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The New Regulation in the Romanian Law Concerning the Victim's Consent – a Case which Exonerates from Liability

Abstract

The problem of the victim's consent, requires a differentiated analysis, as it regards the damage caused to the goods, the damage caused through violations of the right to life, health or physical integrity or the damage resulted from the breach of some non-patrimonial rights, other than the right to life, health, integrity. Where consent allows the diminution or exoneration from liability, it will be verified under the aspect of meeting the conditions requested by law for its validity.

The rule is the interdiction to cause injury to the human body. The human body is inviolable and indispensable. Generally, no disclaimer can regard this type of rights which are granted and protected by the norms of the positive law. The human body is indispensable, which means that neither the body, as a whole, nor its elements, can form the object of transaction. All the situations of exception are strictly subordinated to the condition of the prior consent of the victim. She does not consent to the occurrence of the damage, but manifests her agreement to the performance of that activity – activity that also presents the risk of generating certain damages.

The problem of the consent has special connotations within the medical field, especially in relation to the aesthetic surgery; when patients are incapable of expressing their consent; in the case of drawing of tissues, organs or human cells; in the framework of bioethics activities. Moreover, the consent is a prior and indispensable condition for the disclosure of personal rights. In the Romanian legal system, the principle of consent was regulated for the first time in the new Civil code. It governs the entire field of personal rights. It is expressly stipulated in relation to the private life, right to dignity, right to one's own image, to the respect owed to the deceased person.

Keywords: *civil liability, new Romanian Civil code, justificatory cases, victim's consent, damage caused to the goods, damages caused to the physical or mental integrity.*

Nowa regulacja w prawie rumuńskim dotycząca zgody ofiary – przypadku, który uwalnia od odpowiedzialności

Streszczenie

Problem zgody ofiary wymaga zróżnicowanej analizy, gdyż dotyczy on szkód wyrządzonych przedmiotom, szkód spowodowanych poprzez pogwałcenie prawa do życia, zdrowia lub nienaruszalności cielesnej, czy też szkód spowodowanych przez naruszenie niektórych praw niemajątkowych, innych niż prawo do życia, zdrowia i nienaruszalności. W przypadkach, w których zgoda pozwala na ograniczenie lub uniknięcie odpowiedzialności, będzie ona badana pod względem spełnienia warunków dla jej ważności wymaganych przez prawo.

Regułą jest zakaz powodowania uszkodzenia ludzkiego ciała. Ludzkie ciało jest nietykalne i niezastąpione. W zasadie nie można zrzec się takiego prawa, które jest nadawane i chronione przez normy prawa stanowionego. Ciało ludzkie jest niezastąpione, co oznacza, że ani ciało, jako całość, ani żadna jego część nie mogą stanowić przedmiotu transakcji. Wszystkie te przypadki wyjątkowe są ściśle podporządkowane warunkowi uprzedniej zgody ofiary. Nie wyraża ona zgody na uszkodzenia ciała, lecz deklaruje zgodę na wykonanie czynności, która również niesie ryzyko spowodowania pewnych szkód.

Problem zgody ma szczególne znaczenie w dziedzinie medycyny, zwłaszcza w chirurgii estetycznej, kiedy pacjenci nie są zdolni do wyrazenia zgody, w przypadku pobierania tkanek, organów oraz komórek ludzkich, a także w działaniach o charakterze bioetycznym. Co więcej, zgoda jest wcześniejszym i niezbędnym warunkiem dla ujawnienia praw osobistych. W rumuńskim systemie prawnym zasada udzielenia zgody po raz pierwszy została uregulowana w nowym kodeksie cywilnym. Rządzi on całą dziedziną praw osobistych. Ma zastosowanie w związku z życiem prywatnym, prawem do godności, prawem do własnego wizerunku oraz szacunku dla osoby zmarłej.

Słowa kluczowe: *odpowiedzialność cywilna, nowy rumuński kodeks cywilny, usprawiedliwiające przypadki, zgoda ofiary, szkoda wyrządzona przedmiotom, szkody na nieraszulaności cielesnej i umysłowej.*

The Victim's Consent. The Problem of Risks Acceptance[1]

The new Romanian civil code, enforced starting from 2011, embodies detailed regulations regarding the cases that exonerate from civil liability. The 2nd and the 3rd section, the 5th Book ("On obligations") enlist and present the legitimate defense, the state of necessity, the disclosure of commercial secrecy, the performance of an activity imposed or allowed by law or the performance of the superior's order, the exercise of subjective rights, the victim's consent, the force majeure, fortuitous case, the victim's deed or the third party's act.

Within the following lines we will only refer to the victim's consent[2]- case provided in Article 1355 Civil code. In fact, the text of this article includes two situation that we will distinctly analyze:on the one hand, the victim's consent and on the other hand, the risk acceptance.

1. The Victim's Consent

The problem of the victim' consent, requires a differentiated analysis, as it regards the damage caused to the goods, the damage caused through violations of the right to life, health or physical integrity or the damage resulted from the breach of some non patrimonial rights, other than the right to life, health, integrity. Where consent allows the diminution or exoneration from liability, it will be verified under the aspect of meeting the conditions requested by law for its validity.

The victim's consent, prior to the wrongful act, sets aside the liability. Expressed through a convention or a unilateral act, this consent represents a disclaimer[3] as the act lacks illicit character. Disclaimers regard both conventions and unilateral legal acts (Article 1355 paragraph 1). The regulation regards the contractual liability as well as the non-contractual one.

[1] See: G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la responsabilité,* 3e édition, Librairie Générale de Droit et de Jurisprudence, Paris 2006, pp. 583-593.

[2] With regard to the victim's consent and the cases of exoneration from liability: L. Pop, I.-F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligaţiile* (*Elementary Treatise of Civil Law. Obligations*), Editura Universul Juridic, Bucharest 2012, pp. 432-434.

[3] L. Pop, I.-F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile …,* p. 432; G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil* (*Institutions of Civil Law within the Regulation of the New Civil Code*), Editura Hamangiu, Bucharest 2012, pp. 250.

Damages caused to goods

The cases that exclude civil liability

For the pecuniary damages caused with intention or serious fault, the conventions for the removal of liability are not valid. The intention (the author foresees the result of his act and pursues or accepts it) and serious fault are defined in Article 16 Civil code. The fault is serious when the author acts with a negligence or imprudence that not even the most reckless person would show towards her own interests). Serious fault proves the debtor's inaptitude to fulfill his duties[4]. It is not enough to breach an essential obligation in order to ascertain the presence of serious fault[5]. The debtor's serious fault or that of his employees was assimilated to malice in the French judicial practice.

