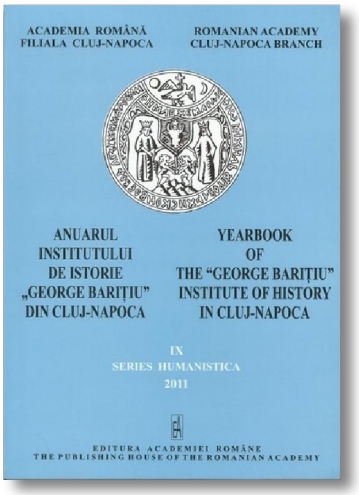

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TERMINOLOGY AND LEGISLATION IN THE FIELD OF THE PREJUDICE CAUSED BY INJURY BROUGHT TO THE INTEGRITY OF A PERSON. ROMANIAN LAW[1]

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Résumé. *Le corps humain est le substrat de la personnalité, protégée contre les ingérences des tiers. Les principes de l'inviolabilité et de l'indisponibilité de la personne sont consacrés dans les documents internationaux; toute atteinte préjudiciable à l'integrité physique entraîne la responsabilité civile.*

Le préjudice généré par l'atteinte de l'integrité de la personne couvre deux réalités: le préjudice corporel direct de la victime et le préjudice par ricochet. Le dommage corporel contient, simmultanément, les pertes de nature pécuniare et le préjudice moral (douleurs physiques, infirmités, cicatrices). Le préjudice indirect, par ricochet, appartient aux proches de la victime, qui peuvent solliciter l'indemnisation.

Controversé encore, le préjudice généré par l'atteinte de l'integrité de la personne représent une réalité enrichi, au niveau règlementaire, au fil du temps, mais pas dans le même rythme que le progrès des débats doctrinaires. Les principaux actes normatives concernant les différents aspects que le préjudice corporel implique sont: la loi fondamentale, le Code civil roumain, l'Ordonnance du Gouvernement no. 7/2005 pour l'approuvement du Règlement de transport sur les chemins de fer de Roumanie, l'Ordonnance du Gouvernement no. 29/1997 concernant la Code aérien, la Loi no. 95/2006 concernant la réforme dans le domain de la santé, la Loi no. 703/2001 concernant la responsabilité civile pour les dommages nucléaires, la Loi no. 240/2004 concernant la responsabilité des producteurs pour les produits défectueux et l'Ordonnance d'urgence du Gouvernement concernant la protection de l'environnement. Inspiré par le droit comparé, le nouveau Code civil roumain dedique plusieurs alinéas au préjudice consécutif aux atteintes corporels.

Mots-clés: *corps humain, préjudice corporel, préjudice par ricochet, indemnisation, réglementation, droit roumain*

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1. THE HUMAN BODY. INVIOLABILITY AND INALIENABILITY

The substrate of a person is the human body[2]. The biological data structure the basics of personality, protected against any injury caused by third parties. The human body polarizes life and death. The two biological extremes are expressed within the legal field: birth, acquire of legal personality, declaration of birth, death, declaration of death, and have peculiar meanings and multiple consequences, traceable through legal analysis[3].

The European Convention on Human Rights protects the right of every person to their life. As it was said, it is difficult to conceive that life can be separated by the body in order to become the object of a personal right and "perhaps the Decalogue said much more and better, being situated at the opposite pole, «You shall not murder». Once the principles were settled, the exceptions followed. The Bible is full of wars justly set for the survival of the people; the Convention specifies the situations of necessity which paralyze the right of a person to life: death penalty, self-defense and even the authorities' right to suppress rebellions and insurrections»"[4].

The principle of inviolability of the human bodies is strongly rooted in international documents of first class[5], aimed to prevent or, if need be, to settle penalties for any prejudicial conduct. Once the integrity injured, the person has the right to just and equitable compensation. What seemed impossible in the past – the human body could not be regarded as the object of any pecuniary assessment – is now admitted: "the corporal prejudice is subject to assessment, starting with the pecuniary compensation (the indemnity assigned to repair has, based on its object, an original nature, being considered inalienable, as it is attached to the person)" [6].

The inalienability of the human body means that neither the body, as a whole, nor its elements, can be traded. The law expressly forbids the drawing and transplantation of human cells, tissues and organs or organizing these activities to obtain profit (Article 158 of Law 95/2006 on health care reform[7]); the sole scope which is allowed is the therapeutic one.

[2] See J. Carbonnier, *Droit civil. 1. Les personnes. Personnalité, incapacités, personnes morales,* Paris, Presses Universitaires de France, 2000, p. 19.

[3] For a detailed analysis of the manner in which the two existential moments – life and death – are transposed within law, J. Carbonnier, *op. cit.,* p. 32–37.

[4] *Ibidem*.

[5] The Universal Declaration of Human Rights sets the interdiction to physically hurt or kill another person. The French legislation embodies an express provision on this matter: "Every person has the right to respect of their body; the human body is inviolable" (*Code civil,* Paris, Dalloz, 1999, quatre-vingt-dix-huitième édition, p. 53; the provision was added by means of Law no. 94-653 of 9 July 1994).

[6] J. Carbonnier, *op. cit.,* p. 21–22.

[7] Law no. 95/14.04.2006 was published in „Monitorul Oficial al României", Part I, no. 372/28.04.2006.

2. **TERMINOLOGY**

The expression "prejudice caused by the injury brought to the integrity of a person" covers two realities.

