PERSONAL TRAINER'S CIVIL LIABILITY

RESPONSABILIDADE CIVIL DO PERSONAL TRAINER

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ABSTRACT

This work deals with the civil liability of the personal trainer in the exercise of the physical educator profession. This study covers the incidence of the Civil Code, the Law 9.696/1998, the CONFEF Resolutions and other normative provisions that regulate the professional performance in physical education and its relationship with the institute of civil liability. The study of the theme is pertinent considering the increase in the demand for personalized services in the area of physical education in search of a better life quality and health in general. The objective of this work is to understand the regulation of the professional practice of physical education teachers in Brazil, specifically the profession of personal trainer, building a dialogue between this and the civil liability general theory, passing through the evaluation of how these issues are handled and applied by the Judiciary. The methodology consists of hypothetical-deductive research, with qualitative approach, descriptive purpose, with the objective of proposing a formative evaluation on the theme. Based on the Consumer Protection Code, it is concluded that the personal trainer responds subjectively, when acting as a liberal professional, and when linked to an academy, it responds objectively.

KEYWORDS: Civil liability. Physical Education. Personal Trainer. Damage.

RESUMO

Este trabalho trata da responsabilidade civil do personal trainer no exercício da profissão de educador físico. Este estudo abrange a incidência do Código Civil, da Lei nº 9.696/1998, das Resoluções do CONFEF e demais disposições normativas que regulam a atuação profissional na educação física e sua relação com o instituto da responsabilidade civil. O estudo do tema é pertinente considerando o aumento na demanda da prestação de serviços personalizados na área da educação física em busca por uma melhor qualidade de vida e de saúde em geral. O objetivo deste trabalho consiste na compreensão da regulamentação do exercício profissional dos educadores físicos no Brasil, especificamente da profissão de personal trainer, construindo um diálogo entre esta e a teoria geral da responsabilidade civil, passando pela avaliação de como esses temas são trabalhados e aplicados pelo Poder Judiciário. A metodologia consiste em pesquisa hipotético-dedutiva, com abordagem qualitativa, propósito descritivo, com o objetivo de propor uma avaliação formativa sobre o tema. Com fundamento no Código de Defesa do Consumidor, conclui-se que o per-

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sonal trainer responde subjetivamente, quando atuar como profissional liberal, e quando estiver vinculado a uma academia, esta responde objetivamente.

PALAVRAS-CHAVE: *Responsabilidade Civil. Educação Física. Personal Trainer. Dano.*

1 INTRODUCTION

Liability is one of the main themes of study in the scope of Civil Law, based on the restoration of equity and off-balance sheet arising from the damage and this arising from the most varied species of social facts. Among the many activities carried out in the social field, the activity of physical educators in general is one of the fields from which the existence of damages and losses can originate, leading to the need for reparation. This is essential in the social field, as a way to protect legal interests safeguarded by law, whether they are of a patrimonial nature or rights related to personality. In this context, this work will have as main theme the civil liability of physical educators, more specifically, the personal trainer in their typical activities.

In recent years, the demand for a physical education career has grown considerably. According to data from the National Institute of Educational Studies and Research Anísio Teixeira (*Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira - INEP*), in 2015, the number of trainees in the higher education courses in physical education was around 35 thousand people[3]. In addition, the search for a better quality of life and health in general, through the most varied types of supervised physical activity is increasingly growing. As this activity is supported by doctors and the media, the importance of studying civil liability is perceived in the case of: physical, patrimonial and moral damages that can be caused to users of the services provided by physical educators, especially those who act as personal trainers.

Methodological procedures include hypothetical-deductive research, with a qualitative approach, descriptive purpose, and the objective of proposing a formative assessment. The rules related to the proposed theme will be directly examined, including Law Nº 9.696/1998 and specific resolutions published by the Federal Council for Physical Education (*Conselho Federal de Educação Física - CREF*), such as, for example, Resolution Nº 307/2015, which provides on the Code of Ethics for Physical Education Professionals (*Código de Ética dos Profissionais de Educação Física*), building a dialogue between its determinations and the civil liability institute. In addition, a current practical case will be analyzed in order to examine the treatment given by the Judiciary to the concepts and facts involved in the repair of damages caused during the professional exercise of the personal trainer.

Initially, the concepts that support the general theory of civil liability will be outlined, including the concepts of strict/objective civil liability and subjective civil liability, contractual and non-contractual, illegal act, abuse of rights, as well as the foundations that give meaning the observance of civil liability within the social reality.

