

The Effect Of Professionalism On The Legal Nature Of The Professional's Obligations (Comparative Legal Study)

Dr.Sulaiman Barrak Aljumaily¹, Mohammed Albasheer abdulla Hamd²

¹Professor of private law at the University of Fallujah

²Researcher in private law

* zasbar955@gmail.com

ABSTRACT

Obligations are generally divided in terms of their legal nature into obligations to achieve a result and obligations to exert care. This division has fruits that we find in several places in the contractual bond, starting from the burden of proof and ending with responsibility.

The obligations incurred by the professional contractor are supposed to be different from the obligations borne by the ordinary (non-professional) contractor in terms of severity, and this is a manifestation of the legal effects of the character of professionalism. Originally it was just an obligation to pay attention. This result is the result of the legal provisions that are supposed to undertake this aspect of regulation, for legislation is the effective way to protect the contractor with the professional, due to the lack of other means such as the joint will of the contractors and the discretionary power of the judge, due to the inability of the contractor with the professional to impose his contractual conditions on the professional party in the first, and the absence The legal basis for the second.

As for the obligations whose nature cannot be changed, it is certain that they differ from the obligations of other contractors in terms of the care that must be exerted by the professional contractor. The prevailing standard in jurisprudence and the judiciary is the objective standard, and it is the standard of the usual man in the framework of ordinary contracts in which the two contracting parties are equal in terms of contractual status, but in the framework of contracts that link between a professional contractor and another ordinary, it is not possible to measure the amount of the professional contractor's care in it with the same standard. The ordinary contractor is measured by the amount of his care in a normal person, while the professional contractor is to measure the amount of his due diligence with a professional like him, and if the objective criterion is inadequate and does not lead to the results that the personal standard of professionals leads to. What is required by the usual professional, in application of the idea of professional gradient

Article History

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Introduction

The great development in economic life in the field of production and distribution operations and professional activities has led to the emergence of a group of people with great qualifications in the field of their commercial, industrial or professional activities called professionals, which is reflected in the technical and knowledge differences between them and the people who enter with them in Contractual operations, as most often the party who meets the professional is a

normal person who does not have qualifications that enable him to obtain rights commensurate with the obligations incumbent upon them in facing the professional party. This leads to an imbalance in contracts in which a professional party and another ordinary person conclude contracts To satisfy his personal needs, unlike the professional who concludes contracts in the circle of his specialized activity to achieve profit and satisfy his professional needs, the characteristic of professionalism had a positive effect on the professional by creating this knowledge, technical

and economic disparity between him and the people with whom they enter into contracts. However, the quality of professionalism also leaves, of course, positive effects for the one who acquired it, so it must be arranged for effects that do not work in his favor vis-à-vis the other party in the contractual process.

Therefore, in order to reduce the differences in this type of contract, and bridge the gap between the contracting parties, it was necessary to search for a means to assist the legal systems to achieve contractual justice. Therefore, in the absence of legal regulation in most cases, the judiciary sought to restore balance between the contracting parties in contracts in which the professional is a party by stressing the latter in his contractual obligations by striking the legal nature of his obligations by changing them from obligations to exert attention to obligations to achieve a result, and what is related to it. This switch from requiring the professional party to perform beyond the performance required by the person who does not enjoy the quality of professionalism, in the obligations that are by their nature accept to

Research aims:

The research aims to change the nature of the professional contractor's obligations from obligations to exert care to obligations to achieve a result, after which a means of stressing the professional contractor ensures that he performs the obligations entrusted to him in the fullest manner. As for the commitment of the obligations that do not accept exchange, the research aims to search for the most appropriate standard to measure the degree of its concern in line with the general perception of the concept of professionals.

Research rationale:

The lack of differentiation in Iraqi jurisprudence between the legal nature of the obligations incumbent upon the ordinary and professional contractor, with the privacy that the latter possesses from the qualifications that make him excellent from other contractors, at a time when we do not see the interest of the judiciary, but rather its rigidity and its confinement in the legal texts in effect without Adherence to the distinction between the professional contractor and the ordinary contractor in terms of the legal nature of

change from obligations to exert care to obligations to achieve a result. As for the obligations that were found to be obligations to exert care and do not by their nature accept to be converted into obligations to achieve a result, the strictness that appears on the professional party is through the amount of due diligence that he is required to perform, which naturally exceeds the amount of care demanded by a non-professional person.

Research importance:

The change of the nature of the professional contractor's obligations and his demand with a measure of care that exceeds that of ordinary contractors who do not enjoy this capacity is of great importance in reducing the differences in contractual positions between the professional and the other party in the contracts that bring them together, in order to achieve the legitimate trust that the contractor attaches to the professional to this last in proportion to The appearance in which it appeared.

their obligations. This prevented them from keeping up with the practical reality, which led us to search for radical legislative solutions that put an end to these forms.

Research problematic:

The general rule in the obligation to perform an act is for the debtor to give it the care of a regular man so that he has fulfilled his obligation. However, the development witnessed by the economic, industrial and commercial life has resulted in the principle of specialization and the related considerations related to the expertise, technical knowledge and know-how of the specialist that lead to his description as a professional. As it is merely an obligation to exert care, and to stress him in obligations that do not accept exchange by demanding an amount of care that exceeds what is required of an ordinary contractor, in order to restore the imbalanced balance in such contracts.

