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LEGAL PERSPECTIVES ON LIABILITY FOR CONSULTANCY SERVICES

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Abstract
The paper analyzes the legal and economic implications of financial and consulting services under Articles 1391-1399 of the Civil Code, highlighting that third parties may use professional information for their own purposes. The presentation of false information or inadequate services can lead to economic damages for contracting parties and material losses for third parties. The concept of patrimonial and non-patrimonial damages (Article 19 of the Civil Code) is explored, emphasizing the role of the "rule of exceptions" in limiting compensation for purely economic damages. The paper also discusses the professional liability of notaries and lawyers, as well as the impact of audit and expert services, where third parties benefit from information without having the right to compensation, thereby avoiding increased costs for direct beneficiaries. The "rule of exceptions" is presented as an efficient mechanism for protecting the professional services market.
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1. INTRODUCTION

The substantive rules of the obligation to provide information in consumer contracts have been established at the level of case law in *the Cofinoga case* (ECJ, 2004, pp. 1-157) and are reduced to ensuring market transparency as a means of guaranteeing equal conditions of competition between undertakings and, subsequently, the protection of the consumer who is given the opportunity to choose between offers according to his interests and the ability to assume contractual obligations. The requirement of transparency is satisfied by the completeness, clear, unequivocal and correct nature of the information subject to the obligation.

With the entry into force of the new Romanian Civil Code, the obligation to inform and advise was seen as specific to professionals when they are in legal relationships with non-professionals (Orga-Dumitriu, 2013, p. 196).

Distinguished civil experts have concluded that most of the obligations of professionals fall under the obligations of means, prudence and diligence, without excluding the possibility that some of them are obligations of result (Stoica, 2013, p. 20-25; Puie, 2017, p. 15-16).

Academician Liviu Pop, in the analysis of the pre-contractual obligations regarding the exchange of reciprocal and unilateral data and information, mentions that they must, as a rule, cumulatively meet three conditions: they must be complete, clear and correct (Pop, 2023, p. 202). In developing these conditions, the author emphasizes that the information must be clear, unambiguous, correct, and up-to-date (Pop, 2023, pp. 213-214).

At the same time, with reference to the obligation to cooperate, it is shown that it creates the premises and conditions necessary to comply with the obligation of pre-contractual and contractual information, which is, in fact, an expression of the general obligation of the contracting parties to act in good faith (Pop, Popa and Vidu, 2020, p. 335). Thus, the necessary framework is created for the promotion and compliance with other obligations complementary to good faith, such as the obligation of sincerity, the obligation of advice, the obligation of prudence and the obligation of coherence.

Persons who professionally deal with the collection and processing of information relating to the legal regime established in Articles 1391–1399 of the Civil Code, providing financial and consultancy services, must accept that third parties, who do not have direct contractual relations with them, may also use this data or information for their own purposes. The presentation of unrealistic information, the provision of inappropriate advice or services may be grounds for the termination of the contract for the provision of financial and advisory services. For the contracting parties, this resolution can generate economic damages, and for third parties – strictly material damages (Boilă, 2012, p. 204).

Given the structure of the legal framework for the classification of damages as defined in Article 19, paragraph (1) of the Civil Code, *"Under the conditions of the law, a person whose right or legally recognized interest is harmed may request full compensation for the material and non-material damage thus caused,"* it becomes clear to see that the legislator make distinct uses of the terms "material" and "non-material" damages. Furthermore, on paragraphs (2) and (3), *"Material damages include the expenses that the injured party has incurred or will incur in restoring the infringed right or legally recognized interest, the destruction or damage of their property (actual damage), as well as the lost profit resulting from the violation (lost profit). Non-material damages (moral damages) include physical and psychological suffering, and the reduction in quality of life. In case of health injury, non-material damage also includes the loss or impairment of a bodily capacity (biological damage)."* Considering the damage category, this can be viewed or applied only through the lens of economic damage. A similar conclusion may be drawn from the provisions of Article 1998, paragraph (1) of the Civil Code: *"The person who acts unlawfully and with fault towards another is obliged to repair the material damage, and in the cases provided by law, also the moral damage caused by action or omission."*

Specialized legal literature analyzes the cases in which compensation for strictly economic damages is limited, known as the **rule of exceptions** (to the recovery of such damages).