3 National Institute of Educational Studies and Research Anísio Teixeira (Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira - INEP). Higher Education Statistical Synopses - Graduation (Sinopses Estatísticas da Educação Superior – Graduação). Available in: http://portal.inep.gov.br/web/guest/sinopses-estatisticas-da-educacao-superior. Accessed on: September 21, 2018.

Then, the assumptions, or essential elements of civil liability, will be defined, that is, positive or negative human conduct, the general fault/blame of the agent, the causal link or nexus of causality and the damage, or injury caused.

Subsequently, the regulation of professional practice in physical education in Brazil will be presented and analyzed, based on Law Nº 9.696/1998, Resolution Nº 307/2015 of Federal Council of Physical Education (*Conselho Federal de Educação Física - CONFEF*) and the other resolutions issued by the same institution. Understanding this matter is especially relevant, as these determinations organize and regulate the work of physical educators in the country, making it possible to perceive the relationships that can be established between this regulation and the subject of civil liability in case of damages arising from the professional exercise of the personal trainer.

Finally, a judicial decision related to the topic will be examined, making it possible to analyze the protection afforded by the Judiciary to individuals who suffer losses from the follow-up and supervision of physical education professionals, especially in the case of those who work as a personal trainer.

2 GENERAL THEORY AND ASSUMPTIONS OF CIVIL LIABILITY

Responsibility or liability is one of the main aspects of social reality, representing the duty to restore the equity balance (*patrimonial and extrapatrimonial balance*) (property and off-balance sheet damages) and resulting from any activity that causes damage or loss, originated in the legal consequences of the activity and the duty not to harm others (STOLZE, 2012, p. 46). The origin of the theme is linked to Roman Law, in the regulation organized by the State to compensate the damages caused in the criminal and civil spheres, through the fault/blame of the author, generating a penalty and the duty of reparation (TARTUCE, 2017, p. 499).

In the case of civil liability, its observance may originate from mandatory non-compliance, disobedience to contractual rules or the lack of observance of a certain rule that regulates life and social relations. Civil liability is well founded and linked to the need to demand a response that expresses efficiency, justice and security, contributing to social order and pacification. For this reason, the issue of responsibility is increasingly concentrated on the judgment of the damage itself and its consequences, not only in the conduct of the agent who caused it (GONÇALVES, 2018, p. 30-31).

The doctrine deals with civil liability from a dual or binary model. Despite their distinct origin, the modalities of civil liability are based on the same source, which is the social contract, and on the same fact, that is, the violation of a pre-existing legal duty, and obey the same basic principles and rules (MARTINS-COSTA, 2003, p. 97).

In the Brazilian legal system, civil liability assumed the *status* of fundamental right by the Federal Constitution of 1988, being expressly recognized in article 5º, item V (the right of reply is guaranteed, proportional to the appeal, in addition to compensation for material,

moral or image damage (our translation into english)) and in article 5º, item X (intimacy, private life, honor and image of people are inviolable, and the right to compensation for material or moral damage resulting from their violation being assured (our translation into english)), these articles deal specifically with the right to compensation for property/equity and off--balance sheet damages (*patrimonial* and *extrapatrimonial* balance).

In general, civil liability can be classified into contractual or business (*negocial* or by negotiation) and 'extracontractual' or non-contractual or Aquilian.

The first stems from the breach of a contractual obligation or unilateral business and is regulated in articles 389 to 391 of the Civil Code[4]. It can originate, for example, in the non--compliance with the obligation of a transport company to drive a goods safely, in the event that the goods were partially or totally destroyed due to a transport incident.

In Aquilian civil liability, there is no link between the victim and the one who caused the damage, based on the illegal act and the abuse of the right, treated in articles 186 and 187 of the Civil Code, respectively (GONÇALVES, 2018, p. 45).

One of the main institutes that characterize non-contractual civil liability is the unlawful act or ilegal act, treated in article 186 of the Civil Code[5]. This can be understood as any human act or conduct that violates subjective and private rights, injuring the legal order and causing harm to others. It's a legal fact in a broad sense, generating the duty of reparation and indemnity, whether in the civil, criminal or administrative scope, as demonstrated in Article 927 of the Civil Code (BRASIL, 2002).

The abuse of rights, which is also the basis for non-contractual civil liability, is provided for in article 187 of the Civil Code[6], being a legal act that has a lawful object, but which when practiced is exaggerated, entails consequences that are considered illegal, violating principles such as that of ethics, sociality, good faith and good customs (FRANÇA, 1977, p. 45).

