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# DIFFICULTIES OF THE EVALUATION OF CORPORATE DAMAGE

**Călina JUGASTRU**[1]

**Abstract**

*The Romanian Civil Code follows the internationally promoted line in the right for repairing the corporeal injury. First of all, it uses a new classification of the prejudices - a tripartite classification of the Quebec Civil Code: material damages, non-patrimonial damages and corporeal damages. It is then welcomed the regulation (even incompletely) of some of the non-patrimonial components of the corporeal prejudice (such as the recreational prejudice, in article 1391 paragraph 1 of the Civil Code); the regulation of the reparation forms, both for the material damage and for the extra-patrimonial damage; the regulation (again, incomplete) of the non-patrimonial damage of the indirect victims (damage by ricochet); regulating the prejudice consists in losing the opportunity, the source being the offense or the contract; the inclusion, in the reparable damage, of the expenses incurred in order to avoid or minimize damage.*

**Keywords:**

*Bodily injury, elements, assessment, difficulties, criteria*

## A. Preliminaries

The increasing interest of the victims, to obtain full reparation of the damages, correlated with the obstacles encountered in the practice of repairing the damage have led to the crystallization of a specific level. The right to repair the body injury is a reality, validated first and foremost by jurisprudence. The doctrine, in particular the one from abroad, has only complied with the need to offer fair satisfaction to the victims, consecutive to the violation of the right to physical integrity and the right to health. The poor legal system for repairing the bodily injury has raised concerns for the correction of the deficiencies and for the trial in equity. The right to repair the bodily injury is interdisciplinary. The identification of the appropriate benchmarks and the actual constructive approach are marked by difficulties. A steady lean towards the problem of corporeal injury brings to the fore a small number of states that would channel the energies towards practical / theoretical solutions of viability. From jurisprudence to doctrine and then to legislative, the route is not linear, and unanimity is virtually impossible. It is

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possible the convergence – of the efforts, vision and proposals, so that the principles of repairing the bodily harm would resonate with the indissoluble rights associated with the human personality. The multitude of implications / consequences present in the bodily injury right outlines this level of reparation as being, probably, the most profoundly associated with human solidarity. The rationale for the preoccupation of finding the right solutions derives its essence from the fact that the corporeal injury is the expression of achieving supreme values (Y. Lambert-Faivre, S. Porchy-Simon. (2012) :9; M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :9). The corporeal injury does not simply touch the right to health; the corporeal injury is not a disturbing factor only in the protected area of the right to physical integrity. A wide range of subjective rights generates a complicated equation that protects first-rank values (physical integrity, mental integrity, human dignity, private life).

The Romanian Civil Code follows the internationally promoted line in the right for repairing the corporeal injury. First of all, it uses a new classification of the prejudices - a tripartite classification of the Quebec Civil Code: material damages, non-patrimonial damages and corporeal damages[2]. It is then welcomed the regulation (even incompletely) of some of the non-patrimonial components of the corporeal prejudice (such as the recreational prejudice, in article 1391 paragraph 1 of the Civil Code (S. Neculaescu . (2017):45[3]); the regulation of the reparation forms, both for the material damage and for the extra-patrimonial damage; the regulation (again, incomplete) of the non-patrimonial damage of the indirect victims (damage by ricochet (. Flour, J.L. Aubert, É. Savaux (2009):164-172)[4]; regulating the prejudice consists in losing the opportunity, the source being the offense or the contract; the inclusion, in the reparable damage, of the expenses incurred in order to avoid or minimize damage. It was rightly said that, at a time when the security and integrity of the person are recognized as fundamental rights, the corporeal injury receives its own configuration, aspiring to autonomy,

[2] The tripartite classification is currently found in the doctrine and the laws of some states. The Civil Code of the Quebec province enumerates, between the reparable damages, the corporal, moral and material prejudice, separately for the tort liability (Article 1457) and for the contractual liability (Article 1458).

[3] According to article 1391 par. 1 of the Civil Code, in the event of injury to the bodily integrity or health, compensation may be granted for restricting the possibilities of family and social life. For the critique of the phrase "to restrict the possibilities of family and social life.

[4] The prejudice of the indirect victims or the ricochet prejudice (the reflected prejudice) may be, in turn, patrimonial or non-patrimonial (for distinctions and explanations regarding the two components.

both in doctrine and in positive law (Y. Lambert-Faivre (2000):77; S. Neculaescu (2010):163).

We understand, through "*corporeal injury/ bodily harm* ", "the touches brought to the bodily integrity and the health of a person" (L. Pop (2010) :476). The difficulties of compensating for bodily harm are multiple (in the Romanian law) and we do not propose an exhaustive inventory. We will mention only a few issues that seek resolution, in order to optimize the judicial practice. Among these: the absence of a nomenclature of the corporeal injuries, the regulation that lacks rigor in terms of establishing the date of settlement, the incomplete legalization of the categories of corporeal injury.

## The absence of a nomenclature of the corporeal injury in the positive Romanian law

### The need for an "inventory" of the varieties of corporeal injury

Constantly aware of the limited possibilities for identification, harmonization and indemnification, the jurisprudence has launched the call for legislation. Hence, the systematizations and categorizations converted into nomenclatures, which have the ambition of encompassing the ensemble of bodily injuries varieties. The consistency, the care for the absence of some overlapping between the proposed divisions, the full nomination of the extra-patrimonial damages from the component of the corporeal damage, the legitimation of the correspondence between lesion-handicap-the amount to which the victim is entitled – there are a few requests that have had an echo (as a rule) *of lege ferenda* - although isolated (in certain systems of law) and sometimes limited (in certain matters, such as insurances).