2. LEGAL FRAMEWORK OF PROFESSIONAL LIABILITY

The typology of the damage, regulated in art. 19 para. (1) of the Civil Code, provides: "Under the law, the person injured in one of his rights or in an interest recognized by law may request full compensation for the pecuniary and non-pecuniary damage thus caused" (Terzea, 2021, p. 137). The legislator uses the phrase of pecuniary and non-pecuniary damage, detailed in para. (2) and para. (3): "The expenses that the injured person has incurred or will bear for the restoration of the right or interest recognized by the law, the destruction or deterioration of his property (actual damage), as well as the lost profit as a result of the violation of the right or interest recognized by law (lost profit) are considered pecuniary damage. Non-pecuniary damage (moral damage) is considered to be physical and mental suffering, as well as a decrease in the quality of life. In the case of damage to health, non-pecuniary damage also includes the loss or reduction of a capacity of the human body (biological damage)" (Boilă, 2012, p. 204).

This regulation can be viewed and applied from the perspective of economic damage. A similar conclusion results from the provisions of art. 1998 para. (1) Civil Code: "The one who acts towards another unlawfully, with guilt, is obliged to repair the pecuniary damage, and in the cases provided for by law, also the moral damage caused by action or omission" (Boilă, 2012, p. 204).

The literature analyzes the cases of limitation of the payment of strictly economic damages, known as the "rule of exceptions" (Van Boom, 2004, p. 3). Professor Willem H. Van Boom mentions that strictly economic damages are probably the central problem of modern tort liability. In some countries, they are associated with uncontrolled and unpredictable compensation requirements, which has led to the development of the exception rule to restrict access to such compensation.

Notarial and legal consultancy services are usually offered for a single person or for a small circle of third parties, indicated as beneficiaries in the contracts. Under these circumstances, third parties may request from lawyers or notaries compensation for the economic damages resulting from the poor quality provision of services by liberal professionals (Pop, Popa & Vidu, 2020, p. 335). The fees charged by notaries and lawyers must include both the costs of professional liability insurance, as well as the "quality guarantee payment" and the price of the right to obtain financial compensation for inadequate services.

3. THE RULE OF EXCEPTIONS

The economic analysis of other categories of services, such as audit and expertise services, has another characteristic of them: third parties, such as investors, are allowed to benefit in a commercial interest from the information presented by auditors and experts in acts drawn up at the request of those who commissioned and paid for them (Schwartz, 1995, p. 103). If the information developed in the context of consultancy, audit and expertise contracts becomes accessible to third parties, the direct beneficiary of the information, a party to the contracts under which the expert reports and/or expert conclusions were prepared, may not request payment from third parties for any benefits obtained by them from the use of this information for their own purposes. In such situations, the "rule of exceptions" becomes an effective tool in annihilating the influences of external factors on the professional services market (Van Boom, 2004, p. 3).

The plaintiffs, in the person of third parties to the consultancy, audit and expertise contracts, will not be able to rely on compensation for purely economic losses, as this would lead to an increase in expenses for those who actually pay for the professional services (Boilă, 2012, p. 204, Plotnic, 2024, p. 257). The effectiveness of the application of the 'exception rule' is an important advantage, but the key is that third parties must pay the cost of professional services in order to fully benefit from the right to material compensation for non-quality services.

By reason of the fact that typically, notarial and legal consultancy services are offered to a single person or a very limited circle of third parties, expressly indicated as beneficiaries in the contracts, third parties are entitled to request compensation from lawyers or notaries for economic damages resulting from the provision of low quality services by liberal professionals. The price of the services offered by notaries and lawyers must include the cost of professional liability insurance. The largest share of the price of the services offered by notaries and lawyers should represent the “payment for quality assurance” as well as the price paid for the right to obtain compensation for the provision of substandard services.