Civil liability can also be classified as objective or subjective. The subjective liability is based on proof of the blame of the perpetrator of the damage, thus being indemnifiable.

And the strict liability, on the other hand, exists in the legal possibilities in which the damage needs to be repaired, regardless of the existence of blame, requiring only the existence of the damage and the causal link or nexus of causality. Strict liability is present in several articles of the Civil Code, such as articles 936 and 937[7], that deal with the responsibility of the owner of the animal and the owner of the ruined building, as well as in articles 12 and 14 of the Consumer Protection Code (*Código de Defesa do Consumidor*) (Federal Law Nº

4 Art. 389. If the obligation isn't fulfilled, the debtor is liable for losses and damages, plus interest and monetary restatement according to regularly established official indexes, and attorney fees.
Art. 390. In the case of negative obligations, the debtor has been defaulted since the day on which he performed the act that he should abstain from.
Art. 391. For the default of obligations all debtor's assets are responsible. (Our translation into english)

5 Art. 186. Anyone who, through voluntary action or omission, negligence or imprudence, violates the right and causes harm to others, even if exclusively moral, commits an unlawful act. (Our translation into english)

6 Art. 187. The holder of a right who, when exercising it, manifestly exceeds the limits imposed by his economic or social purpose, good faith or good customs also commits an unlawful act. (Our translation into english)

7 Art. 936. The owner, or keeper, of the animal will reimburse the damage caused if it does not prove the victim's blame or force majeure.
Art. 937. The owner of a building or construction is liable for damages resulting from its ruin, if it comes from a lack of repairs, whose the necessity was manifest. (Our translation into english)

8.078/90). It's based on the theory of risk, whose idea is that every person who carries out an activity assumes the risks of damage to third parties arising from this activity, being obliged to repair them, even if there is no fault/blame (GAGLIANO; PAMPLONA FILHO, 2012, p. 201).

There is no consensus on the essential elements of civil liability or the duty to repair and indemnify. However, in general, four elements are considered: human conduct or action, the general blame of the agent, the causal link or nexus of causality, and the damage or harm caused.

The assumption of human conduct, concerns an action or omission, from any person, that causes harm to others. That is, the damage may be caused by positive or negative conduct, voluntary or arising from negligence (*negligência*), recklessness/imprudence (imprudência) or malpractice (imperícia), characterizing intent or blame in *stricto sensu*. For the negative conduct to be characterized, it is necessary to demonstrate that a certain conduct, configured as a legal duty that would avoid the damage, was not practiced. For example, article 938 of the Civil Code determines that the inhabitant of the building, from whom things fall, is responsible for the damage caused, since there is a presumption that this damage could be avoided through positive conduct that was no longer practiced by the agent (GONÇALVES, 2017, p. 65).

Generic blame/fault or lato sensu, covers intent and fault stricto sensu. The intent involves the agent's willingness to harm the right of others, in order to harm. In civil liability, the intent receives the same treatment of serious or very serious blame, generating the duty of indemnity. The guilt/blame in *stricto sensu*, on the other hand, results from the non-observance of an existing legal duty, there being no need for intentional violation, and may stem from the lack of diligence of the agent causing the damage, or from negligence, recklessness or malpractice. (TARTUCE, 2017, p. 522).

The causal link is the immaterial element of civil liability, directly linking human conduct to the damage caused in a cause and effect relationship. It constitutes the link between the offense to the right and the damage suffered. Thus, the harmful fact originates in the action or is a predictable consequence of it. The existence of a causal link is a mandatory element for the obligation to indemnify (PEREIRA, 1994, p. 75).

Finally, damage is the essential element, the legal fact that triggers the civil liability. This results from proof of damage, from injury to a legal object, whether of an equity or off-balance sheet nature. Without it, there is no object for redress in the civil sphere. The damage can be moral, falling on honor, personal or family name, causing suffering to the victim, or property (patrimony), when it has repercussions on the financial reality of the victim (FARIAS; ROSENVALD; BRAGA NETTO, 2017, p. 235).

