fondement de la responsabilité civile de l'avocat*, Editura Recueil Dalloz 2009, p. 995.

as a *type III* special responsibility or liability hypothesis[1]. So, on the realm of civil liability we are witnessing the *annihilation* of the contractual and tort dichotomy, the responsible person being obliged to satisfy the victim's demands, whether he was counter-party or not.

As early as 1982, in the French legal doctrine, the reputed author Philippe Le Tourneau[2] drew attention to the need to recognize professional liability, enshrining the idea regarding the existence of a *special law of professional's liability*. It was emphasized, that the oppositions of civil and commercial law must be overcome, and also that of contractual and tort liability, with bringing up the need of a real professional's liability autonomy.[3]

In practice, more and more special contracts seem to appear, derived from usual contracts, but pursuing to meet special needs. Without any doubts the innovations are numerous, because contracts have new applications now, constituting a real challenge for the science of law concerning their interpretation and establishing the applicable legal regime. Positive law Regulations caused substantial changes in contractual practice.[4] This development has led to the delineation of specific rules circumscribed to professional contract law, characterized by professional diligence, which requires a lot of specific, ingenious and subtle obligations. These contracts are based on moral values regarding business relationships, such as honor, friendship, kindness, integrity, loyalty, patience, with its legal implications. From this perspective, the professional's obligations are circumscribed to professional competence, respect and scientific integrity.

Therefore, it has been found that the civil liability of professionals can't be strictly classified into a certain mold, it also entails the establishment of specific criteria of evaluation on which legal nature, its specific conditions and its fundamentals can be determined.

---

[1] L.R.Boilă, *Răspunderea civilă delictuală subiectivă*, Editura C.H,Beck, Bucureşti, 2009, p. 416-428.

[2] Ph. le Tourneau, *La responsabilité civile*, 3e éd., Paris, 1982, Dalloz, n° 1373; Ph. le Tourneau, *Quelques aspects des responsabilités professionnelles*, Gaz. Pal. 1986.2. Doctr. 616 ; Ph. le Tourneau, *De l'allégement de l'obligation de renseignements ou de conseil*, D. 1987. Chron. 101.

[3] În acest sens, P. Serlooten, *Vers une responsabilité professionnelle*, Mélanges Hébraud, 1981, p. 805; G. Viney, *La responsabilité*, 1982, LGDJ, n° 244.

[4] G. Marty, P. Raynaud, *Les obligations*, 2e éd., par P. Raynaud, 1988, Sirey, n° 52 s. ; G. Cornu, *L'évolution du droit des contrats en France, Journées de la société de législation comparée*, 1979, Rev. int. dr. comp., n° spécial, vol. 1, p. 447 s. ; Ph. le Tourneau, *Quelques aspects de l'évolution des contrats*, Mélanges offerts à Pierre Raynaud, Dalloz, 1985, p. 349 s. ; J. Savatier, *L'évolution contemporaine du droit des contrats*, PUF, 1986.

The theme chosen for this thesis is still considered current and fairly interesting. We find that this issue incites more and more the interest of theorists, but especially the practitioner's interest, often invoked before the judge in solving case-studies.

In the structure of this paper, under Title I, we intend to summarize the ethical-legal meanings of this liability, to delineate the responsible person's category while trying to support with solid arguments the need to recognize an autonomous liability, distinctive compared to other assumptions of liability, but likely to provide effective protection for innocent victims. We are talking about an aggravated responsibility motivated by skill, craftsmanship, information and knowledge of the threat of possible damage to the recipient of benefits.

As a *special case of legal liability, the civil liability for professional malpractice,* is that legal relationship that is born from violation of the rules of conduct established by law by certain groups of people, collectively called *professionals*, or the professional body they belong to, and causing damage to another person, to whom compensation must therefore be paid[1]. Analyzed as a legal institution, the malpractice reunites the rules that govern the obligation to compensate the victim, according to the contractual or non-contractual deed of the professional.

