

## THEORETICAL SURVEYS ON PROFESSIONAL CIVIL LIABILITY

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### ABSTRACT

*The study supports the idea that a general examination of professional liability is justified, liability produced by a non-compliant behavior in the exercise of a profession, whatever it may be. The justification for approaching the genus - not the species - was sought in the common elements that can be identified in each of the professional activities - performed independently or not - as well as in the foundations of legal liability. Firstly, it was noticed that work and enterprise - their object and tools, their regime - can outline a legal space common to all professions, of their exercise. The legal regime of work explains the relativity of science, skill, which make up the content of the notion of profession. This content, in turn, will limit the expectations of the beneficiaries of labor, their rights as creditors. The concept of enterprise projects the fundamental obligations of the one who works as a professional: the investigation, information, advice and limited guarantee of the service committed and executed. Secondly, the foundations of legal liability are indicated, with special reference to the civil one. In essence, responsibility is meant to weigh the interests of people - professionals or not - in their free civil manifestations, by comparison, rationalization and balance. In such a framework, the deed of the professional - a potentially criminal act - will be defining in order to establish his civil liability. The other components - guilt and causation - will be only secondary. The general criterion for assessing the existence (non-existence) of a crime will be identified in the concept of care - the obligation to care - for others and for oneself. Caring for others requires provision or, as appropriate, caution in the activity. Self-care recommends the assertion of self-interest legitimized by an agreed social value. Theorizing is the result of a practical need: the sketching of a general standard of behavior for situations in which the professional operates in a normative environment dominated by uncertainties, behavior that then protects him from liability based on guilt.*

**KEYWORDS:** *professional, profession, professional liability, professional misconduct, criminal civil liability, professional liability insurance, legal uncertainty (decision uncertainty)*

### I. Preliminary explanations

The phrase "professional liability", although frequently used, does not indicate much precision. It - in its most general sense - projects the possibility of consequences - some unwanted consequences - as a result of a professional exercise, of the practice of a profession by a subject endowed with specific qualities and with essential but hybrid social functions, the professional. As the professions - no matter how we understand the concept - are very diverse, it is obvious that the reality of professional liability also enjoys the same diversity, a fact that dispersed its analysis (of liability) by categories, by species: the professional liability of the doctor, the architect, the lawyer, the technical expert, the driver, etc. The research of these

typologies or types of liability did not produce unitary results. By tradition, each profession enjoyed - for the legal liability chapter - private studies, adapted to the specifics of its operation<sup>1</sup>.

Predictably, the studies also produced the expected arguments to explain and justify - in given situations - in specific areas - the responsibility or non-responsibility of the provider of professional services.

We meet the generic formulation with greater frequency in the field of insurance: the insurer - also a professional - undertakes to pay - under predetermined conditions - the damages produced by subjects engaged in their professional activities: in this field - of insurance - the parties set their free, contractual, obligations. As a result of this approach, doctrinal developments in the field do not and cannot have generalizing significance<sup>2</sup>. Such a finding in itself imposes a question: for what reason are we concerned with the generalizing legal formula?

The answer is obvious: for practical reasons. The segmented study of models of professional responsibility, by species or typologies, could not always provide us with convincing answers - or at least the perspective of such answers - the questions that provide us - in extremely complex social conditions - the responsible exercise of a certain profession. I have come to the conclusion that the arguments - no matter how rich - cannot be sufficiently convincing without a prior conceptual foundation. Or, substantiation inevitably assumes an understanding of the phenomena, as far as possible, in their entirety. If the responsibility of a professional is discussed - following a systemic methodology - we will have to indicate, first, the foundations of legal responsibility and, then, find the generic purpose of the social function of the professional from which to deduce his legal status and regime; or, why not, the approach could also be done the other way around.

This leads to another preparatory question: is the consequence of the professional attribute associated with civil liability due to the association with the professional or with the profession, or with both? Could the connection of the attribute "professional" with either concept have applied importance? This, in the context where the legal (civil) definition of professional does not refer to the idea of profession.

## II. The professional and the profession

1. Identifying him, the professional, seems an easy task because the positive civil norm consecrates him conceptually: all those who "operate an enterprise" are professionals. The exploitation of an enterprise implies "the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or disposal of goods or in the provision of services, regardless of whether or not it has a profit-making purpose"<sup>3</sup>.

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<sup>1</sup> Gh. Piperea, Asigurarea de răspundere managerială, în <https://www.juridice.ro/32223/asigurarea-de-raspundere-manageriala.html>, accessed on 18. 11. 2022; A. Haratau, *Răspunderea penală a medicului pentru culpa profesională - teorie și practică judiciară*, Editura Universul Juridic, București, 2021, p. 28; there are, however, also general approaches, such as professional liability. To be seen: L. B. Lunțaru, *Răspunderea civilă pentru malpraxisul profesional*, Editura Universul Juridic, București, 2018

<sup>2</sup> I. Sferdian, *Asigurări. Privire specială asupra contractului de asigurare din perspectiva Codului civil*, Editura C. H. Beck, București, 2013; A. Besson, *Le contract d assurance*, 5-eme edition, L.G.D.J, Paris, 1982, pp. 9-53

<sup>3</sup> Art. 3 din Codul civil, text republicat în Monitorul Oficial, Partea I nr. 505 din 15 iulie 2011, în vigoare de la 1 octombrie 2011; doctrina bogată a dezvoltat conceptul civil al art. 3 din Codul civil; selectăm: E. Chelaru, *Drept civil. Persoanele*, ediția 5, Editura C. H. Beck, 2020, p. 17; P. Perju, Gh. Piperea, *Despre legea civilă* în Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, coord., *Noul cod civil. Comentariu pe articole*, Editura C. H. Beck, București, 2012, pp. 4-5; B. Țene, *Elemente definitorii ale noțiunilor "profesie/ profesionist", "comerciant" și "întreprindere" în reglementarea noului C. civ.*, în Revista Romana de Jurisprudenta nr. 31/07/2017 (Universul Juridic nr. 3 / 2017), în <https://lege5.ro/Gratuit/gi3tgmjzgaya/2-elemente-definitorii-ale-notiunilor-profesie-profesionist-comerciant-si-intreprindere-in-reglementarea-noului-c-civ>, accessed on 6. 11. 2022; legea nr. 71/2011, pentru punerea în aplicare a Legii nr. 287/2009 privind Codul civil, publicată în Monitorul Oficial, Partea I, nr. 409 din 10 iunie 2011 – în art. 8 al. 1 - makes another clarification - for explanation,

From the wording of the text, we note that the professional's activity - which would determine his civil status - would be characterized by two essential features: 1) it takes place in a systematic and organized manner, as well as 2) among other things, it involves - as an object - the provision of services.

The civil formula produces two significant consequences, of major legal impact. We have in mind, first of all, the consequence of economic protection of the professional debtor: the professional is allowed to constitute patrimonial assets intended for the exercise of his activity; that is, he - the professional - who can carry out operations with economic and legal risk - if he wants and for personal or family protection - allocates - in advance - to the execution of his professional obligations only the patrimonial assets he wants and affected by the exercise of the profession<sup>4</sup>.

Separately, the civil norm stipulates that the fault of the professional - put in a responsible position - is evaluated in relation to his person and not anyway, but in a more severe version. That is, the professional - in the assessment of his fault - is treated more demandingly than others, the latter being considered to be bearers of a liability under common law<sup>5</sup>. As long as we analyze professional responsibility, this last expression of the norm will have - in the logic of the study - overwhelming importance. That is, if the professional is evaluated more demandingly when he is exposed to the consequences of a professional liability, it is important to know if this "professional" character is related only to the professional or to the exercise of a profession.