The stipulation of a clause through which the debtor pursues to be free of any liability indicates the absence of the intention to be legally bound, in this case the obligations being pure potestative. The sanction is the absolute nullity of the disclaimer – implied solution even if it is not expressly mentioned in the Civil code. The only legal exception imposes two cumulative conditions: the illicit act was director towards the goods (not towards the person) of the victim and was committed out of mere imprudence or negligence. If the act regards the person of the victim, liability will be brought except for the situations expressly stipulated by law.

Normally, disclaimers for breaching public order, good morals or those that encourage fraud cannot be recognized as valid. In addition to this, it was appreciated that under the former Civil code, the causes that exonerate from liability for malice can neither be accepted[6]. Malice needs to be unequivocally sanctioned. It would have been advisable for all these situations to be expressly included in the first paragraph of Article 1355 of the Civil code.

The cases that limit liability

Generally, these are valid. Within the contractual liability, in view of the contractual freedom, it is up to the parties to agree on the payment of certain compensation, namely damages, to an inferior amount than the harm suffered by the victim (creditor). Exceptionally,

[4] The case which brought about discussions on the criteria of ascertainment of the serious fault is the following: a truck driver that transported bags of coins, destined to the Bank of France abandoned his vehicle for ten minutes on the streets of a city, leaving the engine running and the doors opened (despite knowing the content of the transportation). The truck was robbed and the court found the serious fault of the employee of the carrier (French Court of Cassation and Justice, commercial chamber, decision of 3rd October 1989).

[5] In this respect: Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations,* 4e édition, Defrénois, Paris 2009, p. 537.

[6] L. Pop, *Drept civil român. Teoria generală a obligaţiilor* (*Romanian Civil Law. General Theory of Obligations*)*,* Editura Lumina Lex, Bucharest 1998, p. 352.

the clauses of capping of liability when the act was committed with intention or serious fault, are not valid, no matter whether the harm regards the person of the victim or her goods. For bodily damages, the diminution of liability is possible only under the law. It is admitted that contractual liability cannot be limited when the clauses of limitation are totally ridiculous, symbolic[7] (equalizing a disclaimer) or if, through them, imperative legal norms are breached.

Damages caused to the physical or mental integrity or to health

Rule

According to Article 1355 paragraph 3, this liability cannot be removed or limited, unless under the conditions set by the law. ç

The rule is the interdiction to cause injury to the human body. The human body is inviolable and indispensable. The right to life, the right to health, and the right to physical and mental integrity are the three extra patrimonial prerogatives enunciated by Article 58 Civil code. Non-transferable, equally granted and protected by law, these rights inherent to men promote inestimable values, not only at the level of the mere individual but also at the dimensions of the human species. Generally, no disclaimer can regard this type of rights that are granted and protected by the norms of the positive law. The human body is indispensable, which means that neither the body, as a whole, nor its elements, can form the object of transaction. Simultaneously, the human body is inviolable[8] which clearly results from Article 64 Civil code: "The human body is inviolable. Any person has the right to physical and metal integrity. No injury can be brought to the integrity of the human being with the exception of the cases and conditions expressly and limitative provided by law".

The interdiction stated in Article 1355 paragraph 3 Civil code is correlated with the constitutional provisions and with those of the new Civil code in the field of the rights inherent tot the natural person. The fundamental law grants the right to life, right to physical and mental integrity (Article 22), as well as the right to health protection (Article 34). Articles 64 and 66 Civil code establish that no injury can be brought to the integrity of the human being, with the exception of the cases and conditions expressly and limitative provided by the law. The mentioned normative texts establish the principles of inviolability and inalienability of the human body. Thus, the provisions that forbid disclaimers or clauses of capping of

[7] B. Stark, H. Roland, L. Boyer, *Droit civil. Obligations. Contrat,* troisième édition, Litec, Paris 1989, p. 635, work quoted after L. Pop, *Tratat de drept civil. Obligaţiile,* vol. II, *Contractul* (*Treatise of Civil Law. Obligations, 2nd volume. The Contract*), Editura Universul Juridic, Bucharest 2009, p. 677.

[8] Article 16-1 of the French Civil code similarly provides, "[...]The human body is inviolable. The human body, its elements and products cannot form the object of a patrimonial right" (*Code civil*, 110e édition, Dalloz, Paris 2010, p. 126).

liability for injuries brought to the physical or mental integrity or to health, are conferred imperative character. The special laws regulate, in accordance with the provisions of the fundamental law, the rule of the interdiction to set aside liability for the injuries brought to the human body.

In view of the enunciated rule, *euthanasia* is forbidden. Unfortunately, within the current wording, neither the new Civil code nor other legal provision regulate euthanasia in none of its forms. Naturally, the Code of medical deontology shows in Article 22 that the practice of euthanasia is contrary to the fundamental principles of the medical profession[9].

Exceptions from the rule stated in Article 1355 paragraph 3 Civil code.

All the situations of exception are strictly subordinated to the condition of the prior consent of the victim. She does not consent to the occurrence of the damage, but manifests her agreement to the performance of that activity – activity that also presents the risk of generating certain damages.

The Medical Field

The consent within the medical field

The medical field is perhaps the most important of all areas of interest that use the term "consent"[10] and "obligation to inform". Because the scope is obvious – the saving at any cost of the health and sometimes the life of the one that is subject to medical procedures. Responsibility is practical the "watchword" in medical matters, so that the rules turn, one by one, from costume into law.

Principles that did not have legal expression until a certain moment, have received regulation. Following the pattern of the European countries, our legislator has adopted a bouquet of norms for the medical field, reunited within Law No. 95/2006 on healthcare reform[11]. Out of the multitude of special laws existing prior to the mentioned normative text, only Law No. 46/2003 on the patients' rights[12] has remained into force. This consists of a number of provisions referring to the patient's consent, some of them restated in the Law on the healthcare reform.

[9] See: S. Morar, *Eutanasia: între dreptul la viaţă şi libertatea de a muri demn* (*Euthanasia: between the Right to Life and Freedom to Die in Dignity*), 'Revista română de bioetică', vol. 10, No. 3, July-September 2012, p. 1.
[10] With regard to the notion and conditions of the consent, see: Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil* (*Romanian Civil Law. Introduction to Civil Law. The Subjects of Civil Law*), Editura Universul Juridic, Bucharest 2001, p. 146-149; I. Dogaru, S. Cercel, *Drept civil. Partea generală* (*Civil Law. General Part*), Editura C. H. Beck, Bucharest 2007, pp. 115-117.
[11] 'Official Monitor of Romania', Part I No. 372/28.04.2006.
[12] The law was published in the 'Official Monitor of Romania', Part I No.51/29.01.2003.