The development of some nomenclatures of the corporeal injury appears as a notable concern of the years 2000s, having as premise national solutions of non-unitary practice. In a wording belonging to the working group coordinated by Jean-Pierre Dintilhac, the aim of developing the corporeal injury nomenclature is to respond to the victims, who are in the position of waiting for an optimal identification and predictability in terms of the bodily damages that can be compensated[5]. In similar terms, the report drafted by the working group coordinated by Yvonne Lambert-Faivre attests to a state of fact that highlights the lack of transparency in the practice of

[5] Rapport du groupe de travail chargé d'élaborer une nomenclature des préjudices corporels (the working group was coordinated by Jean-Pierre Dintilhac), p. 1, available on the page http://www.aredoc.com/system/files/Rapport%20Dintilhac.pdf, consulted at May 30, 2017.

assessing and compensating for the bodily injury, as well as the absence of definitions of the different categories of corporeal prejudice. The harmonization of the eligibility criteria is based on providing a common nomenclature of the corporeal injury. Initially devoted to facilitating the indemnification mission from the social organizations, the topic of the corporeal injury nomenclature has captured the concerns of specialists from diverse areas.

Several steps, in the area of French law, have led to the development of some nomenclatures and some scales that contain correspondences between the type of prejudice and the amounts involved in the indemnification. The usefulness of nomenclatures is proven: law practitioners, in particular, magistrates, lawyers, but also medical experts and the associations of the corporeal injury victims, resort to such advanced solutions, although they have no binding force. Until now, the nomenclatures have not been included in the positive French law. The project of a decree concerning a new nomenclature of the corporeal prejudices, launched in the year 2014, is being debated.

The need for some institutionalized landmarks is also acutely felt in the Romanian law. The finality of the victim's compensation goes through two stages: assessing the damage and assessing the compensation. Both operations reflect a reality with double valence: factual and legal. Both procedures must be carried out under precision, with the mark of equity. The rigorous assessment of the corporeal injury is the premise of just compensation. The repertoire of the corporeal injury categories and the indemnity scale facilitate the task of the courts, pave the way for fair compensation and favor unitary jurisprudence. The benefits of the legislative benchmarks in evaluation / indemnification are incontestable.

Such a difficult task to "replicate in the previous situation" is, in fact, considered a (true) fiction - as some corporeal injuries are irreparable. The magistrate is placed in the position to "erase" the social consequences for seemingly irreversible factual situations (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :9). In the expression of President Dintilhac - evoked, with every occasion of applying the nomenclature that bears his name - the principle of full reparation is a "constructive utopia", in the matter of bodily harm. "To abandon or, on the contrary, to favor one of the two sides of full compensation (*tout le préjudice, rien que le préjudice*) will return, either to leave the area of the possible by compensating beyond what society can bear or by denying the singularity of the individual touch and charging it based on a scale."

Any of the proposed nomenclatures has imperfections. Each of them has the merit of utility (and is a solution that can be adjusted by the magistrate in the evaluation process) on the field of the alternative of inexistence of the positive legal markers. We will stop at the categories proposed by the Dintilhac nomenclature[6], this being, by *lege ferenda*, included in the project of the normative act elaborated in 2014, in the French legal space. It is a landmark nomenclature whose exposure necessarily involves correlations and references to other significant nomenclatures (such as the 2003 Lambert-Faivre nomenclature)[7]. Our references will also refer to the normative act drafted on the basis of the Dintilhac nomenclature and which is at project stage (*The draft of the decree aimed at establishing a new nomenclature for corporeal injury)*. In July 2005, the report of the working group coordinated by Jean-Pierre Dintilhac, the president of the second civil chamber of the French Court of Cassation, was filed. Extremely useful, the Report is explicit and precise in terms of developing a corporeal injury nomenclature. The document also brings innovative elements, which represent, undoubtedly, significant points of reference in any national regulatory approach.

We present, in general and in summary, the variants of bodily harm – a prejudice characteristic to direct victims (immediate), taking the date of consolidation as a benchmark. The inventory of bodily harm knows two major divisions: the temporary prejudice and the permanent prejudice. In cascade, each of these divisions branches into economic (temporary) and extra-patrimonial (temporary) damage, namely (permanent) economic and extra-patrimonial (permanent) damage. "In cascade", each of these divisions branch out into economic (temporary) prejudices and extra-patrimonial (temporary) prejudices, respectively economic (permanent) prejudices and extra-patrimonial (permanent) prejudices. Further, the economic (temporary) prejudice and the extra-patrimonial (temporarily) prejudice each break into a series of "specialized" prejudices. In their turn, the prejudices that are part of the economic (permanent) prejudice and the prejudices that make up the

[6] The Dintilhac nomenclature is available at the address http://www.anvven.net/archives_PDF/Nomenclature_Dintilhac.pdf. The project of the normative act that uses the Dintilhac nomenclature can be consulted at the addresses http://www.justice.gouv.fr/publication/dacs/consult/20141120-projetdecret.pdf şi http://www.justice.gouv.fr/publication/dacs/consult/20141120-projetannexe.pdf (documents available at May 24, 2017).

[7] Raportul privind indemnizarea prejudiciului corporal [The report concerning the compensation of the bodily injury] (elaborated by Yvonne Lambert-Faivre) is available on the page http://www.justice.gouv.fr/art_pix/syntheseindemcorp.pdf 8, consulted at June 15, 2017).

extra-patrimonial (permanent) prejudice can be traced on the sub-elements(M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :63-211).

The range of bodily harm is wide. A careful examination concludes that the description of each category, to the detail, is intended to delimit the types of corporeal prejudices, to compensate for all the corporeal prejudices present in the present case and to avoid double indemnity („pour ne pas indemniser «plus», mais indemniser «mieux»").

**The date of consolidation of the corporeal injury**

The injuries caused by the illicit deed may evolve in the sense of aggravation; they may diminish, or may experience healing at some point. The specialty literature uses the term "*consolidation date*" in order to designate when, according to medical expertise, the lesions have stabilized. The consolidation date is mentioned as a criterion for the delimitation of corporeal damages to temporary and permanent damages. The temporary injuries are those that occur until consolidation, that is, until the stabilization of the victim's condition, with the entire "cortege" of consequential damages. We can talk about permanent damages after the date of consolidation, with the specific incidence of definitive damages.