The economic analysis of other types of services, such as audit and expert consultancy, reveals a different characteristic, out of the perspective that third parties – for instance, investors – are allowed to commercially benefit from the information presented by auditors and experts in documents prepared at the request of those who commissioned and paid for them. In case the information produced under the process of audit and expert consultancy contracts becomes accessible to third parties, the immediate beneficiary/purchaser of the information, as a party to the contracts under which the expert reports or conclusions were elaborated, cannot claim payment from third parties for the possible benefits those third parties might have obtained from using the information for their own purposes.

In such situations, the "rule of exceptions" becomes an effective instrument to annihilate the influence of external factors on the professional services market.

As a third-party, the claimants in relation to the contracting parties of audit and expertise consultancy contracts, will not be able to claim compensation for purely economic losses, simply because that this would lead to increased external costs for those who actually pay for the professional services. The effectiveness of the "rule of exceptions" in such cases represents an advantage, but not an important one. The essential element in this context is the ideal alternative proposed to third parties, that they will be forced to pay for the professional services in order to fully benefit from the right to obtain material compensation for poor quality service provision.

4. MEDICAL LIABILITY TOWARDS THIRD PARTIES

The doctor must try to express himself, as much as possible, in a way that is understandable to the patient and understand that it is not only a barrier of expression or language, but often also a cultural barrier. Different beliefs and customs encourage people to express their pain differently: either exaggeratedly or by enduring it with stoicism. Depending on his own conceptions, the doctor can be misled by these differences in expression. Therefore, it is necessary to follow all the steps in his activity of prevention, diagnosis and treatment, since, in the event of a harmful or detrimental result for the patient, he will be able to demonstrate that he has not treated his patients with ease, indifference or carelessness and will not be found guilty (Simion, 2010, p. 98).

Questions are also raised regarding the cases in which the breach of professional obligation by the medical professional indirectly causes damage to an interested third party:

1. When a male patient has been informed that the vasectomy has been successfully performed and that he will no longer have to use contraceptives, he follows the doctor's advice, but the partner becomes pregnant;
2. When the doctor is contacted by an insurance company or a commercial company, in order to assess the health status of the future insured/employee; based on the information provided by the doctor incorrectly, the person in question concludes the insurance policy or the employment contract, but subsequently causes substantial damages to the insurer/employer due to his or her poor health;
3. When the doctor is contacted by the future insured/employee and, based on positive medical recommendations, he concludes the insurance policy or the employment contract, but subsequently causes damage to the insurer or employer due to his real state of health.

Third parties interested in the described relationship between doctors and patients (the partner who becomes pregnant without wishing it, the insurer or the employer who bears the appropriate compensation) are outside direct legal relations with the doctors. However, through their professional actions of informing them, the intermediate link – the patient – makes decisions in direct legal relations with interested third parties, based on the veracity and relevance of the information and data received.

Patients' decisions in relation to third parties are ensured by the professional recommendations of doctors, which are not simple reports about facts, but conclusions that can be framed, at least, in the format of a therapeutic standard or based on individual analyses and research (Simion, 2010, p. 161). The laws of European countries establish that the economic damage caused by intentional actions is subject to reparation. By the exclusion method, it is concluded that the economic damage caused by unintentional, i.e. reckless actions (fault), is not amenable to reparation (Terzea, 2021, p. 137).

In the case of determining the level of civil liability for damages caused by intentional and reckless actions, little attention is paid to the subjective element of the crime, since both forms of guilt are regulated by the general rules of civil liability, without detailing the particularities. According to art. 20 of the Civil Code, para. (1) and (2), the act is committed intentionally if the person realized the harmful nature of his action or inaction, foresaw the consequences and consciously desired or accepted them. It is committed out of recklessness if the person realized the harmful nature, but easily considered that the consequences could be avoided, or did not realize it, although he should and could have foreseen it (Pop, Popa, & Vidu, 2020, p. 335).

