THE LIABILITY OF THE PHYSICIAN

ABSTRACT OF DOCTORAL THESIS

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PART II. TRIGGERING THE PHYSICIANðS CIVIL LIABILITY

TITLE I. CONDITIONS FOR TRIGGERING THE PHYSICIANðS CIVIL LIABILITY

CHAPTER 1. GENERAL CONDITIONS FOR TRIGGERING THE PHYSICIANðS CIVIL LIABILITY

Key words:

Medical contract, public health service, medical malpractice, health care facility liability, insurance contract, public and private interest, jurisdictional procedure, forced intervener

1.1. The medical legal relation is not limited to the physician-patient relation; it represents the relation between the medical service provider (generally, an entity with legal personality, but exceptionally without personality)[554] and the beneficiary of medical service (natural person, healthy or otherwise)[555] regulated by the medical law regulations, which is that law branch comprising all

[554] According to art. 3 letter g of Directive 2011/24/EU of the European Parliament and of the Council from 9th of March 2011, the medical service provider is: ñ*any natural or legal person or any other entity who is legally providing the medical assistance inside the territory of a member state*ò, and according to art. 210, paragraph (1), letter b of Law no. 95/2006, the medical service providers are ñ*natural or legal persons authorised by the Ministry of Health for providing medical services, medicine and medical devices*ò. It is noticeable that the community law definition is more limitative, even if it can also be understood lato sensu in that the *medical assistance* term used by the directive could include, aside from the medical service stricto sensu ï i.e. providing the actual medical practice, and the dental medical service and/or the paramedical service, paramedical services and/or services associated with the medical practice (prevention, recovery etc.), while the definition of internal law is a very long one, too long, in fact. Thus, the medicine or medical devices provider is not a service provider, but a goods trader. According to the system to which they belong, the medical service providers divide into: a.) providers within the public health system (the county ambulance services and those of Bucharest municipality, mobile services of emergency, intensive care and extrication, Hospitals) and b.) providers within the private health system (medical cabinets). The necessity of this distinction derives from the fact that providers within the public health system are part of the medical legal relation of public law, and the providers within the private health system are part of a medical legal relation of private law. The consequence resulting is that in case of an event of default, the providers within the public system have an administrative patrimonial liability, and the providers within the private system a patrimonial liability of private law (civil, commercial, of labour law). Because of this distinction, and the consequences of triggering a certain public law liability for providers within the public system, according to art. 244 paragraph (4) of Law no. 95/2006, Order no. 1211/2006 has been adopted. Depending on the judicial personality criteria, the providers divide into: a.) providers with judicial personality (The county ambulance services and those of Bucharest municipality, Hospitals, medical practices functioning as commercial companies) and b.) providers without judicial personality (Mobile services of emergency, intensive care and extrication, individual, grouped, associated, medical civil companies). This classification is important because providers, who are legal persons, according to art. 193 paragraph (1) thesis I the new Civil Code, participate on behalf of themselves to the civil circuit, which means they are the subjects to the rights and obligations contained by the medical legal relation and, according to art. 193 paragraph (1) thesis II the new Civil Code, shall pay with their personal goods for the obligations assumed, while providers without judicial personality are only means of practice as liberal practice, by means of which the physician [554]- natural person is indirect part of the medical legal relation, which means he is the titular of the rights and obligations within the medical legal relation and he is responsible for personal goods and assumed obligations. This distinction is very important judging from this studyôs perspective because only for providers without judicial personality, the physicians shall be charged civilly for the obligations included in the medical legal relation because these are their personal obligations.

[555] According to art. 3 letter h of Directive 2011/24/ EU of the European Parliament and of the Council from 9th of March 2011, the beneficiary of medical services: ñ*is any natural person demanding or receiving medical assistance in a member state*ò, and according to art. 1 letter a of Law no. 46/2003: ñ*the patient is a healthy person or otherwise who is using the health services*ò. First of all, as opposed to the provider of medical services, the other party to the juridical relation, the beneficiary of the medical services can only be one natural person and never a legal person. Second of all, as patient, from a legal perspective ï which means as part of the medical legal relation as beneficiary of medical services, it is not equivalent, conditioned, nor does it originate from the anatomical and physiological state of fact as a

the regulations and juridical institutions of public or private law, which govern the relations between medical service providers (including professionals and the professional activity of their employees; as well as their medical materials and devices providers) and patients (including their legal representatives).

Within the private health system, the medical juridical relation originates, generally, in the medical contract (the informed consent of the beneficiary of the medical service, expressed personally or via a representative who meets the physicianôs consent[556]) through which one party, called the provider of medical services, commits to offering the medical service (medical practice for prevention, diagnosis, treatment and associated services)[557] as opposed to the other party, called

sick person and/or the existence of a certain physical disability and/or mental. The two notions are not equivalents because being a patient is a state in fact by law (the patient is part of the medical juridical relation), whereas the sick person statute is an anatomical and physiological state of fact. The juridical statute of being a patient, as part of the medical juridical relation, is not obtained via sickness (*lato sensu*), but by means of a juridical act or fact, seen as the basis for the medical juridical relation. Hence, the following two conclusions: 1. There may exist natural persons in the anatomical and physiological fact state of sickness, which are not patients because there is not juridical act that had generated a medical juridical relation; and 2. patients can be natural healthy persons, who are part of the juridical relation, the purpose of which is the providing a medical service for prevention or only for investigation (medical consultation, analysis etc.) without treatment because they are healthy from a anatomical and physiological perspective.

[556] The necessity for physicianôs consent is not expressly stipulated by law. However, its existence can be understood from two dispositions of Law no. 95/2006. First of all, art. 652 paragraph (2) of Law no. 95/2006 stipulated that: ñ*The physician, dentist, medical assistant/midwife cannot refuse offering medical assistance/health care based on ethnical, religious criteria and sexually-oriented or based on any other discrimination criteria forbidden by law".* Thus, the physician cannot refuse offering medical assistance based on discrimination criteria, but, per a contrario, he can refuse it from other reasons. Hence we understand that art. 652 paragraph (2) it is only the exception to the general rule, expressly and restrictedly stipulated by law. The rule is the free-will of the physician regarding providing the medical service, consent which can be granted or refused; and the exception is the impossibility to refuse, based on discrimination criteria. Second of all, art.653 paragraph (1) of Law no. 95/2006 stipulates that ñ*When the physician, the dentist, medical assistant/midwife has accepted the patient, the relation can be broken (...)"*. As a consequence, by accepting the patient, (expressing the physicianôs consent), the physician enters a relation (medical juridical relation) which can only be broken in situations expressly stipulated by law. Out of this legal context results that accepting the patient (physicianôs consent) is the premises of the medical juridical relation.

[557] The object of the medical juridical relation is the partiesô actual behaviour for providing the medical service (medical prevention, diagnosis, treatment and associated services) to which the patient is entitled to and of which the medical services provider is held. The behaviour can be an action (prophylactic medical services, curative, associated services, recovery and special services) or an inaction (genetic inaction, medically assisted human reproduction, the inaction of life termination). The action, object of the relation, is providing the medical service, which a process of ñmakingò triggered by the medical services provided and not a process of ñgiving somethingò on the side of the patient. This underlined section is imposed in order to eliminate the confusion that the medical juridical relation has a derived object ï the body of the human body parts (cells, tissues, organs), which would be nonsense. The human body or parts of the human body (cells, tissues, organs) cannot be the derived objects of every juridical relation in general, because they do not constitute goods. According to art. 66 the New Civil Code: ñ*Any act, the object of which is offering a patrimonial value to the human body, its elements and products are affected by absolute invalidity, except cases expressly stipulated by law.".* Hence, we understand that acts conferring a patrimonial value to the body, its elements and products, are absolutely invalid because these do not have and can never have a patrimonial value. Due to the fact that these do not have a patrimonial value, they do not constitute good according to art. 535 the New Civil Code.: ñ*The*

the beneficiary of the medical service, in exchange of a fee or free of charge; exceptionally, in originates in a legal juridical act (business management or unjust enrichment). In the public health system has its origin in the state-citizen relation, materialised in the contracts group citizen-health insurance fund-medical services providers, where the main contract is the contract institutionalised by art. 211 paragraph (1) of Law no. 95/2006.