**The temporary bodily prejudices**

**The temporary patrimonial prejudices include:**

• the medical expenses prior to consolidation: medication expenses; hospitalization expenses; the cost of prostheses; transportation expenses by motor vehicles specific to the medical field; expenditure on medical analysis; paramedical expenses - consultations in the cabinet of a psychologist, physical therapist;

• miscellaneous expenditures prior to consolidation, other than the expenses included in the first category: expenses incurred by the victim exercising a liberal profession in order to be replaced in order to carry out professional acts; expenses for improving the car or dwelling, in order to adapt it to the handicap of the victim; expenses for the person accompanying the victim's child at school or at the ordinary activities (to practice a sport, for example);

• expenses with a third person - the victim's companion during the period before consolidation. This category of expenses arises because the companion is indispensable for the fulfillment of daily activities - for "ensuring security, restoring dignity and compensating the loss of personal

autonomy."[8] Broadly understood, the concept of "third person" covers all areas of social life where the victim was active before the illicit act. Alongside daily life (support for personal hygiene, nutrition), the following are considered: the family sphere (support to leave / to return from / to the home); the social sphere (support to participate in the work of the associations of which the victim is a member, for taking action with public administration authorities);

• professional injury means the total or partial loss of income over the period of time between the date of the injury and the date of consolidation and also some situations related to the victim's "unavailability". This type of injury includes the loss of income and professional opportunities, before the injury was stabilized. Loss of opportunities on a professional level is what may fall within the concept of "loss of opportunity" (for example, the loss of opportunity to take part in a promotion contest);

• school / university / training injury, corresponding to the pre-consolidation period. Here are included: the loss of study years, from any education cycle; the total or partial incapacity of the victim to be educated, as a result of the harmful act.

**The temporary non-patrimonial prejudices[9] (P. Hivert, D. Arcadio, J.-M. Grandguillotte (2007):2)**

The temporary functional deficit is a "difficult" category, because it must be firmly

• delimited by the functional deficit after consolidation and because it brings together more non-patrimonial damages. . In the general lines of judicial practice (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :159)[10], the temporary functional deficit also includes the total or partial functional incompetence, as well as the hospitalization time, the loss or diminution of the quality of life, throughout the illness, until consolidation. Specifically, the temporary functional deficit means invalidity, the temporary sexual prejudice, the disruption of family life (separation of the victim from the

[8] See, Proiectul decretului care vizează instaurarea unei noi nomenclaturi a prejudiciului corporal [The project of the decree aimed at establishing a new nomenclature of corporeal prejudice], op. cit., p. 1.

[9] Regarding the "formalization" of certain categories of prejudices in the Dintilhac classification.

[10] French court of cassation, second civil chamber, May 28, 2009; idem, January 22, 2009, judgments cited by M. Le Roy, J.-D. Le Roy, F. Bibal, *L'évaluation du prejudice corporel*, *Expertises-principes-indemnités*, *op. cit*., p. 159.

family and from entourage, during hospitalization), and deprivation of the opportunity to participate in social activities;

• the temporary recreation prejudice causes discussion in terms of autonomy. The jurisprudence records a non-linear route either in the sense of including the temporary functional deficit or recognizing it as a separate indemnity category[11]. Due to the importance and frequency, the recreation prejudice legitimizes the classification and distinct indemnity. The modalities of implementation are diverse and do not absorb themselves into the temporary functional deficit. The latter is invariably present in all bodily injuries; any impairment of the right to physical integrity leads, temporarily, to a functional deficit. In the sphere of recreational damage, other particular consequences are included, depending on the extra-professional activity and the victim's abilities: the inability to continue practicing a sports activity, to participate in recreational activities - preoccupations which it was proven that it had previously;

• the temporary sufferings. Again, a court practice with a variable route has proceeded in two ways: it either included the sufferings endured in the temporary functional deficit, or it indemnified them separately. Certainly, the sufferings endured do not overlap with the functional deficit. The sufferings endured refer to the ensemble of all physical and moral sufferings (depression caused by the severity of the injuries or by the hospital environment, in case of a long duration of hospitalization) ((M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :165-166).

Physical pains are disagreeable sensory experiences, of varying intensities and are in most cases accompanied by mental suffering (depression, feeling of inferiority due to physical disability, etc.). For example, people who are aware of the condition of paralysis or blindness and are trying to project a life expectancy, go through special psychological traumas, in addition to the inherent physical pains. Even if the pains are more intense on a fragile psychological background, the determining role lies in the unlawful legal act which is the source of the prejudice. The measure of the physical and mental sufferings is, from the point of view of civil liability, the *pretium doloris* or the *le prix de la douleur*. The primary cause of compensation is represented by the medical expertise, in order to assess the

[11] The courts have called for separate disclosure in the medical expertise reports of the temporary recreational injury: Amiens Court of Appeal, January 8, 2014; Nancy Court of Appeal, January 20, 2014; Aix-en-Provence Court of Appeal, October 9, 2014). In the sense of including the recreational prejudice in the temporary functional deficit, see, French Court of Cassation, second civil chamber, decision from March 5, 2015 (*ibidem*, p. 164).

severity of the physical and mental sufferings. The importance of pain is expressed in what we call *quantum doloris*. The medical setting sets the *quantum doloris*, and the judge is called upon to determine the indemnity for the sufferings, that is *pretium doloris*.