The reference normative act is the European charter of patients' rights[13] that correlate the right to informing with the right to participate in decisions and with the right of freedom of choice. Only an informed patient can be involved in the decision making process regarding his own state of health. He is free to choose between several procedures of treatment, with the observance of the confidentiality of personal data.

The law of European countries transposes the requirement of the respect for the human body. Let us only mention the example of the French civil code that, starting with 2004, has inserted the text according to which "No injury can be brought to the integrity of the human body unless for the case of medical necessity for the person in question or, exceptionally, in the therapeutic interest of another person. The consent of the interested one must be previously given except the case when his state requires a therapeutic intervention to which he did not consent" (Article 16-3)[14].

The obligation to inform – condition prior to the patient's consent. Object of medical informing

What our legislation regulates is the obligation imputed to the professional that is compelled to bring to the patient's knowledge, prior to any intervention, complete data on his state of health and the strategy to follow.

Law No.46/2003 refers to the right to medical information. A first category of information includes the available types of medical services, the suppliers of health (their identity and statute), the institution in which he is being hospitalized – rules and customs during the hospitalization. A second category of data regards the state of health, the diagnostic, the proposed medical intervention – with the presentation of risks of each procedure, alternatives, consequences in the absence of the treatment, including the disease's prognostic.

In a nutshell, Law No. 95/2006 compels the medical personnel (physician, dentist, pharmacist, nurse, midwife who provides medical services) to offer information to the patient only in the case of performing procedures of prevention, diagnostic or treatment that present risk potential. In such hypothesis, the patient has to be presented the diagnostic, nature or

[13] The charter adopted in 2002 includes 14 rights of the patients and represents a useful means of harmonization of the national systems of health. For the detailed study of each of the rights provided by the Charter, see: I. Turcu, *Dreptul sănătăţii. Frontul comun al medicului şi al juristului* (*Health Law. The Common Front of the Physician and Legal Counselor*], Editura Wolters Kluver, Bucharest 2010, pp. 71-74.

[14] *Code civil*, 110[e] édition, Dalloz, Paris 2010, p. 128. On the ground on this text it was considered in a case in which the sick refused transfusion, that the obligation of the physician to save life does not prevail over the patient's will (the decision was issued by the Council of the French State, 26 October 2001 and is quoted after *Code civil...,* p. 129).

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.

The wording of Law No. 95/2006 is scanty from several points of view. The obligation to inform must regard all types of medical procedures having or not a risk potential. In the absence of specialized medical knowledge, the sick does not receive complete information, and thus he cannot make an informed decision. The practice proves that sometimes, interventions regarded as routine, simple, can cause medical accidents[15] and important injuries. This is all the more so, since there are no criteria set in order to distinguish the medical acts with risk potential from the interventions that lack this character. The factors that accompany any procedure (age of the patient, medical record etc.) make the act of informing compulsory and constant, in all phases of treatment, regarding any intervention on the patient's body. The lack of information or misinformation can bring about the negligence or passivity of the sick with the result of the degradation of his state of health.

In what concerns the plastic surgery, the patient has to have the representation of the consequences that he assumes after the requested intervention. This means he must be offered sufficient data on the location, aspect and dimensions of scars[16], amount of time they will be noticeable, the possibility that the post operation period is accompanied by pain, etc.

Moreover, between the moment of the informing and that of the intervention there should be a reasonable period of time (at least 24 hours) in order to allow the patient to actively participate to the choice of the most suitable therapy for his own health[17]. Certainly, one needs a period of time to reflect on the optimum choice, which involves weighing the advantages and disadvantages, depending on objective and/or subjective factors known to the patient.

Of course, in all cases, the informing must be efficiently carried out, using a language that is accessible to the non-specialist. It is even provided the possibility of using the mother tongue of the patients, another language that he knows or a translator, if he does not master the Romanian language.

What the law does not expressly provide is the necessity for the patient to provide absolutely all the relevant data, so that the physician can correctly assess the situation and

[15] With regard to the notion of medical accident, see : J. Penneau, *Les modalités d'une loi organisant l'indemnisation des accidents médicaux même non fautifs,* [in:] *L'indemnisation des accidents médicaux,* Actes du colloque du 24 avril 1997 organisé par le Centre de droit des obligations de l'Université de Paris I à la Grande Chambre de la Cour de Cassation, Librairie Générale de Droit et de Jurisprudence, Paris 1997, p. 33.

[16] For instance, in case of liposuction, the surgeon will inform the patient that it is possible to perform two incisions, not only one; despite the fact that this does not represent a problem for the health, it is an aesthetic inconvenient (*Revue trimestrielle de droit civil,* No. 3/1998, p. 681-682).

[17] I. Turcu, *Dreptul sănătății …,* p. 190.

choose the adequate therapy. The medical record, life conditions, any other information requested by the physician can influence the specialist's option for a certain treatment. Thus, we can talk about the patient's obligation to completely and correctly inform the medical personnel, as a premise of the efficient collaboration in the medical relationship.

The condition of the consent set forth by the law is natural. The person's right to her own image is one of the personality rights that bring about serious difficulties in relation to the condition of the consent. "Just as the name, the person's image is protected as an element of identification of the person. Being a representation of the physical characteristics of the person, when it is taken without the person's consent it constitutes a violation of the right to image"[18]. Basically, any operation of using the person's image, of spreading aspects that are linked to the intimacy of the person in question and, in general, everything that involves the notification of third persons in respect to the values belonging to the sphere of the personality rights imposes with necessity the consent of the person in question. The medical legislation has adopted in this respect.

Consent in special hypothesis

a. *The refuse and impossibility of expressing the consent.* In view of the right to freely express one's consent, the patient can refuse the proposed intervention, or, if it is already being performed, he can ask for its interruption. The obligation to inform imputed to the medical personnel, regarding all the consequences of the refuse, namely of the interruption of the procedure, operates in this phase as well. The consent and refuse of treatment are "expressions of the patient's right to self-determination, opposite sides of the same coin. When the consent to the treatment is necessary from a legal point of view, the refuse of a capable (competent) patient acts like a veto towards the forbidden treatment. If the physician were to ignore such refuse, his action would be illicit and would represent a constraint"[19].