This, in the context in which the rules governing the field are equivocal and the doctrine and jurisprudence have not given significance to this distinction.

2. We examine, first and by way of example, the rules:

At the level of principle, art. 1358 C. civil is unequivocal: professional civil liability is associated with the professional. If the conditions of liability are met and their provider is a professional, these conditions are interpreted strictly in favor of the victims.

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for particularization - in relation to the notion of professional: "the notion of "professional" provided in art. 3 of the Civil Code includes the categories of merchant, entrepreneur, economic operator, as well as any other persons authorized to carry out economic or professional activities, as these notions are provided by law, on the date of entry into force of the Civil Code"; however, we note that the indicated explanatory regulation does not change the meaning of the concept of professional. Separately, we also note that it is not the only legal definition of a professional; in a special field the professional is seen as an "authorized natural or legal person, who, on the basis of a contract that falls under the scope of this law, acts in the framework of his commercial, industrial or production, artisanal or liberal activity, as well as any person who act for the same purpose in its name or on its behalf in art. 2 para. 2 of Law no. 193 of November 6 on abusive clauses in contracts concluded between traders and consumers, republished in the Official Gazette, Part I, no. 305 of April 18, 2008, amended on 31.01.2013; such a definition considers a very narrow area of economic activity - that of consumer protection in relation to financial institutions in receiving certain loans - this, in relation to the conceptual generality of the Civil Code.

<sup>4</sup> For details see V. Stoica, *Drept civil. Drepturile reale principale*, ediția a III-a, Editura C. H. Beck, București, 2017, pp. 13 - 16; in the logic of the foundation we propose, such a possibility - by the way, very important in the new philosophy of civil law - is not interesting.

<sup>5</sup> Art. 1358 C. civ.: „for the assessment of guilt, account will be taken of the circumstances in which the damage occurred, unrelated to the person who committed the act, as well as, if applicable, the fact that the damage was caused by a professional in the operation of an enterprise”; the idea is supported and deepened, in another formulation, in: A. R. Bulcu, *Răspunderea pentru malpraxis în contextul noului Cod civil*, Universul Juridic, din 12/07/2016, nr. 7 / 2016, în <http://revista.universuljuridic.ro/raspunderea-pentru-malpraxis-contextul-noului-cod-civil/>, accessed on 5. 11. 2022; or in R. I. Motica, G. M. Mara, *Răspunderea magistraților și riscul în activitatea judiciară*, Universul Juridic din 25/02/2020, nr. 2 / 2020, <https://lege5.ro/gratuit/gm3denbwga4q/raspunderea-magistratilor-si-riscul-in-activitatea-judiciara>, accessed on 5. 11. 2022; L. R. Boilă, *Izvoarele obligațiilor*, în Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, coord., *Noul cod civil....*, op. cit., pp. 1425 – 1426; the doctrine - noting the aggravating liability formula of professionals - notes the tendency to legislate this civil liability - at least on certain components - in the model of objective liability: P. Perju, Gh. Piperea, *Despre legea civilă* în Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, coord., *Noul cod civil....op. cit.*, p. 5

Other rules do the association differently. So:

The criminal code when fixing a professional fault<sup>6</sup> - premise of a type of repressive liability – refers to the profession, to those who exercise professions, trades or other activities<sup>7</sup>. Criminal jurisprudence explicably follows this model of understanding and expression, applying the express norm of incrimination: the driver was considered as the bearer of an aggravating professional fault, when he was discussed the fault following a benefit, which led to a traffic accident<sup>8</sup>; or it was debated whether there is professional culpability in the case of the reckless killing of a victim by a subject who did not fulfill the specific tasks of the hired service, respectively, who inappropriately carried out a completely casual activity (he cut a tree off his leg)<sup>9</sup>.

Separately, special laws - issued for different fields - frequently use the wording "profession" and "professional responsibility"<sup>10</sup>, however, in these rules, the "professional" attribute - intended for liability - is linked to the performance, to the performance of the tasks that define the performance, more precisely, to the profession and in no way to the subject of the performance.

Civil doctrine<sup>11</sup> and even jurisprudence<sup>12</sup>, both inclined towards particularization, they examine the civil liability produced in a professional environment in a segmented manner: the liability of merchants, doctors, lawyers, notaries, architects, etc., i.e. professionals, is analyzed. The model is simplistic and effective: the one who applies the norm - in offering solutions - has at hand the general norm from the civil code and the special regulations made up of the various professional statutes. Moreover, the developments in order to observe faults, when fixing

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<sup>6</sup> The law does not use the phrase professional liability; the expression belongs to the doctrine: see also: V. Cioclei, *Infrațiuni contra persoanei*, în G. Bodoroncea, V. Cioclei coord., *Codul penal. Comentariu pe articole*, ediția a III-a, Editura C.H. Beck, București, 2020, p. 700; the norm of criminalization treats the legal situation of interest as a circumstance of aggravation of criminal liability.

<sup>7</sup> Art. 196 of 3 of the Criminal Code: when the injury ...." was committed as a result of non-compliance with the legal provisions or the measures prescribed for the exercise of a profession or trade or for the performance of a certain activity, the punishment is imprisonment..."; Art. 192 para. 3 of the Criminal Code: "manslaughter as a result of non-compliance with the legal provisions or the measures prescribed for the exercise of a profession or trade or for the performance of a certain activity is punishable by imprisonment..."; The criminal code of July 17, 2009 (Law no. 286/2009), published in the Official Gazette, Part I, no. 510 of July 24, 2009, entered into force on February 2, 2013; the same expressions were recorded in art. 178 para. 2 and art. 184 para. 3 of the old Criminal Code, in <https://www.beck.ro/tag/culpa-profesionala/> accessed on 18. 02. 2022

<sup>8</sup> Criminal decision no. 4987/1972 of the Supreme Court, in the Collection of decisions from 1972, p.424; criminal decision of the Bucharest Court no. 2251/1084, definitive, in *Criminal Judicial Practice*, vol. III, in coordination G. Antoniu, C. Bulai, Publishing House of the Romanian Academy, Bucharest, 1992, p. 38; criminal sentence no. 13/20. 02. 2020 Sebeș Court, Alba County, final, unpublished; decision no. 70/2011 of the Court of Appeal Târgu Mureș, Criminal Section, in <https://www.avocatura.com/speta/181730/actiune-in-raspundere-delictuala-tribunalul-maramures.html>, accessed on 25. 03. 2022

<sup>9</sup> Criminal decision no. 825/2018 of 1. 11. 2018 of the Alba Iulia Court of Appeal, final, unpublished.

<sup>10</sup> For example, art. 12 and art. 55 para. 2 of Law no. 188/2000 regarding bailiffs, republished in the Official Gazette, Part I, no. 738/20. 10. 2011; or art. 1 of the Statute of the profession of legal advisor, published in the Official Gazette, Part I, no. 684/29. 07. 2004; Art. 4, 30 of GEO no. 86/2006, regarding the organization of the activity of insolvency practitioners, published in the Official Gazette, Part I, no. 724/13. 10. 2011; and the examples can go on.