In the literature it is claimed that physical pain is a phenomenon that can be quantified [12](M., Boar. (1998):158-159). Even in the absence of legally established criteria or scales, the assessment must take into account a complex set of factors and, obviously, the opinion of the medical staff. At least two aspects become operational: estimating the suffering based on pre-established scientific data and interpreting them in a personalized manner, depending on the victim's situation. The forensic expertise describes the pains, the nature of the investigations required, the duration of the recovery time, the number of lesions. The practice of the French courts has resorted to various scales over time[13]( M. Medina Crespo (2000):28-38). For example, *pretium doloris* has been evaluated on a scale, developed by the forensic doctor, from 1 (low intensity sufferings) to 7 (high intensity sufferings). The corresponding amounts are € 680 and respectively € 25,000, the amounts being appreciated by law specialists as being modest, in relation to the impact of this type of injury over the victim's existence (M. Medina Crespo (2000):226). It is statistically demonstrated that the most serious traumas are usually accompanied by intense physical and psychological sufferings and by a high degree of functional sequelae deficit. Even so, the correlation between categories of prejudices is not mandatory: people who have suffered trauma through high-intensity burns remain with a reduced functional deficit, compared with the extremely intense physical sufferings endured until healing[14]. In the second variant, the injury is assessed on a scale from 1 to 7, qualifying as "very easy" (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :77)[15], "light", "moderate", "medium", "quite important", "important" "very important".

One of the variables that, in practice, can lead to a different amount of compensation is pain sensitivity. The "sensitivity" factor applied to some identical algorithms cannot be ruled out to lead to different finalities. It is

[12] The author mentions that in the forensic practice of some countries an apparatus is used that determines the degree of pain intensity, when the pain is still present. There are also scales which, depending on the lesions found, allow the forensic doctor to appreciate the intensity of the physical suffering even after the painful sensations cease.

[13] The Spanish courts have also used scales in order to assess the bodily harm.

[14] Loc. cit.

[15] The "very easy" rating corresponded to 3,000 French francs, amounting to between FRF 200,000 and 300,000 for a "very important" prejudice.

admitted that, following the corroboration of evidence, especially in view of the medical records, as a result of the same type of trauma, the sufferings endured by a patient are more intense than the sufferings endured by another patient ((M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :169-170). The nature and intensity of pain are differently perceived by each person, depending on age, health, mental balance, and other existential circumstances - the form of professional activity, isolation, ethnicity, etc.;

• the temporary aesthetic prejudice. This kind of prejudice consists in the sum of the injuries, the lesions that harm the physical harmony and the appearance of the person. We are not talking only about mutilation, the scarring, disfigurement caused to the victim, but also the psychic suffering inherent in such situations. *Pretium pulchritudinis* (*prix de la beauté*) is the appropriate compensation for the victim of aesthetic damage. As in the case of the other varieties of bodily injury, medical expertise is essential in determining the injuries. The manifestation forms are scars, hematomas, burns, facial bandages, alteration or temporary loss of the voice. The doctrine captures two dimensions of the aesthetic prejudice: from an objective point of view, it concerns the lesion caused, and subjectively, the capability of the victim to accept exposure to his fellow human beings, in the family and society(M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :176);

• the exceptional temporary prejudice. In practice, it was considered exceptional and fit for compensation: the victim's prejudice caused by canceling the planning of the marriage due to the accident occurred a few days before it; the prejudice suffered by the victims of catastrophes. In case of survival, these victims have as common denominator the strong sense of anxiety (which can degenerate into obsessions), following the catastrophic event.

**Permanent corporeal prejudices**

**Permanent patrimonial prejudices**

• medical expenses. For the expenditures made for medical analyzes, medications, disability-specific equipment, transport, specialized medical advice, the consolidation date will be taken as a benchmark, so as not to overlap with the medical expenses prior to that date;

• expenditures for adapting the dwelling, post-consolidation. The expenditures in this category are among the most diverse. The courts have compensated both the adaptation of the dwelling (in the sense of changing the interior) and the extension of the dwelling for a disabled child. When the

victim's home was not susceptible to change or adapt, the victim was compensated with the price difference between the new home (adaptable to the handicap) and the old home (to which the victim renounced, alienating it) ((M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :99). Among the expenses made for the adaptation of the building, the following were compensated: the cost of masonry works, the expenses for sanitary installations or for adapted means of transport (bathtub, shower, lift); arranging a dwelling or a room for the third person accompanying the victim; legal fees for the purchase of a new home; the cost of admitting the victim to a specialized medical facility, depending on disability;

• expenses for vehicle adaptation. The category includes amounts that are awarded even if the victim does not have a driving license (for example, is a minor) or, even though it has a permit, the disability prevents it from driving. The range of the expenses targeted is generous: costs for gearbox adaptation, assisted steering installation, pedal reversal, remote controls - acceleration, brake, light detector etc.;

• third party costs for victims with permanent disabilities. Not only the support of a third person is compensated in all the situations that I have mentioned when listing the temporary patrimonial prejudices, but also the constant presence of the third person along with the sick person (for example, in the case of the chronic vegetative victims[16]);

• loss of income from the profession, post-consolidation. These expenses include the total or partial loss of income (salaries, bonuses), the loss of some opportunities - employment, promotion, etc.;

• professional incidence, after consolidation. The phrase "professional incidence" was introduced by the authors of the Lambert-Faivre and Dintilhac nomenclatures. Unlike the previous category, this type of prejudice compensates for the profound and lasting repercussions of the illicit deed on the victim's professional life. To the extent that the professional sphere is integrated into a whole - which is the personality of the victim - this category compensates the impairing of the social and professional identity of the victim (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :133-134). According to the report of the working group Dintilhac, compensation takes into account elements such as the devaluation of the

[16] We consider that compensation for the injury if the victim has remained in a chronic vegetative state is the expression of full reparation, by virtue of the principle that crosses civil liability; indisputably, the damage must be repaired "in all its elements" (The French court of cassation, second civil chamber, decision from February 22, 1995), cited G. Légier, Droit civil. Les obligations, 17e édition, Dalloz, Paris, 2001, p. 142).

victim in the labor market or the loss of opportunity for retraining, forced abandonment of the professional activity carried out previously to the accident (career prejudice). Practically, this division takes into account the professional marginalization of the victim due to the illicit deed or, as the case may be, its total exclusion from the professional life (condemnation to inactivity);

• the school / university / training prejudice subsequent to consolidation. Included in this category are the expenses related to the total or partial loss of the possibility of starting or continuing education, including university education. The compensation concerns, for example, the additional costs for studying at a disability-related education institution; the expenditures due to the extension of schooling. The requirement is that all expenses have as their source the unlawful deed.