The *Professional's* quality establishes a separate category of responsible persons[2], who are required to have an irreproachable conduct. The professional must exercise their activity in the company they work in with extreme care and only on the basis of a solid training, so that he will be able to prevent a possible injury or damage to the persons benefiting from his services. Professional activity is recognized as an objective criteria based on which special conditions of damage liability are evaluated.

The current Civil Code adopted through Law no. 287/2009[3] , entered into force on the 1st of October 2011, adopts the monistic conception on private law and introduces the legal notion of "professional", by reference to the term "enterprise". According to Paragraph (2) of Article no. 3 of the Civil Code, *all those that are operating an enterprise are considered professionals*[4]. We note that neither the Civil Code, nor the

---

[11] D. Cimpoeru, *Malpraxisul*, Ed. C.H. Beck, București, 2013, p. 5

[2] Ph. le Tourneau, op. cit. , p. 976

[3] Legea 287/2009 privind Noul Cod Civil, republicată în Monitorul Oficial al României, Partea I, nr. 505/2011.

[4] În Cartea a V-a – „*Despre obligații*" a actualului Cod civil au fost cuprinse o serie de contracte considerate a fi esențialmente comerciale, precum sunt *contractul de comision* (art. 2043-2053), *contractul de consignație* (art. 2054-2063), *de expediție* (art. 2064-2071), *de agenție* (art. 2072- 2095), *de intermediere* (art. 2096-2102), *contractul de antrepriză* (art. 1851-1880), *de report* (art. 1772-1776), *de furnizare* (art. 1766-1771), *contractul de depozit hotelier* (art. 2127-2137), *contractul de cont curent* (art. 2171-2183), *contul bancar curent şi alte contracte bancare* (art. 2184-2198), *contractul de asigurare* (art. 2199-2241).

Law implementing it, Law no. 71/2011[1], has a synthetic definition of either the term of *professional* or the term of *enterprise*, and the legal criteria for the identification of a professional are not indicated.

In essence, the professional is a person that is performing alone or with other people, certain activities, such as production of goods and services, provision of services, administration or transfer of goods[2]. This activity is an organized one, not occasional or sporadic, and subject to special rules regulated by legal norms. In addition, the professional's activity requires a systematic exercise, a certain duration, which means it cannot be occasional, sporadic or random. The exploitation of an enterprise is not conditioned only to profit, which means that the professional's work is thoroughly analyzed in all cases, even when he acted voluntarily, without remuneration or seeking an advantage.

In a comparative analysis, we note that the French legal doctrine[3], after examining the defining elements of a professional, has identified seven independent criteria according to which the sphere of these responsible persons can be delimited. These are: the special quality of the person due to the fact that his work aims to achieve an economic interest, with a certain utility; the pursue of a legitimate activity for provision of services, production or distribution of goods; operating a routinely and consistently activity; essentially an onerous nature of activities; functional organization, systematic activity directed toward achieving its object; the professional is required to have competence and thorough knowledge of his work, which is an important advantage in order to attract the trust of the customers; namely, to be able to exercise authority over the persons involved in the execution of contractual obligations and in his relationship with the client.

The professional liability basis, along with its finality - full compensation for the damage that has been caused, is a central issue of maximum interest of this legal institution. Legal provisions applicable in this area do not provide a standalone solution applicable in all cases where this particular responsibility is activated.

By the very specifics of his work, the professional is responsible for the way the *best endeavor obligations* are fulfilled, being held liable only if it is proven that he

---

[1]Legea nr. 71/2011 denumită Legea de punere în aplicare a noului Cod civil, publicată în Monitorul Oficial al României, Partea I, nr. 409 din 10 iunie 2011.

[2]În acest sens, S. D. Cărpenaru, *Tratat de drept comercial român*, Ediția a V-a, actualizată, Universul Juridic, București, 2016, p. 40 și urm., nr. 50 și urm.