<sup>11</sup> D. Sîngeorzan *Informarea precontractuală a pacientului* (II) în *Universul Juridic* din 5/03/2019, nr. 3/2019, în <https://www.universuljuridic.ro/informarea-precontractuala-a-pacientului-i/>, accesat la 7. 05. 2021; C. M. Florescu, *Răspunderea civilă profesională*, teză, Universitatea „Nicolae Titulescu” București, <file:///C:/Users/Vasile/Desktop/statut%20notari%20Romanai%20idei%20rezumate/teza%20doctorat%20rasp%20profesioanala.pdf> . accessed on 20. 02. 2022

<sup>12</sup> We exemplify the association of professional liability with the quality of the professional - notary - decision no. 225/2015 of May 20, 2015 of the Maramureș Court, final, in <https://www.avocatura.com/speta/181730/actiune-in-raspundere-delictuala-tribunalul-maramures.html> accessed on 25. 03. 2022

possible civil liabilities, have in mind - in general - the free professions<sup>13</sup>. In other cases, professional liability is examined by reference to the way the profession is practiced<sup>14</sup>. Or, at other times, professional liability is related to both elements: both subject matter and performance<sup>15</sup>.

There are also analyzes - far-reaching - which - keeping in mind the strict specificity of the field - avoid using the professional attribute for the eventual civil liability of the subject who exercises a function, a dignity<sup>16</sup> and moving away from the generic expression of art. 3 of C. civil.

3. As long as the civil norm does not define the profession and we give meaning to the distinctions stated before, we try a conceptualization adapted to the need for analysis.

In an extremely simplistic formulation, we could note that the professional is the one who operationalizes the profession indicated by the general civil norm: organizing and ensuring the functionality of the enterprise or - by detailing - ensures the systematic exercise of an organized activity in the form of production, administration or disposal of goods or by providing services. Expression does not help us, however, because - logically - it throws us into a vicious circle. We can only remember - from this association of terms - that the professional would be the subject in manifestation and the profession would locate the potentiality of the object of his work (in the legal sense, of the performance). More precisely, the profession would be the condition for fulfilling the professional's performance, the condition for fulfilling his social function.

This observation directs us to the meaning of the notion in the common expression: the profession is an occupation, a business that someone exercises on the basis of a qualification and which necessarily implies a status that indicates an assembly of knowledge and skills<sup>17</sup>. Whatever the professional assumes, whatever and however he is tasked, the fulfillment of his functional performance depends on his will as an active subject, as well as on the fulfillment of a double condition: his level of qualification and the model of its application (of the qualification).

Juridically, as a legal framework, with reference to the conditions of the production of liability, the performance - the execution and the sufficiency of its quality or quantity - is the productive source of an obligatory legal relationship with double potential<sup>18</sup>: 1) if the performance is properly fulfilled, the subjective right of a specific creditor is fully realized and, conversely 2) if the performance is defective, the same creditor's right to compensation arises.

The performance, the fulfillment of the objectives of the profession, will be the subject of the subjective right or, as the case may be, of the obligation from this relationship. In such a framework, the elements of the profession, of whatever kind they may be, describe from a specific perspective the debtor of the benefit, illustrate his personality, professional personality,

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<sup>13</sup> For developments in this regard, see also: S. Spinei, *Organizarea profesiunilor liberale*, Editura Universul Juridic, București, 2010

<sup>14</sup> M. Mihail, *Unele consideratii in legatura cu natura juridica a activitatii notariale*, în *Revista Dreptul* nr. 3/1997, pag. 51; I. Les, *Manual de drept notarial*, Editura All Beck, Bucuresti, 2001, pag. 38; M. C. Dobrilă, *Aspecte juridice ale profesiei de fizioterapeut/kinetoterapeut în România – implicații în plan european. Considerații pe marginea malpraxisului în fizioterapie*, în *Revista Dreptul*, nr. 9 / 2019.

<sup>15</sup> I. Leș, *Secvențe asupra răspunderii patrimoniale a titularilor unor profesii juridice liberale*, <https://www.afdl.eu/rjl/files/Prof.%20univ.dr.%20Ioan%20LE%c8%98%20.pdf>, accessed on 3. 11. 2022

<sup>16</sup>With reference to the magistracy, G. M. Mara, *Prejudiciul patrimonial cauzat prin eroare judiciară*, Editura Universul Juridic, București, 2020, pp. 25 -87..

<sup>17</sup> See: <https://www.google.ro/search?q=profesie+dex&sxsrf=ALeKk016EiGJ2odsHNEHvA9vag8I91-> accessed on 7. 05. 2022.

<sup>18</sup> The model is described in I. Dogaru, N. Popa, D. C. Dănișor, S. Cercel, *Basics of civil law*, vol. I, General theory, C. H. Beck Publishing House, Bucharest, 2008, pp. 392 – 393; D. C. Dănișor, I. Dogaru, Gh. Dănișor, *General theory of law*, 2nd edition, Publishing House C.H. Beck, Bucharest, 2008, p. 295

professional status. In the dynamic of obligations, the professional status - a component of the owner's private life - is presented as a condition for the fulfillment of the performance, of the object of the obligation: if the elements of the condition are met, the professional performance closes the legal relationship, the subjective right being executed. If the conditional model fails, the right to damages arises.

### **III. Effects of conceptualization**

1. The scheme described above assumes the elements, steps, producing the relationship of responsibility: the norms of objective law, the subject that expresses itself socially, through action or inaction, bearer of a defined personality and through a status given by the profession, the manifestation that provides the situation subjective legal fixed - in case of non-fulfillment of the professional condition - in the current framework of civil liability and, finally, the claim for damages.

The model does nothing more than follow the general scheme of civil liability with a single differentiation. Something extra is added to the personality of the debtor-provider with special legal significance: a professional status, a profession. The diversity of professions, trades, activities, their details, all included in the scope of the notion of "professional" indicate its complete relativity and, equally, the lack of practical perspective of attaching this attribute to the liability mechanism. The use of the notion to frame a certain responsibility - which the doctrine or jurisprudence practiced and still practices - rather accidentally than systematically - seems to depend more on the fluency of expression that the generalization would provide and less on the provision of a unitary legal regime of this responsibility

2. However, we posed the problem of whether we cannot find a common foundation for this diversity of professional practice - which segments the study into the types of professional liability, from which we can then deduce a general legal regime for subsequent civil liability . We would be concerned with the possibility of obtaining some guiding principles for observing the liability conditions that would result from the non-compliant exercise of the profession in any field.

What would uniquely characterize the exercise of any profession is work and the product of work: any professional exercise - individual, direct or intermediate, organized - involves work, a place of work: the interested subject rents his work capacity to provide the beneficiary (creditor) the expected performance. Such an observation of maximum generality gives a common point to all benefits, regardless of how they are organized, the work regime indicating the principles of the exercise of the professions<sup>19</sup>. Here are two elements - the exercise, the object and the regime of work, as well as its product - of the community of all professions, functions and any regime of activity, regardless of how they are initiated, provided, organized or executed.

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<sup>19</sup> This reality was also captured by the guiding jurisprudence: although the profession of magistrate has a very special character, we cannot fail to observe - with reference to this specificity - otherwise, of a constitutional order, that in a dispute regarding remuneration rights, it was admitted - as a matter of principle - that the labor law norm can be - as an exception - common law for defining the special function relationship; in this regard, decision no. 46 of 15 12. 2008, issued in an appeal in the interest of the law, published in the Official Gazette, Part I, no. 495/16. 07. 2009; or in doctrine - and particularly significant - the hospital - state institution - is analyzed - among others - as a professional - starting - essentially - from the same premises: the common elements specific to the exercise of the profession, regardless of what they are: Ioana -Anamaria Filote-Iovu, An x-ray of tortious civil liability regulated by the provisions of art. 320 of Law no. 95/2006, in <https://revista.universuljuridic.ro/o-radiografie-raspunderii-civile-delictuale-reglementate-de-dispozitiile-art-320-din-legea-nr-952006/> , p. 6, accessed on 14. 05. 2022

3. The exercise of work - the performance - therefore also the profession - involves an assembly of knowledge, skills, dexterity, skills, ideas, assembled more simply or more complex, of a manual, technical or intellectual nature, which are acquired individually and in actuality or through transmission over time, between generations, organized or improvised; the beneficiaries become aware of the skill of the provider, on their own initiative or as a result of an advertisement - whatever its model - and have confidence in the level of his skill (it is not excluded that the provider offers or is obliged to give a guarantee in relation to the level of this training ; or it is possible that society systematically produces a model of guaranteeing the level of professional qualification).