**Permanent non-patrimonial prejudices**

• the permanent functional deficit represents a complex division, which brings together the final reduction of the psychological / physiological / sensorial / intellectual potential resulting from damaging the integrity, ascertained through medical expertise, as well as the psychological repercussions of the illicit deed. The recreational prejudice is not included in this category, represented by the loss of the opportunity to perform recreational or sports activities. The judicial practice solutions reiterated the complexity of the permanent functional deficit, in a vision that integrates the disturbances that occurred in the conditions of personal, family and social existence[17];

• the permanent recreational prejudice is a widely interpreted category, which includes the impossibility of practicing any recreational or hobby activity, as well as the loss of the chance to carry out such new activities in the future. We do not believe that compensation for the recreational damage is conditioned by a specific frequency of the activities in the victim's past. The object of the test is represented by the fact of practicing the activity (witnesses, photographs, press articles, diplomas attesting to this circumstance). An increased frequency (a sport practiced each winter / every holiday, tours run regularly) may justify a more consistent amount of compensation (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :193-194);

[17] See, Proiectul decretului care vizează instaurarea unei noi nomenclaturi a prejudiciului corporal [The project of the decree aimed at establishing a new nomenclature of the corporeal injury], op. cit., p. 4.

• the permanent aesthetic prejudice. The ultimate alteration of the physical aspect can have significant consequences when the victim's profession is likely to imply a pleasant appearance or when the victim is a young, unmarried person. Such aspects allow the individualization of the compensation at a higher rate.

The assessment of the aesthetic prejudice in order to award compensations calls for a complex of factors. The nature of the lesions, scars, mutilations, the evolution of the deformations that affect the normal aspect of the appearance, especially if they refer to the area of the face or if they involve morpho-pathological changes, like in the nature of a paralysis, are determinant; the loss of an eye, of a tooth[18], a post-traumatic handicap (abnormal walking), paraplegia, etc. The aesthetic damage compensation will also take into account the sex, the age of the victim, the repercussions of the injuries over the victim's possibilities to marry, over the harmony of its marital life, over its professional condition[19]. For example, the cumulation of the recreational damage with the aesthetic damage led to the granting of a total moral compensation of 100,000,000 lei, and from the date of pronouncing the decision of the first instance court, for the entire duration of the injury, a regular benefit of 1,000,000 lei per month, also as moral damages. Following an altercation between the parties, the victim was hit with an iron fork with four sharp horns in both eyeballs, so his infirmity is permanent and consists in the total loss of the sense of vision. He has also obviously undergone the alteration of the natural elements of physiognomy, which requires an appropriate indemnity, with the purpose of alleviating the sufferings endured, both as a direct consequence of the injury and those that inevitably follow in the future from the state of infirmity[20].

The permanent sexual prejudice is indemnifiable separately. The prejudicial consequences are discernable from the point of view of the temporary or permanent character. In the Dintilhac classification, the temporary sexual injury is integrated into the temporary functional deficit. Instead, the permanent sexual injury is a category which has its autonomy specifically configured.

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[18] Regarding the assessment of the aesthetic damage with the help of dental expertizes, see L. Melennec, *Évaluation du handicap et du dommage corporel*, Masson, Paris, 2000, p. 153-174.

[19] Broadly on this complex of factors, M. Boar, *op. cit.,* p. 166-172.

[20] Craiova Court of Appeal, criminal section, decision no. 1059/4 October 2001 (unpublished), cited, Gh. Vintila, C. Furtuna, *Daunele morale. Studiu de doctrină și de jurisprudență [Moral damages. Doctrine and jurisprudence study]*, All Beck Publishing House, Bucharest, 2002, p. 94.

The most complete definition is provided by the Dintilhac classification. Sexual prejudice is a variety of prejudice that includes three elements: the morphological damage that concerns the injuries brought to the sexual organs; the prejudice that concerns the sexual act (loss of libido, diminished or loss of sexual intercourse); damage that concerns the impossibility or difficulty to procreate. *In concreto*, there will also be taken into account the personal parameters of each victim (age, civil status, the circumstance that, as a result of the illicit deed, the young person has remained sterile, under the conditions that it has no children and is unmarried);

The permanent damage consisting in the impossibility of achieving a normal personal / family life project. We are talking about young or very young victims who will never achieve a normal personal life project, losing any hope of marrying and setting up a family. The specific damage consists, as it has been shown, in the loss of hope and the chance of a natural family life, due to the handicap created by the illicit deed[21]. This type of injury is not confused with the sexual injury, or with the leisure injury, or with the permanent functional deficit, although it borrows elements specific to each of them. The new category of prejudice is compensated in the practice of the French courts and accepted in the specialized doctrine[22]. In a decision of the French Court of Cassation it is mentioned, for example, that this category allows for compensating for the loss of hope and the chance of the victim of the accident to carry out a personal life project due to the serious disability. In the present case, the difficulties created for the 29-year-old victim, for establishing a family or creating a sentimental relationship constitute a serious permanent prejudice[23].

It can be noticed, from the Dintilhac classification and the draft normative act that the juvenile prejudice is missing. In the Romanian doctrine it was expressed the idea that the bodily injury presents itself as a "mix of patrimonial and moral prejudices"[24] and it subdivides, in its turn, into several categories: the injury which consists in physical or psychical

[21] Y. Lambert-Faivre, S. Porchy-Simon, *Droit du dommage corporel. Systèmes d'indemnisation,* 6e édition, Dalloz, Paris, 2009, p. 236-237.

[22] For an opinion favorable to compensating this type of injury, Ph. Brun, O. Gout, *Responsabilité civile*, *Panorama*, *novembre 2010-novembre 2011*, în *Recueil Dalloz*, no. 1/5 January 2012, *Études et commentaires*, p. 47.