But, regardless of the origin, the content of the medical juridical relation is established via imperative and suppletive rules, which institutionalises the medical service for the beneficiary: a.) subjective medical right derived from the auto-determination principle (the right to information, the right to a second opinion, the right to choose the provider), b.) subjective medical rights referring to personal life (the right to confidentiality, the right to image, the right to non-intervention in personal life), c.) subjective medical rights referring to health guard (the right to security, the right to medical care); and for the medical services provider: a.) the right to information, b.) the right to payment, c.) the right to gratefulness.

Breaching these subjective medical rights, institutionalised by law by the *lato sensu* non performance of correlative obligations (generally, diligence obligations, to do or not to do), leads to the triggering the juridical medical liability, which represents the entire juridical mechanism, starting with the assembly of all correlative right and obligations driven from the illegal act of breaching the medical right regulations and continuing with the juridical procedures to be applied, via the coercive power state, of the juridical sanction. Depending on the nature of the medical right breached regulation, the medical juridical liability may be: a.) criminal medical liability, b.) administrative medical liability, c.) disciplinary medical liability for labour low ï all of these medical juridical liability forms have a sanctioning main purpose; d.) civil medical liability (which could also be a civil common law liability, a patrimonial liability of employees, a commercial liability) ï the main purpose of this medical juridical liability form is repairing the prejudice.

1.2. At large, the civil medical liability belongs to the medical system and it consists in a complementary system of liabilities, the purpose of which is to cover in any prejudice suffered by

goods are the corporeal or incorporeal goods, which are the object of a certain patrimonial right". Since they are not goods, the body and its elements and products cannot be the derived object of any juridical relation.

the beneficiary of the medical service, regardless of the person who has committed the illegal act. The system is made up of three associated liabilities, but different from a legal and juridical basis perspective, which engages care se complementary, depending on the illegal act generating the prejudice and by the person who had committed it by breaching its various responsibilities: a.) civil liability of the physician, having a legal basis art. 642-643 of Law no. 95/2006 and based on the idea of guilt (art. 642 paragraph (2) of Law no. 95/2006 itself imposes expressly got engaging the liability the existence of negligence and imprudence, both guilt forms); b.) the civil liability of the health care facility, having a legal basis art. 644-646 of Law no. 95/2006 and is based on the idea of warranty; c.) the civil liability of producers and providers of materials (equipments, devices, substances) and facilities, founded on the dispositions of art. 646-648 of Law no. 95/2006 and being a objective liability.

Generally, the civil medical liability is a contractual liability[558] generated by the *lato sensu* breach of medical obligations correlative with the subjective medical rights[559] from the content of

[558] After passing Law no. 95/2006, in the Romanian specialised literature the previously rejected theory of legal juridical nature, from French literature, has been poached, and called the liability of professionals (a summary sense of the term used before the new Civil Code). As a consequence, with a new basis and after passing Law no. 95/2006, the idea that the entire spectrum of medical liability for the medical act is occupied with the physicianôs liability is sustained. This time the idea goes further, affirming that thus professional liability would be one without guilt, which would direct itself towards an objective liability. For evaluating this hypothesis the analysis of the following three aspects is necessary: legal dispositions, the nature of the breached obligation and even arguments brought for supporting it. From the very beginning it should be pointed out that legal provisions are ignored because art. 642 paragraph (2) of Law no. 95/2006 expressly imposes the existence of negligence or imprudence, both forms of blame (guilt) for triggering the liability. Moreover, according to art. 643 paragraph (1) of Law no. 95/2006 ñ*All the persons involved in the medical act shall answer depending on the guilt degree of each and everyone*"[558], continuing until eliminating the physicianôs liability, according to art. 643 paragraph (2) letter a of Law no. 95/2006, when the prejudice happens while practicing, via individual prevention, diagnosis or treatment acts, but is due to working conditions, insufficient with diagnosis and treatment equipments, nosocomial infections, adverse effects, complications and risks in generally accepted of the investigation and treatment methods, hidden defects of sanitary materials, medical equipments and devices, medical and sanitary substances used. Thus, the lack of guilt eliminated the liability so we cannot talk about liability without guilt. What should not be forgotten is the fact that the physicianôs liability, with regards to the medical act, is a diligence obligation (mid obligation, not of result); however, triggering the liability is sustained (even that of the liability without guilt) for not reaching the result. Do not confuse the physicianôs obligation in the medical act (diligence obligation for which a subjective diligence exists according to art. 642-643 of Law no. 95/2006), on one hand, and the obligations of the health care facility, respectively those of the utilities providers towards health care facility (result obligations for which there is an objective liability according to art. 644-648 of Law no. 95/2006), on the other hand. Last but not least, I should also emphasize the fact that, although we discuss about the physicianôs liability, as part of this judicial relation the health care facility is seen as co-debtor because, according to art. 644 paragraph (2) of Law no. 95/2006, the health care facility shall be held responsible together with the physician. Thus, we cannot talk about the liability of professionals if the obligation has a sum of passive subject, and the main debtor[558] ï and not only voucher for the repair obligation ï is the health care facility. This particular *solidarity*, method of the obligation with multiple subjects, stands at the basis of this study.

[559] Solving the problem of the juridical nature of the liability determines us to follow the road in the opposite direction: repairing the prejudice is a general obligation of subjective right breach. The problem is reduced to the question if this subjective right is an absolute or a relative one. In other words, we are discussing about a non-patrimonial right, which