However, the level of knowledge is perishable, volatile, constantly evolving and completely uncontrollable. Science, technique - the support of professional qualification - has its general, sequential or regional limits. It is an indisputable reality that science is capped, that at a reference moment we have a model, a content, so that a leap is immediately produced, the effect of a discovery; or the phenomenon can take place in reverse: to lose a level of knowledge. Not all practitioners have the same professional level, individually or regionally, in a wider or narrower area. Information regarding the profession does not arrive instantly in the mastery of a subject, but over a certain period of time or never arrives.

There is also a huge inequality between the professional levels of practitioners, inequalities that can have a subjective source or are produced by social organization.

Knowledge is capitalized in a social framework organized by the beneficiary or by third parties, which the practitioner can control, bypass, or not. In principle, then, it is admitted that the practitioner does not know and cannot know, does not control and cannot control, everything in the field of his specialization, neither now nor in the future.

The exercise of the profession - supported by science - is also based on imagination, creativity, inspiration, each of these personal developments can produce benefits or a certain level of uncertainty, more or less controlled. Then, each professional has a percentage of skill that - by virtue of a well-defined personal interest - justified or not - he does not want or, as the case may be, is not obliged to reveal.

All these characteristics - which we observe as common to the work - produce two consequences: one of a subjective order - the practitioner has or reserves by his will a certain level of independence in the use of his qualification, independence which - in essence - describes his personality in general (not the professional one); and another objective, which is the result of the environment in which he operates and which he (the practitioner) cannot overcome and which, in turn, gives a level of uncertainty about the effects of his performance.

4. The work product consists of a work and its execution is subject to the principles of the undertaking: an amount, an assembly of operations, documents, manual or intellectual supplies, which a partner requests and wants to benefit from.

We understand the concept of joint venture in the sense of positive regulation (art. 1851 al. (1) C. civ.<sup>20</sup>; art. 3 al. (2) and (3) C. civil<sup>21</sup>): the execution of a work, material or intellectual, or the provision of a certain service; or in the sense given by the doctrine, where along with the fixing of the basic elements indicated by the law, a few other characteristics are observed: the

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<sup>20</sup> Art. 1852 of (1) C. Civ.: "through ...enterprise, the entrepreneur undertakes, at his own risk, to perform a certain work, material or intellectual, or to provide a certain service for the beneficiary, in exchange for a price".

<sup>21</sup> Art 3 C. civil: "al (2) All those who operate an enterprise are considered professionals. (3) The exploitation of an enterprise is the systematic exercise, by one or more persons, of an organized activity consisting in the production, administration or disposal of goods or in the provision of services, regardless of whether or not it has a profit-making purpose".

entrepreneur undertakes the work at his own risk, a complex business that accumulates, combines, associates operations and acts, skill, science, tools<sup>22</sup>.

We note, separately, the differentiation between work performance (under joint regime) and entrepreneurial performance, which the doctrine emphasizes: the employee (official) operates under orders, the entrepreneur independently assumes his own risks and pursues - very important in our opinion - his own interests<sup>23</sup>. Then, we distinguish between the position of the agent, the employee and the entrepreneur: the agent is a representative, an intercessor, an intermediary; the employee is a subordinate and the contractor is himself and on his own account<sup>24</sup>.

This approach from a double perspective (work - entrepreneurship) gives practical consequences, consequences that we find in the general principles deduced from the concepts and that we can selectively apply to the performing professions, by species and separately, according to how independent the one who performs the work is .

First of all, the work product must be efficient, according to the beneficiary's expectations: the criteria by which its efficiency will be evaluated can be discussed (efficiency burden)

Moreover, the operator exploits his work in a context that, in principle, he does not know: he must investigate this environment, retain what is important in the exercise of his activity in favor of the efficiency to which he is obliged (obligation to investigate) .

The relativity of knowledge, of his skill, the imprecision of the system, the inevitable uncertainties of the operating framework or of his science, the risks of the work, present or future, subjective or objective, the possibility of executing the work in versions, imposes on him the task of informing the beneficiary. Then the knowledgeable specialist must advise, advise, the beneficiary - ignorant of the field - in relation to the version most suitable to the latter's needs. And finally, he will have to perform the work. Its typology - of the work - indicates the nature of the obligation of the executing operator: an obligation of means or one of result: The classification of the task of completion - of diligence or result - will give the level of care, of the guarantee, that the operator must carry and provide the beneficiary's interests<sup>25</sup>.

#### IV. Common and special in professional liability

Placing the analysis of professional liability in the space of the two concepts provided us with some principles of maximum generality that outline the way a practitioner of the profession must behave in his relationship with the beneficiary of his work. The relativity of the value of the knowledge that makes up the profession, the personalization and regionalization of the professions, the uncertainty produced by the operating framework itself<sup>26</sup>, respecting one's own interest - not only that of the beneficiary or the third party - of the practitioner, are the specific principles of the execution of a professional work.

These principles charge the practitioner with fundamental obligations, unwritten, therefore inferred, too little expressed but unavoidable: investigation, detailing the possibilities, information, advice, efficiency and guarantee on the work product.

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<sup>22</sup> Fr. Deak, *Treatise on Civil Law. Special contracts*, 4th edition - updated by L. Mihai and R. Popescu, vol. II, Universul juridic, Bucharest, 2006, pp. 188-2014; V. Ursoaie, *The need for a unified legal regulation of the provision of services to the population*, *Legal studies and researches*, no. 3/1973, p. 417 et seq.; F. Ţuca, C. Munteanu Jipescu, *Actuality of the contract*, *commercial law magazine* no. 4/2002, pp. 68-90; I. Popa, *Civil contracts from theory to practice*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2020, pp. 424 – 437; PhD Malaurie, L. Aynes, P. Y. Gautier, *Contracte speciale*, 3e edition, Defrenois, Paris, 2007, translation in Wolters Kluwer, Bucharest 2009, pp. 391-425.

<sup>23</sup> Ph. Malaurie, L. Aynes, P. Y. Gautier, *Contracte speciale...op. cit.*, p.400.

<sup>24</sup> Ph. Malaurie, L. Aynes, P. Y. Gautier, *Contracte speciale...op. cit.*, p. 395

<sup>25</sup> Jean Luc Aubert, *La responsabilite civile des notaires*, ediția a V-a, Defrenois, Paris, 2008, pp. 71 – 142.

<sup>26</sup> With the specification that the law itself or jurisprudence can produce uncertainty



They are common for the execution of any work, any undertaking. Only the professional species and circumstances will differ. There follows a number of norms of the most diverse nature, generality, hierarchy, all placed in a chaotic sequence, difficult to follow and, therefore, difficult to apply. In general, a significant part of the professions enjoy specific regulations, by law<sup>27</sup>, by statute<sup>28</sup>, more or less complete or systematized. Other professions derive their norms from regulations framed in negative patterns: what is forbidden to perform, for personal protection or that of others<sup>29</sup>

They are constituted - and we regard them as such - as special regulations in relation to the deduced principles that we stated. All these normative principles - producers of rules or standards - will indicate the general or special framework of the behavior of those who exercise a certain profession.

