Contribution to the Study of the Civil & Professional Liability of the Notary

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Abstract:

This study aims to demonstrate civil liability for the professional misconduct of the notary, because the problematic of the study is to demonstrate the adequacy of the rules of civil law to guarantee the damage arising from the professional activity, the problems arising from professional misconduct, the burden of proof of the resulting damage and their appropriate compensation.

Keywords:

Civil liability, professional, notarial, fault, damage, proof.

Received: 04/05/2025 & Accepted :12/06/2025& Edited: 27/12/2025

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مساهمة في دراسة المسؤولية المدنية والمهنية للموثق

الملخص:

تهدف هذه الدراسة إلى بيان المسؤولية المدنية عن الخطأ المهني للموثق، حيث أن مشكلة الدراسة تتمثل في بيان مدى كفاية قواعد القانون المدني لضمان الضرر الناشئ عن النشاط المهني، الإشكاليات الناجمة عن الأخطاء المهنية وعبء إثبات الضرر الناجم عنها والتعويض المناسب لها.

الكلمات المفتاحية:

المسؤولية المدنية، المهنية، الموثق، الخطأ، الضرر، الإثبات.

Contribution à l'étude de la responsabilité civile et professionnelle du notaire

Résumé :

Cette étude vise à démontrer la responsabilité civile pour la faute professionnelle du notaire, car la problématique de l'étude est de démontrer l'adéquation des règles de droit civil pour garantir les dommages découlant de l'activité professionnelle, les problèmes découlant de la faute professionnelle, la charge de la preuve des dommages qui en résultent et leur indemnisation appropriée.

Mots-clés :

Responsabilité civile, professionnelle, notariale, faute, dommage, preuve.

Introduction

The principle that « no one is responsible for anything but his own actions» is a departure from this theory. According to the theory of risk[1] , « he who profits from the thing must bear the risks ». thus, a notary who benefits from the drawing up of a deed should also bear the risks, and should be held liable in all cases[2]. The mere fact that a fault has been committed by a collaborator demonstrates the negligence of the notary as a ministerial officer , who must supervise and guide his collaborators under the terms of article 136 of the french civil code, which states that « the foundation is liable for the damage caused by the unlawful act of his agent when this act was performed by the latter in the exercise or on the occasion of his duties ».

Paragraph of the civil code, and under the terms of article 16 of law 06-02 which organizes the profession of notary in Algeria: « the notary may, under his own responsibility, employ any person he deems necessary for the operation of the office »[3], following the article 1384 paragraph 1 of the french civil code[4].

In fact, the legislator has made no mention of the notary's responsibility for professional acts performed, and has subjected his treatment to the provisions of the general rules of law .Article 3 of law 06-02, which organizes the profession of notary, states that « the notary is a public officer, mandated by the public authority responsible for executing deeds for which the parties wish to give this form ». This article specifies that the legislator has conferred on notaries alone the right to draw up contracts and deeds …. The multiplicity of obligations placed on the notary, whether of means or of results, means that he must be diligent and prudent so that his client's interests suffer neither delay nor negligence.

The notary also remains liable, as principal, for the professional faults committed by his colleague, whose permanent or occasional collaboration he has secured».

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[1] The theory of risk-profit, also called the theory of activity risk, is a theory developed by the doctrine of the end of the 19th century in Louis, in particular by Labbe, Raymond Saleilles, or Louis Josserand. "It consists in saying that the person who profits from an activity must bear the costs, which includes compensation for the damage it causes, one is responsible for the damage one has caused by one's act, and that of one's employees..." GERARD CORNU, Legal vocabulary, 5th ed., p u f, 1996.

[2] C.MELLOTTE, "The professional liability of the notary", in .x, Liability, Theoretical and Practical Treatises, Title ll, File 28, Brussels, 2006, p.7

[3] Law No. 06-02 of 21 Muharram 1427 corresponding to 20 February 2006 on the organization of the profession of notary.

[4] Article 1384 paragraph 1 of the French Civil Code, which states that "a person is liable not only for the damage caused by his own act, but also for that caused by the act of the persons for whom he is responsible"

All these provisions are merely general rules of law, and law no .02-06 on the organization and practice of the notarial profession is silent on the subject of civil liability. There is no legislative provision specifying which faults may be reproached, the competent jurisdiction or the procedure to be followed, and it is always common law that determines this liability some authors admit that the notary's liability is linked to ordinary law because of the relationship that forms between the notary and his private law clients[5] ; others note that it is reinforced and goes beyond the general regime to establish a regime appropriate to the nature of the notary's fundamental activities and obligations.to answer this question, we will attempt to identify and analyse the nature of this ability and his professional obligations as laid down by special law , in particular law 02-06 organizing the profession of notary in Algeria, and common law , without forgetting the impact of french law , which is the main source of inspiration and influence for the law, and we will study the impact of his missions on the notary's civil liability regime. resulting from the violation of these professional and ethical obligations- is it a contractual liability, an extra - contractual liability, or simply a professional liability?