is the object of a juridical relation where the active subject is determined (subject of the right) and the passive subject is not determined (all the other subject of right) or it is a right of claim from the din content of a juridical relation where the active subject is determined (subject of the right) and the passive subject is also determined (one or more legal entities)? The easiest answer would be that we are dealing with a non-patrimonial subjective right (bodily integrity, health, life, etc.), from the content of a juridical relation the passive subject of which is not determined (although we no longer discuss about all the other legal entities, because we refer to a professional category, it is nonetheless a generic passive subject: all of the physicians). This is the reason why the breach of this right triggers the delictual liability of the passive subject who has breached it. Judging by this simple perspective, there is no difference if the physician makes a mistake inside the operating room, if he hits a pedestrian while driving or stabs a person in a bar. The relation between the patient and the physician has always been and it presently is a juridical relation. This particular juridical relation is a special one due to its content: the right of the active subject, the patient, is not a non-patrimonial one (bodily integrity, health, life, etc.), but a patrimonial right (money evaluated): the right to be provided a proper medical service. Even more so, unlike the non-patrimonial obligations, which do not include correlative obligations, this right/these rights of the patient also include correlative obligations (with title for example, fee payment). This also because the passive subject of the relation it is not represented by a generic category of legal entities seen as impersonal (physicians in general), but rather is a determined passive entity (certain physician/ physicians) even by the patient based on his consent. So that we could conclude that the right/ the rights of the patient (those in the initial relation, which are breached through a defective medical act) are relative (of claim) and, thus their breach triggers the contractual liability. However, we must not ignore the fact that based on Law no. 95/2006 obligations for the breach of which the physician shall be held responsible are institutionalised; preceding obligation or adjacent to the actual medical act, which until now was the only one at the basis of the discussion: contractual or delictual liability. Thus, according to art. 642 paragraph (3) and art. 649-650, the physician is under the obligation to obtain the informed consent of the patient. On the face of it, we would be facing a legal confirmation of the contractual nature of the liability, because, if we are talking about the consent, it means that we are facing a juridical act. However, the problem is not completely solved because there is the obligation of information, which is a pre-contractual one and thus its breach cannot trigger a contractual liability. Moreover, its breach may be a flaw of consent shaped as fraudulent concealment and may trigger the relative invalidity of the contract which, due to the fact that it is considered to have never existed, cannot represent the basis for the liability of the physician. In conclusion, the breach of the information obligation triggers the delictual liability. Once the physician had fulfilled its obligation of information, does not mean we already have a contract. This generates only upon consent. If the patient or the person authorised can but it does not express the consent, what results is that there shall be no contract, case when, if the physician if performing a medical act, he shall be responsible also on a delictual basis because there is not contract. Concluding a contract shall be made when the patient expressed his direct consent or in exceptional cases by the authorised person, and the physicianôs liability shall be triggered based on this contract, even if the obligations for the breach of which he shall be held responsible are stipulated by law. The Romanian institution has rejected this position, arguing that in cases of bodily injury, the liability basis is delictual and not contractual, because any convention which might have life, health, etc. as object, was invalid according to art. 963 of the former Civil Code.[559] Here we are confronted with a false problem because this legal text has no incidence in the medical contract. Thus, art. 963 of the former Civil Code: ñ*Only things which are commercialised*[559] *can be the object of a contract*ò and art. 1229 of the new Civil Code: ñ*Only things within the civil circuit can be the object of a contractual practice"* represents a condition of validity for contracts which have as material object a good which must be inside the civil circuit. The medical contract does not have a derived material object because it is a service contract: does not have as object a good which is not in the civil circuit (human body, in general, or parts of it, in particular), but its object is providing a certain medical service. The obligations we are talking about it is not a ñgiveò to the patient obligation, but a ñmakeò obligation by the physician. Even more so, based on it the patient is not the debtor of any obligation to have any part of the body mutilated or dismembered, on the contrary, he is the creditor of an obligation consisting of a medical service. We refer here to the cause of the contract, which must exist and must be legal and ethical. If this contract had been prohibited by law or contrary to the public order, it had valid according to art. 966 and the following formed Civil Code and would have been invalid according to art.1238 paragraph (2) the new Civil Code, but its purpose it not at all allowing the bodily injury of the patient, on the contrary, saving his live and improving his health.

the civil or administrative medical contract[560]. For this purpose, the responsible person, debtor of the obligation to repair the prejudice, is part of the medical contract that is the medical services

[560] Before Law no. 95/2006 entered in force, the doctrine completely ignored the distinction between the public law and the private law, between the public law relations and private law relations. Thus, it started with the premises that between the patient and the medical services provider in the public health system there is no contract, which is why the liability is delictual and because it did not belong to the administrative assemblies of the health care facility (for triggering the facilityôs personal liability), it belong to the physician. There is no contract because there is not civil juridical relation to arouse from the agreement between two equal private persons. On the contrary, there a public law juridical relation between the citizen and the State, within which enters, aside from the obligation for public order and safety insurance, of justice and consular assistance etc., also the obligation of medical services insurance. Nobody has ever requested a certain citizen to have a contract with the Ministry of Interior as origin of the obligation of safety insurance, and nonetheless it ñ*has been executed*ò. Also, nobody had ever requested a citizen to have a contract for the practice of medical assistance in a health care facility from the public system, however, the obligation has been provided, exactly because it did not originate in a contract but in the public law relation of which the patient is part by virtue of its citizen statute. In spite of all that, when the *lato sensu* non-execution of the obligation has triggered a prejudice, the citizen is reproached for not having a contract. Thus, the State becomes the private person and shall not be held responsible from a contractual perspective because is not part of a contract[560]; nor delictual, as consignee because, when it comes to the execution of the medical act, there would be no principal-agent relationship. Subsequent to the entering in force of Law no. 95/2005, the doctrine has ignored the dispositions of art. 3 of Law no. 95/2006, according to which: ñ*The protection of public health represents the obligation of central and local public administration authorities, as well as that of all natural and legal persons*ò, which is why the first of the principles of public health assistance is according to art. 7 letter of Law no.95/2004 the liability of the society for public health. We are not talking about a simple intention program but a juridical liability institutionalised expressly and directly by art. 2 paragraph (8) of Law no.95/2006: ñ*The liability for insuring the public health lies in the hands of the Ministry of Health, the territorial public health divisions, as well as the public health authorities within the ministries and institutions with the personal sanitary network*ò. In other words, only the content of the obligation relation for repairing the prejudice generate by the *lato sensu* non-execution of the medical service has been analysed, without taking into consideration the nature of the juridical relation determined by the nature of the obligation and of the debtor (whether it is a private person or a public authority or a person of public utility). This happens because the patrimonial liability of public authorities has been considered to be just a form of delictual civil liability. In France, via the Blanco Decision from 1875 the competence of the administrative courts has been established for solving litigations generated by prejudices triggered by the public services[560] (initially only local and subsequently of the entire public system), judged until then by juridical courts, exactly because the administrative liability cannot bow to regulations which apply to private persons as they are institutionalised by the Civil Code[560]. But, paradoxically, in Romania, over a period of 100 years, the same situation was confronted: the increase of the number of public services and their volume, the enforceability of social solidarity concepts[560], which in France have led to a continuous extension of the administrative liability which engages in an objective manner, we have gone the other way. Thus, in despite of many studies[560] which have supported the administrative nature of Stateôs liability via the public authorities, the concept enforced in the Romanian doctrine was the one that the patrimonial liability for the prejudice caused by the public authorities is a form of delictual civil liability. The most obvious aspect is the appliance of private law principles in the Stateôs liability with regard to this. First of all, an abnormal situation emerges: there is only one public law juridical relation (the citizen is under the obligation so enter a juridical relation with the State via the public authorities exercising their public power responsibilities, where the parties do not hold equality positions), if the citizen breaches an obligation within the content of the relation his administrative liability shall be triggered (for example, if a private person starts building without a building permit, his contraventional liability shall be triggered for breaching Law no. 50/1991), and if the public authority breaches an obligation included in the relation (if the Mayor produces a prejudice as due to the refusal of issuing a building permit, his civil liability shall be triggered for breaching Law no. 50/1991), its delictual liability shall be triggered. Thus, for private persons the administrative liability shall be triggered, and for the public authority the civil liability!? Second of all, an important argument for supporting the civil nature of the liability of the public authority is that the nature of the obligation for prejudice repairing does not depend on the nature of the breached juridical regulation. Thai is, it is sustained that the breached regulation is part of administrative law, the liability of public authorities is civil, but, nonetheless, it is supposed to be triggered by the administrative court according art. 1 of Law no. 554/2004. The object of the litigation triggers the courtôs competence. Similarly, when the competence belongs

provider. This is why the distinction between the debtor of the medical obligation, the medical services provider, and the person who executes the medical obligations, the physician. The simplest hypothesis is the one where practice of medicine is professed of as a liberal practice in one of the forms established by art. 1 paragraph (3) of G.O. no. 124/1998. In this situation, the physician himself, via professing as liberal practice is part of the medical contract, and the medical obligation is executed by the debtor himself. Only in this case there is a civil liability of the physician generated as due to the *lato sensu* breach of personal obligations within the contract from which he takes part. The situation becomes even more complicated if the health care facility debtor of the obligation exercises its obligation via a physician, employed or associated. In this hypothesis, regardless if the discussion is about the insurance obligation of the performance background of the medical act of providing the medical service itself, the medical liability belongs to the health care facility because it is a contractual liability. For the prejudice caused as due to the repairing for the