[3]Ph. le Tourneau, *Responsabilité civile professionnelle*, 2e édition, Ed. Dalloz, Paris, 2005,p. 6, 0.12.

guiltily violated a professional ethics rule.[1] It should also be mentioned that the professional has also some *obligations to achieve a result,* that needs maximum diligence for their fulfillment, such as, the duty of the lawyer to be presents at his client's hearing, to edit a document, to promote an appeal within the statutory period, and so on, or the architect's obligation to deliver the project on deadline, or the banking consultant's obligation to present all the credit offers to his customer. What is specific to these obligations is that simply not reaching the end result is considered a professional liability for not completing ones professional responsibilities, ending with presuming the professional's failure of performance.

Based on the highlighted facts above and by using a logical- legal reasoning, we can say that through the essence of the professional's duties, civil liability is in general, a *subjective* liability, based on the element of guilt. In some cases, when we consider an *obligation or duty to achieve a result,* the professional's civil liability is objectively based on *the idea of objective guarantee of activity risks*[2]. The same is true when it comes to a professional's responsibility to others, such as administrative staff or the probationer/intern working under his authority.

Freedom to practice a profession is related to professional responsibility, particularly those carrying out dangerous activities. Therefore, a professional should be diligent and competent, able to master the risks and prevent causing any damage to others people. In some exceptional cases, we can discuss about the intervention of a random factor or fate, but usually the risks can and should be anticipated and avoided. In his work, the professional must always seek absolute security of documents and facts, which requires vast knowledge, a lot of research, perseverance and avoiding the risk of injury to other persons[3].

The norm of positive law requires the professional's compliance with specific obligations, setting the conditions of an activity and the liability for violating them. Therefore, in some fields the specialist's liability is regulated, such as doctors, pharmacists, dentists, lawyers, bailiffs, liquidators, bank advisors, architects, constructors and so on. These rules aim to strengthen the position of the beneficiary,

---

[1]Pop, *Faptele juridice ilicite şi celelalte fapte juridice extracontractuale cauzatoare de prejudicii (răspunderea civilă delictuală sau extracontractuală)*, p.303 şi urm. în L.Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile conform noului Cod civil*, Ed. Universul Juridic, Bucureşti, 2012

[2] L.Pop, idem. , p. 404 în L.Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile conform noului Cod civil*, Ed. Universul Juridic, Bucureşti, 2012.

[3]Ph. le Tourneau, *Droit de la responsabilité et des contrats*, Dalloz action, 2010-2011, Paris 2010, p.977.

him being the compensation creditor, whose rights are more effectively protected, ensuring a new balance.

In their relationship with non-professionals or laymen, professionals are those perceived as informed and documented, ensuring them a position of superiority due to which they could abuse the ignorance or lack of experience of the latter. Such an approach has led to the creation of a certain mindset in contemporary law, regarding the particular manner of application of classic law rules in the legal relationships between specialist and victim, born from the desire to protect the "weaker party" and the recipient of services, who is a layman in the field.

Following our work, under Title II, we appreciated as being very helpful information about *tort liability,* respectively the *professional contractual liability,* given that according to traditional guidelines this legal institution stems from acts and civil offenses.

The regulation of civil liability is found in the Civil Code, Book V entitled *"About Obligations",* Title II *"Source of Obligations",* Chapter IV *"Civil liability"* structured in six sections. In the content of articles 1349 and 1350 from the Civil Code, the rules applicable to tort liability or non-contractual and contractual liability, are imposed as principles[1].