In the event when the sick has autolytic (suicidal) tendencies and refuses medical care in the emergency unit, the physician's dilemma regards the possibility of intervening. An express refuse to benefit of a therapeutic act means, in fact, that the physician is denied the right to exercise his profession[20]. On the one hand, the physician is aware that the patient needs specialized care and foresees the deterioration of his state of health; on the other hand,

[18] O. Ungureanu, *Persoana fizică* (*The Natural Person*),[in:] O. Ungureanu, C. Jugastru, *Drept civil. Persoanele* (*Civil Law. The Persons*), Editura Hamangiu, Bucharest 2007, p. 44.
[19] A. T. Moldovan, *Tratat de drept medical* (*Treatise of Medical Law*), Editura All Beck, Bucharest 2002, p. 330.
[20] O.-C. Sima, M. C. Vicol, *Consimţământ informat şi vulnerabilitate* (*The Informed Consent and Vulnerability*), 'Revista română de bioetică', vol. 5, No. 4, October – December 2007, http://www.bioetica.ro/bioetica/ie2/info.jsp?item=10327&node=1695).

the observance of the sick's autonomy means non-intervention, if this is his wish[21]. The law does not contain provisions for such a hypothesis. The solution is the performance of the medical act with the consent of the legal representative or of his kin, if the person in question does not have discernment. However, there should be an express mention of the cases that, exceptionally, allow the physician to act over the patient's will if his autolytic tendencies and unfavorable evolution of his state of health are proven through a medical examination.

The second situation regards the person without discernment, found in a situation of emergency, and whose representative cannot be contacted. The consent of the legal representative or of the closest kin can be substituted, at the physician's request, with the authorization of the tutelary authority. It can also be acted without this approval if the time required for the approval to be obtained would irreversibly endanger the health or life of the sick.

The law on the rights of the patient adds another hypothesis in which the medical act does not involve the prior consent. When the patient cannot express his will, but an emergency intervention is necessary, the medical personnel have the right to deduce the consent from a previous express of will of the first. The text refers, in this wording, both to the minor and to the mentally deficient, and to the adult that has discernment but is found in a circumstance that prevents him from expressing his will (for example the person that suffered injuries and is unconscious).

b. Sometimes the diagnostic treatment performance requires ***the procurement of certain biological products from the patient's body.*** The consent is compulsory for their procurement, collection, storage and use.

Consent within a bioethical context

The medical deontological code sets forth the principle of consent and the rules of the experiments performed on humans. Title VI of Law No.95/2006 states the general conditions for the procurement of tissues and organs from living or deceased donors.

The G.O. No.57/2002[22] creates the current general frame for the performance of the activities of scientific research and technological development, considered as main components of the social and economic progress. Taking into consideration that through its

[21] *Ibidem.*

[22] The initial text of the Ordinance was published in the 'Official Monitor of Romania', Part I No. 643/30.08.2002 and was subsequently altered.

pioneer character the biomedical research can be the source of some major accidents, with significant consequences, in the long run and in the near future, we can expect to find it in a comprehensive legislative framework.

The new Civil code brings novelties, regulating, after the French model, current problems regarding the genetic selection; the examination of the genetic characters; the identification based on genetic prints; human clonation; the procurement and transplantation of tissues, cells and organs; the medically assisted human reproduction (the last two only compendious, with reference to special laws).

Correlatively to the right to life, life to health and right to integrity, the new Romanian Civil code regulates aspects essential to bioethics: the interventions on genetic characters, the examination of genetic characters and the medical interventions on men.

a. Interventions on genetic characters. The new Civil code introduces under this title the provisions regarding the interventions on genetic characters. In fact there are regulated two types of biomedical activities: those that regard the individual genetic patrimony and those that concern the genetic patrimony of humanity.

The individual is protected by the interdiction of interfering with the genetic characters of a person, in such a manner as to alter his origin. The sole exception is admitted for the purpose of preventing or treating genetic maladies[23]. The individual genetic patrimony is transmitted from generation to generation[24]. It represents the human genome or, other said, the assembly of characteristics peculiar to a certain individual, contained in his D.N.A[25].

The genetic material of the human species forms the genetic patrimony of humanity and requires special regulations. Certain legislations have already adapted, such as the French Civil code, constantly reviewed, according to the major practical imperatives. According to Article 16-4 paragraph 1 and 2 of the French Civil code[26], "Nobody can cause injuries to the human species. Any eugenic practice intended to the organization of the selection of persons is forbidden". As it was stated, this legal norm approaches the most important values at the scale of the entire humanity, in a vision that extends a national impulse to a universal

[23] Article 63 paragraph 1 of the New Romanian Civil code reproduces Article 16-4 paragraph 3 of the French Civil Code.
[24] Regarding the individual genetic patrimony, see: G. Cornu, *Droit civil. Introduction. Les personnes. Les biens,* 8e édition, Montchrestien, Paris 1997, p. 180.
[25] http://www.mon-genome.com/patrimoine_genetique.php (page visited on December, 5th 2010).
[26] *Code civil...,* édition 2011, Dalloz, Paris 2010, p. 131-132. The autopsy performed in accordance with the law cannot be regarded as violating the integrity of the body or of the human species (Administrative Tribunale Nantes, decision of January, 6th 2000, in *Recueil Dalloz,* 2000, *Informations rapides,* 101; *Semaine Juridique,* Édition Générale, 2000, II, 10396, *note* S. Prieur).

approval[27]. The necessity of a change had already existed in our law too, and the new Civil code brings the legitimate provision, long waited, that no injury may be brought to the human species. Next are the provisions that forbid the practices that organize human selection (Eugenics). The provisions of the Romania fundamental law must be updated to the times we live in and to the modern provisions of the European states. Alone, Article 22 of the Romanian Constitution, which states that the rights to life and to physical and mental integrity of the persons are guaranteed, is insufficient.

Also, the techniques of medically assisted human reproduction cannot be used in order to choose the gender of the future child, as this represents a form of Eugenics. The exception is given by the situation in which the procedure would be useful in avoiding serious hereditary maladies which are connected to the child's gender.

We make further mention presenting the provisions of the Code of medical deontology (Article 47) that underlines that, any medical intervention on the genetic characters aimed at altering the descendants of a person is contrary to the scope and role of the profession of physician. The exceptions are the situations that regard the prevention and treatment of genetic maladies in which case all adequate authorizations must be obtained. Furthermore, the interventions that aim at creating a human being genetically identical to another living or deceased human being; the creation of human embryos for research purposes; the interventions aimed at determining the gender of the future child, are forbidden. The exception is given by the situation in which the procedure is useful in avoiding serious hereditary maladies which are connected to the child's gender.

b. Examination of genetic characters. The code uses "Examination of genetic characters". In fact there are regulated two distinct issues: the genetic study of the person's characteristics for medical and scientific purposes and the person's identification using the genetic print, within the judicial procedures. The application area of the genetic methods is significant due to the fact that the nucleic acid is found in every cell of the body[28].

The medical or scientific study of the individual genetic characters is limited to the medical purpose and to the scientific outcome, aimed at enriching the knowledge on the matter. These texts are taken from the French Civil code (Article 16-10 paragraph 1). Unfortunately there is no provision on which is the main-condition of the genetic study

[27] G. Cornu, *Droit civil. Introduction. Les personnes. Les biens...,* p. 180-181.