Research Methodology:

In this study, we adopt the comparative analytical approach, and through this approach we examine aspects of the problem raised in light of legislative

provisions, judicial trends and jurisprudential ideas prevailing in the French and Egyptian legal systems, hoping to benefit from the comparative legal systems and adapt them in the Iraqi legislative system.

Search questions:

The problem raised raises several questions, including: What is the mechanism used to change the nature of the obligations of the professional contractor? What are the implications of changing the nature of his obligations? Regarding the professional's obligations to exert care, what degree of care is required by the professional contractor, and what is the appropriate standard to measure the extent of his care?

Research division:

In order to know the topic of the research and answer all the questions raised, we divide this research according to the following:

The first topic / changing the nature of the commitment of the professional contractor

The first requirement / a mechanism for changing the nature of the professional's commitment

The first section / the discretionary power of the judge as a mechanism to change the nature of the obligation

The second branch / the joint will as a mechanism to alter the nature of the professional's commitment

The third section / the text of the law as a mechanism to alter the nature of the obligation

The second requirement / the effect of changing the nature of the professional's commitment on the legitimate interests of the contractors

The second topic / switching due diligence on the professional contractor

First Requirement / Standard Professional Standard

The second requirement / the criterion of a careful professional

The third requirement / personal standard for professionals

Altering the nature of the professional contractor's obligation

In this requirement we present a statement of the legal mechanisms for changing the professional's commitment from an obligation to pay attention to an obligation to achieve a result, and then explain the legal implications of changing the nature of

the obligation in terms of the legitimate interests of the contractors, and in terms of the burden of proof, in three branches, as follows:

The first requirement

The mechanism for changing the nature of the professional's commitment

What is the mechanism through which the professional's commitment to exert care is transformed into a commitment to achieving a result and its legitimacy? This is what we try to show in the following sections:

First branch

Judge discretion as a mechanism to alter the nature of the obligation

The role of the judiciary at the present time in the field of developing legal concepts and its serious attempts to narrow the gap between legal texts and practical reality is not denied. From this standpoint, can the judiciary alter the nature of the professional's commitment? What is the legitimacy of that authority?

What called us to go into the discretionary power of the judge as a mechanism to change the nature of the obligation, some judicial rulings that, if we examine them closely, reveal a result that is very close to changing the obligation imposed on the professional contractor.

It came in a ruling issued by the Egyptian Court of Cassation¹ (If the trial court has the authority to assess the error arising from the responsibility of the perpetrator, it has decided that the appellant made a mistake by performing the surgery in both eyes simultaneously with no need to hurry to perform the surgery under the circumstances and circumstances referred to in the technical reports, which is "a specialist." Without taking full precautions to secure its result, then the patient exposes the occurrence of complications in the eyes, which leads to loss of sight, because the fixed amount of error alone suffices to establish the responsibility of the appellant.) It is noticed in this case that the description focused on harm - which is blindness and not healing - so she gave an evidence for the doctor's error, without

¹ Egyptian Court of Cassation, Appeal 45 of 1994, Session 12 June 1994, p. 316. Quoted from: Dr. Sabri Hamad Khater, standard of medical error, standard of medical error, a research published in the book of the Professionals Responsibility Conference, College of Law - University of Sharjah, April 3-5 2004, 2006, p. 129

referring to the standard of the usual doctor, and perhaps this is due to her description that the doctor is a specialist, so she used her discretionary power to prove the mistake by the doctor through evidence. It is not amenable to prove the opposite by describing the doctor as a specialist, that is, he possesses the qualifications that make him distinguished from other doctors, and this is consistent with our approach to describing the professional contractor.² In many of its decisions, the French judiciary resorted to a method that deviated from the usual professional standard, as it deduced the error from the mere occurrence of damage, and described the error as assessed, meaning that if there was no mistake by the professional, the damage would not have occurred, with no evidence of negligence or due diligence³. And the result of that is nothing but switching the contractor's commitment to achieving a result as a professional, and he is not accompanied by proof of due diligence in this regard. In our talk about the role of the judiciary in changing the nature of the commitment of the professional contractor, we find that clearly in guaranteeing the hidden defect, as the French judiciary established an presumption whereby the professional seller knows about the hidden defects surrounding his products.⁴ The differentiation between the text of Article (1646) of the French Civil Code has become useless, which differentiates in the judgment between the seller who knows the faults and is not aware of them⁵, so the knowledge of the seller or not is of no use in this regard, but it is necessary to search for the availability of professionalism. Whether or not, if

the seller is a professional, his knowledge is presumably an assumption that is not capable of proving the opposite⁶, so the seller's commitment to achieving a result is only necessary for his responsibility to prove the existence of the defect and the causal relationship between the damage and the defect that afflicted the buyer, and the latter is not obligated to prove the seller's knowledge of that defect. So, the professional seller's obligation to achieve a result and he must present a commodity that is suitable for use in the purposes for which the sale was contracted in order to fulfill it, as well as safety checks⁷, and he cannot prove the opposite.

Thus, the guarantee of the hidden defect acquired a content different from the content established by the civil legalization under the judicial intervention, so the jurisprudential dispute revolves and reaches its peak when it becomes clear that the seller's position in connection with his responsibility for the hidden defects of the sale is no longer distinguished by his knowledge of them, but rather has become distinguished by looking at the availability of a characteristic Professionalism or lack thereof⁸. This delving into the judicial role is an answer to a question we had previously posed, which is the legitimacy of using the judge's discretionary power to alter the nature of the obligation of the professional contractor.