Starting from a punctual analysis of these legal provisions, we tried to systematically present the special conditions regarding the professional's liability, from the perspective of the two forms of liability, tort and contractual. We tried to pertinently demonstrate the idea of *uniqueness* and *peculiarity* of professional malpractice, regardless of the legal regime applicable, justified by consecration of a common legal basis, essentially objective by nature, regarding the assumption of risks while practicing a profession or operating an enterprise. In other words, regardless of the legal form of civil liability, professional malpractice has the same purpose to *restore social balance destroyed by committing a harmful act, and by putting the victim in the situation prior to its commission.*

In the next Title, we addressed *specific rules of professional liability,* trying to thoroughly argue the need to recognize a third type of liability, which doesn't completely identify with traditional contractual or tort liability. The analysis of legal obligation relationship in which the professional participates as a creditor, involves the

[1] L.R.Boilă, *Comentariile art.1349 și 1350 Cod civil*, în lucrarea Fl.A.Baias, E.Chelaru, R.constantinovici, I.Macovei, coordonatori, „*Noul Cod civil. Comentarii pe articole. Art.1-2664*", Editura Ch.Beck,București, 2012.

systematic presentation of civil obligations, according to law or contract, that the professional takes responsibility for to the recipients of benefits. In this study we took into consideration the division of the specific obligations of professionals in two categories, also proposed in the legal French doctrine[1]: *general obligations* undertaken in all legal relationships, both contractual and non-contractual, opposable *erga omnes* and *specific obligations* arising expressly or tacitly in the content of certain contractual stipulations.

In the first category I examined the legal system and the essential features of information obligation, namely security obligation, that incubates the specialist or professional with a general and absolute title, found without exception in any profession.

The second category covering special professional obligations we split it into three sub-categories: obligations deriving from contractual loyalty, obligations that target the loyalty towards the counterparty and obligations under the Principle of Efficiency.

In the first category we surprised: obligation of contract performance, cooperation obligation, the special obligation of information and security.

We tried to trace the identification and definition coordinates regarding the second sub-category, considering that it includes: loyalty obligation, professional obligation to comply with the contractual partner's interests, professional obligation to show an active behavior, professional obligation to persevere, obligation of transparency, professional obligation to facilitate the contractual partner's execution of contract, but also moral duties, such as patience, honor, discretion, integrity and consistency.

Regarding the third sub-category, about the professional obligations arising from the Principle of Efficiency, we have analized the following: the professional's obligation to observe whether the work provided will lead to the result requested by the client, the professional's obligation to have the requisite expertise and competent skills, the obligation to have continuous training, professional obligation to manifest initiative, the professional obligation to anticipate any possible incidents that might affect in any way the client, meaning the recipient of the benefits, and the professional obligation to promptly perform their duties.

---

[1] Ph.le Tourneau, *Droit de la responsabilité et des contrats. Régimes d'indemnisation*, Dixième édition, 2014, Dalloz Action, p. 1171-1175, nr. 3567 şi urm..

In the final part of Title III, we proposed to exemplify *particular professional liability schemes in different fields.* Section I is identifying the coordinates of a doctor's liability as a professional.

The central pillar of the legal construction regarding the medical professional malpractice is to ensure a full and effective protection of the patient. The ensamble of incidentally legal rules in this field, prefigures a new foundation applicable in this field, represented by the Precautionary Principle (atticle 4, paragraph (1), letter f.) from Law no. 95/2006) This concerns mainly the establishment of enhanced protection rules against serious threats, present or future, known or unknown, regarding medical accidents.

The doctor's work involves the safety of the patients life with respecting his personality rights, especially the one regarding his dignity. The doctor patient relationship is mainly focused on medical care, making the appropriate intervention or treatment according to diagnosis, which implies besides a high level of professionalism and scientific training, also faith, patience, discretion, and the right to information, security and privacy. The doctor should show a special concern to each one of his patients, to use all his knowledge, competence and experienced gained, to apply the most effective treatment and to achieve the best intervention.[1]

After presenting the national legal framework and the analysis of the essential conditions for such a liability, we examined the main duties of medical personnel towards patients, from the perspective of existing precedents and doctrinal interpretations, grouping them in four categories: *the fundamental obligation of providing medical care in accordance with the scientific rules in force at the time, on obligation, security obligation and confidentiality obligation*.