To answer these questions, we will attempt to define and analyze the nature of this liability according to law no. 06-02 of February 20,2006, regulating the notarial profession in Algeria and common law, which is a source of inspiration and influence on Algerian law.

Certainly, the notary commits to their client to draft deeds, and their liability

The study of the notary's civil and professional liability requires an analysis of its basis and nature (chapter1) and an analysis of its conditions and discharge (chapter2).

Chapter 1: Nature and basis of the notary's liability

The liability of legal professionals is governed by common law Civil liability. There are no special regimes, as is the case for health professionals, but this ordinary liability is divided between contractual liability and delictual liability (124 C.c.a and 1382 C.c.f).

Section 1: Impact of the nature of the status and missions on the civil liability regime

The legal professional is called upon to fulfil the general obligations of common law, but it is also called upon to fulfil the special obligations that his profession imposes upon him[6] « The influence of his missions leads to the definition of his

[5] Cf. J. Flour, J-L. AUBERT and E. SAVAUX, The legal act, op. cit., n°124 et seq. also, DURAND; "The legal constraint in the formation of the contractual relationship", RTD civ.1944, 73; Morel., "The ImposedContract", in French Private Law in the Middle of the Twentieth Century, Etudes en hommage à G, ripert, vol. 2, p. 116.)

[6] J-L-Aubert: "The Civil Liability of Notaries" ed. DEFRENOIS, 2008, p.17

liability in a way that is not common to the influence of deontology, the particular activities of the notary would give a forced and vain character to any integration into the common law of civil liability »[7].

§1 _ the dual status of the notary :

A: A public and ministerial officer

As one author has said « The nature of notarial liability has long been the subject of controversy in doctrine and case law »[8].

The notary's hybrid[9] and complex status sets him apart from other legal practitioners: he is considered a public and ministerial officer, and also holds a liberal function.

For some authors, when the notary acts as a public and ministerial officer in the exercises of his instrumental function to authenticate agreements and acts between the parties, according to article 3 of law 06-02 «the notary is a public officer mandated by the public authority charged with authenticating acts for which the law prescribes the authentic form and acts to which the parties wish to give this form » It is this authentication mission that represents the scope of application of public character,[10] It is one if the characteristics that differentiates it from the common law system, Yet it offers the parties great legal certainty, and down by law are the guarantee of legal certainty and provide a certain stability conferred by the law.

This power goes hand in hand with mission of advising customers with a certain prudence and diligence, given the law and its public place the utmost trust in him and his profession »[11]

1- A regulated liberal profession:

The notary is the person who is entirely and personally responsible for his acts.

The organic law has enshrined the free choice of notary by the client; no one can impose the choice of notary, except in the case of the appointment of a notary

[7] On the notion of civil liability and its related notions, see, Henri, Jean. Mazeaud.

[8] Marie-Hélène de Cattay "The professional liability of the notary in particular in the context of marriage contracts and in the agreements prior to divorce by mutual consent" complementary master's thesis, 2014-2015, pp. 7-8.

[9] N. Estienne, the responsibility of notaries in Belgian law, available online at http ll grerca-univ-rennes1.frl digital Assets 316/316660 theme Belgium N ESTIENNE p d f.

[10] Article 1, of the law of 25 ventôse year x1, containing the organization of the notarial profession (16 March 1803) decrees: "notaries are public officials"

[11] J-L-Aubert. "The Civil Liability of Notaries", ed. DEFRENOIS, 2008, p.17

by court order, as a certain author put it. « Freedom of choice of notary is the very essence of the notarial profession

As a result, «this freedom sometimes appears limited by the public nature of the profession, which other liberal professions do not enjoy, since the notary has no choice but to reside wherever he wishes », article 9 paragraph2, « a public notarial office is entrusted…. The said office must obey particular conditions and standards ».

The notarial profession straddles the boundary between the liberal professions[12] and the public prosecutor's office, which do not share the same characteristics.

As we saw before, the liberal nature of this profession is the guarantee of trust in the notary. The is only master on board[13] , there is no one above him to give him orders on directives, which is why, in principle, he is personally responsible for his acts, although this profession is liberal and sometimes limited, given its public nature.

According to JEANNE de POULPIQUET, while notaries are undoubtedly public officers, it is impossible to equate them with other ministerial officers, such as bailiffs, court clerks or lawyers; They are holders of an office not attached to the administration of justice, and they are also the authenticators of common law, conferring authenticity on the deeds they receive, which in fact possess three virtues: special probative force, enforceability and guaranteed preservation.

After studying the duality that characterizes the status of a notary, which is described as ambiguous, it is simply because it reflects a profession whose requirements are twofold: recognized public authority and complete independence[14].

B - The duality of the notarial function:

We have just seen and analysed the complex and hybrid status of this professional, from which we deduce that he is endowed with two fundamental missions, a mission of authentication which designates (instrumental), and a mission of advice which refers to a content (négotium), organized by the organic law on the notarial. These two missions are indeed the two major sources of notarial responsibility.

C f . J. Savatier « Legal study of the liberal profession », thesis in law Poitiers, 1946, p. 34 et seq.; F.Maury, "The exercise, in the form of a company, of a regulated liberal profession", op.cit., p. 22, n°7.