First of all, the judiciary did not authorize a change in the nature of the professional's commitment, but rather took the means that must be replaced as a result of it, because the judiciary did not go beyond establishing a presumption - incapable of proving the opposite - far from going into exerting care, which leads to the commitment of the professional contractor not being bound to an outcome.

² Iyad Ahmad Al-Batayneh, Personal Consideration and its Impact on Contracting, Master Thesis, submitted to the Council of the College of Law - University of Babylon, 1999, p.64

³ Cass . Civ. 12 nov - 1968 j.c.p. 1968 . 4. 298. cass . Civ. 19 juin - 1962 . j.c.p. 1962 .4.110.

⁴ Among the relatively recent provisions in this regard: Cassation Madaniya, November 3, 2003, Madaniyya 111 publication, No. 194., citing: French Civil Code in Arabic, previous source, p. 1616.

This presumption has become a legal presumption in some Arab legislations, as it was stipulated by the Tunisian legislator in the Code of Civil Contracts and Obligations in Article 655, as well as the Lebanese legislator in the law requiring contracts in Article 449, and the French, Egyptian and Iraqi legislators did not stipulate this presumption.

⁵ Seen texts referenced

⁶ Dr.. Hassan Abdel-Basit Jamei, The Impact of Unequal Contracts on Contract Conditions, Dar Al-Nahda Al-Arabiya, Cairo, 1996, p. 45

⁷ Dr.. Mowafak Hammad Abed, The Professional Seller's Commitment to Ensuring Safety (Comparative Study), 1st Edition, Dar Al-Sanhouri, Baghdad, 2016, pp. 46-47.

⁸ Dr.. Hassan Abdul Basit Jamei, The Extent of Presumption of Professional Error in Light of the Division of Obligations into Commitments to Achieve Results and Obligations to Exercise Care, a study published in the Fact Book of the Professional Responsibility Conference, previous source, p.45

However, this approach has not been without criticism. In establishing the judiciary for the presumption of knowledge, it contradicted the most important fundamental principles and basic constants, which is the principle of good faith, which has been established as the original. This is on the one hand, and on the other hand, part of the jurisprudence ⁹.

This is considered a distortion in the texts, and there is no textual basis for it, for it is a pure judicial innovation, and likewise, the supposed knowledge does not rise to the level of certain knowledge¹⁰.

Therefore, we can say that the judge's discretionary power cannot in any case change the nature of the obligation, and if the matter is limited to establishing a presumption, then that presumption must be capable of proving the opposite, and if it is and must be, then the matter becomes legislation ¹¹.

The second branch

Shared will as a mechanism to alter the nature of the professional's commitment

The division of the obligation, in terms of its nature, is an obligation to achieve a result, and a commitment to pay attention from the jurisprudential divisions ¹², and the judiciary taught it after that and became stable, so the source of this division is not civil codification, and then researching it if its rules are peremptory or interpretative rules.

Therefore, according to the general rules and the philosophy of the contractual system, the will can play an effective role in changing the commitment of the contractor, from an obligation to pay attention to a commitment to achieve a result, especially if a condition is mentioned in the

contract requiring changing the nature of the obligation to be in the interest of the non-professional party in the contractual relationship as a creditor ¹³, And it is possible to look at the common will of the contractors before the conclusion of the contract and after its conclusion. In the stage of contractual negotiations, the will is the decisive factor in determining the type of commitment. The creditor, in agreement with the professional debtor, may make the latter's commitment an obligation to achieve a result if the obligation according to the principle is an obligation to pay attention (except that which is impossible, then no obligation is impossible), so there is no legal impediment that prevents the entry of such a condition in the contract ¹⁴, and all this when speaking For the express agreement in the pre-contracting stage.

Either looking at the joint will in the post-contracting stage, then that is entrusted to the judge, so looking at the joint will of the contracting parties is the powers that the judge has in the stage of conflict, so he searches for it, guided by the nature of the deal, the circumstances in which the contract was concluded, and what is required of the obligation to implement safely, confidently and well. Intention, as part of the search for an implicit common will. The role of the will in changing the nature of the obligation is evident if the tenant agreed with the lessor to return the leased property to him after the end of the contract in the same condition that it was in at the time of the contract. After the end of the lease contract in an acceptable condition, then the tenant's commitment in this case is an obligation instead of care ¹⁵, and here the role of the judiciary appears in approving that in the case of litigation, as well as in the contracting contract, so the contractor can bind himself more strictly than what is stipulated in the law based on an agreement With the employer, he makes his commitment to a result, and he is, according to the

⁹ Ghestin (J.) et Gonbeaux (G.) . *Traité de droit Civ . in* troduction générale Tame I . 2 éme éd. . L. G. D. H. paris. 1983 . p. 348 . n 429 .

¹⁰ Ibid, p.105-109

¹¹ This can be replaced by the adoption of objective responsibility, as stated in the European approach, and what was stated by the French law regarding the regulation of producer responsibility.

¹² Professor Starck notes that Professor Demogue was the first to advocate and support this division in France, citing: Dr. Osama Ahmed Badr, *Commitment to Exercise Care and Commitment to Achieving a Results Between Personal and Objective Responsibilities*, New University House, Alexandria, 2011, p. 101, margin No. (1).

¹³ As for the conditions imposed by the professional debtor to mitigate or exempt from his obligations and then his responsibility, controversy arises because he is the strong party in the contractual relationship, and this is what we will try to explain in the third chapter of this study.