3 REGULATION OF PROFESSIONAL ACTIVITY IN PHYSICAL EDUCATION AND ITS CODE OF ETHICS

In Brazil, the work of the physical education professional started to be regulated as of Law Nº 9.696, of September 1, 1998, enacted after intense debate by scholars, researchers

and professionals, with the objective: the organization of the professional exercise of the physical educator and the creation of the Federal Council of Physical Education (*Conselho Federal de Educação Física - CONFEF*). Before the enactment of this law, since the 1940s, the need to regulate the physical education profession in Brazil was discussed through meetings and debates between students, scholars and directors of educational institutions, aiming at its organization, protection and appreciation of professionals working in the area (SOUSA NETO et. al, 2004, p. 123).

The article 1º of Law Nº 9.696/1998 defined limits as to the subjects who could act in the area of physical education, restricting such action exclusively to those who are regularly registered with the Regional Physical Education Councils (*Conselhos Regionais de Educação Física - CREFs*)[8]. This limitation aimed to protect the labor market of physical educators, since many people without training (higher education) in the area acted as such, reducing the quality of services and classes provided by these individuals without higher and specific training (BRASIL, 1998).

To be enrolled in the Regional Physical Education Councils, it's necessary, according to article 2º of the referred Law, to have a diploma obtained in a higher education course in physical education, officially authorized or recognized, or to have a physical education diploma issued by a foreign higher education institution valid in the National territory. In addition, item III of article 2º determined that those who already exercised their own activities of physical education professionals until the law was in force could also be enrolled in the Regional Physical Education Councils (BRASIL, 1998)[9]. That is, the latter could receive authorization from *CONFEF* to continue working, as a transitional measure between two legal states, respecting the right already acquired by these workers in this adaptation phase. (ALMEIDA; GUTIERREZ, 2008).

The duties of physical education professionals are listed in article 3º of Law Nº 9.696/1998, which is a taxing role, involving functions such as: planning, supervising, organizing, executing and evaluating works, programs and projects, as well as providing services consulting, advisory, planning personalized and specific training, as well as participation in the dissemination of technical, scientific and pedagogical information in the area of physical activities and sports (BRASIL, 1998)[10]. In this way, the physical education professional can act as a specialist in the most varied types of physical exercises, from gymnastics, through struggles in its various categories, dances, weight training, rehabilitation, ergonomics, yoga, activities organized in groups or supervised individually.

In this sense, it's important to note that the limitation of subjects who are authorized to exercise the duties of physical educators not only had effects on the protection of these professionals, but also contributed to the increase in the quality of service provision and in

8 Art. 1o. The exercise of Physical Education activities and the designation of a Physical Education Professional is the prerogative of professionals regularly registered with the Regional Physical Education Councils. (Our translation into english)

9 Art. 2º. Only the following professionals will be enrolled in the boards of the Regional Physical Education Councils: I - holders of a diploma obtained in a Physical Education course, officially authorized or recognized; II - holders of a diploma in Physical Education issued by a foreign higher education institution, revalidated in accordance with the legislation in force; III - those who, up to the date of entry into force of this Law, have provenly performed their own activities for Physical Education Professionals, under the terms to be established by the Federal Physical Education Council. (Our translation into english)

10 Art. 3º. The Physical Education Professional is responsible for coordinating, planning, programming, supervising, promoting, directing, organizing, evaluating and executing works, programs, plans and projects, as well as providing audit, consultancy and advisory services, carrying out specialized training, participating in multidisciplinary teams and interdisciplinary and prepare technical, scientific and pedagogical reports, all in the areas of physical activities and sport. (Our translation into english)

the exercise of related activities, due to more in-depth knowledge and the most effective preparation expected from those who have training courses, generating more satisfactory results and avoiding risks and possible damage to the health of those whose activities are being mediated by a physical educator (FREIRE; VERENGUER; COSTA REIS, 2002, p.42-44).

Among the activities developed by physical education professionals, there is the work of the personal trainer, an original term in English already incorporated into Brazilian daily life, which is used to identify a physical educator who offers: supervision, guidance and individual and adapted monitoring, in the search for goals based on the user's need or desires in relation to their health or fitness. This work is built through specific training that takes into account the abilities and limitations of each student, giving him security and the possibility of faster and more efficient results. For the exercise of this activity, the following are mandatory: registration with CREFs and adequate training, guaranteeing quality in the provision of services and reducing risks from inadequate guidance and monitoring.

One of the main determinations of Law Nº 9.696/1998 was the creation of the Federal Physical Education Council (Conselho Federal de Educação Física), which was established as an administrative, non-profit entity, responsible for the professional regulation of physical educators; empowering this autarchy to determine the ways in which physical education professionals should be trained, guarantee their exclusive rights to act in the area, guiding, disciplining and supervising the exercise of professional activity (BRASIL, 1998)[11].