to the administrative court, the object of the litigation must belong to the administrative law. Due to the fact that in Romania the jurisprudence did not reach the same level in France, in terms of the extension of the public service liability until almost eliminating physicianôs liability for malpractice (he is held responsible only for serious fault, i.e. intent, which excludes error, negligence, imprudence, i.e. malpractice), the health care facility could go against the employed physician, however not according to art. 77 of Law no. 188/1999, because the physician is not a public servant, but rather according to art. 270 paragraph (1) the Labour Code. Starting with the Launonnie-Carriol cause of 1977, the French jurisprudence made the distinction between personal fault and work fault. Thus, without eliminating the personal responsibility, but only by its limitation to the situation of serious fault of the physician *bordering on* intent, the personal responsibility of the public service is underlined. Subsequently, the liability of the public service has worsen, which determined that via the Decision from 10th of April 1992 the State Council established the fact that the public service liability is also triggered for its simple fault. This liability does not represent a liability for somebody elseôs act (of the physician) as consignee and neither for his fault only in the organisation and operation of the medical service, but it is rather a liability for the medical act itself. The public service is held responsible for his simple fault, i.e. that of a *good family parent* and the physician is held responsible for his serious fault, i.e. unforgivable fault because not even the most incapable person would not be guilty. The extension of the public service liability department eliminates the liability of the physician from the public service for malpractice. Thus, in the hypothesis where the perpetrator shall be held responsible only for a serious fault which strives after intent, we can no longer discuss about the liability of the perpetrator as physician, because it should be triggered only for error (negligence or imprudence), but not for intent. The perpetrator shall be held responsible, but not as physician for malpractice, according to special law, because we are no longer discussing about error, but the intent to prejudice. In Romania, even in cases when the prejudice would be only the result of a illegal act and physicianôs fault (shaped as negligence or imprudence), the health care facility would be also the debtor of the obligation for repairing the prejudice along with the physician who is guilty according to art. 644 paragraph (2) of Law no. 95/2006: ñ*The facilities stipulated in paragraph (1) are held responsible under the terms of civil law for the prejudices caused by the employed medical personnel, jointly with it*ò. Thus, even in cases when the liability of the physician is triggered, the health care facility is also held responsible; again, not as consignee according to art.1373 of the new Civil Code, not as fidejussor according to art. 2280 of the new Civil Code, but *jointly with* the physician. The effect of the passive solidarity between the co-debtors is the fact that the debtor who has paid the entire flow shall turn against the other debtor only for his debt quota[560]. Thus, if the health care facility is being watched and fully pays the debt, it shall be able to turn against the guilty physician for part of that sum, and even in cases when the guilty physician fully pays the debt (caused by him exclusively), he can turn against the health care facility. Is it true that that part of the sum which shall be covered by the health care facility should be determined, but in any case the fact remains that the health care facility shall pay a certain quota of the debt to repair the prejudice resulted exclusively of the illegal act made with guilt by the physician, limiting to his actual liability.

prejudice generated by the way the actual *medical service has been provided, the health care facility can turn against the physician (associated or employed), but not on the basis of a delictual liability according to art. 1373 of the new Civil Code*[561]*, but on the basis of a contractual liability, according to the civil convention*[562] *or the employment contract*[563].

Subsidiarily, the medical civil liability can be a delictual liability whether it is generated by the lato sensu of the subjective correlative medical obligations within the content of the medical

[561] The minority opinion in the doctrine is that for these there would be a liability of the health care facility according to art. 1000 paragraph (3) of the former Civil Code (presently, art. 1373 of the new Civil Code) as consignee. This happens, essentially, due in lack of a legal definition of the principal-agent relationship, no limitative interpretation of it can be made, which means that the subordination of the physician towards the health care facility limits to the organizational aspects and not the medical act. The argument is in fact a critique of the majority orientation of the doctrine[561] which supports that for the defective medical act performed by a physician, who is employed of associated, the liability of the health care facility is not triggered according to art. 1000 paragraph (3) the former Civil Code (presently, art. 1373 the new Civil Code) as consignee. The solution is appropriate, but the motivation is erroneous. Thus, it is considered that health care facility shall not be held responsible for the act of the official in charge according to art. 1000 paragraph (3) the former Civil Code (presently, art. 1373 the new Civil Code) because the first special condition of this form of delictual liability has not been fulfilled for somebody elseôs act, i.e. there is no principal-agent relationship between the facility and the physician with regards to the actual medical act (for which there is a special and derogatory liability), but rather in with regards to the organisation and operation of the facility (for example, respecting the program). This motivation is based on a repealed legislation, art. 188 of Law no. 3/1978[561], and completely ignores art. 351 paragraph (2) of Law no. 95/2006, which expressly stipulates that ñ*The entire liability of the medical act remains in the hands of the medical and pharmaceutical services providers*ò. The facility shall not be held responsible for the medical act on a delictual basis, as consignee, but it shall be responsible on a contractual basis for the personal act.

[562] The associated physicians enters a category, inappropriately called by the juridical doctrine, the category of the ñauxiliariesò for the act of which the health care facility has a contractual liability for somebody elseôs institutionalised by art. 1519 of the new Civil Code.

[563] Employed physicians practice under the terms of a individual employment contract, the main origin of the principal-agent relationship. This is the reason why we must distinguish between the contractual liability for the breach of the medical contract by the health care facility ï debtor, due to its employees; and the delictual liability of the health care facility ï consignee for the extra-contractual illegal act of its servants. The *lato sensu* breach of the medical contract triggers the contractual liability of the health care facility. If this breach is due to the employed physician, the health care facility shall not subrogate to the rights of the patient (because the patient did not have a juridical relation the object of which is providing the medical service, with the employed physician that he had breached), but it rather has a direct action against its employee on the basis of the individual employment contract. The object of which is providing them medical service of the employer. The employed physician towards the employing health care facility according art. 270 paragraph (1) of the Labour Code: ñ*The employees shall be responsible from a patrimonial perspective, according to the regulations and principles of the contractual civil liability, for material damages caused to the employer caused by and in relation with their work*ò; just like the employed physician in Belgium is responsible towards the employing health care facility for error by practicing *stricto sensu*, according to art. 18 of the Law from 3rd of July 1978. Art. 270 paragraph (1) of the Labour Code, regulation, is the basis of the patrimonial liability of the employees ñ*a form of juridical liability, which consists of their obligation to repair material damages caused by the employer, by guilt and in relation with their work*ò[563], which is triggered when, aside from the general terms of civil liability (illegal act, prejudice, causality relation, fault) the special condition of the employee statute of the perpetrator and employee al injured person are brought together. Just as the lack of this condition eliminates the patrimonial liability of the employee with the consequence of the common law appliance, the same way, bringing together this condition, mandatorily imposes triggering this special liability form.

juridical relation arouse from a legal juridical act (unjust enrichment or business management), or its effect is the obligation to repair the prejudice indirectly of other person than the beneficiary of the medical service. In such circumstances, there is no doubt that there is a delictual liability of the physician, but it is about a delictual civil liability, called *residual* by the French doctrine, because it covers only extreme exceptional situations.

2.1. Triggering the physicianôs civil liability is the result of cumulative assembly of all general conditions (A. illegal act, B. prejudice, C. causal relation, D. blame) and special (1. the physician statute of the perpetrator, 2. the performance of the illegal act while practising).

A. The illegal act generally consists in the breach of contractual medical subjective rights, and exceptionally, in the unfulfilment of obligations resulted in the legal juridical act.

Breaching the right to choose the provider was represented by the *de facto* limitations in public health systems of exercising the right of the beneficiary to medical service, citizen of the European Union, only to national providers of health services.

Breaching the right for choosing the object of the medical contract is made whether by committing to a prevention, diagnosis or treatment procedure to which that particular person did not give consent, or by providing a medical service for which the beneficiary of the medical service has expressed vitiated consent, mainly by fraud or violence.