The corporal prejudice gathers a patrimonial loss, clearly assessable (medical expenses, unrealized profit etc.) and a non-patrimonial loss, which prevails. The physical and mental pains, lesions, invalidities, mutilations, the deprivation of the victim's possibility to enjoy life, the loss of certain recreation possibilities at a young age – give expression to the compensable moral prejudice. The above mentioned damages can be seen in the French literature on the matter as "personal prejudices", since they harm a person[8].

The indirect prejudice (by ricochet) is caused to other persons than the victim[9], through the latter's decease. It also consists of a patrimonial and a non-patrimonial loss. The victim's followers (children, spouse, brothers etc.) lose, in some cases, a pecuniary support which leads to the changing of their life conditions. The right to compensation belongs to the heirs, either as a right acquired directly in their patrimony, or by means of the inheritance, when the victim's rights, in relation to the compensation for the patrimonial loss suffered during the period between the unlawful act and the date of death, are transmitted[10].

3. **LEGAL TEXTS**

Still representing a bone of contention, the prejudice caused by the person's injury is a reality that time enriches at the legislation level, not keeping track, however, with the progress it reached within the doctrinaire debates.

3.1. ROMANIAN CONSTITUTION

The Constitution protects the right to life, to physical and mental integrity, and Article 21 grants the free access to justice of any person that suffered a prejudice by the entrenchment upon their rights and legitimate interests. It does not embody express provisions regarding the corporal prejudices, and the action may be brought before the court by the injured one or his heirs, in the event of the victim's decease.

[8] Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Obligaţiile* (eng. *Obligations*), D. Dănişor (trans.), Bucureşti, Edit. Wolters Kluver, 2007, p. 145–146.

[9] For further details on the right of third parties to compensation in the event that the victim died due to the corporal lesions, see I. Dogaru, P. Drăghici, *Bazele dreptului civil* (eng. *The Basics of Civil Law*), Bucureşti, Edit. C.H. Beck, 3rd volume [*Teoria generală a obligaţiilor* (engl. *General Theory of Obligations*)], 2009, p. 250–252.

[10] In regard to the same type of prejudice, see M. N. Costin, M. C. Costin, *Dicţionar de drept civil, L-Z* (eng. *Dictionary of Civil Law, L-Z*), Bucureşti, Edit. Lumina Lex, 2004, p. 240.

3.2. ROMANIAN CIVIL CODE

Entered into force in 1865, the Romanian civil code regulates that any act of man that causes to another a prejudice sets forth the obligation to repair it. Any act of man, committed with intention or by negligence, is relevant from the civil law point of view only if it resulted in a damage, namely a prejudice. In the absence of a prejudice, however serious the act may be, it will not be subject to the civil responsibility[11]. The presence of the conditions of civil responsibility brings about the obligation to restore the balance disturbed by means of the unlawful act.

The text of Article 998 of the Civil code uses the term "prejudice", as a blank norm[12], without making the difference between the patrimonial and the non-patrimonial loss. The prejudice caused by injury brought to a person's integrity is a mixed prejudice, in which weight is attached to the moral side[13]; after all, the non-patrimonial aspect is the one that offers specificity, even if occasionally the medical expenses, treatments, physiotherapy etc., are not to be neglected.

The old Romanian jurisprudence used the Code's provisions in order to compensate corporal damages; the indirect prejudice was repaired on the same grounds. Convicting the accused to pay damages of 60 000 lei, the court stated that the non-patrimonial loss "results from the suffering caused to the plaintiff by the loss of a being which she gave life to and towards which she is believed to have a great deal of affection according to the natural laws"[14].

We cannot overlook the situation created by means of the guiding decision no.VII of December 1953, issued by the former Supreme Tribunal[15]. Ignoring the provisions of the Civil code, the court adopted the thesis of the inadmissibility of pecuniary compensation of non-patrimonial losses, and thus also of corporal prejudices. Without denying the possibility of causing a non-patrimonial prejudice by unlawful acts, the decision drew different guiding lines for the courts of justice, according to which the non-patrimonial losses, could be repaired only by non-patrimonial means. The argument was that the fundamental principles of the socialist legislation are incompatible with the bourgeois idea of turning into a sum of money the mental pain and of speculating a moral prejudice, as a means of becoming rich. The idea of using only means that do not have a patrimonial

[11] In what concerns this condition of the civil responsibility, see R. Petrescu, *Drept civil. Teoria generală a obligațiilor. Răspunderea delictuală* (eng. *Civil Law. General Theory of Obligations. Ex Delicto Liability*), Bucureşti, Edit. Oscar Print, 1996, p. 137–142.

[12] I. Tanoviceanu, *Tratat de procedură penală* (eng. *Treatise of Criminal Procedure*), ediția a 2-a (eng. second edition of the textbook on criminal law and criminal procedure law, revised and altered), Bucureşti, Tipografia „Curierul Judiciar", vol. 4, 1924, p. 309.

[13] Within the comparative law the corporal prejudice is assessed through coefficients of value, the medical-legal expertise being compulsory depending on the lesions suffered (see L. Melennec, *Évaluation du handicap et du dommage corporel*, Paris, Masson, 2000).

[14] Vălenii de Munte Court of first instance, decision ruled on May 8th 1950, „Justiția Nouă" (eng. "New Justice"), vol. 2, 1950, p. 657.