We also analyzed the responsability of the public and private health care unit and also the one of the the professional who works within a team, to highlight specific elements of the "illegal act", that causes the damages, which triggers the mechanism of civil liability. In the final part we tried to capture the impact of introducing new techniques and medical procedures in civil liability, presenting "telemedicine" as a new challenge in a constantly changing professional field.

In Section II we presented the lawyer's liability for damage caused to his clients, and third parties, in the course of practicing his work, considering that this is looming as a distinct, autonomous hypothesis of liability, which gradually acquires new meanings,

[1] Ph.le Tourneau, *Droit de la responsabilité et des contrats, Régimes d'indemnisation*, Dixiéme Edition, Dalloz, Paris, februarie 2014, p. 1272, nr. 4190.

standing out against traditional guidelines.[1] We identified the national legal framework, after which we discussed the issue of the legal nature of this liability, considering that, in principle, it constitutes as a third type of liability, but beeing cataloged by law as essentially a contractual liability. Next we analyzed the specific obligations, that incubate the professional, grouping them into three categories: assistance, representation and counseling obligations.

Regarding the foundation of this special type of liability, we observed that the relevant legal provisions in this fiels do not offer a viable solution that could be used in all the cases where this liability appears, so it is up to doctrine and juriprudence to detect this legal problem. Taking into consideration the fact the lawyer's obligations are catalogued as best-endeavors obligations, meaning he has to put all their art and their skill in performing the tasks entrusted on him to protect and help his customer, therefore it is a mostly a subjective liability, based on guilt. It should also be noted that in the lawyer's domain of activity, absolute obligations or *obligations to receive a given result* can occur, and simply by not arriving at the desired result automatically activates the professional's liability, making this a basic objective liability, based on the *idea of objective guarantee of activity risk*.[2]

We conclude this part of our study by emphasizing that in modern society, institutional and functional improvement is reinforced by following the best practices related to the functioning of the judiciary system, ensuring full compatibility between this and applicable law. In this context, justice is a fundamental function of the state and its administration is an essential attribute of its sovereign power. The role of lawyers in the functioning of the judiciary system is highly important. This occurs on two levels: protection of rights and legal interests through law and access to qualified defense, namely, making the act of justice by defending the general interests of society, the rule of law. On these lines, the Code of Conduct and the fundamental principles of the profession of lawyer, represent major milestones that guide the lawyer's assignment in society. Compliance is essential to ensure the rule of law. Whenever, this wrongful act of a professional lawyer results in a prejudice against the client or a third party, the lawyers's liability is necessary, obligating him to completely repair the damage made.

---

[1] Yves Avril, *Responsabilité des avocats*, Editura Dalloz Référence, Paris, 2008.

[2] L.Pop, *Faptele juridice ilicite şi celelalte fapte juridice extracontractuale cauzatoare de prejudicii (răspunderea civilă delictuală sau extracontractuală)*, p. 404 în L.Pop, I.F.Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile conform noului Cod civil*, Editura Universul Juridic, Bucureşti, 2012.

Section III of Title IV concerns the civil liability of the professional public notary. We tried to delimitate the bases of this liability starting from identifying the legal framework in this field. If serious problems do not arise from the liability that stems from the authentification function in relation to its foundation, public notary obligations established very clearly by Law no. 36/1995, of the public notary and notary activities, in the case of the second type of obligations of a public notary resulting from its role as a legal advisor some more detailed assessment is needed.

These obligations are the public notary's task whenever he makes a legal document or one with a certified date, and also when the client comes to his office seeking legal advice. Counseling obligations derive from fundamental legal obligations of the public notary, and therefore is of considerable importance in the profession of public notary, found in any activity carried out by these professionals. In any case, it is preferable to concretely lay the foundation of notarial liability, on a case by case basis, depending on the circumstances and the role played by the professional, especially because in practice various assumptions can materialize, such as one in which the public notary has overstepped his duties and assumed the role of a true agent or business manager.