The illegal act of breaching the right to proper information consists of whether the refusal to provide the requested information, the presentation of incomplete or inaccurate information, or offering information in a manner which renders them useless (using a sophisticated language and/or at a scientific level superior to the educational degree of the beneficiary, or by their late conveyance) or imperceptible (by presenting them in a written form although the beneficiary is illiterate or in a language he does not understand).

In specialised literature it has been shown that it would represent situations of obligation non-performance: a.) the lack of any medical recommendation and b.) getting the wrong opinion[564]. To this situation it should also be added the hypothesis according to which the medical services provider presents (out of negligence or imprudence) the advice as information and not judgement.

[564] **L. R. Boilă,** *Op.cit*, p.398.

Breaching the right to confidentiality is done by the non-performance of correlative not to do obligation, to not inform the public, in general, or a larger or smaller group of people about information regarding health, the results of analysis, diagnosis, prognosis, treatment, as well as any other personal data[565].

The illegal act of breaching this right is done by simply photographing or filming, regardless if subsequently the image or video is made public or viewed or in private or not.

The *lato sensu* non-performance of the safety medical obligation with regards to the proper medical act consists of whether the risk assumption (despite the knowledge and experience) of a medical risk (not of a extremely reduced possibility, but a high production probability of a corporeal prejudice via the medical act itself, due to the combination between health state of the beneficiary of the medical service and the danger of the diagnosis process and/or treatment); or in the absence of subsequent supervision of the medical act.

B. What results from the dispositions of art. 642 paragraph (1) letter b and art. 642 paragraph (2), (3), (4) of Law no. 95/2006 is that if the professional error committed while practicing the medical act does not cause prejudices to the beneficiary of the medical act, then there is no malpractice. The medical prejudice is whether patrimonial: direct patrimonial prejudice (the paid fee itself for the defective medical service provided and/or the economic competence of the corporeal prejudice) and/or patrimonial prejudices generated by the breach of subjective medical right associated with the medical service[566]**;** or non-patrimonial: the ethical competence of

[565] Informing the public or only some people about medical information can be done whether via a commission, i.e. the verbal disclosure of information (directly or by mass communication media) or written (on material or electronic support); or by an omission, by non-obstructing the access to the databases where medical data stored (on material or electronic support).

[566] There is the possibility that the medical service to be provided appropriately with the performance of all medical obligation of information and counselling, of security and medical care; but, nonetheless, that associated medical obligations be breached, such as the confidentiality obligation or the correlative obligation of the right to image o the medical service beneficiary. Generally, the prejudice caused by the non-performance of these obligations is non-patrimonial, but there is the possibility that the effect of the breach to not be affective but patrimonial. Thus, the image of the person in inalienable, but by reproduction it can be used erroneously as a material object derived from a image contract[566]. Breaching the right to personal image of the beneficiary of the medical service, by photographing or filming him within the premises of a health care facility and its usage for advertisement purposes (for the physician, the health care facility, medical equipments etc.) or educational, renders impossible the subsequent conclusion of image contracts by the beneficiary of the medical service for advertisement or educational purposes and deprives him of a patrimonial gain. The non-performance of the confidentiality obligation by disclosing medical data with regards to the medical health of a certain person from the staff or with an important role in the activity of a shared-stock companies may lead to the decrease of the shares value or the decrease of the activity, and, as a consequence, the decrease of profits and for some employees the loss of the working place. Under this circumstance, the creditors of the prejudice repair obligation

the corporeal prejudice (a. physical pain and psychological distress; b. sexual prejudice; c. aesthetic prejudice; d. loss of amenity; e. Juvenile prejudice; d. the loss of life expectancy) and/or non-patrimonial prejudices caused by the breach of medical rights referring to private life[567].

C. The civil liability of the physician is triggered only for the act ñ*generating the prejudices*ò (art. 642 paragraph 1 letter b of Law no. 95/2006), only for ñ*produced prejudices*ò (art. 642 paragraph 2 of Law no. 95/2006), only for ñ*deriving prejudices*ò (art. 642 paragraph 3 of Law no. 95/2006), only for ñ*produced prejudices*ò (art. 642 paragraph 4 of Law no. 95/2006). Thus, the civil liability of the physician is conditioned by the causal relation between the illegal act and the prejudice it generates, produces, causes. As a consequence, regardless if the civil liability is contractual or delictual and regardless if the civil liability is objective or subjective, the causal relation is a necessary condition, general, material of the civil liability, generally, and of the civil liability of the physician, especially. The court establishes the existence of a causal relation between the act of the physician and the medical prejudice, based on evidence, i.e. the medical expertise. For the performance of the medical expertise, in France, there are experts for medical accidents, listed by the National Commission of Medical Accidents, subordinated to the Ministry of Justice and of Health. This commission does not perform the speciality expertise itself, as opposed to, the Romanian forensic medical investigation institutes, for example; it only organises the exercise of the expert profession in this department, by evaluating the knowledge of the candidate and decides the subscription of experts on the national list. In Romania there are no experts for the medical accidents department.

D. The minority orientation in the literature considers that the civil liability of the physician is one of these circumstance and it is ñ*substantiated objectively, based on the idea of practice risk, both the culpable illegal medical actions and inactions and those non-culpable and prejudiciable*

consisting in the decrease of shares value or, for some share holders, respectively employees, the loss of their working place. Also, the non-performance of the confidentiality obligation by disclosing medical data referring to the physical state (impotence or infertility, for example) of a notorious person (politics, sports, artists) may lead to his/her loss of advertising contracts.

[567] Breaching the right referring to private life is done by generally making available to the public or to a smaller or larger group of people medical data or images of the beneficiary of the medical service during examination or treatment. Their effect may consist of a discomfort due to the disclosure of certain intimate details (if, for example, a person has an eczema, it is not a eulogy aspect), but it may place that person in an embarrassing situation (if, for example, the person suffers a physical dysfunction). This may cause whether an affective reaction of the victim, which can determine the refusal of concluding a contract with the company, or a rejection reaction by the company.

*being excluded*ò[568]. First and foremost, the support ignores completely the legal dispositions because art. 642 paragraph (2) of Law no. 95/2006 expressly imposes the condition of negligence and imprudence existence, both forms of blame for triggering the liability. Even more so, according to art. 643 paragraph (1) of Law no. 95/2006, ñ*All the persons involved in the medical act shall be held responsible proportionally to the blame degree of every one of them*ò[569], continuing until reaching the elimination of the physicianôs liability, according to art. 643 paragraph (2) letter a of Law no. 95/2006, when the prejudice happens while practicing, by individual or prevention, diagnosis or treatments acts, but it is due to working conditions, insufficient diagnosis and treatment equipments, nosocomial infections, adverse effects, complications and risks generally accepted of investigation and treatment methods, hidden flaws of sanitary materials, medical equipments and devices, medical and sanitary substances used. In other words, the lack of guilt eliminated the liability. Second of all, the liability of the physician, with concerns to the medical act, is a diligence obligation, (I emphasize: of middle not of result); however, triggering the liability is supported (even of the liability without guilt) for not reaching the result. I also want to emphasize that the physicianôs obligation in the medical act (diligence obligation, because there is subjective liability according to art. 642-643 Law no. 95/2006), on one hand, and the obligations referring to the performance background of the medical act, obligations of the health care facility, to the providers of the facility towards health care facilities (results obligations, for which there is an objective liability according to art. 644-648 Law no. 95/2006), on the other hand, must not be confused.