[23] The French court of cassation, second civil chamber, January 13, 2012, in *Recueil Dalloz*, no. 5/February 2, 2012, *Actualités*, p. 281.

[24] Iulia Albu, Repararea prejudiciului cauzat prin vătămări corporale [Repairing the prejudice caused by corporeal injuries], Lumina Lex Publishing House, Bucharest, 1997, p. 25.

pain; the aesthetic injury, the recreational injury, the juvenile injury. The juvenile injury is usually defined as damage to the young person who, as a result of the illicit deed, sees no opportunity to perform age-specific activities: games, an institutionalized learning process, along with the other children of the same age etc. The consequences of the violation of the right to physical integrity are more pronounced at younger ages and may have negative consequences for the long term or for the whole life. The severity of the juvenile prejudice must also be assessed in the light of the victim's age and preoccupations[25]. For the time later in life, the tendency is to renounce the notion of juvenile prejudice as an autonomous category of prejudice. Its place is taken by a category of prejudice, referred to in the French law system, which also promoted this innovative idea - "préjudice d'établissement". The arguments invoked relate to the fact that the amounts awarded for the juvenile prejudice are mediocre and far disproportionate from the amounts which adult persons benefit from. On the other hand, even in the absence of the autonomous category of juvenile prejudice, the courts have the possibility to indemnify young people, as compensation title for the recreational prejudice;

Exceptional permanent prejudices. The Dintilhac working group proposed, the inclusion in this category, of the atypical consequences of the illicit deed. The source of the exceptional character can be identified in the victim's personal situation, in the nature or in the particular circumstances of the illicit fact. The example given in the doctrine and in the decree project of the new nomenclature ((M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :197) is that of the victim who, according to its culture of origin, is obliged to perform some ritualistic gestures, such as the inclination of the spine for salutation (in the Japanese culture). For a Japanese victim, the disability of the spine will have a special resonance, as it will put it in the position of not being able to tilt the spine in order to greet, which is equivalent to an impoliteness.

[25] As a result of the defendant committing corporeal injuries from fault and driving a vehicle on public roads with an alcohol level of 2.70 grams per thousand, the victim required 75-80 days of medical care and underwent surgery for the introduction of osteosynthesis material. In assessing the severity of the moral damage, not only the physical and psychological sufferings of admission and surgery were taken into account, but also the fact that the injured party is a student and, as a result of the accident, he lost almost a quarter of school, he can no longer participate in age-specific activities and he will always walk with a limping. The indemnification for the compensation of the moral damages was set at 3,000,000 lei (Sibiu Court, criminal sentence no.1095 / 17.09.1997, final by non-voting (unpublished).

**Evolutionary prejudices**

By their nature, certain damages cannot be discussed in the context of stabilization. These are constantly evolving prejudices, sometimes altering the form of manifestation of the lesions and / or symptoms. In the case of these prejudices, the non-patrimonial component is predominant and dynamic at the same time. New patrimonial or extra-patrimonial damages are appearing (in different stages of the illness) and the victim's condition, usually, worsens. Some of these damages are "irremediable" - at least in the current state of science. To the extent that the patient is aware of his / her own situation / consequences of disease progression, one can (also) speak of the prejudice that consists in the awareness of the near end of life.

One of the prejudices that does not know the stabilization stage is the AIDS contamination prejudice (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :212)[26] (acquired immunodeficiency syndrome). The evolutionary stages of AIDS were highlighted in the doctrine[27], and the evolutionary nature of the prejudice can be very clearly observed. The first stage of the disease is HIV infection[28], with approximately 3% of patients showing mild clinical signs. The second stage corresponds to seropositivity, which lasts from a few months to a few years. The seropositive begins treatment to ameliorate the effects of AIDS. Although he does not have any functional disability, he suffers harm simply by knowing his HIV seropositivity. He realizes that he is condemned, as there is currently no known way to cure the disease. In the third stage, patients have obvious clinical signs: enlarged nodes, etc. In the fourth stage, accentuated specific symptoms are present, and death will occur in about two years. Clinical manifestations of this stage are diverse, from a constant febrile state and weight loss, to dementia,

[26] In the category of evolutionary damages are also listed the hepatitis C contamination prejudice and the prejudice caused by the Creutzfeld-Jakob malady (X. Pradel, Le préjudice dans le droit civil de la responsabilité, Librairie Générale de Droit et de Jurisprudence, Paris, 2004, p. 123; M. Le Roy, J.-D. Le Roy, F. Bisbal, L'évaluation du préjudice corporel. Expertises-principes-indemnités, op. cit., p. 212).

[27] Y. Lambert-Faivre, L'indemnisation des victimes post transfusionnelles du SIDA; hier, aujourd'hui et demain..., în Revue trimestrielle de droit civil, no. 1/1993, p. 3-4. In the eyes of the French courts, this variety of injury justifies the introduction of a special indemnity procedure. To this end, a special indemnity fund (legal person) was created in 1991, whose governing bodies rule over the claims made by the victims.

[28] There are currently three ways to transmit the HIV virus: the sexual way (the most common one), mother-to-child transmission, and blood transmission. Despite the severity of the disease, it was claimed that AIDS is not a fatality and can be defeated (E. Hirsch, Responsabilités humaines pour temps de SIDA, Collection Les empêcheurs de penser en rond, Synthélabo Groupe, 1994, p. 197-198).

polyneuritis, shingles, etc. The indemnification of the persons contaminated with HIV due to blood transfusions has led to the emergence of a new kind of prejudice, in the jurisprudence of some countries, known as contamination prejudice or personal contamination prejudice.

The contamination prejudice has been defined as non-patrimonial prejudice, consisting of all personal, physical and psychological character harm suffered by the victim and resulting from a reduced life expectancy, disruption of family life and social life in general[29]. The contamination harm includes the aesthetic damage, the recreational damage, and all the consequences of declaring the disease. The components of this injury can be detected by detaching the evolutionary characteristics of each stage of the disease, according to known scientific data.