[13] L. Rancent, fonctions et statut des notaires, Louvain -la-neuve, Académia, BRUYLANT, 1988, p. 28.

J. Demblon, Everything you need to know about notaries, Bruxelles, E, STORY- scienta. 1988, p.18.

2- Authentication mission Instrumentum

The major role of the notary, in accordance with article 3 of law no .06-02 on the organization of the notarial profession : «The notary is a public officer, mandated by the public authority to authenticate deeds for which the law prescribes the authentic form and deeds to which the parties wish to give this form» and article 12 : «must ensure the validity of notarial deeds and give advice to the parties so as to bring their agreements into harmony with the laws which must govern them and ensure their execution ».

It is true that notaries are not the only public officials who can draw up an authentic deed, but they are the only ones empowered to confer authenticity on agreements between the parties [15].

In this way, the notary gives the authentic instrument a certain quality[16]And content, guaranteed by the state. It is the means of prooypar excellence, and the notary is obliged to act when required to do so under the terms of article three of the notarial framework act. However, there are certain legitimate impediments which allow the notary to refuse to lend his services, His minstery, if he is required on a Friday or Saturday, if he is ill or if he is required late at night. In certain cases, he is obliged to refuse to lend his assistance when he sees that his client is legally incapable of contracting, or when the deed reveals an illicit or fraudulent character.

Thus, the notary may not receive deeds containing conditions in his favor; nor for the benefit of his relatives and allies, nor deeds that would prejudice the rights of third parties. The notary must also carry out the subsequent informalities required to ensure the validity and effectiveness of the deeds he draws up.

As for the enforceability of the deeds, this is a matter for courts alone. But to achieve this mission, and to ensure that the notarial deed is authentic, a certain formalism is required, on the one hand, by personal requirements relating to the notary and, on the other, by formal requirements linked to the deed in question.

Notary requirements:

The notary is the impartial guarantor of the contract’s equilibrium, and must comply with the conditions relating to kinship and probity.

[15] Laurent Garnier. "Electronic notarial authenticity." of the Notary, University of Montpelier, 1, 2014, p.12

[16] DE-Poulpiquet, "The civil and disciplinary liability of notaries", L.G.D.J, 1974, n° 4, p. 13. V, also, Alain. MOREAU, "The Metamorphoses of the Scribe-History of the French Notariat", Socpresse, 1989.

Concerned by this prohibition, because the notary cannot be[17] impartial if one of the parties is related to him. In addition to this, there is a probity prohibition.

The notary may not execute a deed of which he is the beneficiary[18], or receive a deed requiring the intervention of two notaries, together with a partner or a notary related or allied to the degree of probity.

Formal requirements linked to the act

Here we find two forms of general and special requirements:

A- General requirements :

The deed must be received by the notary himself, and must be read and signed in his presence.[19]For example, a notary who fails to verify the identity, status and domicile of the parties[20]to a sale of real estate is obliged, in order to ensure the effectiveness of his deed, to verify the origins of ownership, the mortgage situation, and to check that the seller's declarations, in particular those relating to the absence of easements encumbering the property sold, are correct.[21]

B- Advisory mission

This is the stage that leads up of the deed, as the legal shaping of the parties wishes, presupposes a prior activity, that of guiding and helping them to express their wishes and desires, and to understand their steps and enlighten them on the scope and consequences of consultations that enable them to.

- know all the rights and obligations relating to the decisions to be made

- Identify the risks likely to affect their personal, financial and tax situation.

Professor J. SAVATIER demonstrated in his thesis that « the professional relationship in the liberal professions is established on a human rather than a legal level, the duty to advise certainly extends beyond the legal level, the professional may be morally obliged to give his client advice with a broader scope than that

[17] Article 19 of the Framework Law on the Notarial Profession No. 06-02 Article 20: "The relatives or relatives of the notary referred to in the previous article as well as the persons under his authority may not be witnesses in the acts he drafts..... "

[18]Article 22, paragraph 4. " …. To be interested in profits in a business for which he lends his assistance".

[19] CASS 1e. civ, 6 fev 1979 n° 77-15 232;BULL . civ , I n°45.

[20] Cass, 1e c i v, 23 November 1999, bull. C i v I N° 320.

[21] JOHN. SAVATIER, Studies of the liberal profession, thesis presented and defended at the Faculty of Law of the University of Portiers on 12 July 1946, published by L. C. DJ in 1947, p. 279.

imposed by their legal obligation, and we know the influence that this professional could exert as a result »[22]

He adds that « these two obligations derive in fact from the relationship of trust between the two parties, the customer addresses or professional to ask him for help, this help is obviously of a technical nature : the customer who, by hypothesis, is ignorant of the professional technique, relies on the science of the other party, but, it is not only a question of technical help : it is also a question of human [23].

§2: The impact of the nature of the status and function on the liability regime

The law professional is called upon to fulfill the general obligations of common law, but he is also called upon to fulfill the special obligations that his profession imposes upon him « the influence of his mission leads to the definition of his responsibility ». In a way that is not common to the influence of deontology, the notary's particular activities would give a forced and vain character to any integration of civil liability into the law of obligations ».