Related to the civil liability of the physician, art. 642 of Law no. 95/2006 by express reference only to the unintentional blame forms. Thus, art. 642 paragraph (1) letter b of Law no. 95/2006 defines the practice as being only the ñ*professional error*ò made, according to art. 642 paragraph (2) of Law no.95/2006, by negligence or imprudence[570]. With regards to the illegal act of medical practice, the specialised literature sustained that it might committed with intent, according to art. 666 paragraph (2) letter a of Law no. 95/2006[571]. However, the legal disposition invoked does not institutionalise a new condition for triggering the liability, nor does it regulate a special

[568] **L. R. Boilă,** *Op.cit.*, p. 406
[569] Paradoxically, the same author invokes this legal text in a previous paper in order to argue that the subjective liability of physician: **L. R. Boilă**, **A.C.Boilă**, *The juridical nature of the medical personnel civil liability in the Romanian law*, ñDreptulò (The Law) magazine, no. 5/2009, page 87.
[570] The legal text refers to negligence, imprudence or insufficient medical knowledge, however, the insufficient medical knowledge do not represent a physical behaviour towards an illegal act or its result, but rather the consequence of an act ï lack of education.
[571] **Fl. I. Mangu**, *Op.cit.*, p. 75

derogatory circumstance, rather it only provide that the corporeal prejudice is committed with intent, compensation cannot be requested to the civil liability insurer, rather it must be requested directly to the appropriate person. Thus, this legal text limits the civil liability insurance contract only to illegal act committed without intent, exactly because the physicianôs civil liability is triggered only for illegal act without intent. This does not mean that the physician cannot commit the illegal act with intent or that, when the physician has committed the illegal act with intent, he shall not be held responsible civilly; but rather that, under this circumstance, there is not malpractice, resulting that the perpetrator of the illegal act shall be held responsible civilly as physician, according to art. 642-64 Law no. 95/2006, but as any other perpetrator according to common law ï art.1357 and the following new Civil Code.

However, the obligations performed by the physician (regardless if the provider of the medical service, debtor of the obligation is the health care facility or the physician himself) do not limit to those of medical practice. Besides, Title 14 of Law no. 95/2006 provides right and obligations, the *lato sensu* non-performance of which triggers the liability according to art. 642 paragraph (3) of Law no. 95/2006. This legal text does not condition the liability of unintentional blame (negligence or imprudence). Therefore, if the physician does not *lato sensu* perform the obligations referring to confidentiality, the informed consent and the obligation for providing medical assistance (providing and not the way it is provided), the civil liability is triggered even if the physician had committed the act with intended blame (direct or indirect).

2.2. The causes excluding the civil liability of the physician divide into: a.) clauses excluding the illegal character of the act (1. necessity state, 2. unliability causes, 3. the performance of a legal obligation of a competent authority); and b.) causes which exclude the causal reaction (1. force majeure and act of God, 2. the act of the beneficiary of the medical service, the health care facility, the providers of the health care facility).

The self defence is not part of the first category of causes because it is absolutely impossible to *lato sensu* provide a defective medical service with the purpose of eliminating a material, direct, immediate and unjust attack, which endangers the physician, or any other person, their rights or a general interest, if the defence is proportional with the gravity of the attack. Also, when a physician provides the medical service, he is performing a medical obligation and does not exercise one of his rights. Thus, in the actual case of civil liability of the physician, the liability cannot be eliminated not

even theoretically considering that the act of the physician does not have an illegal character and also considering that he is practising with good faith his personal right, because the physician has not right.

With regards to the unliability clauses of the physician, from the dispositions of art. 1355 paragraph (3) of the new Civil Code, two conclusions emerge. First and foremost, the liability for the prejudice caused to life, i.e. death, cannot be eliminated or reduce by any restriction or waiver of liability clauses. Second of all, the general rule is that the liability for prejudice brought on the physical and mental or health integrity cannot be eliminated or reduced by any restriction or waiver of liability clauses. Only exceptionally, when a special regulation would expressly and limitatively provision those *conditions*, to which art. 1355 paragraph (3) of the new Civil Code refers, could validly be concluded limitation or elimination clauses for the civil liability for prejudice caused to physical and mental or health by meeting certain conditions.

Apparently, according to art. 375 paragraph (1), (3) and art. 473 paragraph (1) Thesis 2 of Law no. 95/2006 referring to the professional independence of the physician within the limits of its competence, the performance of a legal obligation or of a competent authority could not be considered as being a cause for the elimination of the civil liability of the physician. However, precisely that limitation of professional competence, which is expressly referred to in art. 375 paragraph (3) of Law no. 95/2006, imposes an executive hierarchy, where the resident physician is the subordinate of the specialist, who, also is the subordinate of the primary physician, who is the subordinate of the physician who is the head of department. This subordination materialises in a control activity during visitations and counter-visitations; and, respectively, direction activity via compulsory indications during visitations and counter-visitations. Such a compulsory indication may eliminate the illegal character of the physicianôs act if it bringing together the terms mentioned above. Also, the same limitation of professional competence referred to in art. 375 paragraph (3) of Law no. 95/2006 determines also a horizontal interdependence. For example, the surgeon shall be able to provide the medical service consisting of a surgical intervention upon the beneficiary of the medical service with heart problems without the compulsory notification of the cardiologist or the gynecologist shall not be able to provide the medical service, consisting in a premature challenge of birth without the compulsory notification of the neonatologist. Under these circumstance, there is not hierarchical subordination and, yet, due to the complexity of the medical act, the notification of the

competent authority is necessary (not in the institutional meaning of the term, but the professional meaning). And under this circumstance, such a compulsory notification may eliminate the illegal character of the physicianôs act, obviously, only if it bring together these four terms.

The beneficiary of the medical service is not a third party of the medical contract, on the contrary, is it an actual part of the medical contract and it can, according to art. 13 of Law no. 46/2003, disturb any medical intervention, which, according to art. 376 paragraph (2) of Law no. 95/2006, eliminates any medical liability. Also, the health care facility is also not a third party because it is part of the medical contract, as medical services provider and thus, the debtors of all obligations within the content of a medical juridical relation and liable for the personal act for the *lato sensu* non-performance of these obligations (even if, in fact, they are being performed by a natural person ï the physician, because the juridical fiction ï the legal person cannot execute nothing directly). The doctrine does not dispute anywhere the statute of party to the medical contract and thus, debtor of all obligations within the medico-legal relation, of the health care facility ï medical services provider; however, as previously shown, it claims that the civil liability belongs to the physician (even if he is not practicing in one of the forms stipulated by art. 1 of the G.O. no. 124/1998) which only performs the obligation on behalf of the debtor (supra. Part I, Title II, Chapter 3). What is incontestable is that according to art. 643 paragraph (2) letter a of Law no. 95/2006, the physician shall not be held responsible when the prejudice: ñ*is due to working conditions, insufficient diagnosis and treatment equipments, nosocomial infections, adverse effects, complications and risks generally accepted of the investigation and treatment methods, hidden flaws of sanitary materials, medical equipments and devices, medical and sanitary substances used*ò. Under these circumstances, there is no *de plano* exemption of medical liability, but only the replacement of civil liability of the physician with the liability of the health care facility[572] and the providers of equipments, devices, materials, medical or medicamentary substances [573] according to art. 644-648 of Law no. 95/2006.

[572] The five civil liability situations of the heath care facility for the performance background of the medical act stipulated by art. 644-645 of Law no. 95/2006 can be grouped in three categories: a.) the liability of the health care facility for medical devices, b.) the liability of the health care facility for the breach of internal regulations, c.) the liability of the health care facility for nosocomial infections.

[573] Generally, the act of any third party of the initial juridical relation can, according to art. 1352 of the new Civil Code, eliminate the civil liability of the perpetrator. Especially, in the medical law department, the *lato sensu* providers of the health care facility are third parties towards the medical juridical relation between the beneficiary and the provider of the medical service; this is the reason why the act of these providers would eliminate the civil liability according to art. 1352

3.1. The effect of triggering the civil liability of the physician is the rise of two new rights for the beneficiary of the medical service.