Thus, during the seropositive period, with a different duration from case to case, the seropositive is contaminated but does not suffer any physiological or functional disability and can perform its professional activity. The economic damage is relatively reduced during this period, with the victim usually incurring expenses for the detection of contamination, starting the specific treatment or resorting to treatment for psychiatric depression. At the stage of seropositivity, the moral prejudice prevails. From the moment of knowing the HIV status, the life of the contaminated person will suffer irreversible changes. The relationship with itself unfolds under the ineluctable sign of death and of profound feelings generated by the final loss of life expectancy[30]. In relations with the other members of society, marginalization and, often, exclusion, intervene. The patient's social relationships are marked by the fear of the others of not being contaminated, with physical molestation or job loss. Since the AIDS disease was declared, the economic damage will increase considerably. Clinical manifestations may lead to partial or total inability to work. The non-patrimonial damage is diversified, resulting in aesthetic damage, recreational damage, as appropriate, depending on the particularities of the manifestation of the disease. The last stage brings material and non-patrimonial damages (constant febrile states, weight loss, dementia, polyneuritis, shingles, and the loss of life expectancy towards the incurable character of the disease).

[29] For definitions of this new type of prejudice, see E. Savatier, Le principe indemnitaire à l'épreuve des jurisprudences civiles et administratives. À propos de l'indemnisation des victimes de transfusions sanguines, in Semaine Juridique, Édition générale, no. 13/31.03.1999, p. 620.

[30] Y. Chartier, La réparation du préjudice, Dalloz, Paris, 1984, p. 63.

It can therefore be seen that, in the case of contamination prejudice, the future damages are certain, but they are to be estimated in time, as the disease evolves, so it is appropriate to grant compensation through periodic benefits[31].

**The issue of the date of settling the indemnity (art. 1386 paragraph 2 of the Civil Code)**

The mission of the magistrate is to determine the compensation due to the victim of the bodily injury, taking into account the date of the injury, according to art. 1386 paragraph 2 of the Civil Code. The regulation does not meet the requirements of the full repair[32]. There may intervene substantial changes between the date of the prejudice (the date of the illicit act) and the date on which the decision is made that obliges the author to pay compensation. As it has been shown[33], the indemnity obligation is a debt of value, which implies the indemnity relating to the date of the trial. The compensation granted to the victim must reflect the present value of the prejudice rather than an "overdue" value. The indemnity (amount of money) is just the interface of the value of the loss, expressed at the date of the decision. In fact, the new Civil Code states that compensation must include, in addition to the equivalent of the gain from work that the injured person has been deprived of, or which it is prevented from acquiring through the loss of or reduction of his / her work capacity and the cost of medical care and, if appropriate, the costs of increasing the life needs of the injured party, as well as any other material prejudices". Or, some of the injurious consequences occur at a time after the act of committing the illicit deed.

The criticisms brought to the legal text have been numerous[34], and the remediation of the current solution is necessary. The principle of full

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31 Regarding the categories of the corporeal prejudice, see C. Jugastru, *Prejudiciul – repere românești în context european [Prejudice - Romanian landmarks in European context]*, Hamangiu Publishing House, Bucharest, 2013, p.269-278.

32 The full reparation means "the removal of all the harmful consequences of an unlawful and illicit fact, whether they are patrimonial or non-patrimonial, that means, repairing the damage in its entirety, in order to restore, as far as possible, the situation prior to its occurrence" (I. Albu, V. Ursa, *Răspunderea civilă pentru daunele morale [Civil liability for moral damages]*, Dacia Publishing House, Cluj-Napoca, 1979, p. 37).

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34 See, L. Pop, I.-F. Popa, S.I. Vidu, Tratat elementar de drept civil. Obligaţiile [Elementary civil law treaty. Obligations], Universul Juridic Publishing House, Bucharest, 2012, p. 569; P. Vasilescu, Obligaţiile [Obligations], Hamangiu Publishing House, Bucharest, 2012, p. 668; S. Neculaescu, Dreptul victimei la repararea prejudiciului în cadrul răspunderii delictuale. Privire

reparation applies indiscriminately to all types of prejudices, and therefore to the corporal prejudice also. A full, real remediation cannot disregard the factors that can lead to a change in the value of the damage - the monetary depreciation, for example, occurring between the date of the damage and the date of the judgment in the appeal (M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :13)[35].

**The incomplete regulation of the direct victim's bodily harm (art. 1391 paragraph 1 of the Civil Code)**

We also addressed, with another occasion, the issue of the insufficient regulation of the non-patrimonial component of the bodily harm[36]. Article 1391 paragraph 1 of the Civil Code provides the possibility of granting a compensation that takes into consideration the moral side of the prejudice, which consists in restricting the possibilities of family and social life. Without naming the prejudice which it takes into account (and only showing what this prejudice consists of), the new Civil Code regulates one of the forms of the bodily harm, namely, the recreational prejudice[37].

The two advanced theses concerning the recreational prejudice take into account either limiting it to the loss of pleasures related to the pursuit of certain activities[38] (which the victim had previously performed, in general

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critică. Drept comparat [The victims' right to compensation for damage under the tort liability. Critical view. Comparative law], in the magazine Universul Juridic, no. 9/2016, p. 50-52.

35 For the purposes of restoring the previous situation by granting compensation at the date of the judgment, note 41. It has been fully stated that the object of reparation, in the case of bodily injury, is the (lost) corporeal capacity , "declined in all aspects": the capacity to occupy a profession (of course, paid), the capacity to perform acts of daily life , the capacity to live in a building adapted to the handicapped person). Such aspects, as exemplified, are in correspondence with the victims' sequelae which they carry in their existential baggage, on the remaining route (ibidem, p. 10).

36 See, C. Jugastru, Prejudiciul – repere româneşti în context european [Prejudice - Romanian landmarks in European context], op. cit., p. 269-272.