[15] The decision was published in *Culegere de Decizii ale Tribunalului Suprem pe anii 1952–1954* (eng. *Collection of Decisions of the Supreme Tribunal for the Period 1952–1954*), vol. I, p. 25–26.

character was furthermore stated in the Decree no.31/1954 regarding natural and legal persons, normative act which gives examples of such measures. In such conditions the victim could not be compensated for the injuries brought to her corporal integrity, which was absolutely inequitable. The principle of the integral repair of the prejudice was deeply affected and set the victims of corporal prejudices on a lower position than those entitled to claim the compensation of patrimonial losses.

Prestigious authors have clearly underlined the injustice done to the victims that suffer injuries to their corporal integrity. It is said that, as a result of the guiding decision, the compensation of non-patrimonial losses by pecuniary means remained censured, despite the fact that there are cases in which "the rigid prohibition of damages in the case of non-patrimonial prejudices lead to results which cannot be regarded as completely satisfactory. Such cases can be seen when the injury brought to the physical integrity and health, the moral and social conditions of the victim were significantly changed. If she can no longer walk towards life, wouldn't it be just to be offered resources in order that through the radio, television etc. life could penetrate to her, or that she could move by means of mechanical devices? Furthermore, the young men that survive an unlawful act being disfigured or mutilated, and thus deprived of the natural joys brought by marriage and procreation, not to mention the repulsion they provoke in the society, or the parents that, by losing their child, are left alone at retirement, in such cases the sole compensation of the material losses cannot be regarded as integral. If money cannot restore the previous situation, they allow such miserable persons, deprived of the every-day joys and satisfactions of the human condition, to try and replace them, as possible, with other moral satisfactions. It is not about transforming an inner pain into a source of profit, but about alleviating, through damages, the altered life conditions of the victim"[16].

After 1990 the natural practice of the pecuniary compensation of corporal prejudices and non-patrimonial losses, in general, was reinstalled, in the framework of the disappearance of the ideological considerations that motivated the previous jurisprudence. Together with the texts of the Romanian civil code, the courts of justice can refer to other normative acts, which regard the prejudices caused by injuries brought to integrity.

3.3. GOVERNMENT ORDINANCE no.7/2005 ON APPROVING THE REGULATION ON RAIL TRANSPORTATION IN ROMANIA[17]

Preliminaries. The reference law in the transportation field is represented by the norms applicable to all transport varieties (rail, road, naval, aerial) stipulated in

[16] M. Eliescu, *Răspunderea civilă delictuală* (eng. *Civil ex Delicto Liability*), Bucureşti, Edit. Academiei R.S.R., 1972, p. 109.

[17] The Government's Ordinance no. 7/2005 was approved with alterations by Law no. 110/27.04.2006.

the Civil code and the Commercial one. Nevertheless, each type of transportation has its own regulation in special laws; certain special norms, which we will present, referring also to the losses brought by the injuries caused to a person's integrity.

Short historical view on the Regulation. For a long period of time, the provision of the Civil code and those of the Commercial one were completed by the special norms embodied in the Regulation on transportation adopted in 1959[18]. This regulation did not stipulate, *in terminis,* the possibility of compensating non-patrimonial losses generated by contract.

Later, the rail transportation was stipulated in the Regulation on transportation included in the Government Ordinance No.41/1997[19]. Besides the Regulation, Law No.129/1996 on the rail transportation on Romanian Railways, currently abolished. To a great extent, the previous provisions were similar to the current ones. It referred to the pecuniary compensation, in case of death or injury, as well as of the remedy of other categories of prejudices. A different text stipulated that non-patrimonial losses could be offered compensation and enumerated as examples, *pretium doloris,* the esthetic prejudice.

Compensable prejudices. A few articles of the ordinance expressly refer to the compensation of losses in the case of the prejudices brought to the traveler within the public rail persons' transportation. The current regulation defines the traveler as the person that benefits from the carrier's service on the basis of the contract of transportation. Consensual, bilateral, onerous convention, the contract of public rail transportation of persons compels the operator, in exchange of a sum of money, to perform the transit of a traveler from the expedition station to the destination one[20]. In the French regulation, it was said that the contract of rail transportation of persons represents a condition-legal act, namely that the parties "are incapable of bringing the slightest alteration to the legal frame set by law: they can only adhere" [21]. The affirmation is valid also in the context of the Government Ordinance no.7/2005.

The rail transportation of persons may bring about accidents related to the rail exploitation, either when the traveler is located in the train or in other places belonging to the operator, at the entrance or exit. The transportation operator is responsible for the prejudices that result from the decease, hurt or other injury of the traveler's health. Separately, there are also mentioned the damages in the case of decease and in that of injury. The general formula of the legal text regards two categories of prejudices: the prejudice caused to third persons (in the case of the traveler's decease) and the prejudice caused to the traveler himself, if he got hurt or

[18] Approved by the Decision of the Council of Ministres no. 941/1959.

[19] Monitorul Oficial al României, Part I, No. 220/29 August 1997.

[20] With respect to this type of contract: Gh. Caraiani, Gh. Stancu, *Transporturile feroviare* (eng. *Rail Transportation*), Bucureşti, Edit. Lumina Lex, 1998, p. 198.

[21] H. Mazeaud, L. Mazeaud, J. Mazeaud, *Leçons de droit civil,* Paris, tome I, 1955, p. 286 and the followings.

injured in the accident. In the case when the injured person does not have a ticket, the liability of the operator will be *ex delicto*.