Next, we talked about the conditions of the public notary's liability with concrete examples of how the legal courts evaluate these conditions. At the end of this section we review two point of reference judgements delivered by French Courts, that closely adresses the issues concerned.

In Section IV we plan on charting the legal system of the arbiter's liability, considering that it has a special feature, in that it must take into account the dual nature – contractual and legal – of the arbiter's mission[1]. The arbiter, just like the judge, has special protection in liability actions for an erroneous judgment. But the arbiter is not only a judge. He is primarly a service provider, that signed an arbitration agreement or contract with the involved parties, from which sprang a number of specific obligations, including even the organisatio of the procedure[2]. Consequently, between the arbiter and parties a contractual relationship arises with the typical elements, that have direct effects in terms of professional liability. Although the legislator tends to create a similarity between the arbiter's and the judge's responsibility, considering the dispositions of Law

[1] X.Delpech,*Responsabilité civile de l'arbitre : un régime original*, Dalloz actualité 23 janvier 2014,Recueil Dalloz 2014 p. 219.

[2] E. Loquin, *La responsabilité civile des arbitres en cas de dépassement du délai de l'arbitrage*, în RTD Com. 2006 p. 299.

no. 303/2004 regarding the status of the magistrate, in reality the arbiter's liability noticeably distances itself from this, putting on the legal nature of a *contractual* liability. Of course, in practice we can find situations where other persons outside of the ones he made a contract with are harmed by the defective performance of his duties. For example, by not pronouncing a judgement on a deadline set by the arbitral agreement or contract may affect the interests of third parties not involved in the court case, that want to purchase for example a property, and by being late loses the funding. Similarly, we can imagine the situation in which, the arbiter breaches the confidentiality of the procedure, which also extends to the co-contractors of the partie involved in the arbitration procedure.

Therefore, the issue of legal nature, will always report to the concrete terms of the case subjected to judgement, noting that in general we are dealing with a contractual liability.

Regarding the basis of arbiter's liability, this is, through the essence of his atributions, a *subjective* one, focused on the guilt element. While practicing his profession, the arbiter is obliged to offer his entire understanding, knowledge and craftsmanship to delivery a fair solution and for carrying out the arbitration procedure in optimum conditions. Specific obligations are essentially best-endeavor obligations.

Again, I considered useful forming conclusions regarding this particular responsibility, by providing a jurisprudential solution as a reference in the field, concerning the arbiter's liability for violating his impartiality obligation or duty, namely to acomplish his duties in good faith.

Section V of the paper adresses the issue of the legal expert's liability. For a long time, the Court has wrongly assimilated the position of the legat expert to the one of the magistrate, reaching even to confer him the specific immunity of the judges. For example, in the French legal system, a quote from a judgment of the Court of Appeal of Pau in 1863[1], has been generalized, and said „ *The expert's work is considered a work of justice and it is invulnerable, just like the final judgement containing the conclusions of the expert's report. Experts enjoy the regulated immunities designed for magistrates exercising their legal functions.*" This orientation was justified by the consideration that, challenging the expert's work would be tantamount to an appeal of the decision that is based on the expert's report, and the parties can not be provided with an indirect remedy

[1] Hotărârea din 30 déc. 1863, S. 1864. 2. 32, citată de către S. Bertolaso, J.-Cl. *Responsabilité civile et assurance*, Fasc. 375, n° 19 ; J.-J. Daigre, *La responsabilité civile de l'expert judiciaire*, Rev. huiss. 1986. 487 ; L. Melennec, *La responsabilitécivile des experts judiciaires et des médecins experts en particulier*, RDSS 1972. 1.