37 L. Melennec, L'indemnisation du préjudice d'agrément, în Gazette du Palais, January-February 1976, p. 272-274. In resolving some issues of law, the High Court of Cassation and Justice decided: "The provisions of art. 1.391 par. 1 of the Civil Code is interpreted as meaning that in a criminal case involving an offense of bodily injury by fault, only the victim of the offense who has suffered an injury is entitled to compensation for the reduction of the possibilities of family and social life "(Decision 12/2016).

38 The decision which gave the tone in promoting the strict conception over the recreational prejudice belongs to the Paris Court of Appeal, which in 1961 defined this prejudice as the victim's deprivation of social, monden and sports satisfactions, from which a person who has the age and training of the victim normally benefits. Under the restrictive (subjective) thesis, other courts preferred to resort to the criterion of loss of opportunity to carry out activities that the victim did before the accident (French Court of Cassation, Social Chamber, decisions

sports or artistic activities and which it had to abandon brutally , following the accident[39]), or depriving it of all the pleasures of a normal life, that is, the totality of the shortcomings caused by mutilation, infirmities, physical or psychic imbalances - in other words, the ensemble of moral sufferings that the injury of bodily integrity attracts(M. Le Roy, J.-D. Le Roy, F. Bisbal (2015) :64-65). The application of the broad concept has raised the issue of the connection of the physiological or functional prejudice, with extending the notion of recreational prejudice. The expected solution was to define the recreational prejudice as damage that has a dual nature - objective and subjective[40]. From an objective point of view, it translates into physiological prejudice (inconveniences caused by physical injuries) and from a subjective point of view it involves the psychic sufferings of the victim who becomes aware of its condition and perceives the constraints that it has to accept. The extensive thesis was also promoted in the judicial practice, having as support the Council of Europe's Resolution concerning the correction of physical damages, adopted on March 14, 1975. In the terms of the resolution, the victim must be indemnified for the various shortcomings and disagreements, such as depressive states, insomnia, the feeling of inferiority, diminishing the possibility of enjoying the pleasures of life, as a result of the inability to carry out some recreational activities. The ideas are found, starting with 1977 (Court of Appeal from Paris, judgment of 2 December 1977), in the French jurisprudence[41]. Also, the wide or objective conception over the recreational prejudice was favored by the adoption, in France, of two normative acts (1973 and 1985) which exclude from repairing, from the competent social organisms, this of type prejudice[42].

Naturally, the new Civil Code should have regulated, in the section dedicated to the reparation of the non-patrimonial damage resulted from harm brought to the person, all the extra-patrimonial aspects of corporal damages, not only restricting the victim's life possibilities. The Romanian

from November 9, 1976, December 13, 1979, November 16, 1983, Poitiers Court of Appeal, December 23, 1969).

[39] In this regard, G. Viney, B. Markesinis, *La réparation du dommage corporel,* Economica, Paris, 1985, p. 71.

[40] I. Urs, Înţelesul noţiunii de prejudiciu de agrement, temei de reparare bănească a daunelor morale [The meaning of the notion of recreational prejudice, basis for monetary reparation of moral damages], in Dreptul, no. 2/1999, p. 26.

[41] French court of cassation, criminal chamber, May 26, 1992; French court of cassation, second civil chamber, May 20, 1978, June 14, 1978, February 25, 1981, October 23, 1985; French court of cassation, social chamber, November 16, 1983, decisions cited after M. Le Roy, *L'évaluation du préjudice corporel*, quatorzième édition, *op. cit.*, p. 64 .

[42] X. Pradel, *Le préjudice dans le droit civil de la responsabilité, op. cit.,* p. 456.

legislature's intention to provide compensation for repairing the damage caused by injury to the bodily integrity is obvious. This is all the more so since, according to art. 253 corroborated with art. 252 of the Civil Code, the person who has suffered the violation of the non-patrimonial rights to life, health, physical and psychological integrity, "may claim compensations or, as the case may be, a patrimonial repair for the prejudice, even the non-patrimonial one, which was caused to it". Harming these mentioned rights results in complex damages, which may take different forms - in their non-patrimonial side, the recreational damage being only one of these forms. The corporeal prejudice brings together not only the material prejudice, exactly measurable, but also a non-patrimonial prejudice, which is, sometimes, of greater weight. The physical and psychological pains, lesions, infirmities, mutilations, deprivation of enjoying life for the victim, the loss of certain recreations of existence at a young age - all these give expression to the indemnifiable moral prejudice. The mentioned damages are found in the French legal literature under the heading of "personal prejudices" as they affect the person[43]. The text argument that justifies the necessity to consecrate all varieties of bodily harm of the direct victim is article 253 of the Civil Code, to which even article 1391 of the Civil Code makes reference. The injured person has at its disposal the action for damages for any non-patrimonial damage caused to it, without further specification (article 253 paragraph 4). The special text from article 1391 par. 1 of the Civil Code was to be drafted in accordance with the general text of article 253 par. 4 of the Civil Code. In the support of what it has been said, we mention a few categories (other than the recreational prejudice), which are part of the concept of bodily harm and which require explicit and distinct legal consecration (some of these are found in the Dintilhac nomenclature): the prejudice consisting in physical or mental pains[44]; the aesthetic prejudice (the compensation- *pretium pulchritudinis*); the sexual prejudice[45], the juvenile prejudice (compensation - *pretium juventutis*) [46].

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[43] Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Drept civil. Obligaţiile [Civil law. Obligations], translation made by* D. Dănişor, Wolters Kluver Publishing House, Bucharest, 2007, p. 145-146.
[44] L. Melennec, *L'indemnisation du* quantum doloris*,* in *Gazette du Palais,* July-August 1974, p. 958-960.
[45] L. Melennec, *Le préjudice sexuel (*damnum sexuale*),* in *Gazette du Palais, Doctrine,* November 3, 1977, p. 525-527.
[46] For definitions and explanations, see, I. Albu, V. Ursa, Răspunderea civilă pentru daunele morale [Civil liability for moral damages], op. cit., p. 79-89.

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**Web**

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