[28] It was mentioned in the literature on the matter that the sole cells of the human body that do not contain DNA (not having a nucleus) are the red globules or the red blood cells. The blood, however, appears as an assembly made not only of red globules, but also of other elements that can be dissociated in laboratory conditions, so that it cannot happen for those that investigate the crime scene to find no cells that carry DNA. (see: E. Stancu, *Tratat de criminalistică* (*Treatise of Criminalistics*), Editura Actami, Bucharest 2001, p. 183).

(unlike the French Code) – the consent of the subject. The examination of the individual characters in the absence of the previous, express, revocable at any time and written consent is unconceivable.

The genetic print is possible within the criminal and civil lawsuits or in other situations when the law allows it for medical or scientific purposes.

Hence it appears that, during the criminal lawsuit, the measure of identification based on the genetic print may be ordered by the prosecution body or by the court. We are witnessing one of the most spectacular identification techniques, which appears as an indispensable instrument, especially for the criminal field. The literature on the matter rested upon the analogy between the digital print and the genetic one. Thus, it was outlined that the two notions have in common only the capacity to reflect one of the fundamental features of living organisms: the biological uniqueness. The word *print* means, *strict sensu,* the trace left by an object on a plastic surface. Thus, the term *genetic print* appears as being improper, and for this reason the tendency in the literature is to use as synonymous expression, the DNA profile[29].

The names under which this method of investigation is known, the evidence of the DNA profile, the DNA analysis, or the genetic print – *DNA fingerprinting* – are taken from the language of other law systems that have validated it by means of the jurisprudence, or some even by means of the law. Here are some definitions given in the doctrine to the genetic print: genetic method used in order to determine "the dimension of the discontinuous fragments of DNA, hyper variable, that contain target sequences, for the purpose of identifying the persons they belong to"[30]; the totality of the structural characteristics of the genetic material, that lead to the identification of the individual[31]. The DNA genotyping represents in fact, the means of identification that consists of a sequence of analysis based on techniques that belong to the molecular biology, capable of identifying an individual with precision.

In what the civil lawsuit is concerned, the new provisions of the code seem incomplete, since the principle of availability operates in this field, the measure of examining the genetic characters are not suitable for all litigations. In general, the cases that have as an object the establishing of the filiation connection involve the genetic analysis. The French

[29] D.T. Ştefănescu, L. Bărbării, *Un mijloc de probă revoluţionar – amprenta genetică* (A Revolutionary Means of Probation – the Genetic Print), 'Dreptul' No. 9/2001, p. 99.
[30] N. Văduva, *Controverse privind valoarea probantă a expertizei amprentelor genetice* (*Controversies Regarding the Probatory Value of the Genetic Print Expertise*), 'Dreptul' No. 2/2005, p. 155.
[31] D.T. Ştefănescu, L. Bărbării, *op. cit.,* p. 99.

Civil code embodies express provisions in this respect and lays down the condition of the express consent of the living person. The genetic printing after the person's decease is forbidden.

We mention that the participation or involvement in an activity of identification of a person based on her genetic prints, otherwise than within a legal civil or criminal procedure or for strictly medical purposes or for scientific research, represents, according to Article 47 of the Code of medical deontology, one of the limitations brought to the research on the human being.

c. Medical interventions on men. The new Civil code refers, *in terminis,* to the medically assisted human reproduction, the procurement and transplantation and to experiments, tests, other interventions for therapeutic or scientific purposes.

Artificial procreation. For the first time a Romanian Civil code embodies problems connected to the field of the artificial procreation in a distinct section[32]. For the picture to be complete, we are waiting for the adoption of the law to which the code refers. For the time being, we have the bill of the Law on the medically assisted human reproduction, adopted by the Senate on December, 9th 2009.

The new Civil code regulates only in segments the artificial procreation, from two points of view. Firstly, because only one of the techniques of medically assisted reproduction is approached – that involving a third donator. Secondly, the assisted reproduction is approached only from the perspective of filiation, being placed within the title that refers to kinship, in a section of the chapter entitled "Filiation". Explicitly, the new Civil code states that the legal regime of the assisted human reproduction involving a third donator and the ensuring of the data that refer to it, are established by means of a special law.

The medically assisted human reproduction represents an important medical act that involves a complex of treatments and procedures. Nowadays, several methods are used, each including other procedures. The new code mentions the artificial insemination (with the partner's sex cell[33] and the insemination with the cell of a donor) and the *in vitro* fertilization (technique that consists of the fecundation of a feminine gamete and of a masculine one in

[32] For the presentation of the texts regarding the assisted human reproduction within the Romanian Civil Code: I. Turcu, *Dreptul sănătăţii* ..., pp. 430-431.

[33] In the expression of the bill of law on the assisted reproduction, the partner is the member of the couple that benefits from the medically assisted reproduction and that partly or completely contributed or, in certain cases din not contribute with genetic material.

conditions of laboratory, while the resulted embryo is transferred into the uterus with the purpose of further implanting and developing of the fetus).

At the present time, it is envisaged the usage of several procedures that fall into the *in vitro* fertilization. We enunciate them as they appear in the bill of law: the *in vitro* fertilization with gametes from the beneficiary couple (the embryo is created in the laboratory and implanted then – this method is used when the embryo cannot be obtained through a natural process, despite the fact that both the parents are fertile); the fertilization with gametes from third partners and the implantation in the uterus of the female; the fertilization with the egg cell of another donor female.

Procurement[34] *and transplantation*[35]. Currently, these two activities have a major importance in saving lives. From an experimental procedure to a therapeutic one, transplantation has become a gift of life, a gesture of maximum generosity, of maximum altruism. The French sociologist Marcel Mauss characterized the gifts of life by freedom, duty, generosity and personal interest. The organ transplantation is defined through a set of symmetric duties (to offer, receive, search, reward), which, according to him, govern all gifts of life no matter how spontaneous and expressive they may seem[36].

Within a general framework, the Code of deontology of the Romanian College of Physicians, sets forth that the procurement and transplantation of organs, tissues and cells of human origin from living donors is performed exclusively in the cases and conditions stipulated by law, with the written, free, prior and express consent of the persons and only after their previous information on the procedure's risks.

The consent is revocable: in all cases, up to the moment of procurement, the donor can take back his consent. With the exception of the cases expressly regulated by law, the procurement of organs, tissues and cells of human origin from minors as well as from living persons that lack discernment due to a medical disability, a serious mental disorder or other similar reason, are forbidden (Article 45 of the Code).