at law that would bring the possibility of restoring the trial[1]. The solution and judgment were sharply criticized in the specialized literature, because it confuses the position of judge with the profession of legal expert, while these two are totally different: the legal expert formulates his ascertainments that the judge uses in making his decision[2]. By criticizing the legal expert's work, you can not dispute the judge's decision. The legal expert's report presents the exactly what it finds. If it contains any mistakes in its elaboration, then the legal expert's liability is necessary, just like in a situation where an act of cheating is commited during a trial by presenting a false document and if actions would be taken against its author without doubting the decision that was rendered. The legal experts's liability does not contradict the res judecata principle since the decision is not rectified, but compensates the loss suffered by the parties by making it the expert's fault.[3]

Jurisprudence[4] has remembered these critics and subsequently evolved, admitting civil liability of the legal expert, even when the expert report is part of the final decision, witout touching the authority of res judecata principle.

Legal expet's liability is undertaken in relation to the dispositions or art. 34 from O.G 2/2000, which is supported by common law provisions contained in art. 1357 of the Civil Code., according to which *:"One that causes harm to another by an unlawful act committed with guilt, is obliged to repair it".* Litigants have the opportunity to act against the legal expert and ask for compensation under tort liability, there having been no contractual obligations between them and the professional.

In exercising his atributes the legal expert must submit all his craftsmanship, skill, knowledge and experience. He, must act fairly and conscientiously, in compliance with all the legal norms with direct or indirect bearing on the situation brought to his attention. The legal expert must ensure that his report does't contains inaccuracies and obvious errors, erroneous conclusions or objectives treated superficially becasue of negligence or lack of professional competence. In the legal expert's tasks we mainly find *best-endeavor obligations,* so that his liability is essentialy a subjective one, based on the element of guilt.

---

[1] V. Larribau-Terneyre, op.cit..

[2] S. Bertolaso, op.cit., nr 29; L. Melennec, op.cit., 1972. RDSS 1.

[3] Nota H. Mazeaud sub T. Civ. Seine, 09 februarie 1939 Gas. Pal. 1939. 1 743.

[4] Tribunalul civil din Sena a statuat pentru prima dată în cuprinsul unei hotărârâri din 9 februarie 1939 faptul că legea nu acordă expertului judiciar nici o imunitate, deşi funcţia sa se află în legătură directă cu administrarea justiţiei, acesta *fiind supus pe deplin regulilor de drept comun al răspunderii civile*.

Next, in Section VI, we studied the civil liability of the professional architect. In the introduction I mentioned that in principle, this liability is contractual one, built on the contract concluded between the beneficiary and professional, this contract could be a contractor agreement, a purchase agreement of a real estate that is going to be built or an unnamed contract, designed by the parties, through which the architect assumes the specific obligations of his profession to the beneficiary[1]. Naturaly, in exceptional situations when damage is caused to a third party, it incidently becomes a tort liability system for his deeds or the deeds of the presumed.

In the sight of the architet's liability, the unjust injury victim has at his fingertips both common law action for damages, specific to professionals, and claiming the guaratee for hidden defects and quality agreed upon. Depending on the chosen path, disctinct legal systems are engaged, but targeting mainly the professional quality of the person who committed the act of malpractice.

After identifying the legal framework, we proceeded to study the main obligations of this professional: obligation to information and of implementing his work. Given the specific field in which we stand we considered appropriate to present the legal significance of the construction reception. Previous to the reception any act of malpractice that caused injury or damage to the beneficiary will fall within the scope of contractual liability as regulated by art. 1350 of the Civil Code and based on art. 1851-1880 of the Civil Code. and special laws. The professional quality of the architect will always be considered, which will influence the terms of common law liability in a specific, exacerbating manner.

After the reception, the prejudice is falling under the legal conditions of hidden defects and quality agreed guarantee, and will be repaired using their specific rules. Other damage and situations regarding the execution bond will be subject to specific contractual liability of the architect.