The corporal prejudice gives the traveler the right to claim damages, in respect to the material component and the moral one. The hurt or any other forms of injury caused to health bring about a patrimonial loss (treatment and transportation expenses, total or partial labor incapacity etc.). The non-patrimonial losses include the pain and physical and mental sufferings (*pretium doloris),* a restraint of the possibilities to live a normal life (prejudice of recreation), mutilations, disfigurations that harm the physical harmony (esthetic prejudice). If the victim is a young person that loses due to the railway accident the possibilities to affirm her life, we are in the presence of a juvenile prejudice[22].

The prejudice caused to other persons. The prejudice suffered by third parties (Article 23), has a material component (expenses necessary for the transportation of the body, funeral or incineration; indemnity or allowance for the persons in relation to which the victim had the obligation of support, or would have had this obligation in the future or which he had previously maintained without having the duty to do so) and a moral one, represented by the prejudice of affection.

The non-patrimonial prejudice belongs to the indirect victims and is materialized in the suffering generated by the loss of a loved one. The persons bounded by strong affection towards the victim claim the compensation of their own prejudice consisting of moral sufferings brought by the traveler's decease. The jurisprudence is not unitary in what concerns the claims for compensation. Very few courts of justice rejected such claims considering that only the victim may receive damages since she suffered the physical or mental trauma[23]. The majority of the courts admit, as it is only natural, the compensation.

In the case of the traveler's decease, discussion may arise as to who is entitled to claim compensation. The former Regulation stated that the legal successors may claim damages, whereas the current provisions do not mention this possibility. It simply says that in the event of the traveler's decease, the damages consist of funeral expenses, incineration etc., and the term of prescription of the right to action for the *entitled persons* is of 3 years, calculated starting with the day that follows the decease. In such conditions, the access to justice is recognized for two categories of persons: the successors, on the one side and the persons closely connected to the victim, without necessarily being successors, on the other side.

[22] For a detailed characterization of these prejudices, see I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale* (eng. *Civil Responsibility for the Moral Prejudices*), Cluj-Napoca, Edit. Dacia, 1979, p. 79–89.

[23] As an example, the Supreme Court of Justice, criminal section, decision no. 347/1993 and the Court of Appeal of Timişoara, criminal decision no.. 274/1994, in „Dreptul" (eng. "The Law"), no. 12/1995, both quoted after C. Crişu, N. Crişu-Magraon, S. Crişu, *Repertoriu de jurisprudenţă şi doctrină română, 1989–1994* (eng. *Repertory of Romanian Jurisprudence and Doctrine, 1989–1994*), Curtea de Argeş, Edit. Argessis, vol.2, p. 268; Blaj Court of first instance, criminal sentence no. 129/1995, quoted after L. Augustin, *Acordarea daunelor morale* (eng. *Admitting Damages*), "Pro Lege", no. 2/1996, p. 179.

Generally, the legal successors are the first ones entitled to receive compensation; usually they were the closest connected to the victim. However, the relationship between the successor and the victim may not always be of harmony and mutual affection. The indirect prejudice, which is the object of the damages, represents a prejudice of affection. The core of this prejudice is that it draws the line between those entitled to claim compensation and those that are not, using as a criterion – the existence, during the victim's life, of the feelings of affection between her and other persons. It is possible that the victim had strong connections to some heir in the past that did not persist at the moment of the railway accident[24]. In the absence of the real affection connection (proved, of course, before the court, according to the law), the quality of legal successor alone does not legitimate the compensation of the non-patrimonial loss.

On the other hand, there are persons, other than the legal successors, that suffer a *prejudicium affectionis* as a result of the victim's death. It is possible that the deceased had affective relationships or even benefit during life of cares from behalf of a person that was not compelled to do so and which is not a member of the family. If such circumstances are proved together with a real affective prejudice caused by the victim's disappearance, the compensation is possible. From this point of view, the current regulation is superior to the former one. At the same time, it is in accordance with the European exigencies, one the recommendations of the Council of Europe[25] providing the possibility of claiming compensation by the persons that were closely connected to the victim before the accident.

The ground of compensating the indirect prejudice. The thesis according to which the indirect victims may claim damages on contractual grounds[26] is extremely interesting. In the French law, it was said that, through the mechanism of the stipulation for another[27], implied in the transportation contract, the indirect victims are the third parties beneficiary in relation to the transportation contract closed between the operator and the direct victim. It is mentioned that the operator

[24] For jurisprudence on the matter, see Court of Appeal of Bacău, criminal section, decision no. 28/A/11.02.1997; idem, decision no. 146/R/20.03.1997, in A. Ungureanu, *Jurisprudența penală a Curții de Apel Bacău pe anul 1997 – 204 spețe commentate* (eng. *Criminal Jurisprudence of the Court of Appeal of Bacău for the Year 1997 – 204 Commented Cases*), Bucureşti, Edit. Lumina Lex, 1998, p. 72–74 & p. 330–334.

[25] Recommendation no. 75 (7) of the Council of Europe is mentioned in Y. Lambert-Faivre, *Droit du dommage corporel. Systèmes d'indemnisation,* 3-ème édition, Paris, Dalloz, 1996, p.42.

[26] See J. Chestin, Ch. Jamin, M. Billiau, *Traité de droit civil. Les effets du contrat,* 3-ème édition, Paris, Librairie Générale de Droit et de Jurisprudence, 2001, p. 1042–1045; J.-L. Goutal, *Essai sur le principe de l'effet relatif du contrat,* Paris, Librairie Générale de Droit et de Jurisprudence, 1981, p. 128 and followings; Fr. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations,* Paris, Dalloz, 2005, p. 519–520. All the authors are quoted after L. Pop, *Tratat de drept civil. Obligațiile* (eng. *Treatise of Civil Law. Obligations*)*,* vol. 2 [*Contractul* (eng. *Contract*)]*,* Bucureşti, Edit. Universul Juridic, 2009, p. 605.