The two operations (the procurement and the transplantation) are detailed in Law No. 95.2006, Title VI. They are procedures that can only be performed, as a rule, on the donor above the age of majority, after obtaining his informed, written, free, previous and express

[34] The procurement involves the collection of organs, tissues or cells of human origin, morphologically and functionally healthy, with the exception of the auto-transplantation of stem or haematopoietic cells, when the cells are collected from the patient for the purpose of transplantation.

[35] The transplantation is the medical activity through which an organ, tissue or cells, are implanted or grafted in the organism of a patient, for therapeutic purposes.

[36] See L. Cocora, B. Ioan, V. Astărăstoae, *Bioetica stărilor terminale* (*The Bioethics of Terminal Stages*), Editura Universităţii „Lucian Blaga" din Sibiu 2004, p. 218.

consent. We agree with the opinion that we are in the presence of a special consent[37], the physician cannot skip the part of informing with the argument that the act of procurement presents common minimal risks. In order to warn the donor of the gravity of the act of procurement, the specialist is compelled to inform him of the possible risks and consequences on a physical, psychical, family and professional level[38].

The patient's consent must be given in writing, by means of a declaration according to that attached to the law. One of the faults of Law No.95/2006 is that it does not personalize the consent. The informing owed by the physician (or other persons settled by law) is personalized for the purpose of protecting the persons that resort to these techniques. An approval expressed in relation to the state of health of the person involved, or to the qualities or personal circumstances, would have been beneficial. Furthermore, in the literature the authors mention that the text of the law "pushes the duty to inform lower and lower on the scale of competences, assimilating the informing made by the social assistant or other person with medical preparation (the specialization required is not mentioned) with that made by the physician"[39].

Usually, donors have to have reached the age of 18 at the moment of procurement. In what the living minors are concerned, the procurement is possible only in the case of the hematopoietic stem cells[40], only if the minor reached 14 and there is the written consent of his parent, tutor or legal representative. The previous investigation performed by the representatives of the tutelary authority is compulsory. The oral or written refuse of the minor represents an obstacle for the procurement.

The procurement of human organs, tissues and cells for therapeutic or scientific purposes from deceased persons, is particularly regulated. Under the strict condition of the consent, it will also be verified whether, during his life, the deceased expressed his written consent or, in the absence of this, the written, free, prior and express consent was given by, in this order, the surviving spouse, parents, descendants or, finally, collateral relatives up to the fourth degree (Article 46 of the Code of medical deontology).

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[37] See: O. Ungureanu, *Reflecţii asupra protecţiei corpului uman. Prelevarea şi transplantul de ţesuturi şi organe umane* (*Reflections on the Protection of the Human Body. The Procurement and Transplantation of Human Tissues and Organs*), 'Acta Universitatis Lucian Blaga', No. 1/2001, p. 24. According to the former law (Law No. 2/1998 on the procurement and transplantation of human tissues and organs) the same condition regarding the consent of the living donor was required.

[38] *Ibidem.*

[39] I. Turcu, *op. cit.,* p. 505.

[40] The stem cells have the quality of converting in any other cell of the human body. They are numerous in the body of new born; they can be procured from the umbilical cord and may be further used if the same child gets sick of one of the diseases that can be treated. So far, these diseases are leukemia, diabetes etc. (I. Turcu, *op. cit.,* p. 504, note 1).

Other intervention for therapeutic or scientific purposes. Certain provisions regarding the activities associated with biomedical research[41] are found in the Code of medical deontology. Any activity of medical research will be performed with the strict observance of the fundamental principles of the physician profession in full respect to the human being and species and with the strict observance of the conditions stipulated by law and the profession's norms.

The values that prevail within the medical research on human subjects are life, health, intimacy and dignity. The individual's interest prevails over the interest of society or of science. Moreover, it is mentioned that the research destined to the medical progress (the research without therapeutic purpose) can be performed on human only exceptionally. The only justification allowed would consist of the improvement of the prophylactic, diagnostic and treatment methods, the understanding of the etiology or pathology of a malady. According to Article 41 of the Code of medical deontology, the medical research whose subject is the human being has an exceptional character and is possible only if there is no other alternative method to the research on the human being, of comparable efficiency and the risks to which the person may be exposed are not disproportional in comparison to the potential benefits of the research.

The participation of the human subjects to these researches respects the rule of the consent[42], after a rigorous informing with regard to the purposes, methods of research, risks and anticipated benefits. At any time the person may revoke her consent to the clinical experiment and leave the research. In what minors are concerned, the consent will be given by the family or legal representative, the approval of the minor to participate in the research also being necessary. It is required a maximum of prudence in using minors to medical experiments and this can only be possible when the risks are minimal.

The researches performed for therapeutic purposes represent the application for the first time on a human of certain medical or surgical procedures and will exclusively be performed for curative purposes. In such researches there has to be a just proportionality between the risks of the new procedure and the gravity of the case, in favor of the sick one; the possible dangers of the new procedure should not be more severe than the probable evolution of the basic disease or of the know and used treatments. The artificial inducing of a disease on healthy individuals for experimental reasons is forbidden.

[41] With regard to the types of biomedical research, see: J. Penneau, *Le cas particulier de la recherche médicale,* [in:] D. Truchet (sous la coord. de), *L'indemnisation de l'aléa thérapeutique,* Sirey, Paris 1995, p. 45.
[42] The consent of the person represents the elementary condition of the biomedical researches also within the French law. For a synthesis of the testing conditions of the new treatments on men, see G. Cornu, *op. cit.,* p. 175.

De lege ferenda, the detailed regulation of the experimental protocol would be necessary, in relation to the type of experiment (research for therapeutic purposes, research without therapeutic purposes) and to the particularities of the content of that operation. Momentarily it is only generally regulated, that the research project has to be approved by the court or competent authority, after being previously subject to an independent examination of its scientific pertinence, including an evaluation of the importance of the object of research and a multidisciplinary examination of its acceptability on an ethical level. Normally, the protocol has to embody in detail all the predictable risks and advantages, the ethical aspects involved in the research, the responsibility of the medical staff for the possible failures, including in the form of victims' compensation. In addition to this it would also be preferable to create a special organism, formed by experts that would have the prerogatives in the field of the medical research on human subjects. In certain respects we may take after the French model of the National Ethic Consultative Committee for the sciences of life and health, established by means of Law No. 800 of August 2004 on bioethics[43].

Sports Activities[44]

Contact games (box, rugby, martial arts) imply a dose of violence that participants accept prior to engaging in the game's action. The serious or deliberate breach of the competitive rules brings about the liability of the author of the personal injury. Such sports involve "consented" injuries caused by each participant to their physical integrity. The consent must be seen as regarding only the performance of the sports activity, following the agreed rules. Under no circumstances will the author be exonerated from liability if he exceeds the regulated frame of the sport in question.