The framework law governing the notarial profession in Algeria is silent on the subject, and contains no provisions concerning the notary's civil liability, the legislator referring to the provisions of the general rules of law .

Civil liability arises when the notary breaches the legal and ethical obligations that characterize his profession.

The purpose of this liability is to compensate the client who has suffered as a result of the notary's failure to meet his obligations. According to some authors, « …in recent years, judges have become stricter and harsher with lawyers who fail to meet their obligations, imposing sanctions even for minor faults.

In view of the paucity of literature devoted to the study of the nature of notarial liability on a national scale, another difficult arises when reading the works devoted to notarial liability in France, which reveal a lively controversy over whether liability is contractual of tortious. This being the case, it seems appropriate to examine the proposals of doctrine[24], which has supported all the acceptable solutions, wether unitary or dualist:

[22] JOHN. SAVATIER, Study of the liberal profession, thesis presented and defended at the faculty of the University of Poitiers 12 July 1946, published by L.G.D.J in 1947, p. 279.
[23] Idem, pp. 278-279.
[24] Jeanne de Poulpiquet. «Civil and disciplinary liability Notaries "the influence of the profession on the mechanisms of liability», L.G. D. J, 1979, p.12.

1- Unitary theses :The alternative between delictual and contractual liability

In the field of research into the nature of the notary's liability, there are a number of unitary theories in France[25], which attempt to treat all notarial activity with one of the two types of liability (delictual or contractual). On the one hand, according to one line of doctrine, contractual liability corresponds to the reality of notarial activity, which is subject to contractual liability. Indeed, the existence of a contract cannot be denied, and even the requirement of an authenticated deed necessitates recourse to the notary[26].

On the other hand, another doctrinal trend attempts to justify the hold of delictual liability[27] By saying : «to decide in favor of tort liability… is to emphasize the need for notaries to be legally dependent on their status, to take a stand against the tendency towards commercialization that is part and parcel of their profession, and to insist on the legal role of the notary as impartial authenticator, advisor and conciliator »[28], for them, delictual liability is more protective[29] of customers, and the principle is full compensarion for damage suffered, whereas contractual liability[30]time the contract was concluded , Moreover, clauses limiting or exonerating liablity are prohibited. In matters of contractual liability.

B – **Dualist thesis :** On the other hand, some authors put forward contradictory arguments, and have suggested a principal of alternative application of the rules of delictual and contractual liability according to the circumstances of the role or intervention of the public official. According to this argument, the notary's liability is tortious, when he intervenes as a public official and fails to respect the obligations of his office, and his liability will be contractual when the non-compliance arises from his intervention as a mandatary, as well as the rules of a business manger.[31]

[25] The French legislator, the main traditional inspiration for our legislation.
[26] G. DURRY «the distinction between contractual liability and tortious liability"; university MC, GILL, 1986 n° 168, quoted by J-L- AUBERT, op.cit., n°132, p. 24, n19.
[27] Benmohad Ouerdia, « The civil liability of notaries », doctoralthesis in privatelaw, Faculty of Law Algiers1, 2018, p. 22 et s.
[28] J.L AUBERT., « The civil liability of notaries », éd. DEFRENOIS, 2008, p. 17.
[29] MAZEAUD and TUNC, "Theoretical Treatise on Civil Liability", T.16th edition Montchrestien, h°-514, p. 600, quoted by J. DE POULPIQUET. "Responsabilité civile-disciplinaire- pénale", op.cit., pp. 25-26, h° 11 .51
[30] On the notion of civil liability and its related notions, see, Henri, Jean Mazeau, and François Chabas, Lesson in Civil Law, Obligations, General Theory, T. H, ed. Montchrestien and delta, 2000, pp. 365-369.
[31] G. Ripert et J. Boulanger, « Elementary Treatise of Civil Law. »

According to a third theory, a cumulative application of the two liabilities (contractual – tortious) proposed by Dean RENE SAVATIER : when « the notary is taken …as a public officer…, it remains true that the parties make a contract with him, consisting precisely in the correct exercise of his functions , if in such cases, contractual liability in tort, the client cannot be denied the right to invokeit. We therefore believe that there is an accumulation of liability »[32]

3 **Towards an autonomous professional civil liability** : As we have seen, the notary is a public officer holding a parcel of public authority, and endowed with a monopoly for certain services, he is entrusted with a mission of public service.[33] In our society, and in the french society as a whole, the notary has two main missions, authentication and advice.

As far as the obligation to authenticate is concerned, the obligations of notaries are statutory and their sources are the law . The public officer may be held liable in tort on the basis of article 124 of the Algerian civil code, which states : « any act whatsoever by man which causes damage to another. Obligs the person by whose fault it occurred to repair it. This is a faithful reworking of article 1382 of the old Criminal Court Charges, replaced by article 1240 : any act whatsoever by man which causes damage to another. Obligs the person by whose fault it occurred to repair it. »

This shows a desire to stabilise a fault – based regime, and the duty to advise should be sanctioned on the same basis. However, french case law links this duty to the notary's function as a public official, but not to the contract between the notary and his client.