Theoretically, the existence of the details that the special rules make would give a level of safety for those who want to have correct behaviors, absolving them of liability. The idea is very generous, seems to be operationally valid, but is clearly inaccurate.

When we move, in the area of the daily activity of a practitioner, the subjective legal situations that have arisen demonstrate - in a way that has not been allowed for a long time - the opposite: there are too many uncertainties related to the standards of behavior of the professional in his services, too many excesses on the part of the beneficiaries services, too much hesitation on the part of the administration and, most unpleasantly, too many contradictory jurisprudence that the courts produce<sup>30</sup>.

For this reason, we dealt - in order to fix the conditions of professional liability - whatever type of liability we analyze - with the principles of the exercise of the profession and we will go to the foundations of the production of legal liability phenomena in general and, concretely, to those of civil liability.

## **V. Fundamentals of civil professional liability**

1. Civil liability works on the basis of a logical scheme explained and established in doctrine over time<sup>31</sup> and jurisprudence<sup>32</sup>. In order for liability to exist, an illegal act must be culpably committed that produces damage, damage in a causal relationship with the act. The model is unchallenged and produced the expected results in almost all of the assumptions.

If we look at civil liability not through the doctrinal statements of its components - deed, damage, fault, causality - but through its reparative function, we will have to preliminarily

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<sup>27</sup> We give an example: Law no. 188/2000 regarding bailiffs, republished in the Official Gazette, Part I, no. 738/2. 10. 2011

<sup>28</sup> We exemplify: the professional status of legal advisors, 2004, updated, republished in the Official Gazette, Part I, no. 684/29. 07. 2014

<sup>29</sup> We have in mind the many labor protection rules: We exemplify: General labor protection norms issued by the common content of orders no. 505/20.11. 202 of the Minister of Labor and Social Solidarity (M.M.S.S.) and no. 933/25. 11. 202 of the Minister of Health and Family (M.S.F.)

<sup>30</sup> Let's give an example: civil decision no. 1205/3. 10. 2016 and no. 1787/14. 12. 2015 of the Hunedoara Court, definitive, unpublished; both rulings rule on identical issues – the qualification as abusive of some credit contractual clauses, followed by the granting of compensation – in the opposite direction. So, we have a contradictory jurisprudence and it is obvious that, for the banker - as a professional - there is a real uncertainty in knowing, for the future, what would be the behavior absolving liability.

<sup>31</sup> The developments of the doctrine are very numerous; we indicate, by way of example: L. Pop, I. Fl. Popa, S. I. Vidu, *Tratat elementar de drept civil*. Obligațiile conform noului Cod Civil, Editura Universul Juridic, București, 2012, pp. 421- 423; Ioan Albu, *Drept civil. Contractul și răspunderea contractuală*, Editura Dacia, Cluj Napoca, 1994, pp. 244-245; Paul Vasilescu, *Drept civil. Obligații*, Editura Hamangiu, București, 2012, p. 581

<sup>32</sup> For example, civil sentence no. 3231/ 16.09.2020 of the Court Tg. Mureș, definitive, in <https://www.avocati.info/jurisprudenta/actiune-in-raspundere-delictuala-pentru-provocarea-unui-accident-de-circulatie/>, accessed on 11. 05. 2022

remember that any damage will have to be covered. The safety of those around, of the victims, in relation to the initiatives of others is defining for liability.

But it is, from its essence (of liability) that only the delict - the impermissible deed - is responsible and only to the extent that the provider of the deed produces the harmful effect and foresees it (or should have foreseen it). And vice versa, even if there is damage on someone's account, the one who manifested himself legitimately will not answer. The responsibility in this case will be borne by someone else who, in a common conjunctural framework, produced by apparently concurrent facts, acted criminally. The burden of damage will be transferred from the one suspected of unauthorized manifestation - but who acted in full legitimacy - to another, the true producer of the crime.

Therefore, if we admit that one's legitimate expression absolves liability and that another, a third party, is liable, we must admit that between the legitimate expression and the true tort there is independence, even if the appearance would suggest their concurrence.

The positive norm records with great accuracy this approach which would be deduced from the reparative function of civil liability, because it indicates in a simplified and essentially its scheme: "the one who causes damage to another through an illegal act, committed with guilt, is obliged to fix"<sup>33</sup>. That is, the text indicates the delict as a fundamental element of the observation of liability, guilt will be deduced casuistically from the compliant or non-compliant deed, and the concept of causality matters less due to its imprecision<sup>34</sup>.

The practical problems arise when the one who has the initiative and the interest of the manifestation does not know from the beginning whether he is operating legitimately or not, even if he anticipates the possibility of causing damage. The ambiguity of legitimacy appears against the background of the uncertainties produced by the special norms that regulate the subjects' behaviors or the uncertainties offered by the circumstances in which they operate.

So, we have in mind the situations in which the one who acts, although he has the desire to proceed in a correct manner, which does not produce liability, does not know or cannot deduce how to proceed. In practice, there are frequent cases where even the magistrate - the one who determines liability - does not know how the general norm of behavior should be understood<sup>35</sup>. Thus, a delicate problem arises: to what extent - and if so, why - will the active practitioner respond while no one knows from the beginning how to behave.

2. The concern to capture - in generic, but more pragmatic formulations - the criteria for identifying appropriate behaviors leads us right to the foundations of liability phenomena. Man lives in freedom, freedom being a constitutive principle<sup>36</sup> and indisputable. The one who initiates something through free expression - as a result of the general need for safety - has a

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<sup>33</sup> Art. 1357 al. (1) C. civ.

<sup>34</sup> For details, by way of example, see: L. Pop, I. Fl. Popa, S. I. Vidu, *Curs de drept civil*, Editura Universul Juridic, București, 2015, pp. 344 – 348; G. Antoniu, *Raportul de cauzalitate în dreptul penal*, Editura Științifică, București, 1968, pp. 29 - 50; from the multitude of these theories - products of necessity - it follows that in a world in a universal connection it is very difficult, sometimes even illusory, to identify the causal relationship, from the concrete act to the harmful effect.

<sup>35</sup> We indicate as an example - out of so many possibilities - the decision from the council chamber no. 21/2021 of 11.02.2021 of the Hunedoara Court, unpublished, definitive: in a car accident, followed by a death, the question arose of the liability - criminal and civil - of the driver, employee, professional, who - on the public road, at night, in full swing of his transport activity, coordinated by the demands of economic efficiency and subject to a standard of behavior – he had to reduce the speed below a certain limit or not; the prosecutor of the case - with all his authority to assess culpability - held that he should not have reduced the speed; the preliminary chamber judge decided the opposite: he was at fault because the speed had to be reduced; in the appeal, the prosecutor's point of view was maintained; in an explicable way, the limits of the clichés of substantiating liability based on fault (which, in turn, implied the provision) were observed, when no one knew from the beginning how the principles of the standards should be interpreted (not even the judge).

<sup>36</sup> Pentru detalieri, a se vedea: George Burdeau, *Droit constitutionnel*, Editura L.G.D.J, Paris, 1984, p.133

fundamental obligation from the moment of the initiative: caring for others<sup>37</sup>. The fundamental, subjective rights - their recognition - are only the flip side of this fundamental obligation: the others, the third parties, in turn have the duty of care towards the rights holders. Practically, the rights are defined - not as essential attributes of the holder - but by the opposition of the fundamental duty of care that others have towards the holder.

Care – the fundamental task – would have a dual application: care for others and care for oneself. Concern for others would require the adoption of preventive or, as the case may be, cautious behaviors<sup>38</sup>. Personal protection involves asserting and promoting personal interest in competition with other interests that claim to be injured<sup>39</sup>.