[27] In respect to the stipulation for another – true exception from the principle of the relativity of the contract's effects, see L. Pop, *op. cit*., p. 600–615.

has (in what concerns the transportation of persons) an obligation of security, which is an obligation of result[28]. Thus, the victims of the indirect prejudice, third parties beneficiary of the stipulation, are not compelled to prove the operator's guilt, the contractual responsibility being objective.

It is probable that in the future the jurisprudence will use more frequently this theoretical construction that facilitates the situation of the persons that were affectively connected to the direct victim of the accident.

3.4. THE GOVERNMENT ORDINANCE no.29/1997 ON THE AERIAL CODE[29]

The aerial transportation operator is contractually responsible for the prejudices caused to the passenger during the moment of embarkation and that when all the persons are debarked. On contractual basis, the operator is compelled to transport people, by air, to the destination airport, in exchange of a price paid by the beneficiary.

A few remarks are necessary from the perspective of the legal text before analyzing the prejudice. The responsibility belongs to the aerial transportation operator – natural or legal person that operates the airplanes[30]. According to the current legislation, holding an air operator certificate as well as an aerial transportation license[31] allows the performing of regular and irregular passenger flights. The prerogatives correspondent to the transportation of passengers, goods, luggage or mail on national and/or international routes, underline the content of the right to traffic.

The compensable prejudices result from the passenger's decease or from the injury of his health from the moment of embarking into the airplane with the intention and legal right to perform a flight. Both types of prejudices caused by the injury of a person can be repaired: the prejudice caused to other persons by the passenger's decease and the loss of the direct victim of the corporal prejudice.

We can also find the aspects seen within the road transportation of persons, in what concerns the content of the prejudice, in the two types (directly caused to the victim and caused to other persons than the victim) and the persons entitled to compensation.

[28] G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la responsabilité,* Paris, Librairie Générale de Droit et de Jurisprudence, 1998, p. 477–478, paper quoted after L. Pop, *op. cit*., p. 605.

[29] Government Ordinance no.29/1997 on the Aerial Code was published in „Monitorul Oficial al României", Part I, no. 208/26 August 1997 and was approved with alteration by Law no. 130/2000. After approval the ordinance was altered and completed by Law no. 399/27 December 2005, which disposed the republication.

[30] According to the law, the airplane is the device that can be maintained in the atmosphere with the help of other reactions of the air that those on the surface of earth. The airplanes used for military, custom or police services are State airplanes.

[31] The air operator certificate represents the document that attests the fact that the air operator has the capacity to perform activities of public aerial transportation expressly mentioned in that field. The aerial transportation license allows the holder of the certificate the right to exercise his activity. The terms are defined in Article 3 of the Government Ordinance no.29/1997 on the Aerial code, modified by Law no. 399/2005.

3.5. LAW no.95/2006 ON THE HEALTH CARE REFORM[32]

The medical legislation is currently gathered in Law no.95/2006 which embodies a distinct title that deals with the responsibilities of medical personnel and of the suppliers of products, medical, sanitary and pharmaceutical services. These provisions are elements of novelty in relation to the previous regulation in the medical field. Before the adoption of this normative act, such provision could be found within the Code of medical deontology, Law of hospitals no.270/2003 and Law no.2/1998 on the drawing and transplantation of human tissues and organs[33]. Together with the enforcement of Law no.95/2006 these normative acts were expressly abolished.

The civil responsibility of the medical personnel. The causes of the person's prejudice. The Law on the healthcare reform indicates as sources of prejudice, the professional error, violation of the professional secrecy, violation of the legal provisions regarding the informed consent or that state the compulsory medical assistance and the overstepping of the limits of competence. The first cause of the losses brought by the person's injury is, beyond doubt, the professional error. However, it is also possible for the other situations to generate prejudices.

a. *The professional error,* for the first time defined within a legal text, is called "malpraxis". In fact, the malpraxis or professional error express prejudicial realities generated by negligence, imprudence or lack of the necessary abilities for the profession (insufficient medical knowledge) within the medical or medical-pharmaceutical act. In relation to malpraxis the legislator uses the formula "prejudices on the patient" (Article 642 letter a) which bring about the civil responsibility. First and foremost, it refers to the corporal prejudice, but it can also bring up other losses that affect third persons, in the event of the patient's decease.

The prejudices caused to the patient rest in the responsibility of the medical personnel and of the suppliers of medical products and services. According to the law, the medical personnel consist of the physician, dentist, pharmacist, medical assistant and midwife that perform medical services. The suppliers of medical services are the public or private sanitary unities. The mentions of the types of compensable prejudices, of the possibility of compensation of non-patrimonial losses, are almost absent. In such conditions the reference law will be enforced. Several provisions regard the categories of medical acts that can generate prejudices, the cases of exoneration from responsibility and the compulsory medical insurance of civil professional responsibility, as a manner of repairing the prejudice.

[32] „Monitorul Oficial al României", Part I, no. 372/28 April 2006.