Some authors consider that the decision of the french court of cassation of January 23,2008 ruled that : « the notary's obligations, when they tend only to ensure the effectiveness of an instrumented act and constitute no more than an extension of his missions as a drafter of deeds, fall within the scope of his delictual liability »[34]. Above all, since case law has extended the duty to advise to all the natory's activities, this authorizes a unitary qualification of notarial liability »[35].

According to a certain author : «in contractual matters,.. it matters little what prejudice the creditor suffers ; the only thing that matters is misplaced trust, failed faith, contractual liability is fisrt and foremost the effect of an attempt to obtain by equivalent what one does not have to obtain directly , Hence the possibility of providing for or framing damages, which is a way of establishing an alternative from, in the absence of forced performance of the contract. In delictual matters,

[32] R: SAVATIER, «Treatise on civil liability », T2, L.G.D.J, Paris, 1991, n° 803, p. 409.
[33] J.GOEMARE,Is the notary's liability contractual ! rev, not, Belge, 2009, pp.143-144.
[34] CASS.1re CIV.,23 JANV 2008, n° de pourv :17489,BUL.CIV.1n°27p.21.
[35] C f. J.L.AUBERT : « The civil liability of notaries ».éd. DEFRENOIS, 2008, p. 17

the violation of an unobtainable rule is obviously less important than the occurrence of illegitimate damage, which cannot remain the responsibility of the person who has unjustly suffered it, and which is the starting point of a retrospective mechanism which seeks to identify the person who is most adequately liable of the damage suffered. The objective of reparation here is not to restore the authority of the violated rule, but to achieve full compensation for the loss illegitimately suffered by the victim »[36], and the same author concludes that :« the notary guarantees effectiveness, even if the latter would have been assisted by their own notary[37]».

Chapter II: Conditions of the notary's civil liability

The effective application of the civil liability regime is subject to the classic tripartite test fault, damage and causality, which applies to both delictual and contractual claims. The notary is no exception to this common law system. In addition to the usual qualifications relating to civil liability, the time of his irresponsibility is devolved, and he engages his civil liability on the same basis as any litigant.

Thus, to be considered civilly liable, the professional must be accused of a fault constituting an injurious event, a loss and a causal link between the two.

Paragraph I: Establishing fault

The idea of fault has not formal definition, doctrine has defined it unanimously, according to VINEY « it is characterized by the disregard of a duty or obligation imposed by the legal order»[38], For PLANIOL, it is « a breach of a pre-existing obligation which must be remedied».[39]

For some, this definition has the merit of showing that, in accordance with etymology[40], fault is a failure, a breach of a pre-established rule for MAZEAUD an error or failure of conduct[41], and finally TOURNEAU sums it up as « illicit behavior that contravenes an obligation or duty imposed by law, custom or a general standard of behavior».

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[36] REMY LIBCHARBER, note underjudgment cas.1re civ, 23 January 2008n° de appel, 06 17489, Défresnois,2008, art 38740, n°8.

[37] ibid.

[38] VINEY-JOURDAIN(P), Treatise on Civil Law: The Conditions of Liability, 4eme éd., LGDJ, 2013, p. 442.

[39] PLANIOL(M) Elementary Treatise on Civil Law, Obligations, tome2, 8th ed., Paris, General Bookstore of Law and Jurisprudence, n°863.

[40] CNRTL .extract from definition, mistake; bankruptcy in Latin" is missing. Action of failing", in : http://www.cnrtl.frLétymologieLfaute

[41] FAURE-ABBAD(M)The Causal Event of Contractual Liability" Contribution to the Theory of Non-Performance of the Contract», L.G.D.J., 2003, p.150.

Thus, a fault committed by a notary, within the scope of his profession, can easily be called professional fault, and his liability is assessed over time, from the day the notary acted in disregard of his obligations.

The notary is therefore liable if he fails to carry out an essential formality, for example, a notary who fails to verify the identity, status and domicile of the parties[42]to a sale of real estate is obliged, to ensure the effectiveness of his deed, to verify the origins of ownershipw, the mortgage situation and the seller's declarations.

The burden of proof lies with the client, not only of the existence of this obligation, but also of a fault characterized by false information in the event that the client is not properly advised by the professional. The notary is also required to warn or caution his client, and the cour de cassation considers « that the person who is legally or contractually bound by a particular obligation to provide information must provide proof of this obligation ».[43]

In the case of a lawyer, the court of cassation stated that « It follows from article 1315 of the civil code that the lawyer is bound by a specific obligation to inform and advise his client, and that it is up to him to prove that he has fulfilled this obligation ».[44]In this case, the court of cassation considers that a natory is only bound by an obligation of means :« the decision of the court of appeal which, in order to hold a notary liable, states that the notary was bound to his client by a duty of advice which obliged him to ensure the validity and effectiveness of her deeds, and that it was therefore up to the notary to establish that he had not committed any fault, must be quashed, whereas the duty of advice is intended to ensure the validity of his diligence , and it is up to the client to establish the failure of the notary to fulfil this obligation, the court thus violated article 1315 of the civil code».