¹⁴ See the text of Article 131 of the Iraqi Civil Code

¹⁵ Dr.. Hassan Abdel-Basit Jamei, *The Impact of Unequal Contracts*, p. 26

principle, an obligation to exert care ¹⁶. This is because the contractor with the professional does not have the ability to impose his contractual conditions, being the weak party in the contractual relationship, and saying the opposite obviates the search for legal protection surrounding the contractor with the professional.

On the other hand, changing the nature of the professional contractor's commitment through the judicial disclosure of the common implicit will faces practical difficulty. The professional contractor's will to commit himself to commitment cannot be directed more severely without an explicit stipulation on that. Even if we recognized that the will of the contractor is The professional has tended to change the nature of the commitment, but it is difficult for the professional party, in addition to the ambiguity of the will and the consequent difficulty in determining the type of commitment.

The third branch

The text of the law as a mechanism to alter the nature of the obligation

When looking at the contractual relationships in which the professional is a party, from a practical point of view we see that the other party is not able to stipulate that the entity of the contractual bond will be overturned and make the professional's commitment an obligation to achieve a result contrary to his original. By the judge in terms of the outcome.

Also, the judge's use of his discretionary power does not help him to result in the use of this power altering the nature of the professional contractor's commitment for the purpose of controlling the contractual imbalance. Then the question arises about the legal basis on which the judge relies on this action, as it has been previously mentioned. Upon realizing the shortcomings of the previous mechanisms, it is evident that attention should turn to the legal text, as resolving the dispute and avoiding deficiencies and shortcomings, so that the weak party in the contractual relationship is not charged with something that he has no power with, and the judge is not forced to defy legal reasoning in pursuit of justice. The text to depart from the general rules of considering the

commitment of the professional as an obligation to achieve a result is the best solution and the effective mechanism.¹⁷ He preceded him and that the Iraqi legislator intervened and took a clear stance that removes the embarrassment when he made the commitment of the carrier to deliver the passenger safely and restored to the arrival station an obligation to achieve a result, and if the transportation was free¹⁸, this is considered a qualitative transfer in Iraqi legislation as he decided to depart from the general rule in the obligation to do work to make The order is clearly and smoothly applicable to the judiciary.

Among the vivid applications of the legislator's intervention and the decision to commit the professional debtor to a result in the obligation to perform an act contrary to the general rule ¹⁹, what the Iraqi legislator stipulated in Article (972), related to the preservation of things by the owner of the hotel that the guests bring in, as the Iraqi legislator has made an obligation The owner of the hotel with a result by making a responsibility that goes beyond his personal action or subordinate acts, and extending it to others - the smell and the deceit according to the term of the legislator - this is evidence that the commitment in this case is not a simple obligation, but rather an intense and specific commitment (commitment to an outcome). The same position was taken by the Egyptian legislator in Article (727) of his civil legalization, as he acknowledged the responsibility of the hotel owner for the actions of others, stressing his obligation towards the inmate ²⁰. However, the French legislator was stricter and clearer, as it made in Article (1953) the liability of the hotel unlimited, as it stipulated that it was not permissible to limit the liability of the hotel owner by agreement, and it did not exclude money, securities and valuables as the Iraqi legislator did in terms of the amount Compensation, and the inmate's right to obtain compensation was not restricted to the mistakes of the hotel owner upon his knowledge, and the compensation was made large in the event that the hotel owner breached

¹⁷ Dr.. Hassan Abdul Basit Jumai, p. 26.

¹⁸ Françoise Laparte Riswell Noblot, Op. 576

¹⁹ See the text of Article (251/1) of the Iraqi Civil Code

²⁰ Dr.. Abbas Salman, The Legal Nature of the Hotel Contract - A Comparative Analytical Study, a research published in Ahl al-Bayt Magazine, Issue 19, p. 512.

¹⁶ Françoise Laparte Riswell Noblot, (under the direction of Jacques Gustan), Lengthy Contracts, Entrepreneurial Contract, Modern Book Foundation, 2018, p.576

his obligation towards the guest, and only force majeure was excluded as one of the reasons for the payment of liability, reminding in the text of Article (1954) the conditions for proving the incident on which they rely.²¹ The second requirement

The effect of changing the nature of the professional's commitment on the legitimate interests of the contractors

There is no doubt that concluding contracts results from needs and interests that the person seeks to achieve, so that interest is the focus of the contractual process for the contractors, and this is closely related to changing the nature of the commitment of the professional contractor through the endeavor of the contractor with the professional to achieve his desired goals that represent his legitimate contractual interests. In terms of the fact that the contractor with the professional has placed his trust in the latter, changing the nature of the obligation in order to fulfill the idea of expectation of the contractor with the professional ²², so the person's approach to a contractor who has demonstrated qualifications that makes him distinct from other owners of commercial, industrial or professional activity makes his circle of thought revolves around The imperative to implement the obligations of the other professional party regardless of his due diligence in pursuit of the implementation of his obligations in the required manner without prejudice, and otherwise - in the event of a breach of the contractual obligation that the result will not be achieved - is a breach of the legitimate expectations of the usual person ²³. Failure to implement the obligation is not considered a breach if it is a customary matter according to the expectations of the usual person, but that does not happen in the place of our study, because what is in line with the creditor's expectations is the achievement of the specified result as he has concluded the contract with a professional person.

