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THE LAWYER CIVIL LIABILITY

R. MATEFI[1] D. IONAŞ[2]

Abstract: *The article deals with the lawyer civil liability, with its two forms, namely the tort and the contractual liability, a question of real interest as the civil liability cases are much more numerous than many other criminal or disciplinary cases. We focused on the regulation and content of the lawyer civil liability, analyzing the provisions of Law no 51/1995 regarding the organization and exercise of advocacy in Romania and also on the provisions of the Statute of advocacy and that of the Code of Ethics.*

Key words: *insurance, lawyer, liability, contract, risk, penalty, Code, Statute.*

1. Introduction

The provisions to regulate the lawyer civil liability are not to be found within the Law no. 51/1995 (republished) regarding the organisation and exercise of advocacy in Romania, despite the fact that „while exercising his profession the lawyer may commit acts likely to harm the parties of the trial.” [4]

„Even if the Law of organisation and the Professional Statute are especially dealing with the lawyer disciplinary liability (...) when, because of the wrong way the lawyer fulfilled his obligations under the assistance/representation contract, causing damage to his client, he will respond towards his client in terms of civil law.” [5]

As outlined in doctrine, „the lawyer civil liability does not work simply because of the loss of trial, but most relates to the lawyer’s obligations, to the legal aid contract content and especially to the nature of the obligations assumed by the lawyer.” [4]

The 998 Article of the Civil Code established that „every human action that causes an injury to another person, requires that the one that caused the injury, should fix it”, and the wording of Article 999 states that „everyone is responsible not only for the damage that he caused by himself, but also for the one caused by his negligence or recklessness.”

The civil liability has two forms, namely the tort and the contractual liability, both being based on the principle of compensation for patrimonial damage caused by unlawful and culpable conduct.

Thus, as highlighted in the doctrine „the lawyer liability is contractual. The tort liability shall act only if the lawyer is held to answer for a non-contractual offence likely to cause injury to a third person due to the information provided by the lawyer while exercising his profession.” [1, 3]

[1] Department of Private Law, *Transilvania* University of Braşov.
[2] Department of Public Law, *Transilvania* University of Braşov.

„The civil professional liability may not involve criminal or disciplinary liability, but the latter two will always attract professional liability if the professional caused damage.

However, the civil liability cases are much more numerous that many other criminal or disciplinary cases. The civil liability will always occur when a professional causes damage to someone, while criminal and disciplinary responsibility will intervene only in limited cases specified by law." [2]

2. The Lawyer Civil Liability Conditions

As a first condition of the civil liability arising in the context examined in what concerns the lawyer, is the existence of a *damage* which needs to have a certain nature, and to be sure both in terms of existence and the possibility of its evaluation and also have not yet been repaired. The compensation paid will always have a patrimonial character, however the injury can be both of a patrimonial or moral nature.

In our legal system, if initially the pecuniary compensation for moral damage has been the subject of controversy, at this stage of development of legislation, this problem was finally solved in favour of the possibility of coverage for punitive damages caused by monetary compensation.

The determination of the damage caused by the lawyer to his client is a highly sensitive issue that requires a thorough analysis on a case by case basis.

The second condition of the civil liability is the existence of an *illegal act.*

In order to determine if we are or not in the presence of this element of liability in what concerns the lawyer, we must proceed on analysing his obligations in the conduct of his business, which have the nature of not to do as well as to do obligations.

In general, if we discuss about the civil liability of someone, it is not enough to have an illegal act and a damage, without a connexion between them. In other terms between the illegal act and the damage has to exist a causal relationship, in the sense that the act caused the injury.

This *causal relationship* is the third condition of the civil liability.

The fourth and the last condition is the *guilt*.

In order to talk about the civil liability of the person who caused injury to another person it is not enough the existence of an illegal act under causal link with the damage, it is also required that the offender have acted with culpability. The guilt of the person that caused the injury is closely related to the subjective side of the illegal act.

The analysis of this element or condition of the lawyer civil liability must have as a staring point the nature of his obligations. They are usually duties of care or means, the lawyer committing to use all the diligence in order to achieve a certain result, but he doesn't compel that result.

Of course, there are situations in which the lawyer is bound by the result, e.g. where the object of the contract concluded to his client consist of writing a certain act of legal content, etc. In these latter obligations, their failure bear to a presumption of fault in the profession. In case of diligence obligations, the fact that the lawyer does not obtain the desired result for the client, is not in itself a proof of guilt. In this case, the client has to prove that the lawyer has not filed the required diligence.

3. The Professional Liability Insurance Requirement

The professional liability insurance obligation may have as a starting point only the insurance contract which was defined according to article 9 from Law no 136/1995 regarding the insurance and reinsurance in Romania as the contract that „requires the insured to pay a sum of money to the insurer, who assumes the obligation, in case of a specific risk, to pay to the insured or the beneficiary, the compensation or the insured amount, called indemnity, at the agreed deadlines."

The main purpose or reason for professional liability insurance is to compensate the persons who have suffered various material, financial or other damage as a result of some professionals fault.

„This form of insurance emerged as a necessity imposed by the implications of practicing certain professions which can cause damages to others as a result of the negligence in practicing the profession. These include professions which provide consultancy or a specialized service, such as architects, builders, doctors, lawyers, accountants, consultants and, in general, all the professions or occupations that require high liability activity (including the managers). Through their work they may, by error, mistake, neglect, omit or through any fault of his own, cause harm to the persons they work for or to other third parties." [7]

While in most European Union member countries, this type of insurance is mandatory as a condition for practicing the profession in question, in our country „these types of insurance are still limited practices on categories of professions.

One the one hand, there is no legislation or practice by which to enforce it and on the other hand, an appropriate request to that effect." [7] Furthermore, most of the times the potential customers are not aware about this kind of protection.

4. The Regulation and Content of the Lawyer Professional Liability

The provisions of Law no 51/1995 republished and those of the Statute of advocacy establish the imperative duty of lawyer to ensure for professional responsibility as a permanent obligation.

As for the content of the concept of professional responsibility, according to article 218 from the Statute of advocacy it aims to "cover the actual damages suffered by the customer resulting from the failure in exercising the profession according to the Law, the Statute and the rules of conduct."

The minimum threshold of the insured sum is also provided by the Statute. Thus, the trainee lawyer has to ensure for a minimum risk of 3000 euros annually and the final lawyer for a minimum risk of 6000 euros per year. It should be noted that the insurance premium paid by lawyers and civil associations of lawyers are mandatory professional expenses.

The parties may agree in contract the limits of the lawyer liability, without permitting clauses by which the lawyer should be relieved of all professional liability. In the event that these clauses will be inserted in the contract, however, the penalty provided by the law is that they will be considered unwritten.

5. The Professional Liability Insurance Obligation of Lawyers Operating in a Host Member-State

A lawyer who exercises his activity in a host Member State is obliged to comply with provisions regarding the obligation to

provide for professional liability applicable in the member state of origin.

According to Article 3.9.2.2. of the Code of Ethics of the Lawyers within the European Union ”when the lawyer, who is obliged to take out such an insurance in the Member State of origin, is a professional in the host Member State, he must strive to obtain an extension of this insurance for the professional activity which he carries in the host Member State.”

Assuming it is not required to subscribe such insurance according to member state of origin or the extension of the assurance we have referred above is not possible, however, the lawyer have to conclude an insurance for the activity he has in the host Member State. This insurance must be at least equal to that applicable to lawyers in the host Member State, unless it is impossible to obtain such an insurance. Where a lawyer can not obtain an insurance in accordance with the rules that I have referred to, he has to inform his customers who are at risk of being harmed.

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