[33] In respect to the physician's responsibility for the drawing and transplantation of organs and tissues under Law no. 2/1998, A. Corhan, *Repararea prejudiciului prin echivalent bănesc* (eng. *The Compensation of the Prejudice by Pecuniary Equivalent*), Bucureşti, Edit. Lumina Lex, 1999, p. 132–134.

b. *Violation of the professional secrecy.* The confidential conservation of the information learned during the exercise of their profession, represents the obligation of the medical personnel. The unjust release of these data brings about the civil responsibility if prejudices were caused to that person. If the constitutive elements of a crime are present, the criminal law will be enforced. The incrimination within the texts of the Criminal code aims at the protection of the social relationships regarding the individual freedom in respect to the right to confide secrets in the medical personnel, without fear of divulgation. The legal protection of the medical secrecy is grounded on the relationship of trust between the patient and the physician. In certain cases regulated by law, the physician is compelled to communicate data regarding the patients at the request of the prosecution bodies or of the courts of justice[34].
c. *Violation of the obligation of informing the patient.* The obligation of information has its right place within the current regulation. The patient's consent to the performance of the medical acts with risk potential implies a previous knowledge of the diagnostic, nature or purpose of treatment, risks and consequences of the methods, viable alternatives of the treatment and of the disease's prognostic in the absence of the treatment. Together with the actual information, we believe that the physician is the one that can also give advice on the path to follow and on any other aspects of interest for the patient. Through their conducts, the medical personnel must avoid creating the picture of a more serious disease than the real one. We could say that the obligation of information and counseling represents the essence of the liberal professions. In the medical field, it results from the respect owed to life and human persons, medicine being performed only in the person's best interest. The informed consent is materialized in the written agreement of the patients that reached the age of 18. The law also consists of express provisions for the situations in which the underage can themselves express their consent regarding the medical acts.
d. *Inobservance of the compulsory medical assistance.* The obligation to give medical assistance belongs to the physician in relation to the person he previously accepted as a patient, or to emergency cases when not giving the medical cares, jeopardizes seriously and irreversibly the patient's life and health. The physician-patient relationship, once established, can be disconnected when the disease is cured or unilateral by the patient or by the physician, according to the law.

[34] For a detailed presentation of the medical secrecy within the Belgian law, see Y.-H. Leleu, G. Genicot, *Le droit médica. Aspects juridiques de la relation médecin-patient,* Bruxelles, Éditions De Boeck Université, 2001, p. 147–156.

Medical acts that bring about the responsibility. The prejudicial conduct of the medical personnel is manifested within the acts of prevention, diagnostic, treatment, medical counseling or biomedical research. It might be the case of diagnostic acts[35], simple surgical acts (the physician leaves a pledget or other instrument in the patient's abdomen while on the surgery table or removes a healthy organ instead of the sick one[36]); acts specific to the esthetic surgery[37]; anesthetic acts (errors in establishing the blood type, in selecting the manner of anesthesia, in positioning the patient's body).

Cases of exoneration from responsibility. In certain cases, the medical personnel is not held responsible: if at the bottom of the prejudice lays the working conditions, the insufficient equipments of diagnostic and treatment, adverse effects, general accepted complications and risks of the methods of investigation and treatment, the hidden faults of the sanitary materials, of the medical equipments and devices, of the medical and sanitary substances; if they acted in good-faith in emergency situations, according to their competence; if they intervened in emergency cases overstepping the limits of the competence, in the event when the competent personnel was not available.

A specific case of exoneration from responsibility is represented by the nosocomial infections. Also known as hospital-acquired infections, these are infections that were not present, not even in their incubation period at the moment when the patient was hospitalized. These infections are added to the initial disease and appear after the patient got into contact with other patients or members of the medical care personnel. The nosocomial infections are usually post-surgery and have as causes the deficiency of hygiene, sterilization or medical cares. They are seen as severe infections due to the fact that they have their roots in hospital germs that are multi-resistant to antibiotics. They clinically manifest themselves either during hospitalization or after release from the hospital. The frequency of nosocomial infections differs[38] according to the type of medical cares (they are more often seen in the case of the reanimation services and intensive care), period of hospitalization (long hospitalizations and services of functional reeducation increase the chances to get an infection) and the degree of vulnerability of the subject (they are more likely to appear on the grounds of serious acute disease, fragile organisms, grafts of organs etc.).

[35] For an error of diagnostic, see the cases mentioned in A. Boroi, *Infracţiuni contra vieţii* (eng. *Crimes Against Life*), Bucureşti, Edit. All Beck, 1999, p. 198.

[36] See Tribunal of Bucharest, criminal decision no. 642/1974 (not published); Aix-en-Provence, 12.01.1954, decision quoted after *Code civil…,* p. 194, no. 89.

[37] The premature removal of a mechanism of fixing the limbs, in the event of a surgery of correction of the nanosomia of an adolescent caused a serious corporal prejudice (Cour d'Appel de Paris, 17.02.1994, in "Recueil Dalloz", no. 12/23.03. 1995, *Sommaires commentés,* p. 100).

[38] The prevention activity is crucial within hospitals, and the low level of the nosocomial infections is an indicator of the quality and security of cares (http://www.informatiamedicala.ro/dictionar-medical/i/infectie-nosocomiala-3221.html).

According to the civil law, the sanitary units that perform medical services share responsibility with the medical personnel for the prejudices caused to the patients.

Civil responsibility of medical services and devices suppliers. The public or private sanitary units that deliver medical services are held responsible if the prejudices are caused by: nosocomial infections (unless an external cause that could not be controlled by the institution, is proved); known defects of the medical equipments used in an abusive manner without being subject to recondition; the usage of drugs or medical devices after their term of validity or the guarantee period; the acceptance of drugs and special equipments from suppliers that do not have insurance of civil responsibility in the medical field; inobservance of the internal regulations of the institution, inadequate delivery of utilities.