Nevertheless, from our point of view, we see that the professional is committed to an obligation to achieve a result despite the fact that the creditor did not have in mind that the person contracting with him is a person with great qualifications, because expectation is not the only control in the contractual process and in particular with regard to the fruit of the professional debtor's implementation of his contractual obligations The reality is to impose itself and it is imperative that the debtor be treated in proportion to the focus of the contract. The change in the nature of the professional contractor's obligation affects the right of the one who contracts with the professional to obtain a fair compensation that guarantees for him what he was seeking when directing him to contract with a person who has qualifications and capabilities that distinguish them from other owners of the activity, so obtaining fair compensation is a protection for the legitimate interests of the contractor with the professional .

With regard to product trading contracts, the French civil legislator came up with the text of Article (4/1386), which corresponds to the text of Article (6/1) of the European Directive on Consumer Protection. In this chapter, the idea of protecting the legitimate interests of the contractor with the professional in terms of the legitimate expectation of the latter in obtaining A product free from defects, and the French legislator has been keen to list the elements that affect the usual person's expectations regarding the safety provided by the commodity in order to face criticism that can be directed to the term legitimate expectations as an unspecified term²⁴ He cited these elements as an example, which implies that the judge has discretion in determining what is a legitimate expectation and what is not. The previous text made it clear that the use of the products and the legitimate expectation of their safety depends mainly on the apparent condition of them, on which the user builds his confidence.

Therefore, we can say that changing the nature of the professional contractor's commitment from an obligation to pay attention to a commitment to achieve a result that is fully consistent with the

²¹ Text of Article (1954) of the French Civil Code.

²² Dr.. Hassan Abdel-Basit Jamey, *Producer's Responsibility for Damages Caused by Defective Products*, Dar Al-Nahda Al-Arabia, Cairo-Egypt, 2000, p.

²³ The expectation criterion is an objective criterion determined by the trial judge, d. Hassan Abdul Basit Jumai, the same source, p. 185.

²⁴ Dr.. Hassan Abdul Basit Jamei, *Responsibility of the Producer*, previous source, p. 188

idea of the legitimate expectation of the contractor to protect his contractual interests. Safety that can be legitimately expected from him²⁵. Changing the nature of the obligation here to protect the legitimate expectation finds its basis in legislation, and the judge's role is limited to uncovering the elements that are like the legitimate signature and which are not so, and this supports our view that the most appropriate and effective mechanism for changing the nature of a professional contracting commitment is legislation. The third requirement The effect of changing the nature of the professional contractor's obligation on proof

The change in the nature of the professional contractor's commitment must have practical fruits that deny the purpose for which it has become necessary to tighten the commitment of the professional contractor in favor of the other contractor. Undoubtedly, one of the most prominent of these fruits is the shift in the burden of proof from the creditor to the debtor, according to the circumstances.

In this regard, the issue of proving the implementation of the commitment or lack thereof depends on the company of the previous situation, and this is what the general rules stipulate.²⁶ In the obligation to exercise due diligence, the accompaniment of the previous situation leads to the occurrence of the burden of proving failure to implement the obligation on the shoulders of the creditor contracting with the professional²⁷. In addition to the burden of proving failure to perform the obligation on the creditor, he must also prove the professional debtor's fault, that is, to prove that the professional contractor has neglected to implement his obligation as he did not exert the due care and diligence on the usual professional who is in his like circumstances and within the scope of his profession or His craft ²⁸, and in fact this proof is difficult, and it is not an exaggeration to say impossible in most commercial, industrial and craft activities, as the professional contractor's control over the

contractual process and the implementation of contractual obligations in particular makes the issue of proving his error impossible, and we find a clear practical example of that in Electronic banking operations, as the bank controls all stages in the implementation of banking operations and controls the electronic system and controls it independently of the customer's will or knowledge, In fact, this proof is difficult and it is not an exaggeration to say impossible in most commercial, industrial and professional activities, as the professional contractor's control over the contractual process and the implementation of contractual obligations in particular makes the issue of proving his error impossible, and we find a clear practical example of this in electronic banking operations, As the bank controls all stages in the implementation of banking operations and controls the electronic system and controls it independently of the customer's will or knowledge, and in many cases the professional party can fundamentally deny his mistake by not deviating from the usual behavior despite the damage to the creditor as a result of failure to implement the contractual obligation Or a breach in its implementation ²⁹. The change of the nature of the commitment of the professional contractor requires, according to the conjunction of the previous situation, that the burden of proving the implementation of the obligation on the debtor itself is shifted, because the previous stable situation is the non-implementation of the obligation³⁰. However, this result is the last stage when the nature of the commitment is revealed, and that this is not an easy matter. Sometimes there is a separation between the obligation to achieve a result and the obligation to exert care in the framework of the obligation to act ³¹, and this last is either related to one of the things or it is related By performing a specific service, in the first case, although in most cases there is a commitment to achieving an outcome, for

²⁵See: Article (1386/4) of the French Civil Code

²⁶ Dr.. Hassan Abdul Basit Jamei, The Extent of Assumption of Error, Previous source, p

²⁷ It is shared with the obligation to exercise due diligence in the judgment of concomitant status and the burden of proof on the creditor, the obligation to refrain from work.

²⁸ This is what was stated in Article (251) of the Iraqi Civil Code, and Article (211) of the Egyptian Civil Code

²⁹ Dear Professor Dr. Sulaiman Barak Al-Jumaili, Electronic Cash Transfer System, non-printed lectures given to masters students at the College of Law - University of Fallujah, 2019-2020.

³⁰ Dr.. Hassan Abd al-Basit Jamei, The Extent of Assuming Professional Error, Ibid, 23.