Since its creation, *CONFEF* has issued several resolutions on the topic, such as Resolution Nº 45/2002, which provides for the organization of courses for untrained professionals, and Resolution Nº 46/2002, which deals with the intervention of educators in the organization and supervision of educational activities in basic education (CONFEF, 2002; ALMEIDA; GUTIERREZ, 2008).

One of the main normative provisions of *CONFEF* in recent years is the Resolution Nº 307, of November 9, 2015, which provides for the Code of Ethics for Physical Education Professionals registered in the CONFEF/CREFs System (*Código de Ética dos Profissionais de Educação Física registrados no Sistema CONFEF/CREFs*). From the analysis of the preamble of this Code of Ethics, it is clear that it was elaborated based on the awareness of the social and educational role that physical educators have, and the need to improve and adapt professionals to the complexities involved in individual, social and collective fulfillment of those who benefit from their work. Its creation took into account the Universal Declaration of Human Rights and Culture; the Agenda 21, which emphasizes protecting the environment in human relations; and the Brazilian Charter of Physical Education of 2000 (*Carta Brasileira de Educação Física de 2000*), in its care for the risks that may exist on the nature, society and health of the individual (CONFEF, 2015).

The elaboration of the Code of Ethics for Physical Education Professionals (*Código de Ética dos Profissionais de Educação Física*) aimed to guarantee the exercise of the profession in a competent and qualified manner, aiming at a better quality of life for all involved in its manifestation, whether the beneficiaries, who use the professional services, or its recipient

11 Art. 4º. Federal Council and Regional Councils for Physical Education are created. (*Conselho Federal e os Conselhos Regionais de Educação Física*) (Our translation into english)

(the physical educator himself), pursuant to article 2º of Resolution Nº 307/2015[12]. Thus, the referred Code establishes, in articles 4 and 5, the principles and guidelines of professional practice in the área, in articles 6 to 9, the responsibilities and duties involved; in articles 10 and 11, the rights and benefits of physical educators; and finally, in article 12, infractions and penalties in case of violation of the determinations of the Code of Ethics (CONFEF, 2015).

The principles that guide the exercise of the physical education professional, set out in article 4º, items I, II, VII and VIII of the Code of Ethics, are: respect for life, dignity and integrity of the individual; social responsibility; the provision of services in a responsible and honest manner; as well as, the performance within their identity and specific attributions of their professional field, taking into account the social role of the physical educator and the effects of their activity on the quality of life of the beneficiaries (CONFEF, 2015).

Among the responsibilities of the physical education professional, foreseen in the Code of Ethics, the highlights are items III, IV and V of article 6º, which determine that educators must provide safe service and guidance to the beneficiary, based on the educational knowledge acquired in his training courses, which bring health benefits and avoid risks, acting responsibly, including warning the user about any dangers involved in the activity carried out, according to item VI of the same article and item I of article 5º. In item XIV of article 6º, it's clear the determination that the physical activity professional must be responsible for absences committed during the exercise of his activity, either collectively or individually. In article 7º, item I, it was determined that the physical educator cannot hire services that may cause moral damage to his beneficiary or even to himself, or to incur an error that reveals a lack of professional capacity (CONFEF, 2015).

In the event of violations of the Code of Ethics, according to articles 12 and 14, the physical education professional may suffer penalties from the Ethics Commissions (*Comissões de Ética*), the Boards of Instruction and Judgment (*Juntas de Instrução e Julgamento*), the Regional Ethics Courts (*Tribunais Regionais de Ética*) and the Superior Court of Ethics of the *CONFEF* or *CREFs* system (*Tribunal Superior de Ética do sistema CONFEF ou CREFs*). The penalties involve: warning, public censorship, suspension of the exercise of the profession and even the cancellation of the professional registration together with the publicity of the fact that originated the penalty (CONFEF, 2015)[13]. The work of physical educators, especially the personal trainer, involves the risk of accidents with their students, especially injuries, which can cause property and off-balance damage to the student, due to imprudence, malpractice or negligence on the part of the physical educator. In this case, the personal trainer must be held responsible, repairing the damage caused. (OLIVEIRA, SILVA, 2005, p. 4; CONFEF, 2000).