Civil life, in society, naturally assumes a state of equilibrium, the only state that can support the reality of freedom. In practical terms and starting from the meaning of the fundamental obligation, this balance presupposes the coexistence of rights, freedoms and interests that are valued through the initiative of the holders (bearers) in the general framework organized by objective law<sup>40</sup>. The collision, the conflict, of the components of civil life, their excessive exercise, against the duty of care, gives the phenomenon of responsibility<sup>41</sup>. Liability indicates, therefore, the imbalance and the essential function of liability will be to restore balance in society (through reparation or sanction)<sup>42</sup>.

Such a theoretical premise gives a certain perspective: it can provide solutions for the hypothesis in which we cannot know in advance what behavior would absolve liability due to the generality of the standard of behavior. That is:

We note that the distinction between rights, freedoms, interests is relative: in reality we have interests but with particularities - they can be observed and underlined - and, above all, different degrees of protection<sup>43</sup>. The model is not completely alien to the expression of the Romanian positive norm<sup>44</sup>.

It would matter, therefore, in the assessment of the conditions of liability, from the perspective of art. 1959 C. civ., legitimate interest. However, neither the law nor the Romanian doctrine could accurately specify what a legitimate interest is<sup>45</sup>.

In the conceptual framework offered (responsibility is the result of the clash of interests and the excess is observed only in the non-conformity of the deed), we deduce that the legitimation of the interest must inevitably be sought in the behavior of the one who - in the exercise of his freedom through social manifestation - harms the interest of another. The harm

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<sup>37</sup> It is the famous Atkin thesis that legal doctrine considers to be of Christian origin; for details, see: Feng, Tan Keng, "The Three-Part Test: Yet Another Test Of Duty In Negligence." *Malaya Law Review*, vol. 31, no. 2, 1989, pp. 223–251. JSTOR, [www.jstor.org/stable/24865449](http://www.jstor.org/stable/24865449). Accessed 5 May 2021 și Ph. Brun, *Responsabilite civile extracontractuelle*, 5e edition LexisNexis, Paris, 2018, p. 100

<sup>38</sup> D. Tapinos, *Prevention, precaution et responsabilite civile*, L Harmattan, Paris, 2008, pp. 429 - 484

<sup>39</sup>For extensive developments in relation to the role of interest in fixing civil liability, see: M. Dugue, *L interet protege en droit de la responsabilite civile*, L.G.D.J, Paris, 2019, pp. 215 – 254.

<sup>40</sup> I. Deleanu, *Drepturile subiective și abuzul de drept*, Editura Dacia, Cluj Napoca, 1988

<sup>41</sup> L. Thierry, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes. Un modèle de résolution basé sur l'opposabilité et la responsabilité civile*, teză, UCLouvain - Saint-Louis, Bruxelles, 2004, publicată în Bruxelles de Larcier, 2005, în <https://dial.uclouvain.be/pr/boreal/object/boreal:168645>, accessed on 3. 05. 2022.

<sup>42</sup> Ph. Brun, *Responsabilite civile extracontractuelle...*op. cit., p. 112

<sup>43</sup> For details, see: A. Gervais, *Quelques réflexions à propos de la distinction des « droits » et des « intérêts*, in Mélanges en l'honneur de P. Roubier, t. I, Paris, Dalloz-Sirey, 1961.

<sup>44</sup> Art. 1359 C. civ.: „the author of the illegal act is obliged to repair the damage caused and when it is the result of the damage brought to an interest of another, if the interest is legitimate, serious and, by the way it is manifested, creates the appearance of a subjective right". The wording of the text does not fully confirm the thesis, but it does not exclude it either, which entitles us to interpret it in the sense of our argumentation.

<sup>45</sup> On the contrary, the limits of this recording of the law are emphasized - this, in the context in which we try to outline its qualities; to be seen: S. Neculaescu, *Repararea prejudiciului cauzat prin vătămarea unui interes*, Universul Juridic, nr. 4/2017 din 4. 04. 2017, <http://revista.universuljuridic.ro/repararea-prejudiciului-cauzat-prin-vatamarea-unui-interes/> accesat on 5. 11. 2022

would consist - in the most general formulation - in the violation of the fundamental obligation: care towards others. In relation to this criterion we can evaluate, then, the culpa, the provision, the possibility of provision, of the one who acts.

Such premises lead us to another preliminary conclusion: the basic function of legal liability - reparative or repressive - will be the weighting of conflicting interests (interests are not excluded, not canceled, when they collide, but are weighted)<sup>46</sup>. And the weighting is finally carried out by the magistrate through comparison, proportionality, balance<sup>47</sup>.

3. We apply the formula on the liability that would result from the exercise of a profession, we observe and gather the consequences<sup>48</sup>.

Positive law does not depart from the classic formula, with all its limits: the civil liability of the perpetrator - professional or not - is, in principle - personal and based on fault, on the slightest fault. In the event of a contest of action, the liability will be divisible and main and by exception joint<sup>49</sup> and, as the case may be, subsidiary<sup>50</sup>. In turn, liability for another and liability without fault<sup>51</sup> they are derogatory and must be indicated by law.

We find the source of civil liability in the deed not conforming to a rule or a standard - indicated by the norm or deduced according to general principles - and, finally, if we cannot identify them, from the fundamental obligation of each one. The other conditions of liability - culpa and causation - will be deduced from the point-by-point analysis of the reality of the deed's compliance with the standard. Harm is the premise, not the source. It is illustrated by the existence of the disturbance of the social balance.

4. Everything I have described so far is valid for any form of civil liability. Does, then, professional liability have any particularity of a legal order, apart from the title that provides so much imprecision?

We noted that the source of the standard can be found in the scope of the profession and that the profession implies work, a work regime. The realization of the work is done by capitalizing on the knowledge, practices, skills, dexterities, which due to their volatility give a lot of imprecision in describing what the professional has to do in the activity. The weight of imprecision will have little significance as long as I have stated that - in the absence of an express regulation - the standard deduced from the fundamental obligation can be applied.

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<sup>46</sup> G. Burdeau, *Droit constitutionnel*....op. cit., p. 139

<sup>47</sup> L. Thierry, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes*....op. cit., p. 72

<sup>48</sup> It should be noted that the jurisprudence - in other formulations - applied the proposed model, the court carrying out an identification of the interests and a weighting of them: see, ÎCCJ, Second Civil Section, decision no. 635 of February 19, 2013, in <https://coltuc.ro/2013/11/raspundere-civila-delictuala-criterii-de-apreciere-a-caracterului-ilicit-al-faptei-cauza-exoneratoare-de-raspundere-jurisprudenta-iccj-2014/>, accessed on 14. 11. 2022. In the case, the foundation of the action for compensation of a farmer started against the State was debated, the plaintiff who requested - among other things - compensation for the killing of his birds, ordered to combat an epizootic; when the existence (non-existence) of the illegal fact was motivated, the court observed: it is necessary to "maintain a fair balance between the requirements of the general interest of the community and the imperatives of the fundamental rights of the individual"; practically, the judgment achieved - even if it did not express it explicitly - a weighting according to the criteria I stated.

<sup>49</sup> L. Pop, I. Fl. Popa, S. I. Vidu, *Curs de drept civil*, Editura Universul Juridic, București, 2015, p. 449.