Thus, all professionals are obliged to keep abreast of all new developments in doctrine and case law, in order to inform their customers properly and to fulfill their obligation

According to article 323 of the french civil code and article 1315 paragraph 1 of the french civil code, the professional (notary, lawyer, bailiff..) must prove the performance of his obligation. Case law, which applied article 1315 of the french civil code, stipulates that it is up to the professional[45] to prove the performance of his obligation.

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[42] cas.1re cive.6 February1979 n°77 -232 ; bull. civ1 n°45.

[43] Case.Cive, 1st ch.; of 25 Feb. 1997 gas. On 14 and 15 March 1997, this judgment concerns a surgeon but the terms used also concern all professionals who are bound by an obligation to advise and inform" CHRISTIAN LAPAYADE SCHAMPS in Liability and insurance, ed. JURIS- classer, Apr. 1997, p.4.

[44] -C as cive, 1 rech. du 29 April1997 in Gaz pal 1997. 2, panor.p 180.n° 224 du 12 August1997 -1997 I.R 130.

As a result, since 1997, case law has undergone a radical shift in the burden of proof. Traditionally, it was up to the customer to prove non-performance of the obligation, following a ruling by the aforementioned court of cassation, relating to medical liability, and concerning all professionals, which held that « the person who is legally or contractually bound by a particular obligation to provide information must provide proof of performance of this obligation[45].

From now on, it is the notary's responsibility to establish the effective transmission of information and advice to his client, and he must « warn his needs, and refrain from any negligence, omission or delay».

Paragraph 2: Establishing a loss and a cuasal link

In matters of professional civil liability, the notary's conviction is subject to a direct relationship between the fault committed and the alleged damage, with the aim of repairing the prejudice or damage caused by the notary in the exercise of his profession. Thus, all cases presuppose that the victim has suffered a prejudice resulting from a direct causal relationship between the act attributable to the responsible party.

The characteristics of the reparable damage:

In order to engage the liability of the notary responsible for authenticating deeds, the client must demonstrate that the notary's fault has caused him harm or damage.

However, the mere existence of this damage is not sufficient to enable the customer to obtain compensation[46] the customer must provide proof that the damage suffered is reparable in accordance with the criteria laid down by civil law.

In terms of the notary's duty to advise and inform, if the loss is certain and there is no damage, the notary cannot be held liable, and can only be punished when his fault or negligence has made it definitively impossible for the victim to assert his rights.

The definition of the prejudice suffered by the litigant as a result of the fault of his notary, in particular, does not escape the terms of the general rules. In order to be compensable, the damage must be the direct consequence of the fault committed, which qualifies it as direct damage. It is the fault that necessarily

[45] CASS.1 reCIV.25 February.1997; bull civ., I n°75 ;rg da 1997.p.852,obs.ph.REMY.

[46] BRUNC Richard et FRANCOIS sage « The civil liability of the lawyer», in « in Gaz pal, du 24 déc. 1994 docte, p. 1325.

creates the damage, in addition to having to exist[47]the damage must also be certain[48], so that the cannot be held liable the damage must also be certain, which is why indeterminate possible damage is classically not taken into consideration, and it must also be defined and legitimate.

The existence of causal link

A causal link is essential if the notary is to be held liable. In addition to being proven, it must also be proved if the civil liability mechanism is to operate normally. It is indeed the link between the failure of the generating event and the damage suffered, Once this is established, liability can be claimed, otherwise the plaintiff claims can not be heard. In the case of the drafting of deeds, because of the obligation of result which weighs on the ministerial officer, causality is admitted almost implicitly by the judges, this is difficult for the professional, it contra-legem, since the proof of the causal link is required by the law.

As in the case of prejudice, the onus in on the plaintiff to prove and establish the causal link between the fault and the prejudice claimed, so that the notary connot be held liable if there is no proven link between these two conditions.[49]

Chapter 3: Exemptions from notarial liability and notarial insurance

As the notary is responsible for a public service, with the authority of the state, and is subject to the supervision of the ministry of justice, it is conceivable that the injured victim's action could be brought against the public authority, and compensation paid by the public body.

But this has not been adopted, either by french legal legislation or by the source of law in the field of latin notarial practice.

The notary is a liberal professional, a public and ministerial officer, with a certain degree of autonomy both in the management of his office and in decisions concerning the notarial activity. By insuring all risks, he commits his assets for damages suffered by his clients.

We have seen how easily his liability can be called into question, which makes it all the more difficult for the notary to exercise rigorous caution. This liability can be exonerated by hypothesis (section 1), insurance or collective guarantee (section 2).

[47] cass.civ1ere.6Feb 2013, n°12,15-154; in this case, the plaintiff, who did not justify any prejudice.

[48] Cas cive,1st, 16 January 2003, n°11-24250-civ1rer,19 Dec2013, n°13-11,807, DALLOZ News7 l Jan 2014, COUSET observations: "the damage suffered by a person as a result of the fault of a legal professional is certain".