12 Art. 2º. For the purposes of this Code, it is considered: I - beneficiary, the individual or institution that uses the services of the Physical Education Professional; II - recipient, the Physical Education Professional. (Our translation into english)

13 Art. 12. Failure to comply with the provisions of this Code constitutes an ethical infraction, the infringer being subject to one of the following penalties, to be applied according to the gravity of the infractionI - written warning, with or without a fine; II - public censorship; III - suspension of the exercise of the profession; IV - cancellation of professional registration and disclosure of the fact. (Our translation into english)

Art. 14 - The Ethics Commissions, the Instruction and Judgment Boards, the Regional Ethics Courts and the Superior Court of Ethics are organs of the CONFEF / CREFs System with their areas of coverage and competences listed in the Procedural Code of Ethics of the System CONFEF / CREFs. (Our translation into english) (Art. 14 – As Comissões de Ética, as Juntas de Instrução e Julgamento, os Tribunais Regionais de Ética e o Tribunal Superior de Ética são órgãos do Sistema CONFEF/CREFs com suas áreas de abrangência e competências elencadas no Código Processual de Ética do Sistema CONFEF/CREFs)

The activity of the personal trainer is generally linked to contractual responsibility, when the latter is in charge of fulfilling what has been agreed with his students, in the elaboration, supervision and monitoring of the varied modalities of physical activities, aiming at the desired and necessary objectives for each student. In the case of a civil relation, if he does not fulfill his duty, he can answer for the damages caused, according to article 475 of the Civil Code[14].

In most cases, the existing legal relation (between the personal trainer and the student who benefits from his services) is of a consumer nature, as the service is an activity offered in the consumer market in order to meet your needs (FILOMENO, 2018, p. 44); with remuneration (service)[15], for the work done by a physical education professional (provider/supplier)[16], to an individual as the final recipient (consumer)[17].Thus, in terms of consumer legislation, the following hypotheses are possible, which will imply in different results with regard to the responsibility of this professional: a) the personal trainer acts as a 'liberal professional', that is, without being linked to any gym or any other type of business activity; b) the personal trainer is employed or simply provides service on behalf of a gym or similar entity.

In the first hypothesis, the liability will be subjective, that is, the personal responsibility of the personal trainer will only be determined through the verification of blame *lato sensu* (article 14, § 4°, Consumer Protection Code (*Código de Defesa do Consumidor - CDC*))[18]. In the second hypothesis, however, the gym or similar institution will be objectively held responsible, that is, regardless of the existence of blame *lato sensu* (article 14, *caput*, *CDC*)[19].

The personal trainer's civil liability also stems from the provision in article 186 of the Civil Code[20], because the harmful acts are also understood as illicit acts, which violate the rights of others, and can cause physical or psychological damages, including with patrimonial repercussions. As an illegal act, when it is committed in the context of a consumer relation it will be treated as an abusive practice, under the terms of article 39 of the *CDC* (exemplary list)[21].

In any case, regardless of whether or not the activity is provided in the context of a consumer relationship, it's necessary to take great care on the part of the personal trainer with the physical and psychological integrity of the beneficiary, avoiding accidents (v.g., on weight machines with washers and weights), as well as cherish the student's health, not indicating the use of substances that can harm their health (v.g., anabolic steroids) (ALMEIDA *et. al.*, 2007).

14 Art. 475. The party injured by the default may request the termination of the contract, if it does not prefer to demand compliance, being possible, in any case, indemnification for losses and damages. (Our translation into english)

15 Art. 3º, §2°. Service is any activity provided in the consumer market, for remuneration, including those of a banking, financial, credit and insurance nature, except those arising from labor relations. (Our translation into english)

16 Art. 3°, *caput*. Supplier is any natural or legal person, public or private, national or foreign, as well as depersonalized entities, which develop activities of production, assembly, creation, construction, transformation, import, export, distribution or commercialization of products or provision of services. (Our translation into english)

17 Art. 2°, *caput*. Consumer is any natural or legal person who purchases or uses a product or service as the final recipiente. (Our translation into english)

18 Art. 14, §4°. The personal liability of the liberal professionals will be determined through the verification of blame. (Our translation into english)

19 Art. 14. The service provider is liable, regardless of fault, for repairing the damage caused to consumers by defects in the provision of services, as well as for insufficient or inadequate information about their enjoyment and risks. (Our translate into english)

20 Art. 186. Anyone who, through voluntary action or omission, negligence or imprudence, violates the right and causes harm to others, even if exclusively moral, commits an illicit act. (Our translate into english)

21 Art. 39. The supplier of products or services is prohibited, among other abusive practices: [...]. (Our translate into english)

It's thus possible to perceive the liability involved in the exercise of the professional physical education activity, which have direct effects on the health and well-being of the beneficiaries, that in case of error, poor execution of a certain exercise or improper use of equipment, lack of monitoring or adequate guidance, among others, can result in temporary or permanent physical damage to health or even in an attempt against life itself.