Consent within the context of personality rights

1. *The priciple of consent*

The consent to the exposure of personality rights

Either legislatively regulated in some legal systems or deduced and confirmed through jurisprudential or doctrinal means, the principle of consent is unanimously accepted as a condition of the disclosure or exposure of personality rights.

[43] http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000441469 (text consulted on December, 20th 2010).

[44] G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la responsabilité,* 3e édition, Librairie Générale de Droit et de Jurisprudence, Paris 2006, p. 591.

In our legal system, the principle of consent was regulated for the first time in the new Civil code. It governs the entire field of personality rights. It is expressly stipulated in relation to the private life, right to dignity, right to one's own image, to the respect owed to the deceased person. Article 74 of the Romanian Civil code establishes the interdiction to use, with bad-faith, the name, image, voice or similarity to another person.

Few *provisions* regarding the consent in relation to personality rights:

a. *the consent must be interpreted restrictively,* in terms of its object.

The hypotheses that may occur are diverse:

- The authorization given for the disclosure of personality rights within a given operation cannot be extended to the disclosure of the right in question to other beneficiaries or another context than the one agreed initially. That one that allowed, for example, the publishing of his photography in a certain magazine is not assumed to have approved to the transfer of the cliché in favor of another publication. In cases such as the latter, compensation is present in the practice of the courts and the sums awarded are significant. In a case, the plaintiff P.C. and her fiancée gave an interview to a specialized agency and handed the photos destined to illustrate the text. They did not claim for any sum in return as the advertising campaign benefited their image. Later, the agency conceded clichés of the photos to another company and this, in turn, gave two photos to a weekly newspaper. The Court of Appeal of Paris correctly established that the plaintiff had not authorized the successive concession of the photos to other publications and awarded important compensation, to an amount that greatly exceeded the symbolic franc[45];
- The use of personality rights requires the current consent of the holder (subject); the consent is presumed to be given for a certain circumstance, in the absence of a contrary express provision (written, for example, in the contract);
- The consent for the use of personality rights for a given operation cannot be extended to other operations (the consent for taking the image does not automatically involve the consent for the media broadcasting of the image);
- The consent is presumed to be given for the correct manipulation of the personality right in question, not for a use that is deformed or detached from the context. For example, the physician that lectured within a conference organized by a manufacturer

[45] See: R. Lindon, *Les droits de la personnalité,* Dalloz, Paris 1974, p. 37 (*Clark* case).

of cosmetics has implicitly agreed to the reproduction of his image for the illustration of the presentation report of the event and not to the appearance of the photo in a magazine with the purpose of advertising the products[46].

b. the consent can be expressed in any manner, the law does not impose a certain form. The text of Article 73 is permissive under this aspect, mentioning that in the exercise of the right to one's own image, any person can forbid or prevent the reproduction, of any kind, of his physical appearance or that of his voice or, if need be, the use of such reproduction. Furthermore, Article 76 recognizes a presumption of consent that dispenses any written agreement. No matter the manner of expression of the consent, it is important to clearly result the object and extent of the holder's consent. For instance, certain attitudes implicitly express the subject's will to the reproduction of the image: taking, at the photographer's initiative, the specific posture and keeping it until caption, clearly expresses the wish to be photographed.

In all cases, it is advisable for the consent to be express, especially when the circumstances that are about to be revealed belong to the sphere of private life.

In relation to the obligation of keeping the professional secrecy, the problem of the consent to disclosure is not raised. That one that entrusts information to the professional he resorts to, does not agree to the disclosure of the secret. Within the field of professional secrecy, we also cannot talk about accepting the risk that confidential information can be revealed.

2. *Presumptions of consent*

- When the actual person to which the information or material refers to, hands it over to a natural or legal person known to activate in the field of public information, the consent for their use is presumed;
- The consent is presumed to be given for capturing the image of the person when she participates in public events. In the context of some artistic manifestations (concerts of show celebrities), the image can be captures and reproduced later even without express consent. For such hypothesis, relevant is the public character of the manifestation even if the space where it takes place is private. The statement is not valid if the person

[46] *Ibidem,* p. 80.

refuses the fixation and broadcast of the image. The refuse has to be explicit or to result beyond doubt from certain circumstances[47];

- The authorization is presumed for the capture and/or broadcast of the image while the person is exercising her profession or a public activity (besides the manifest opposition of the one in question). We add the indispensable condition that the image is later presented for the sole illustration of the event that occasioned the capture.

The presumption of consent is based in the last two situations on the public nature of the event and on the public's right to information. The broadcast of certain images in shows with an informative character regards the public. The latter has the right to know subjects of interest and to the text-information broadcasted in the mass media, frequently, images are attached.

Obviously, the right to information, even if it belong to the public, must be invoked with great prudence, since this right does not legitimate, in any circumstance, the violation of the personality rights on the ground of a presumption of consent.

Hypothesis that require damage reparation can occurs when the public's right to information interferes with the right to one's own image and the freedom of expression – and the image is captured in a public place. In a real case, the images were captured with the occasion of a manifestation to which persons with homosexual orientation participated. After approximately 10 months after the event, a magazine published an article accompanied by a photo that presented two of the participants –this time in foreground. The plaintiffs claimed compensation before the French courts[48] and they established the violation of the right to image and the right to private life.

At least two problems arise, in relation to the solution of admission of their request of compensation: the existence of the harmful violation and, in affirmative case, the eventual legitimacy by invoking the public's right to be informed and the media's freedom of communication.

In relation to the first aspect, we believe that the right to image was harmed through the manner in which the captured photo was processed and used. Despite the fact that to the manifestation a great number of persons participated, the photo that was broadcasted represented just the two of them which allowed their easy identification. Moreover, the image amplified by technical means was used in a completely different context than the one that

[47] P. Andrei, E. Safta-Romano, *Protecţia juridică a dreptului la propria imagine* (*The Legal Protection of the Right to One's Own Image*), 'Dreptul', No. 5-6/1993, p. 51.
[48] For observations on the case, C. Caron, *Droit à l'image d'un manifestant et révélation de son homosexualité,* 'Recueil Dalloz', No. 23/2003, *Sommaires commentés*, p. 1533.

occasioned the capture and after a long period of time. It is very true that the public has the right to be informed of events of interest and the information concerning the public manifestations, accompanied by images of the groups of participants (without the possibility for one or another of the individuals to be identified in a close plane) are currently broadcasted and respond to this request. In such a framework, the photos are just an accessory element to the story.

At the same time we cannot lose sight of the circumstances that stamp the peculiarity of the case. The right to image and the right to private life are notions having a dynamic character, under the pressure of the conceptions that function within the society at a given time. Both rights are analyzed in close connection to the current social perception of certain states of fact, events etc. This is also the case of the homosexual orientation in relation to which, in the majority of the cases, those involved prefer to keep the discretion and control of disclosure.