<sup>50</sup> A theorization of the meaning of subsidiary tort liability can be found in L. R. Boilă, Considerations regarding the tort liability of the person lacking discernment regulated by art. 1368 of the current Civil Code, Law no. 5/2014, p. 28; for particular situations of subsidiary liability we note: Gh. Piperea, Legal personality and limitation of liability in the New Civil Code. The end of a myth, in <https://www.curieruljudiciar.ro/2011/12/07/personalitatea-juridica-si-limitarea-raspunderii-in-noul-cod-civil-sfarsitul-unui-mit/>, accessed on 13. 11. 2022; for subsidiary liability in labor relations, see: A. Țiclea, T. Țiclea, Specific liability for damages in legal labor relations, in the Romanian Journal of Labor Law no. 3/2014, p. 33.

<sup>51</sup> For an example of objective liability, expressly indicated by the rules: Law no. 240/2004 regarding manufacturers' liability for damages caused by defective products, republished in the Official Gazette of Romania, Part I, no. 899 of December 28, 2007

The design of the profession in the area of entrepreneurship highlighted, however, a particularity with significance: in a professional activity, the entrepreneur enjoys independence in putting his skill to work and operates at personal risk.

However, the independence of the facts can be an absolving cause of liability while discussing the eventual competition of crimes producing liability, competition that may arise between the entrepreneur and the beneficiary or between the entrepreneur and the third party claimants. In an apparent contest of torts, the precision of the exercise of the profession proves the independence of the act of the entrepreneur and leads, indirectly, to his absolution from liability: the damage was caused by another.

Moreover, in the entrepreneurial area, control of the entrepreneur in the practice of the profession is excluded. This implies the exclusion of the liability of another (the State, a possible client) for his crime.

All in a context where the civil law enshrines - in delictual matters - both solidarity and divisibility, in case of bankruptcy action (entrepreneur, victim, third parties, fortuitous events, as the case may be) for the production of damage<sup>52</sup>.

Separately, the establishment of practice norms of the profession - whatever the form of expression - from which the delict and then the culpa are deduced, sends the non-compliant facts into the field of tortious liability even if the commitments to perform the work are made contractually. We find the specificity of contractual liability only for deviations related to the exercise of the profession.

## **VI. Practical consequences that would result from theorizing.**

1. We follow the practical effects of theorizing on two levels: first, we note the eminently technical character of the components of the profession (specific knowledge is essentially technical in nature and is also subject to similar rules); separately, the actual exercise of the profession takes place in a social framework that operates according to its own norms.

Therefore, the validity of the exercise of the profession, of the solution offered by a professional, results - in principle - from the pursuit of intrinsic, technical legitimacy, and less from compliance with the social environment in which a job is practiced (even if we cannot completely deny the influence of the environment). The technicality of the professional solution gives a level of autonomy, independence, of the act of the professional who offers it. The evaluation of this act as a crime will obviously be done in relation to intrinsic rules and only secondarily according to other contextual rules. This distinction – the actual exercise of the profession, on the one hand, and the social operating framework, on the other – produces consequences.

2. The general standard of behavior of the professional (discharger of liability) must differentiate between the two postures of the exercise of any profession: the technical, fundamental and the environmental, contextual. Even if - in the absence of rules - we refer to the most general standard (duty of care), the distinction should be followed. The formula can give significant results, clarification, more certainty.

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<sup>52</sup> Art. 1370 Civil Code: "if the damage was caused by the simultaneous or successive action of several persons, without being able to establish that it was caused or, as the case may be, that it could not be caused by the act of any of them, all these persons will be jointly and severally liable to the victim"; Art. 1371 Civil Code: " (1) if the victim contributed intentionally or negligently to causing or increasing the damage or did not avoid it, in whole or in part, even though he could have done it, the person called to he will be held responsible only for the part of the damage he caused. (2) the provisions of para. (1) it is also applied in the event that both the act committed by the author, with intention or through fault, as well as force majeure, fortuitous event or the act of a third party for which the author is not obliged to answer contributed to the cause of the damage"; for details and controversies, see L. R. Boilă, Sources of obligations in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, coord., New civil code. Comment...op. cit., pp. 1438 - 1439

We exemplify: the medical act, its technical elements, should be the same: the same disease, the same approach; the reality is different: it is one thing to go to a specialist from a small national provincial town and another will be the medical result offered by the best performing German hospital; in the analysis of medical malpractice – although theoretically it should follow the same guidelines – the indicated distinction will yield different results. And this, without taking into account the doctor's personality.

From here, another consequence related to the injured party's behavior follows: his option towards a specific professional, towards a specific framework in a specific space, indicates the acceptance of the technical standard of the professional, of the framework, of the place. That - the victim's option - will indirectly, but clearly, indicate the technical and contextual standard in which the professional's eventual offense will be judged.

3. The independence of the technical evolution of the professional, of his deed - in relation to the framework in which he operates - distinguishes between the forms of civil liability under which the professional will be judged: professional malpractice is subject to tort rules and the operational framework, possibly, to contractual ones.

We supported<sup>53</sup> that work and enterprise constitute the common element of all professions. Such an observation now compels us to a further explanation.

We have in mind the object of the work, of the undertaking: the exercise of the profession, the implementation of skill, skill which in turn has technical content. The realization of this desired is done legally - as a matter of principle - through contracts. In this mechanism, the content of the profession - contractual object - is not negotiated (eventually, the result of the work, the contract, the versions of the exercise can be negotiated, but never the essential technical components that define the profession itself).

Practically, we will always have a technical professional standard, the non-compliance of which gives a professional offense and a standard of use, as the case may be, of the result, of the professional content that can fall under the contractual regime<sup>54</sup>.

4. The independence of the deed - a deed that constitutes a professional exercise - can give reasons for non-responsibility of the professional who followed the technical tasks accurately.

In this situation, the deed causing the damage will belong to the beneficiary. That is, there will be no criminal competition, but a deed located exclusively on account of a single subject. The phenomenon appears in professional environments where the technique operates with supplementary (not imperative) norms, where the autonomy of will is wide and this happens mainly in the civil operational space, in the legal professions specialized in civil relations<sup>55</sup>.

As the professional environment produces by itself uncertainty or in the hypothesis where the parties enjoy autonomy of will and a supplementary regulation, the appropriate

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<sup>53</sup> See above points III, 3 and 4

<sup>54</sup>The model, although known and generally applied, is not always accurately followed by jurisprudence. For example: the banker, after paying the client damaged by the embezzlement committed by his account manager - employed with an employment contract - requested, retroactively, compensation consisting of the amount already paid. The courts debated whether the dispute falls under the procedural regime of labor or delict and directed the dispute to the labor records - conclusions no. 100/4. 02. 2021 and no. 698/12. 12. 05. 2021 of the first civil section of the Hunedoara Court, final, unpublished. However, in our assessment, the damage was caused by the non-compliant exercise of the management profession; the accompanying employment contract does not regulate the functions or mechanisms of management, but the general set of work in which a professional, a technician (a manager) would operate. In the model we propose, we start from the premise that the technique is performed, applied, only as it is, according to its content and rules, and not as the parties want, and the distinction is necessary. The options are made only in relation to the professional levels, by directing towards a certain professional, towards a certain professional space, towards a certain professional regionalization.

<sup>55</sup> For extensive developments in relation to the implications of operating with supplementary norms in different professional environments, see: C. Peres-Dourdou, *La regle suppletive*, L.G. D.J., Paris, 2004

behavior of the professional requires that the beneficiary of the benefit is informed in relation to the possible work versions as well as the risks of the options in relation to the need for the economic or technical efficiency of the work. If the beneficiary opts for a certain formula - in full knowledge of the case - and suffers or causes damage, the responsibility will not belong to the professional but to the one who made the option for a certain solution out of several possible ones<sup>56</sup>.