³¹ It is worth noting that the obligation to give and the obligation to refrain from work are always an obligation to achieve a result

example, the seller's commitment to deliver a sale in conformity with the specifications - a commitment independent from the obligation to transfer ownership - but this is not a general principle but rather a rule to which an exception is provided, it is related to the content of performance. Therefore, the lessee's commitment to return the leased property in the state it was in at the time of the contract is similar to the seller's commitment to deliver a matched sale in terms of being a commitment to achieving a result³². However, if the lessee is obligated to return the leased property in an acceptable condition, then this obligation is an obligation to exert care, and the burden of proof fluctuates between the creditor and the debtor according to the previous data.

Either if the commitment to work is related to the performance of a specific service, such as the commitment of the agent to carry out legal actions in the name and account of the principal, and the doctor's commitment to treating his patient, then distinguishing the obligations therein is not without precision, but things become clear if we differentiate between two things, the first of which is to do the work entrusted to the debtor, The second is the fruit of these actions. The matters are evident as the debtor's obligation to carry out the actions entrusted to him and through which the contracting parties intend to reach the fruit³³, - such as the attorney winning a lawsuit or healing the patient - is an obligation to achieve a result and the burden of proof of performing it falls on the debtor³⁴. Either if the debtor carries out the duties assigned to him, then this calls for saying that he took care to implement his contractual obligation, and then the burden of proving failure to perform the necessary care falls on the creditor³⁵, and it is worth noting that it is the obligation of the professional debtor despite it being an obligation rather than a care. However, the burden of proof to properly implement it falls on the shoulders, through the use of the judiciary in the

case of evidence whenever it categorically stresses the professionals, by assuming the error as soon as the harm occurs, and this is called the obligation to exert the care of the aggravator³⁶, in which the burden of proof is reversed. While enabling the professional debtor to pay his responsibility by proving his non-default and thus the absence of error on his part³⁷, the Egyptian jurists agreed with the French jurists in considering the presumption of error as a use by the judge who has the discretionary power to extract the error from all the evidence stating that the damage would not have occurred. Had it not been for the mistake of the professional debtor³⁸.

The second topic

The due diligence switch on the professional contractor

Although the nature of most of the professional contractor's obligations in the various activities has changed from the ground up by changing the content of his contractual commitment, there are obligations whose nature cannot be altered, and protection for the contractor with the professional cannot be provided under this section. Professionalism in the contracting debtor necessitates research into the amount of due diligence in performing his contractual obligations with due diligence. Therefore, we divide this requirement into three branches. In the first, we present the standard of usual professionalism, in the second the criterion of a careful professional, and the third we allocate it to the personal criterion with regard to the class of professionals.

The first requirement

Standard professional standard

The general rule requires that the debtor in the obligation to pay attention, whose purpose is to perform an act that would have fulfilled his obligation if he exerted in his performance the

³² Article (1732) of the French Civil Code., Corresponding to Article (591/1) of the Egyptian Civil Code., Corresponding to Article (772/1) of the Iraqi Civil Code.

³³ Dr.. Osama Ahmed Badr, previous source, p. 26

³⁴ Cass. Civ. I. 18 janv. 1989. D. 1989. 302. note c.

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³⁵ Dr.. Hassan Ali Al-Dhanun, The General Theory of Commitment, The Legal Library - Baghdad, without a year of publication, p. 22.

³⁶ Dr.. Hussein Mansour, Medical Responsibility, The New University House, 1998, p. 30

³⁷ However, an opinion from jurisprudence has directed in the meaning of proof through the obligation to exert extreme care that this proof rests with the creditor, until it is an indefinite proof, so as soon as a minor error is proven on the part of the professional debtor, his responsibility is established, d. Moataz Nazih Muhammad Al-Sadiq, Hotel Contract, previous source, p.

³⁸ Hussein Mansour, the same source, p. 30

care of a regular man³⁹, and this latter means the care that is consistent with the principles of the stable activity or profession that is exerted by a person of the same level he found in The same external circumstances in which he was found, that is, he must pay attention⁴⁰, except that we are in the framework of a certain group of contractors except they are professionals, so the criterion is in that context, so we say the standard of the usual professional, as it is not reasonable to measure the mistake of a professional debtor with a debtor error Absent from this quality, the mistake that is committed is not an ordinary mistake but rather a professional mistake, so we say that the usual professional is an objective criterion for the professional sect, so that a professional exercises the same activity in the same external circumstances for the debtor who takes the required care, and an opinion from the jurisprudence goes to differentiate and separate the standard The usual person, and the obligation to exert care, as once a person performs an act that does not come from the usual professional, he is described as having committed a mistake, and then it is not permissible to ask whether this debtor has taken care in thinking or in decision-making or not, and because that will transform the obligation to me A purely mental process outside the circle of law, and in this way it seems that the mistake is not to exercise the care that the usual professional exerts, but rather to perform an action that the usual professional does, Therefore, it is not permissible to ask whether this debtor has taken care in thinking or in decision-making or not, and because that will turn the obligation into a purely mental process outside the circle of law, and in this way it seems that the mistake is not to exercise the care that the professional exerts. The usual professional, but rather to perform an action that the usual professional does not. Therefore, liability is not imposed on the damage resulting from the mistakes of the professional, unless these mistakes are not made by a reasonable person in

the same activity or profession and placed in the same external circumstances, and if he adheres to the foregoing then he has fulfilled his obligation, then stopping the standard of the usual professional does not ask him to be exemplary.⁴¹