4 PERSONAL TRAINER'S CIVIL LIABILITY IN NATIONAL JURISPRUDENCE

Examining current jurisprudence contributes in a fundamental way to understanding the way in which the topic of civil liability arising from services provided by physical educators is being worked on in practice, as well as the protection that can be afforded to those who suffer damage from these activities. This is a topic that has rarely reached Brazilian courts. In this context of scarcity, the decisions that will be analyzed below stand out, which can contribute to the debate due to the relation with the subject.

In this sense, a case judged by the Santa Catarina Court of Justice (TJSC, 2014) will be analyzed, in which, in the initial petition, the author stated that, because he had not been assisted by the trainer in the practice of the exercise called "bench press", nor having received immediate help from the professor and owner of the gym, he could not bear the weight and the iron rod fell on his chest, causing damage to his healthIn addition, he stated that, after the accident, the academy instructor offended him, causing him even more embarrassment. Maintaining that the damages suffered have been demonstrated, the plaintiff requested his compensation through indemnity for moral damages, as well as the application of the inversion of the burden of proof, based on article 6º, item VIII of the Consumer Protection Code (*CDC*)[22].

In the sentence, the judge acknowledged that the indemnity claim for moral damages, made against the academy, filed by the plaintiff, was not considered, understanding that the probation charge was the responsibility of the plaintiff (the judge also did not accept the request for reversal of the burden of proof). Although, having not proven the occurrence of an illegal act, based on article 186 of the Civil Code, there was no basis for the reparation of the moral damages alleged by the author, which was also applied to the allegation regarding the verbal offenses that the author claimed to have addressed to him by the instructor and owner of the academy. In the judgment at first instance, no consumption relation was recognized. It's concluded that the instructor of the academy would not have the obligation to be present at the exact moment of the accident because he is not an exclusive or personal trainer, and that the author of the action was responsible for waiting for his availability, and could not assign him the responsibility for the damage suffered.

In the appeal, the decision handed down in the sentence was maintained, understanding that it was the exclusive fault of the consumer when he used the weight training equipment

22 Art. 6º. The basic consumer rights are: [...] VIII - facilitating the defense of their rights, including reversing the burden of proof, in their favor, in civil proceedings, when, at the judge's discretion, if the allegation is credible or when he is under-sufficient, according to the ordinary rules of experience. (Our translation into english)

with a weight above what he could bear, without waiting for the professional help of the trainer, breaking the causal link and removing the duty of indemnity from the service provider, based on article 14 of the Consumer Protection Code (*CDC*). Only in the second instance was the consumer nature of the relation recognized. Even so, the inversion of the burden of proof was considered unfeasible, the claim was rejected and the sentence was confirmed.

The case cited does not directly refer to the work of the personal trainer, but it is important to analyze some aspects that are related to the theme of this work. When the judge of first instance concludes that the instructor of the gym did not have the duty to closely monitor the author of the action individually, he refers to the work of the personal trainer, which shows that in case of this – personal trainer, he would be held responsible for equivalent damage, since it's a specific, direct and individualized monitoring activity.

The personal trainer has the assignment and the duty to supervise, monitor and support in a manner adapted to the beneficiary's capacities and limitations, and for this reason in the case of accidents, he has the duty to repair the damages suffered by those under his responsibility, orders and supervision, as a professional and service provider in a consumer relationship (ALMEIDA *et.al.*, 2007). This liability must be determined subjectively, that is, it's essential to prove blame *lato sensu* (negligence, imprudence or malpractice).

Another case to be observed was judged by the 1st Class of Appeals of the Paraná Court of Justice (*1ª Turma Recursal do Tribunal de Justiça do Paraná*) (TJPR, 2015). In the initial petition, filed with the Special Court of the District of Foz do Iguaçu, the author stated that she entered into a service contract with the defendant, who would work as her personal physical trainer three times a week, lasting one hour per class, paying the contracted monthly fees, but the latter refused to provide the services, asking the author to leave his establishment. The plaintiff then filed a lawsuit requesting indemnity for moral damages, which was rejected by the first instance.