[49] civ. 1st .18 March 2003, n°-21.641, n°00-22623, civ1re,8juin 2004, n°01-14389.

Section 1: Exemption from the notary's liability

In accordance with the general rules of law, the notary may be exonerated in whole or in part from any personal liability he may incur.

He can establish that the damage claimed is in fact the product of an event of force majeure, which determines absolutely that he could not have committed a fault[50]In application of his principle, there is a breach of the duty to advise only if and when the notary could have been aware of the information or risk that he is accused of not having revealed.

For example, the notary is not liable if he was unaware that the property sold was occupied by a third party[51].

§1-Refusal to notarise:

Article 3 of law n°06-02 on the organization of the notarial profession states that :«the notary is a public officer, mandated by the public authority, responsible for executing deeds for which the parties wish to give this form».

And article 15 :« the notary may not refuse to draw up a deed, unless the deed submitted to him is contrary to the laws and regulations in force ».

In this field, there is a series of situations and hypothesis in which the notary can refuse to intervene[52], in the event that the parties do not agree to deposit in his hands the costs that he will have to disburse, by virtue of articles 40 and following of the framework law on the notary's office and taxes :« the notary collects, on behalf of the public treasury, the duties and taxes of all kinds to the payment of which the parties are bound on the occasion of contracts. He pays the sums owed by his clients to the tax authorities directly.

Thus, certain properties of the authentic deed and the objective of legal certainty that the law assigns to the notarial function require the notary to refuse his ministry in cases where the deed is contrary to public order and morality, or when the deed he is asked to draw up disregards the rights of third parties[53].

In accordance with article 15 of notarial framework law n° 06-02, which states :«notaries must refrain from lending their services to give authenticity to an agreement which they know does not respect the rights of a third party».

§2 – Inclusion in the deed of a clause fulfilling the duty to advise

The notary who is required to act remains bound by the professional obligations that are fundamental to his function :the duty to authenticate and the duty to

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[50] J -L-Aubert : «Notaries' civil liability", 5th ed., Défrénois, pp. 62-63.

[51] -Cass, 11 civ 10 December1996 ddrand heritageFeb1997 p. 3.

[52] C.Mélotte, op.cit., p. 56, seealso, J.-F. Tay Mans, "Duty to advise and duty to lend his ministry", note, 9 oct. 2003, rev.not. Belg, 2004, p. 515.

[53] J de Poulpiquet, rep. Civ. Dalloz, V. Notaire, n 268 obs J- L Aubert, resp .1997 .com civ; 1st .ch . S.bull.civ 1 n° 8: Défrénois.

advise. He may be held liable[54]if he fails to comply with these obligations, but he remains free to provide evidence in order to fulfil his mission.

Thus, he will be[55] required to establish that he gave the necessary advice for the operation at the time of his intervention, what are known as « probatory clauses or precautionary clauses »[56].

These clauses may be useful to the notary, insofar as clients are acting in bad faith, and have chosen the option that was not advised by the officer (obligation of means), given that the notary cannot impose his unilateral way of seeing things[57].

According to some authors, this refers to written documents that can be used against the customer, mentioning the advice and information provided, or mentions made in the body of instrumented deeds[58].

Section 2- Insurance for notaries:

In order to alleviate this problem, insurance companies have developed a product designed to protect notaries from the financial consequences of notarial malpractice.

In France, there is a way of settling disputes between notaries and clients who are victims of notarial malpractice unfortunately, this type of procedure does not yet exist in our country, the“caisse de garantie” collective indemnisation, which remains the best and most effective way for a notary to protect himself against notarial malpractice, with good basic training and ongoing training.

A – The notary’s professional liability insurance:

The legal basis for insurance contact that may exist between a notary and an insurance company is article 43 of the framework law for the notarial profession n° 06-02, which states: « the notary is obliged to take out insurance to guarantee his civil liability ».

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[54] Cass civ 1 er 1997, bull civ 1 n° 197 Déferions, 1998, art 36 815, N° 71 obs., j-l- Aubert, "civil liability of the notary".

[55] J-L- Aubert, op cit, pp., 158 -159.

[56] C. Mélotte, op cit, p 56, See also, J.-F. Tay Mans, «duty to advise and duty to minister», Note under Mons, 9 oct. 2003, rev.not. belg, 2004, p. 515.

[57] See, for example, cass. civ.1re, 25 June 1991, Bull .civil, n°212.Rappr., the developments devoted to this question in the third edition of this work83.

J-L-AUBERT, GAZ. PAL., No. 27-29 April 1997, Art. 36591, No. 82, Report P. SARGOS, note . J.GUIGUE: "Anyone who is legally or contractually bound by a particular obligation to provide information must provide proof of the fulfilment of this obligation. The doctor is bound by a special obligation to inform his patient and it is up to him to prove that he has fulfilled his obligation". V.LAPOYADE-DESCHAMPS, Doctors put to the test ...", resp.civ.et ass.1997, chron. 8. ».