But there is a practical problem facing us in the application of this standard, which is the percentage of professionalism, or the idea of professionalism hierarchy, because not all professionals have one degree of this characteristic and that the standard is passed on by professionals who practice the same activity, so even in one activity the degree of professionalism of those who practice it varies⁴², This is in contrast to what the standard applies to in the general framework of dealing in terms of derogation, so everyone is equal in terms of enjoying qualifications, so the distinction between a middle-aged man is not intended by the middle of them in terms of qualifications, but in terms of caution, diligence and vigilance without concern for looking at the qualifications as long as he does not live up to the limit. The minimum requirements for gaining professional status. With which person will the judge measure the amount of care if the ranks and positions are uneven, despite their caution, concern, and vigilance are all assumed? Is it equal to treat a contractor with the highest qualifications, which makes him in the ranks of those who ascend the throne of activity, as a professional treatment who has reached the minimum level of professionalism, but a large discrepancy between the degree of his professionalism and the degree of professionalism of the first? So is the specialist doctor like periodic resident? Everyone will meet the standard of the usual professional, and if that stresses the periodic evaluator, then at the same time it will be a dilution for the specialist, and this is not consistent with the idea of professionalism itself. The second requirement

The standard of a careful professional

In our talk about the group of professionals and the due diligence in performing the obligation if we want to rise in the amount of care, then we rise from the standard of the usual professional to that

³⁹ Accordingly, Article (231) of the Iraqi Civil Code, Article (211) of the Egyptian Civil Code, and Article (1137) of the French Civil Code stipulated that

⁴⁰ D. Hassan Sami Al-Abadi, and Dr. Sherine Abu Ghazaleh, Standard on Contractor's Commitment to Care in Green Buildings, a research published in the Journal of Legal and Political Sciences, Volume 14, Issue 2, June 2017, p. 293

⁴¹ Dr.. Sabri Hamad Khater, The standard of medical error, previous source, p. 130.

⁴² Dr.. Basem Muhammad Saleh, Commercial Law, Section 1, Sanhoury Library, Beirut, 2015, pp. 87-88

of the careful professional, and the careful professional is in a higher rank than the usual professional, so he is not one of the average professionals in terms of caution, diligence and vigilance. A hypothetical person who is very vigilant and enjoys in performing his obligations with extreme caution and caution, so the amount of care required of him is higher, so he is committed to extreme care that reaches the point of assuming error just because of the occurrence of harm ⁴³, so he is obligated to exert care in vigilance and diligence, if he deviates from this behavior and neglects to follow The work entrusted to him according to the surrounding circumstances, the acquired experience and future expectations, although he was able to distinguish and that as expected from a specialized person with extensive experience in the same field, and his action is described by mistake as soon as any negligence occurs, given that he practices his work as a professional, which requires not to deviate Regarding professional behavior according to what has happened to work conditions that require confidence, speed and caution, in a ruling of the Egyptian Court of Cassation, it indicated that one of the contractors (who is a doctor) is a specialist (professional), stressing that he has not taken Adequate and due care that is consistent with the nature of the method chosen by him, the court did not refer to the standard of the usual man in the activity, but stated that the contractor is a specialist, and this description does not relate to the standard of the usual professional or ordinary man who practices the same activity and is surrounded by the same external circumstances ⁴⁴. Whatever the case, the professional contractor's control over the contractual process makes it possible for him to prove that he has not neglected and that he has

exerted the care that the careful person exerts from the people of his own making, and thus it is difficult to prove the error on his part, and thus his lack of responsibility towards the other contractor.

On the other hand, adopting the criterion of a prudent professional leads to the loss of legitimate trust if a person comes to contract with another who has qualifications that exceed the description of a careful professional. With the professional with the latter.

The third requirement

Personal Standard for Professionals

After we went through the objective criteria (the standard of the usual professional, the criterion of the careful professional), and clarified its concept within the framework of the study, it became clear to us that there is a fundamental idea that prevails when talking about due diligence and assigning the error or not to the professional contractor, which is an idea that includes professionalism, and we mean by it that Professionalism is not of one degree, and we have given many examples more than once in more than one place, which raises a real problem in terms of applying the appropriate criterion in assessing the error of the professional contractor. The disparity in the level of professionalism creates gaps when applying the objective standards, as we have previously indicated that their application It leads to a waste of legitimate trust and the idea of personal consideration if the person hires a professional who is more than the usual professional, and even more than the careful professional.

As well as the possibility of demonstrating due diligence in both criteria, which led us to say that the appropriate criterion in assessing the error of the professional contractor and knowing his due diligence or not is the personal criterion, and we have many justifications in this regard. As for the criticism directed at the personal criterion that it contradicts the rules of justice, then it makes the mistake a purely personal idea. An act, if it was committed in the same circumstances, may entail the responsibility of one person and not another, and it calls for cooperation with those who are used to neglecting his behavior and stressing those

⁴³ This is called the strict commitment to exert attention, which was approved by the jurisprudence, d. Hussein Mansour, Medical Responsibility, previous source, p. 30, as well as the French judiciary c.a.paris, 4nov. 1963, d.1964,11,13., As well as the Egyptian judiciary, an Egyptian civil cassation, June 26, 1969, Technical Office Group, S20, p. 1075, referred to by: Dr. Hussein Abdul Basit Jamei, The Extent to Assuming Professional Error, Previous Source, p. 31

⁴⁴ Egyptian Court of Cassation, Appeal 45 of 1994, Session 12 June 1994, p. 316. Quoted from: Dr. Sabri Hamad Khater, The standard of medical error, previous source, p. 129.

who are accustomed to being awake in the slightest mistake ⁴⁵.