We believe that for each case, it is necessary to reconcile the public interest in knowing topical subjects, with the right to image and namely, the right to private life. In the absence of the express consent, zoomed, foreground images, could not have been revealed. In the mentioned case, the authors of the material must have resorted to other modalities of broadcasting the information, in such a manner that would neither lead to the restraint of the freedom of journalistic expression, nor to the violation of personality rights[49].

Consent to the processing of personal data

Any type of activity that raises aspects of private life, observes the rules regarding the processing of personal data. The new Civil code makes reference to the special law, either Law No.677/2001[50] or Law No. 506/2004[51].

Law No. 677/2001 has as a purpose the protection of the fundamental rights and freedoms of the natural persons, especially of the right to intimate, family and private life, with regard to the processing of personal data. This is the first Romanian law that regulates the issue of private life within the information society. The real threat that the computer techniques represent for the personality rights, the adoption by the Council of Europe of the Convention No. 108/1981 for the Protection of Individuals with regard to Automatic

[49] C. Caron, *op. and loc. cit.*
[50] Law No. 677/2001 on the protection of personal data, the processing of personal data and the free circulation of these data was published in the 'Of. M. of Romania' No. 790/12.12.2001.
[51] Law No. 506/2004 was published in the 'Of. M. of Romania' No. 1101/25.11.2004.

Processing of Personal Data[52], the existence of the community directives on the matter and the requests of aligning our country at the European Union's standards have determined the initiative of the Romanian legislator. The protection of the private life within the sector of the electronic communications enjoys a distinct regulation – Law No. 506/2004 – Law No. 677/2001 representing the common law.

The personal data that can be processed are information referring to an identified or identifiable natural person. Usually, the information regarding the individual's state of health cannot be processed, unless for the event of the expressly mentioned exceptional situations. These data can be collected only from the person in question. Thus, the collection using other sources has an exceptional character, when the person refuses to supply them or is incapable of doing so, and the absence of the data would endanger the purposes of the processing. The operation of processing is performed under the supervision of a member of the medical staff, respecting the professional secrecy and with the actual and written consent of the person in question.

2.Acceptance of risks

Significations

Article 1355 paragraph 4 Civil code sets forth that "the declaration of acceptance of the risk of suffering damage does not constitute, in itself, the victim's waiver to the right to compensation". We distinguish between the acceptance of the risk and the acceptance of damage. By accepting the risk of an activity, the victim does not agree to the emergence of damage. She accepts the performance of the activity – including the risks that are inherent to it – but does not accept the occurrence of the damage. The acceptance of risks is also present in the non-contractual liability; such an acceptance does not represent the victim's waiver to the right to compensation for the damage suffered.

The acceptance of risks means the deliberate exposure to a real danger that results from the performance of a certain activity[53].

Field of application

The literature on the matter and the judicial practice have came up with solutions in what concerns the sports and the medical field, as areas exposed to bodily injuries. However,

[52] The convention was published in the 'Of. M. of Romania' No. 830/21.12.2001.
[53] G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la reponsabilité...,* p. 586.

it is equally true that in general, the resort to the service of a professional induces a dose of risk in what concerns the confidentiality of the information entrusted to him.

The acceptance must regard two categories of risks: the normal risks of the activity and the abnormal ones[54]. *The normal risks* are tangential, especially, to the injuries brought to the integrity of the natural person. Within the sports competitions, in general, the injuries lack gravity and are justified by their nature and scope. The field of application of the rule of risk acceptance is restricted to the participants to the competition. They accept the risk involved by football, volleyball, handball, horse races, gymnastics acrobatics, riding, etc. The immediate mention is that, in all situations, the acceptance of the risks is valid only in the event of the compliance with the rules peculiar to every sport.

The normal risks, natural in any activity, involve the compliance with all the rules; liability is fully imputed if the rules are violated. "La faute de jeu", namely the technical mistake, justified by the implication (within the limits of the regulation) in the particular action for that activity, is admitted; "la faute contre le jeu", namely that illicit conduct that exceeds the regulatory framework and brings about civil liability (perhaps even criminal liability) is not permitted. *The abnormal or excessive risks,* occur for instance when the spectators are placed, recklessly, too close to the race track or in prohibited places or exposed to the danger of skidding.

Regardless of the risks in question, the acceptance of risks is not equivalent to the victim's waiver of her right – to claim and be awarded compensation. A series of decisions attest the fact that, for the normal risk, no compensation was given. The liability of the author of the damage was not established especially in the cases of contact or dangerous sports[55]. In the case of assuming excessive risks the practice established also the fault of the victim that claimed compensation[56].

Within the medical field, prior to the enforcement of the new Civil code, the clause of risk acceptance was considered the most important case of exoneration from civil liability of

[54] *Ibidem,* p. 586-588.

[55] For instance, the Poitiers Court of Appeal, decision of 15 June 1960; the French Court of Cassation, first civil chamber, decision of 8 February 1961 (riding); ; the French Court of Cassation, second civil chamber, decision of 20 November 1968, 16 July 1969 (acrobatic games), 15 May 1972 (football), 21 June 1979 (football), 11 June 1980 (Greco-Roman fights), 9 July 1986 (horse races), 28 january 1987 (squash), 5 December 1990 (French box), 10 April 1991 (horse races), 3 July 1991 (volleyball), 20 January 1993 (ice-skating), 18 November 1993, 16 December 1999 (American football). The decisions are quoted after G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la reponsabilité...,* p. 586, footnote No. 1128.

[56] For example, the French Court of Cassation, first civil chamber, decision of 7 February 1966, 30 January 1968; Nîmes Court of Appel, 25 February 1969, the French Court of Cassation, second civil chamber, 7 March 1984, *apud* G. Viney, P. Jourdain, *Traité de droit civil. Les conditions de la responsabilité...,* p. 588, footnote No. 1136.

the health unit, as an expression of the theory of accepted risks. The patient properly informed of the potential risks of the medical act, accepts the risks, consenting the performance of that procedure. Thus, he assumes responsibility for the damages suffered by the occurrence of those risks and the health unit is free of liability[57]. We believe that, when rights that are intimately linked to the human person, such as the right to life, right to physical and mental integrity, right to health, are in question, any case of exoneration or limitation of liability, even in the form of risk acceptance- must be excluded. The only exceptions are allowed on the grounds of the express provision of the law, such as in the case of medical care in emergency situations.

[57] F. I. Mangu, *Malpraxisul medical. Răspunderea civilă medicală* (*Medical Malpractice. Civil Medical Liability*), Editura Wolters Kluver, Bucharest 2010, p. 612.