This article forms the basis for claiming compensation for damage caused to others.

These insurance are responsible for guaranteeing against the financial consequences of civil liability for damage caused to others. This damage can be material or immaterial as is normal.

The services offered to notaries by these companies often include not only civil liability, but also insurance for the firm, theft, fire...

There are also other risks that are excluded from coverage, such as damage resulting from the deliberate violation of laws and regulations with which the notary must comply in the exercise of his office.

In France, another system of protection for victims of notarial malpractice is provided by an instruction specific to the notarial profession: the collective guarantee, which supplements civil liability insurance.

This collective guarantee covers, firstly, the funds that clients remit to the notary. These are considerable sums, and it is inconceivable that clients should suffer the effects and consequence, of poor management, or even non-compliance, and secondly, it covers liability in cases where there is an exclusion or the guarantee of an insurance policy or the amount will be exceeded.

To implement this collective guarantee, the aggrieved client need only send a registered letter simultaneously to the public official concerned and to the regional caisse on which he depends, after justification of his claim within a period of one month, so that the notary is declared in default.

In this way, the guarantee fund has recourse against the liable notary to recover the full amount of the indemnity paid out of the notary's assets :

However, there is a major difference between a civil liability insurance contact, which benefits not only the injured party, but also the notary responsible, who only has to pay a reduced contribution.

However, the latter is financed both by an annual contribution paid when the notary takes office and by a contribution paid by the firms.

Together, the two insurance systems provide secure, effective protection for all injured parties, victims of the notary's unique faults and negligence.

This organization represents a cost for the notarial institution, but it demonstrates a great capacity to implement national solidarity among its members and to face up to its responsibilities.

3-Notarial training and notarial civil liability:

There is a certain relationship between notarial training and notarial liability.

The notary's legal obligations include high-quality basic training, continuing education and further training in the notarial field in almost all countries of the Latin system.

The notary's responsibility begins with his or her initial training, which in our society takes place over three years (law degree), and should be seen as a simple step (or process). Of self, assessment which must be continued over a lifetime.

This is the responsibility of the law faculty, which must ensure the proper training of its students through the process of determining the methods required for training.

That said, in order to perfect their knowledge, notaries are obliged to continue their learning during the course of their activity through ongoing training, the aim of which is to transform and improve the knowledge acquired during initial training.

Notarial training is not only the result of the public officer's spontaneous motivation in his activity, but is also a legal obligation. It is a deontological obligation, as stipulated in article 18 of law 06-02 code of the notarial profession: « the notary is obliged to perfect his skills, to participate in all training programs and to be assiduous and serious during training.

It also contributes to the training of notaries and notarial office staff ».

Indeed, socio-economic change, the rapid progress of the notarial profession worldwide, and customers who have become more demanding when it comes to the services and information they receive, means that notaries are constantly required to keep abreast of new developments over the long term, as information that was accurate yesterday is no longer so today following changes in laws and regulations that no longer allow initial training to claim to deliver sufficient knowledge.

There are many ways to learn: conferences, seminars (at university level), practical training courses, journals, online training and videos, all supervised by legal practitioners.

Conclusion

In the end, in Algeria as elsewhere, liability law is certainly in turmoil, but it still suffers from shortcomings, such as a defective framework where the courts have to refer to the general rules of law in order to judge a case of notarial fault.

But the best protection is still basic continuiting training, which is becoming a strict legal obligation.for all parties, including those who have not requested it.

We therefore advocate legislative intervention in favor of a specific and autonomous professional liability based on the duty to advise.

The liability rigeme applicable to the notarial profession is important to define.

Indeed, it should be recalled that under Franch law, there are two general regimes of liability: tort (delictual civil liability.

Determining the legal nature of the notary's liability is a necessary preliminary step because, before initiating any liability action, it must be

established whether it falls within the framework of contractual liability or tort liability.

This distinction is important because the Court of Cassation does not permit choosing between the two types of liability nor combining them (Court of Cassation, 2nd civil chamber, 06/09/1993.

Tort civil liability is a common law responsibility. It penalizes the disregard of rules or the failure to fulfill an obligation not found in a contract (which would be sanctioned under contractual liability) but rather established by the authority of a law or statutory rule. Determining the legal nature of notarial liability therefore involves examining whether a contract exists between the notary and their client, or whether the violated obligation arise from the notary's status- an obligation imposed directly or indirectly by law or by professional regulations.

Doctrine has been divided on whether notarial liability is of a contractual or delictual nature.

Case law seems to have resolved the issue: in principle, notarial liability is of a delictual nature, except in certain cases where it may be contractual.

In other words, depending on the origin of the breached obligation during the notary's activity, their liability will be based on one or the other: when the notary acts outside of any contract directly binding them to a client and breaches one of their professional obligations, the liability is delictual. Conversely, if the violated obligation originates from a contract signed between the notary and the client, the liability will be contractual or quasi- contractual (as in the case of managing affairs, which involve quasi – contractual liability).

In light of this distinction, you will understand that most disputes frequently invoke tort liability is, in a way, an exceptional from of liability.