Mainly, with regards to the contractual civil liability of the physician, the *lato sensu* non-performance effect of the initial contractual obligations is represented by an assembly of new rights in favour of the beneficiary of the medical service, consisting of remedying the non-performance of the contract. Depending on the way the contractual purpose is achieved, the remedies used for the non-performance of the contract divide into: a.) natural remedies, which include 1. the additional term of performance[574], 2. forced execution in kind[575], 3. exception of non-performance of the

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of the new Civil Code. However, especially, related to the the civil liability of the physician, the elimination of the civil liability of the physician for the lato sensu act of the providers of the health care facility leads to the triggering of the civil liability of these providers according to art. 643 paragraph (2) letter a as compared to art. 646 and 648 of Law no. 95/2006. Part of the special third parties (third parties of medical juridical relation, but the act of who can impact the performance of medical obligation) also enter the providers of utilities (gas, power, water-canal), as well as the manufacturers of medical devices, equipments and substances; but, the elimination of civil liability of the physician is made on a different juridical basis depending on the two categories. Thus, on one hand, the *lato sensu* act of inappropriate supply of utilities by utility providers (gas, power, water-canal), eliminates the civil liability of the physician and triggers the objective liability (without the possibility to eliminate in any way the liability because it is triggered regardless of the existence or non-existence of any form of blame) of the utilities provider according to special law, art. 648 of Law no. 95/2006; and, on the other hand, the elimination of civil liability of the physician due to triggering the liability of the manufactures of devices, equipments, medical substances is performed on the basis of common law referred to art. 646 of Law no. 95/2006. *Stricto sensu*, because art. 646 of Law no. 95/2006 refers to the hidden flaws of the product, the common law being represented by art. 1707 and the following new Civil Code. However, because art. 646 OF Law no. 95/2006 refers to manufacturers, i.e. to the liability for the manufacturing process it is obvious that the intent of the legislator does not limit only to the hidden flaws warranty owed by the seller (who can be other than the manufacturer), but rather to the liability for defective products institutionalised by Law no. 240/2004. Under the circumstances of the general liability for defective products the civil medical liability of the manufacturer of devices, equipments, medical substances (and/or associated persons), which must respect the community regulations related to: The Council Directive 90/385/CEE, the European Parliament Directive and of the Council 98/79/CE, the European Parliament Directive and of the Council 2000/70/CE, the Commission Directive 2003/32/CE, the Directive 2007/47/CE of the European Parliament and of the Council, Regulation (UE) no. 722/2012 of the Commission, Regulation (UE) no. 207/2012 of the Commission, transposed in the national legislation mainly by: Law no. 176/2000, Government Ordinance no. 54/2009, Government Ordinance no. 344/2004, Government Ordinance no. 798/2003

[574] Paradoxically, the non-performance of the obligation of the debtor generates in his favour a right and an obligation shall fall in the hands of the creditor, whose had been breached. The only positive aspect is that the regulations on which it this contractual solution is based are suppletive, and the parties can agree upon a counter contractual clause. In relation to the medical contract, most of the medical obligations within the contract are obligations of not doing, to refrain from a certain action (the correlative obligations of the right at a second opinion, the right to choose the provider, the right to confidentiality, the right to non-intervention in private life, personal image right), which do not have a performance term (a period during which the action must be performed) especially due to the fact that the obligation consists of an inaction. Other medical obligations within the medical contract, such as obligations correlative with the right to information, or to security, could have been practically performed only under certain terms (the obligation to information should have been performed only previously to the provisions of the medical service, without the possibility to grant subsequently a performance interval; or the security obligation during the provision of the medical service can no longer be fulfilled subsequently). Also, the performance of the medical assistance obligation shall be performed with expediency. There are medical domains such as emergency medicine, where the emergency medicine, where it is impossible to delay the debtor, or such as delivery medical assistance, where it is impossible to

contract[576], by which the contractual purpose is performed in a natural form of contractual obligations; and, respectively, b.) substitutive solutions, part of which are also the following 1. the resolution (respectively, cancelation), 2. reducing the practice, 3. compensation for damages, by which the contractual purpose is touched only by the replacement of the natural performance way of contractual obligations.

On the side, in what concerns the delictual civil liability of the physician, the effect consists of the birth of a new juridical relation, while the prejudice emerges, the object of which is repairing the prejudice and within which there can be found the right of claim for repairing the prejudice of the victim and the obligation correlative with the person sued. The creditor of the obligation of prejudice report is the injured person. Mainly, this person is the beneficiary of the medical service titular of the subjective medical right via the *lato sensu* non-performance of the correlative medical obligation; however, when a prejudice emerges indirectly, this person may be generally any natural and/or legal person linked to the direct victim by a patrimonial and/or non-patrimonial relation, due to its prejudice, it also is morally and/or patrimonially injured. Nonetheless, in case of direct death of the victim, according to art. 1391 paragraph (2) of the new Civil Code only the ascendants, descendants, brothers, sisters and the husband can be creditors of the moral prejudice repair

perform the obligation of the obstetrician subsequently to the delivery of the baby, or such as the medical service of vaccination, where it is impossible the administration of the vaccine after the disease has been contracted. Certainly, this does not mean that there are no medical services consisting of prevention and/or treatment activities to which, as due to the lack of a elevated degree of emergency and importance, can be granted an additional performance interval.

[575] Most of the medical obligations within the content of the medical contract are ñnot to doò obligations (obligation correlative to the right to a second opinion, the right to choose the provider, the right to confidentiality, the right to non-intervention in the private life, the right to personal image). These obligations to restrain from an action are not performed by the actual performance of that action. Thus, according to art. 1529, forced execution in kind of the not to do obligation is performed by eliminating the consequences of the actions from which the debtor should have refrain from. However, in what concern the obligations correlative to the right to non-interference in the private life and the right to personal image, it could be argued that they can be forcibly executed in kind, precautionary, according to art. 253 and 255 to the new Civil Code by interdiction to perform the action. All of the other medical obligations within the medical contract are ñto doò obligations. These obligations cannot be performed in kind directly because the debtor cannot be forced to his own act because it would mean an illicit infringement of his freedom. This is the reason why, according to art. 1528 of the new Civil Code, the forced execution in kind of these obligations is made by charge of the debtor, who may execute the obligation himself, or makes sure that is it executed, by the law, except the conditions of the of the execution of debtorôs notification, does not express clearly how it is performed.

[576] Related to the medical contract, the *lato sensu* non-performance of the medical obligation by the physicians (regardless if the medical service provider, debtor of the obligation is the health care facility or the physician himself), grants the medical service beneficiary, creditor of that particular obligation, to only the non-performance of the fee payment obligation; but, under no circumstance, does it give the right to the non-performance of the personal information obligation of appreciation.

obligation indirectly; and according to art.1390 paragraph (1) and (2) of the new Civil Code, only persons in its *de cujus* maintenance can be creditors of the obligation of repairing them material prejudice[577].

3.2. For the performance of the substitutive contractual solution of the effective payment of compensation for damages, respectively the equivalent performance of the reparatory obligation, Law no. 95/2006 has contractually institutionalised mechanisms and legal procedures, premises of the medical prejudice repair. In this regard, by attempting to transpose the disposition of the French legislation into the Romanian legislation - art. L.1142 of Law no. 303/2002, was intended the instauration of a procedure to establish the liability situations for medico-pharmaceutical malpractice and, preventively, for the situation when the existence of such a case the prejudice of which has to be repaired shall be determined, the focus was on imposing the obligation to conclude an insurance contract.