The sanitary institutions that perform medical services and the producers of drugs, sanitary devices and materials are held responsible for the prejudices caused to patients due to the hidden faults of these, during the period of validity.

3.6. LAW no. 703/2001 ON CIVIL RESPONSIBILITY FOR NUCLEAR DAMAGES[39]

The nuclear damages are a source of civil responsibility. A first normative act referring to nuclear damages is Law no.111/1996 on the secure performance, regulation, authorization and control of nuclear activities[40]. The sphere of application embodies the activities that involve the manipulation of nuclear, radioactive (including nuclear fuel) materials, radioactive wastes[41], devices generating ionizing radiations.

The Vienne Convention and Law no.703/2001 define the nuclear accident as a fact or sequence of facts having the same origin, which causes nuclear damages. The objective and exclusive responsibility of the nuclear explorer intervenes in case of decease, injury, deterioration of goods, economic loss resulted from the previously mentioned situations, the cost of the measures to restore the environment, the loss of the incomes that comes from an economic decease towards any usage of the environment.

The corporal prejudices and the indirect ones are also compensable in this framework. The direct victim that addresses the court has to identify who is responsible for the unlawful act, to prove the prejudice and the causality relationship between the generator factor and the damage. Difficulties may arise with regard to causality, for those corporal lesions that are manifested after a certain amount of time from the accident (for example, certain blood infections that

[39] The Law was published in „Monitorul Oficial al României", Part I, no. 818/19 December 2001.

[40] Law no.111/1996 was published in „Monitorul Oficial al României", Part I, no. 552/27.06.2006.

[41] For the conditions and modalities of usage, transportation, storage of toxic wastes, substances and products, see M. Șt. Minea, *Regimul juridic internațional al substanțelor, produselor şi deşeurilor toxice ori periculoase* (eng. *The Iinternational Legal Regime of the Toxic and Dangerous Substances,Products and Wastes*), „Dreptul" (eng. "The law"), no. 3/1998, p. 43–50.

do not appear immediately after the nuclear accident). The indirect victims entitled to claim compensation can invoke the provisions of Law no.703/2001 which refers to "any economical loss resulted from the decease […]".

There are no specific references to the non-patrimonial losses, neither for the direct victims nor for the indirect ones. We believe that these are not excluded from the compensation, and a future regulation of the matter might find useful to mention these damages. All the more entitled since the Vienne Convention leaves the States to determine the nature, form and extent of the nuclear damages. Such dispositive norms must be valorized in only to give full satisfaction to the victims of such prejudices, some of which extremely serious or even fatal for the human person. Particularly, the existence of the non-patrimonial prejudice and its gravity on the long run due to its effects which are sometimes irreversible, impose specific provisions.

3.7. EMERGENCY GOVERNMENT ORDINANCE no.195/2005 ON ENVIRONMENTAL PROTECTION[42]

The civil responsibilty for the prejudice caused by polution is regulated by the Government Ordinance no.195/2005 approved with alteration by Law no.265/2006[43]. The right to compensation is conceived as a guarantee of every person's right to a healthy and ecologically balanced environment[44]. In fact, the right of any person to a healthy environment represents a subjective prerogative that grants access to justice to the person that suffered the repercussions of pollution on her health or goods. The ordinance's text, as it was altered, offers double protection: for goods and for the person's inner values (life, health, integrity).

In a large meaning, the ecological prejudice represents the pecuniary assessable effect of the damage in the persons' health, goods or environment caused by pollutants, injurious activities or disasters. "Pecuniary assessable" means a measurable prejudice, namely the patrimonial loss. The legal terminology is faulty because it induces the idea of the possibility of compensating only the patrimonial prejudice. Whereas the pollutants frequently generate the deterioration of the victim's life conditions, physical pains, mental traumas (after chemical or biological accidents, after explosions etc.). If the immediate effect is the physical lesion that caused economical losses, it can be said that the esthetic prejudice (mutilations, scars), the prejudice of recreation (the restraint or even loss of the victim's possibilities to enjoy life), the loss of the chances of life (metabolic

[42] „Monitorul Oficial al României", Part I, no. 1196/30 December 2005.

[43] The law of approval was published in „Monitorul Oficial al României", Part I, no. 586/6 July 2006.

[44] The ecologic balance represents the totality of states and interrelationships between the components of an ecologic system that ensures the maintenance of the ideal structure, functioning and dynamics o it.

processes with slow evolution towards incurable disease) are inestimable consequences. The victims of the chemical or biological accidents may develop cancerous maladies or blood diseases for which there is no cure. Moreover, the moment of their tracking has an extreme and negative resonance in the sick person's psychic, for which the end is inexorable. The moral side of the prejudice is prevalent, and the compensation cannot be avoided.

On the one hand, the corporal damages imply the compensation which is rightly paid to the victim that suffered a direct injury to her integrity; on the other hand, the decease of the victim that is affected by pollutants brings about, according to the law, the compensation to the entitled ones (persons towards which the deceased one paid alimony or persons that suffered an affective prejudice). As it was justly said, the assessment of the extent of the ecological prejudice is difficult to perform, because many of the environmental elements cannot be given an economic value[45].