Given the principle of disposability governing civil trial, the Court will address the professional liability action as was determined by the application initiating proceedings, meaning in common law contractual liability action specific to professionals or under the legal guarantee that incubates entrepreneurs.

If the request for legal action aims to establish liability on the basis of guarantee, first instance judge doesn't have the duty to verify whether the alleged damage could be repaired under the common law contractual liability, even if the latter would be more

[1] Ph.Malinvaud, Ph.Jestaz, P.Jourdain et O.Tournafond, *Droit de la promotion immobilière*, Éd. a 8-a, Précis Dalloz, 2009, nr. 303 şi urm..

advantageous[1]. In these conditions, it appears to be most advantageous for the victim to substantiate her claims, both on the legal provisions regarding the hidden defects guarantee and on the provisions that regulate the common law liability, that are applicable if it fails to prove the fulfillment of legal conditions of the guarantee, especially the very important level of severity criteria.

It is important to note, however, that due to the principle *specialia generalibus derogant,* the defects that fall under the characteristic of repairable through legal guarantee can not be subject to an action for damages based on common law.

Section VII of Title IV has been dedicated to the study of the carreier's liability, starting from establishing the national, international or union legal framework and continuing with fundamental analysis. In the research of the legal system we considered each area (air, road, rail and sea) in relation to goods, passenger and luggage transport.

The study of this special hiphotesys had as starting point the legal analysis of the transport contract, the definition and indication of the legal characteristics, presenting the legal nature and elements that distinguishes it from other civil contracts. The research of the contractual obligations of the parties is a prerequisite for the conditions of the examination of contractual liability of the professional, respectively the basis of this liability.

Regarding the basis of this liability, the general rule consists in the realization of a true presumption of culpability of the carrier in the event of an injury during the transport operation. This presumption leads to employing an objective, ipso facto liability of the carrier. The production of damage during transport automatically and objectively triggers the mechanism of the carrier's liability to compensate the victim. In his defense, he may invoke only the reasons laid down by law or contract regarding the possibility of removing his liability. Consequently, the victim will not have to prove the fault of the professional in the damage caused, his procedural position being favored.

Next, we conducted a separate analysis on the legal liability of the goods, people and luggage transport. Within each of these categories we have made direct reference to road, air and sea transport, highlighting the main legal provisions applicable, and also reference jurisprudence solutions ruled in this field.

The conclusions that I made on the whole work is that we have tried to draw attention to the significance of this research theme, which is reflected as a separate liability hypothesis built into the extensive process of reconstruction of the civil liability

[1] Curtea de Casație franceză, Secția a III-a, hotărârea nr. 97-20.505 din 9 iunie 1999, Bull.civ. III, nr. 130; RDI 2000. 58, cu observații de Ph. Malinvaud

institution. I stressed again that our approach is intended as a relevant demonstration of *the uniqueness of professional malpractice*. regardless of the legal system applicable, contractual or non-contractual, justified by consecrating a common legal basis, essentially objective by nature regarding exercise of a profession or the operation of an enterprise. The purpose of civil liability is to *restore the social balance destroyed by a harmful act and restore the victim to a previous situation before the injury was made*. The specific element of professional liability is that it has been recognized on a doctrinal and jurisprudential level as a new type of civil liablity based on ethics and professional deontology.

The research of professional malpractice gave us a good presentation of the most valuable evolutionary ideas shaped over time in the classical doctrine, and also a chance to look to the future, hoping to implement the jurisprudence of innovative elements introduced by the current Civil Code to improve the civil liability institution. The analysis of professional liability and its foundation, demonstrates that the relationship between the professional and the recipient of the benefits, is not fully subjected to the rules set up by a civil contract, essentially of service, on one hand, nor of tort liability, on the other, that would impose a stringent interpretation of the coordinates of its operation. Professional liability, in the face of inherent risks of the professional's activity is a special type of liability, aggravated in relation to other legal responsibilities, targeting primarily the special quality of the pepetrator's malpractice.