In appeal, the plaintiff reaffirmed the occurrence of moral damages and breach of contract, requiring the applicability of the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*). The defendant, in his defense, stated that the breach of contract was due to delays on the part of the plaintiff, which, according to the judgment of the appeal judges, was not properly proven. The Court recognized the configuration of the legal consumption relation, and also considered that there was a refusal and failure to provide the services agreed with the physical trainer, configuring the abusive practice defined in article 39, item II of the *CDC*, that is, the refusal to attend consumer demand, despite his availability and the adjusted agreement, justifying the reparation for moral damages. In Class Appeals (*Turma Recursal*), by majority vote, the judges met, gave and upheld the appeal, reforming the initial sentence.

In both decisions analyzed, 'the consumerist nature of the service provider's relation with the personal trainer' to the beneficiary student was recognized (in one of them this recognition did not occur in the first instance), which attracts its regulation, especially in the area of civil liability, in addition to the general principles and provisions set out in the Civil Code (*Código Civil*), and the specific provisions established by the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*).

5 CONCLUSION

The civil liability institute is one of the most relevant aspects in Civil Law, due to its social role in the protection of patrimonial and off-balance sheet legal assets, contributing to social order and pacification, having a specific foundation in Brazilian legislation, either in the Federal Constitution (article 5º, items V and X) (*Contituição Brasileira de 1988*) as well as in the infra-constitutional legislation, in articles 186, 187, 389 390 and 391 of the Civil Code (*Código Civil Brasileiro*), and in articles 6º, item VI and 14 of the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*).

It is a secondary legal duty that arises with the failure to comply with a primary obligation that generates damage. Always resulting from an illegal act or abuse of rights, civil liability may arise from a contract or legal transaction between the parties (contractual) or instituted by the legislation itself (non-contractual or Aquilian). As a rule, civil liability presupposes the existence of human conduct (commissive or omissive), blame *lato sensu* (intentional or blame *stricto sensu*), damage and the causal link between conduct and damage.

Depending on the need or not to prove the blame in lato sensu of the author of the act, civil liability can be classified as objective and subjective. The first is determined independently of the proof of blame *lato sensu*, while in the second the aforementioned blame needs to be demonstrated for there the application of liability is made.

The regulation of the professional performance of physical education in the last decades, with Law Nº 9.696/1998 and the determinations of the Federal Council of Physical Education (*Conselho Federal de Educação Física - CONFEF*) and of the Regional Councils of Physical Education (*Conselhos Regionais de Educação Física - CREFs*), like the Resolution nº 307/2015 by CONFEF (Code of Ethics for Physical Education Professionals (*Código de Ética dos Profissionais de Educação Física*)), demonstrate the concern for the responsible exercise of the profession by physical educators, in the sense of being adequately prepared, generating more efficient results and reducing risks resulting from poor supervision or execution of the physical exercises.

In order to configure the need for redress resulting from civil liability, it is necessary to observe whether the conduct involved fits into the main assumptions of civil liability, which are: positive or negative human conduct, blame in the broad sense, causation (causal link) and the damage or injury caused.

In most cases, the activity developed by the personal trainer constitutes a legal relation of consumption, since the presence of all the elements that constitute this relation it's verified, with the physical educator (or the gym) being considered a supplier, when he provides his service with the remuneration, to an individual who receives it as a consumer.

The physical education professional who exercises the role of personal trainer can act as a liberal professional, without being linked to any gym, or as an employee or simply a service provider on behalf of a gym. In the first case - personal trainer as a liberal professional - he will be held subjectively responsible (through the verification of blame *lato sensu*) under the terms of article 14, § 4º of the Consumer Protection Code (*Código de Defesa do Consumidor - CDC*). In the second case, the gym will be held objectively responsible (regardless of the existence of intent or blame *stricto sensu*), under the terms of article 14, *caput* of the same Code.

Examination of the jurisprudence showed that there is still divergence between judges regarding the configuration of the legal relation of consumption in the activity of providing personal trainer services, especially as a liberal professional. However, overcoming this discussion, it's peaceful to understand the system of liability of that professional, depending on the way in which he develops his activities, independently if as a liberal professional or linked to a gym or similar institution.

The understanding of the ways in which personal trainer civil liability is characterized and configured contributes to the protection and defense of consumers, immediately, through the application of civil-consumerist legislation with constitutional basis, and mediately, in the search for maintaining order and social pacification.

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