However, art. 668-674 of Law no. 95/2006, by which a special procedure to establish cases of professional civil liability for physicians, pharmacists and other persons within the medical assistance has been institutionalised, represents an alienation from the French model represented by L.1142-4- L.1142-24 from the Public Health Code, by the regulation of a *sui generis* legal special procedure [578], the inefficiency of which (even in the most favourable situation for the petitioner, the

[577] Referring to the dispositions of art. 1392 of the new Civil Code (ñ*The individual who made payments for attending the health of the victim or, in case of his death, for burial he has the right to reimbursement from the individual held reliable for the act which had caused those payments*ò), the doctrine sustained that it would regulate the patrimonial prejudice indirect repair[577]. But, this legal disposition gives the creditor the right (the person who made the payments for attending health or burial) to act, on his behalf and interest, for obtaining the payment of his own claim, on the debtor (the responsible for the illegal act) of his debtor (the beneficiary of paid medical assistance or his heirs with universal title which had the burial obligation). Thus, the legal test does not regulate the repair method of a prejudice indirectly, but it institutionalised a new direct special action[577], of the victimôs creditor towards the debtor of the victim.

[578] The first impulse is to categorise this procedure as a special administrative jurisdiction because it is consigned to the Commission for Professional Monitoring and Competence for malpractice cases. The Commission is appointed by organic law for the purpose of public interest, but it does not have legal personality (the law does not offer directly and expressly legal personality to the Commission and, even more so, although it has a personal purpose and a personal organisation, it does not have a personal patrimony ï constitutive element of the legal personality[578]), which is why, it is practically subordinated to the Ministry of Health (it operates at the level of the county authorities of public health, it is automatically administrated by its Second Managing Director, it performs annual reports to the Ministry of Health, which regulates its activity at a third level). Art. 2 paragraph (1) letter b of Law no. 554/2004 shows that a public authority may be a organ of state or of the local public administration, or a private law legal person with a public utility statute or which provides a public service. It is obvious that if the private law person has legal personality, then the organ of state also as well as the organ of local public administration (for which is not expressly intended) must has a legal personality, because he is not a simple department which issues preliminary technical acts without legal effects, but it is rather an administrative authority with free will which manifests by issuing acts with legal effects. But, nonetheless, since it is subordinated to the Ministry

one in which the Commission shall consist of the existence of a malpractice case, the injured party shall still have to address the court; not for attacking the Decision of the Commission, but for exploit it, because it does not have the legal power to oblige the repair of the prejudice) required the promotion of some projects for its amendment and addendum.

In the same manner, by the regulation of art. 656-667 of Chapter V from Title XV of Law no. 96/2006 obligation has been institutionalised to conclude an insurance contract for malpractice. However, in this situation also, the dispositions of art. 656 paragraph (1) of Law no. 95/2006 presents a huge difference towards the dispositions from the French legislation - L.1142-2 and L.1142-22 of Law no. 303/2002. Thus, in the French public health system, for guaranteeing the prejudice of the finality of this liability, health care facilities within the health public system have the obligation to conclude insurance contracts for the *lato sensu* non-performance of medical obligations; however, according to art. L. 1142-2 paragraph (2), by the decision of the Ministry of Health only those units which benefit from financial resources which would allow them to cover a

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of Health or the county authorities of public health, the Commission may be considered a organ of state with a *sui generis* nature, which profits by a special regulation and derogatory from the common law, Law no. 554/2004. However, the existence of a special administrative procedure does not imply, only the existence of an administrative authority, but also an activity according with art. 2 paragraph (1) letter e of Law no. 554/2004, which defines the special administrative jurisdiction as being ñ*the activity performed by an administrative authority which has, according to the special organic law referred to, the solving competence of a conflict regarding an administrative act, after a procedure based on the principles of contradiction, the insurance of the right to defence and independence of the administrative-jurisdictional activity*ò. In our case, none of these conditions are not fulfilled. For example, the procedure meets the principle of confidentiality in such a way that not even the physician against whom the apprehension has been made it not informed. The physician is not informed about the blame (authorised by law and *de facto* motivation), no term for preparing the defence by the verbal or written presentation is granted, personal or via a lawyer, of its position towards the accusation, there is no regulation of the way he may raise exceptions, invokes defence on the main, evidentiary demands rule. The only administrated evidence is the Evidence Report (he concludes also the analysis of all the other evidences, documents and depositions of involved persons) and, nonetheless, physicianôs actual method of exercising his right to excuse the expert or the experts is not regulated according to art. 332 as compared to art. 42 of the Code of Civil Procedure or to request an assistant expert according to art. 18 of G.O. no. 2/2000; and he does not have the possibility to propose objectives and to bring forward documents. The physicianôs hearing, which does not represent in any way a compensation for breaching all the minimum rights within a certain rightful procedure, it is left to the discretion of the expert or experts, which represents a serious breach of the right to defence guaranteed by art. 24 paragraph (1) of the Constitution of Romanian, regardless of the procedure or jurisdiction. On the other side, the injured person or the accessories of this person do not benefit from an impartial jurisdictional institution. Because in the competence of the Commission fall only the representative of the *system*: 2 representatives of the College of Physicians (which has a priority the protection of professional prestige and honour), 2 representatives of the Health Insurance Fund (which finances the medical activity), 2 representatives of the county public health authority (which could represent for the physicians within the public health system the employer and the superior authority of the employer, in his turn the potential debtor of the obligation for repairing the prejudice for a direct blame or as consignee), however none of his representatives or of patients in general. I have performed an analysis of the appliance of the principles of the defence right and the one of impartial authority from the perspective of the two parties, parties with opposite interests because one is trying to establish a opposing right towards the other, which is why the procedure should be contentious. In spite of all that, there is reference to the principle of contradiction: discussion, expressing the positions and discussing the issues of law (exceptions or basic support) and of evidence (aspects related to admissibility, the administration and interpretation method, conclusions, and the right to counter evidence) etc.

potential prejudice can be excluded from the conclusion of these contracts. Thus, the obligation belongs to the health care facility within the public system and its execution must be guaranteed; generally, the guarantee is made by concluding an insurance contract, but, exceptionally (it is an exception which is made individually, depending on the case), the guarantee of prejudice repair is given by the financial resources themselves. In the Romanian health public system, the French exception is the rule, i.e. the health care facilities or not under the obligation to conclude insurance contracts. Thus, the public authority providing the medical services within the public health system, debtor within the medical public juridical relation and responsible for the *lato sensu* non-performance of its obligations is not under the obligation to conclude an insurance contract. In return, there is however a guarantee of covering the prejudice generated by the *lato sensu* non-performance of the medical obligation within the medical public relation: the physician, who is an employee of the public authority, third party as compared to the medical public juridical relation, is under the obligation to conclude an insurance contract for an obligation for which the law insists that is belongs to the public authority according to art. 2 paragraph (8) of Law no. 95/2006: ñ*The liability for the insurance of public health falls in the hands of the Ministry of Heath, the territorial public health divisions, as well as the public health authorities within the ministries and institutions with personal sanitary network*ò.

The same happens in the Romanian private health system, where the risk for malpractice, which is the risk of a potential prejudice by the *lato sensu* non-performance of a contractual obligation, is not insured by the medical services provider, who is part of the contract, but by an employee (the physician), who does not respond directly towards the patient. First of all, the health care facility, debtor of the contractual obligation and expressly responsible for the *lato sensu* non-performance, according to art. 351 paragraph (2) of Law no. 95/2006, is not under the obligation to conclude an insurance contract; however, the physician, who is a thirds party towards the medical contract, he is under the obligation to conclude an insurance contract for an obligation to which does not belong to him. Second of all, there is no guarantee of the prejudice brought to the finality of the liability by covering the prejudice by the insurance company because it has an insurance contract with the employed physician and not with his employer, the debtor of the contractual obligation and expressly responsible for its *lato sensu* non-performance, according art. 351 paragraph (2) of Law no. 95/2006.