It can be answered that professionalism has been set as a minimum that cannot be relinquished. If a person rises in his qualifications and reaches the minimum level of professionalism, he leaves the circle of ordinary contractors and enters the circle of professionals, and he demands a performance that is distinguished from the performance of ordinary contractors, so the personal criterion applies. The limit, and in the liberal professions, the rules of professional ethics represent the minimum level of vigilance and caution. So you can say that the personal standard has a specificity in its application with the community of professionals. It calls for each professional to be treated according to the degree of his professionalism, so that he claims to achieve justice.⁴⁶ Either with regard to the criterion whose content is a measure of the debtor's care on a person of the same activity and enjoys the same degree of specialization and the degree after it is an objective standard (the criterion of professional error). When looking closely, we find that the doctrine did not introduce a new standard, but rather it is the essence of the personal standard as long as it measures the debtor's behavior and not The usual or even the careful person ⁴⁷, as if measuring the debtor's own behavior.

The judiciary tends to this idea and takes into consideration the debtor's own vigilance, skill and eagerness, so he asks about every failure in a course that does not occur from a person awake at the same level found in the same circumstances that surrounded the debtor ⁴⁸, and this is the criterion for the person despite the reference to external circumstances, which shows the contradiction Between the idea of (profession) and the idea of objectivity when measuring behavior,

⁴⁵ Dr.. Anwar Younis Hussein, The Doctor's Corner of the Error in Civil Liability - A Comparative Study, Dar Al-Fikr Al-legal - Mansoura, without a year of publication, p. 288

⁴⁶ Dr.. Sabri Hamad Khater, The standard of medical error, previous source, p. 134

⁴⁷ Same previous source, pp. 134-134

⁴⁸ Egyptian Court of Cassation, Civil Authority, 12/12/1971, Group of Cassation Rulings 179-2016-22, Civil Cassation, 11/2/1973, Appeal No. 1566 for the year 42., referred to by: Dr. Sabri Hamad Khater, the same source, pp. 129-134.

In another ruling issued by the Egyptian Court of Cassation on June 26, 1969. He was referred to by: Dr. Anwar Youssef Hussein, previous source, p. 294

the first entails artistic behavior in line with the profession's origins with the abuse of internal circumstances, either the second requires nothing but the usual or careful behavior of the person in the same external circumstances⁴⁹.

And whoever claims to exaggerate the application of the personal criterion on the professional debtor, as the assessment of his behavior is from the minimum that he demands from the income in the professional circle, then upwards, and that the professional is satisfied with his level of his efforts and no credit for him, then this is reflected in the idea of contractual justice and the treatment of the imbalance of contractual, which represents One of the main problems on which this study is based and which we seek to address ⁵⁰.

Results

1. The judge cannot change the nature of the professional contractor's obligation from an obligation to exert care to an obligation to achieve a result in any case, because this process lacks the legal basis that justifies it, and his role is limited to establishing legal presumptions in favor of the contractor with the professional who benefits from them in the field of proof
2. The contractual position of the contractor with the professional does not rise to the imposition of contractual conditions that make the commitment of the professional to change from an obligation to pay attention to a commitment to achieve a result, and if the opposite could be imagined, the need to protect the contractor with the professional in the face of the latter would not appear, because the will, if it was not restricted by circumstances. The legal and nodal

⁴⁹ Dr.. Sabri Hamad Khater, The standard of medical error, previous source, p. 134

⁵⁰ As for the professional contractor, it is possible to avoid burdening him with burdens that are heavier than those imposed on other ordinary contractors by various means, and civil liability insurance is in the form of one of these methods.

centers would have had an effective role in protecting their owner.

3. The legal text is the best mechanism for changing the nature of the professional contractor's commitment, due to the fact that this mechanism is characterized by the resolution of the controversy and the strong basis on which to express the legal nature of the obligation.
4. Changing the legal nature of the commitment of the professional contractor achieves the protection of the legitimate interests and the idea of expectation for the other party in the contractual process.
5. The difficulty of proving the contractor with the professional to the professional's mistake, due to the latter's control over the contractual process and its ability to deny his mistake. Therefore, changing the nature of the professional contractor's commitment to the transfer of the burden of proof on the professional himself.

The most appropriate due diligence standard is the personal standard in the framework of the professional's contracts with other ordinary people. Every professional demands a performance consistent with his level of

professionalism, from the minimum level of professionalism upwards.

Discussions

1- The Iraqi judiciary must urgently deal with the spirit of the texts and not adhere to the traditional concept of them regarding the nature of the professional contractor's obligations, so the judge uses his discretionary power to emphasize the professional in the framework of his obligations in preparation for the issuance of a legal text that is influenced by the jurisprudential opinions and judicial applications.

2- The enactment of a general legislative text requiring the privacy of the professional's treatment in terms of the legal nature of his obligations, which provides for the substitution of what can be altered from an obligation to exert care to an obligation to achieve a result, and what cannot be changed, the emphasis on the professional is through the standard of due diligence, which stipulates the personal standard, with Giving the judge space through discretion to assess the professional's fault

Conclusion

After we went through the details of the impact of professionalism on the legal nature of the commitment of the professional, we reached the following conclusions and proposals.

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