3.8. LAW no.240/2004 ON THE RESPONSIBILITY OF PRODUCERS FOR THE DAMAGES CAUSED BY FAULTY PRODUCTS[46]

This normative act intends to be a regulation of high standards of the responsibility of the producer for faulty products, in accordance with the European requests on the matter. The producer is the most entitled to evaluate the risks concerning the products he puts into circulation, being the closest to the measures that are necessary for decreasing risks. Law no.240/2004 aims at increasing the customer's degree of production, and thus it tries to establish the regime of the producer's responsibility[47]. It is the normative act that transposes the Directive no.85/374/EEC of the European Parliament and Council, of 25th of July 1985 on the responsibility of producers for the damages caused by faulty products, altered and completed by Directive no.1999/34/EC of the European Parliament and Council.

The special provisions of Law no.240/2004 are completed with the law of reference: the Civil code, the Civil procedural code, Government Ordinance no.21/1992 on the protections of customers, Customer code. The prejudices caused to third persons that were closely and affectively connected to the victim whose decease was caused by the product's defect (indirect prejudices), are also compensable.

The active procedural quality belongs to the natural persons and to certain organs with a role in protecting customers' rights. The compensation of the damage caused by the faulty product may be claimed by the prejudiced consumer, by several consumers prejudiced by similar products, which present the same fault (by

[45] A. Corhan, *op. cit.,* p. 217.

[46] Law no. 240/2004 was published in „Monitorul Oficial al României", Part I, no. 552/22 June 2004, republished in „Monitorul Oficial al României", Part I, no. 313/22 April 2008.

[47] These circumstances are noted in the motivation of Law no. 240/2004.

a sole action before the court[48]) or by the customers' associations. The latter are nongovernmental legal persons that, without aiming at profit for their members, have as a unique scope the protection of the rights and legitimate interest of them, and of all customers in general.

3.9. NEW ROMANIAN CIVIL CODE

Preliminaries. Inspired by the comparative law, the new Romanian Civil code is more generous with the space allocated to the rights recognized to the persons and the problem of the prejudice. A few paragraphs are dedicated to the compensation of the damages caused by injuries brought to the corporal integrity.

A category of legal provisions takes into considerations the rights closely linked to the human being. The life, health, physical and mental integrity of every person are equally guaranteed and granted by law. It is expressly mentioned that the person has the right to physical and mental integrity, and the human body is inviolable. The only violations that are admitted are limitative stipulated by law.

The second category of provisions of the new code takes into consideration the civil responsibility and thus, the compensation of the prejudice. The general text mentions the object of compensation – "Any prejudice gives the right to compensation" (Article 1 381 paragraph 1) – the extent and form of compensation.

The prejudice caused by the injury brought to the corporal integrity or to health is regulated with respect to both forms: direct prejudice and damage suffered by third persons due to the victim's decease.

Corporal prejudice. The new Civil code does not use the terminology "corporal prejudice", but it is clear that Article 1387 refers to this type of damage. The economic dimension is largely regulated and reflects the legislator preoccupation in establishing as exactly as possible, the component of the compensable economic damage: the equivalent of the salary of which the victim was deprived or is unable to obtain as a result of the loss or decrease of his working capacity; medical expenses; expenses determined by the multiplications of the everyday needs. The author of the unlawful act will repair any other material prejudices, their enumeration being declarative. *Lucrum cessans* is detailed as to facilitate the court's job when invested with the compensation claim. *Damnum emergens* will follow the general rule set forth in the text that refers to the compensation's extent within *ex delicto* responsibility: "The prejudice will be integrally repaired, unless the law stipulates differently […]. The compensation must embody the loss suffered by the prejudiced one […] as well as the expenses brought by the attempt to avoid or limit the prejudice" (Article 1385).

[48] The notion, forms and effects of the procedural co-participation are detailed in I. Leş, *Tratat de drept procesual civil* (eng. *Treatise of Ccivil Procedural Law*), 5th edition, with references to the Project of the civil procedural code, Bucureşti, Edit. C.H. Beck, 2010, p. 113–116.

The non-patrimonial side regards, limitatively, only the compensation for the restraint in the possibilities of family and social life. The right to damages does not pass over to the heirs: they will be able to exert it only if the action was brought before the court by the deceased. In the event that the victim believes adequate to turn to non-patrimonial means of compensation of the prejudice of recreation, she can do so, on the grounds of disponibility. However, it is slightly possible that the losses suffered are susceptible of compensation only through such means. In general, the corporal prejudice gives birth to irreparable consequences by non-patrimonial measures. Usually the patrimonial compensation is the proper path and the most preferred one by the injured parties too.

Indirect prejudice. "The court will also be able to give compensation to the ancestor, descendants, brothers, sisters and spouse, for the pain caused by the victim's death, as well as to any other person that can also prove the existence of such prejudice" (Article 1391 paragraph 2). The obligation of the author to pay damages to the relatives and/or members of the family does not hinder the compensation of the third persons that can prove their affective prejudice. Together with the non-patrimonial prejudice, the above-mentioned persons may also claim the compensation of the economic damage caused by losing the alimony paid by the deceased victim. The amount of money will be assessed according to the person's needs and to the incomes that, normally, the deceased would have had during the period for which a reward is given.

The prescription term of the right to action for damages can be prorogated if the civil unlawful act represents at the same time a crime[49]. If the prescription term settled by the criminal law is larger than that stipulated by the civil law, the one that will prevail is that of the criminal responsibility.

[49] With respect to the sums awarded as damages within the criminal trial, for crimes against the person, see D. G. Matei, *Daunele morale. Practică judiciară* (eng. *Damages. Judicial Practice*), Bucureşti, Edit. Hamangiu, 2007, p. 43–92.