5. INTENTIONAL CONDUCT VS. NEGLIGENCE IN ECONOMIC DAMAGE

The difference between the forms of guilt can only be observed if the recklessness serves as a direct basis for the occurrence of economic damage. The norm established in para. (4) Article 20 of the Civil Code of the Republic of Moldova does not expressly establish this fact, but, by its nature, it can be appreciated as such a ground, because it describes a profoundly negligent behavior, which goes beyond the pattern of wide fault. Culpa brevis is characterized by the law as "The act is committed due to gross negligence if the person committed it with a profound lack of prudence which, in the circumstances of the case, it was obvious that he had to prove" (Pop, Popa & Vidu, 2020, p. 335).

There are still opinions in the civil legal literature according to which the influence of the subjective factor of the perpetrator should not be neglected as an element of civil liability and that only the direct intention can serve as a basis for repairing economic damages (Boilă, 2012, p. 204).

Contemporary legal systems show a tendency to broaden the boundaries of compensation, starting from the idea that the rules of exceptions should not be viewed solely on the basis of the nature of the claimant's losses. It is increasingly recognized that the nature of losses is only one part of the complex system of

conditions for civil liability, a system that can determine when and how limitations can be applied (Van Boom, 2004, p. 3).
We support the idea that there are at least two causes that substantiate the possibility that the economic damage caused by intentional actions is compensable:

1. **Unpredictability and difficulty of prevention** – intentional actions causing harm are very difficult to foresee and prevent by the injured party, even if they represent a minority in actions for damages (Schwartz, 1995, p. 103). This situation creates problems in the procedures for the recovery of exclusive financial damages, from the perspective of the right to correlative legal actions.
2. **Situations of zero transfer to third parties** – even if the damage is caused to a person, he does not suffer social losses, because the profits are transferred to third parties. From an economic point of view, the size of the social losses caused by this person determines the size of the responsibility (Van Boom, 2004, p. 3).

It is important to follow the proper application of the rule of exceptions, in order to avoid double liability – both in favour of the first injured person and the subsequent one, for the same damage. In the calculation of the social damage, both the value of the "clean" damage and the value of the damage suffered by third parties must be included, referring to examples from the legal literature, such as the demolition of a building in which the tenants request compensation for the damages caused (Orga-Dumitriu, 2013, p. 196).

6. CONCLUSIONS

The most relevant cases of injury in medical matters are: diagnostic error, treatment error and failure to fulfill the obligations of information and counseling by medical professionals. Dr. Viorel Terzea cites recent French jurisprudence, which holds that failure to comply with the obligation to inform the medical staff entitles the patient to obtain damages for two distinct types of damages: the damage resulting from the loss of an opportunity – as a result of the fact that the patient could not opt for a less harmful therapeutic act or to give up that therapeutic act, if they had known all its implications – and the moral damage, as a result of the fact that the patient was unable to prepare psychologically for the consequences of the medical act (Terzea, 2021, p. 137).

As regards the primary obligation of the doctor to care for the patient, in most cases it has been assessed as an obligation of means. On the other hand, the obligations of security, information, counseling and maintenance of medical secrecy were considered obligations of result (Simion, 2010, p. 161). The lack of correct information or guidance on treatment, offered at the right time, can lead to the loss of the chance to avoid the occurrence of a tragedy.

In the specialized legal literature, it has been discussed whether informing the patient is an accessory obligation to care, without autonomy, which would prevent the establishment of a direct causal link with the loss of opportunity. The debate was stimulated by the solution offered by the French case-law in the *Terruche* case, pronounced by the Plenary Assembly of the Court of Cassation on 17 November 2001, which ruled on the professional liability of the doctor for the diagnostic error that prevented a pregnant woman from taking the decision to terminate her pregnancy, not being correctly informed about the risks (Pop, 2023, p. 202).

In order to substantiate medical civil liability, the precautionary principle, provided by Article 191 of the Treaty on the Functioning of the European Union, which establishes the legal obligation to reduce and even avoid, to an acceptable level, risks to life, health and the environment must also be taken into account (Orga-Dumitriu, 2013, p. 196).

Overall, the correct application of the 'exception rule' and the clear delineation between intentional and negligent conduct help to protect the balance between the interests of the contracting parties and third parties. It ensures the efficient functioning of the professional services market and protects against excessive liability.

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