5. In such a context, dominated by the autonomy of will, the question arose as to whether or not the professional is obliged to the beneficiary - at his explicit and adequately remunerated request - to expose him to the illegal versions as well. This starts from the premise that the professional delimits himself from the beginning - and undoubtedly proves the delimitation - from the non-permitted version. In this case, if the beneficiary has operationalized the non-compliant version, will the professional be liable?<sup>57</sup>

The problem becomes completely insoluble when we locate ourselves in the area of legal professions that give expression to the autonomy of will.

As a precaution, we do not provide an answer although the professional environment is waiting for it. It would, contextually, be a premature and risky response. We are only formulating the question and can hope, at most, that the model we are suggesting will provide a conducive framework for achieving it as soon as possible.

6. The independence of the professional stemming from the technicality of his solutions delimits him - from the perspective of responsibility - also from the ineffectiveness of the framework in which he operates and which society offers him. The professional, therefore, will not be responsible for the organizational vices in which he expresses himself professionally.

The doctor will not be responsible for an uncertain diagnosis until he has the necessary technology. Maybe, eventually, he is responsible for not informing the patient of the limits of the space in which he is active or for the lack of advice and direction to others. The notary public will not be responsible for system defects in real estate advertising or for inconsistencies in the tax system. He will be liable, in the same logic, for not informing about system risks.

7. Separately, we cannot bypass the clarifications in relation to the legal significance - in the logic of responsibility - of the personal and immediate interest of the person practicing the profession. In principle, I argued that in the interest weighting mechanism - the defining mechanism for the phenomenon of legal liability - the interest of the person exposed to liability

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<sup>56</sup> In notarial practice, the question arose as to whether the notary can instrument a sale of a property in which the seller - spouse - received the asset by donation from the other spouse, as long as the property acquired will be revocable at the pleasure of the donor spouse; the instrumentation was carried out, but in the clauses of the contract it was explicitly recorded that the acquirer was aware of the affectation of his ownership; the question arose whether it was necessary to record this clause in the title or whether a separate clause between the notary, on the one hand, and his clients, on the other, was sufficient; this formula was chosen for the protection of the subsequent acquirers of the operation carried out by the diligent notary (so that the acquirer of the revocable property cannot invoke his good faith towards his subsequent acquirers); it was also questioned whether the notary is responsible for the instrumenting of a power of attorney followed, subsequently, by a sale, in which the seller was represented; everything, in a context in which - at the explicit request of the principal, the power of attorney was not specialized - and, later, the trustee was able to sell below the market price, obviously, to the detriment of the principal warned in advance by the notary (the debate took shape following the conviction of a notary - for such behavior, assessed as insufficiently cautious - by criminal decision no. 101/17. 04. 2014 of the High Court of Cassation and Justice, final). In the logic presented, the notary should not be liable to the principal, but could be made liable - conjuncturally - to a sub-acquiring third party, but this, subject to the omission to record explicitly and in detail in the contract the clauses informing all parties about the risks to which they are exposed now and in the future.

<sup>57</sup> For example: could the architect be held responsible for the design of a building that does not comply with urban planning requirements and that the beneficiary - against the advice of the professional - built without authorization?

also matters<sup>58</sup>. Concretely, the operationalization of this idea is more difficult due to the fact that it is an inferred principle. The analysis may appear to be only speculative.

However, if we accept that the fundamental duty of care towards others prevents the professional from causing harm - damage - to others, the reasoning can also be done the other way around: others, in turn and regardless of the interests they assert, cannot legitimately ask you to - you cause yourself a damage that they could not accept as justified. It's about accepting and achieving a clear balance in judging self-interested behaviors, prior to liability.

This balance derived from the foundations and functions of liability simplifies the premises of reasoning: you cannot ask the professional, any potential debtor, to produce a disadvantageous legal situation, a damage. If we accepted this, there would be no more social life because the freedom of any manifestation, once recognized, implies by itself the protection of the interest that the subject brings to the manifestation<sup>59</sup>

## **VII. Conclusions**

The study supports the idea that a general examination of professional liability is warranted, liability produced by non-compliant behavior in the exercise of a profession, whatever it may be. The justification of the approach to gender - not to species - was sought in the common elements that can be identified in each of the professional activities - carried out independently or not - as well as in the foundations of legal liability.

It was observed, first of all, that work and the enterprise - their object and instruments, their regime - can outline a legal space common to all professions, of their exercise.

The legal labor regime explains the relativity of science, skill, which make up the content of the notion of profession. This content, in turn, will limit the expectations of the beneficiaries of the work, their rights as creditors. The concept of the undertaking projects the fundamental obligations of the one acting as a professional: the investigation, the information, the advice and the limited guarantee of the performance committed and executed.

Secondly, the foundations of legal liability are indicated, with special reference to the civil one. In its essence, responsibility is meant to weigh the interests of people - professionals or not - in their free civil manifestations, by comparison, proportionality and balancing.

In such a framework, the professional's deed - potentially delictual deed - will be defining to fix his civil liability. The other components - guilt and causation - will be only secondary. We will identify the general criterion for evaluating the existence (non-existence) of a crime in the concept of care - the duty of care - towards others and towards oneself. Caring for others requires forethought or, as the case may be, caution in activity. Self-care recommends the affirmation of personal interest legitimized by an agreed social value.

Theorizing is the result of a practical need: outlining a general standard of behavior for situations in which the professional operates in a normative environment dominated by uncertainties, behavior which, then, will protect him from liability based on fault.

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<sup>58</sup> See point V, 2 above

<sup>59</sup> We repeat the motivation scheme of the cited jurisprudence - see note no. 36 - the decision of the council chamber no. 21/2021 of 11.02.2021 of the Hunedoara Court - particularly significant and profound: in essence, not in expression, the judge observed that the mechanism of the provision that the driver had to prove - defining fault -, this in the classic framework of liability (deed, fault, effect, causality) - it is not edifying because, in a justified way, it has been observed that you cannot impute to a driver the lack of a provision that even the judge did not intuit; he did not, however, exclude guilt, but subjected it to another filter, a filter deduced from principles, this time expressed explicitly: the interest of the person engaged in the exercise of the profession; compared the interests subject to weighting - by the fact of the judgment - and gave reasoned preference to the driver: you cannot impose the one who is in the activity to protect the one who is totally unconcerned with his own life (the victim) to such an extent that he sacrifices himself ( not to be efficient and to be fired with patrimonial and social consequences for him and his family); for the role of the judge in weighing interests in case of legal uncertainty, see: M. Pinault, *Incertitude et securite juridique, en Le traitement juridique et judiciaire de l incertitude*, Dalloz, Paris, 2008, pp. 5 - 63.



In practical terms, something else was emphasized: the content of the profession - knowledge, skills, practices - has an eminently technical character. Exercising the profession - under a subordination regime or at one's own risk - gives the practitioner a certain level of independence - narrower or wider - which autonomizes his (the professional's) actions in relation to other actions, of others - supposed or real - competing. This autonomy – once identified and defined – can absolve the practitioner of liability for harm caused to a victim by multiple subjects apparently acting together.

The model obliges the one who determines the faults to delimit the behaviors of multiple subjects according to the nature of the rules - express or inferred - technical or non-technical - that govern the subjective legal situation under examination. The consequences follow from this: 1) culpable deviation from the technical rule always gives a delictual liability; 2) the autonomy given by the technique of the profession may exclude the responsibility of the professional; 3) deviating from the rules designating the group in which the professional operated can give contractual or even tort liability, as the case may be, and 4) the criminal activity committed by deviating from the rules of the operating group can attract joint - divisible or joint liability - of the practitioner, along with others