

PRESENT ISSUES REGARDING LIABILITY FOR PREJUDICE CAUSED IN THE EXERCISE OF PROFESSION BY THE MEDICAL STAFF

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Abstract: *Doctrine and judicial practice point out situations in which liability for prejudice caused during the performance of the medical profession by the medical staff is removed, considering the fact that not always the behaviour of medical staff is culpable. Also, the article aims to point out those situations in which guilt is retained in accordance with the laws in force. The present endeavour also aims to emphasize and explain a current issue, considering the evolution of the Romanian health system and the discrepancy between the private health system and the public health system in which the doctor-patient relationship is in a permanent transformation with many valences.*

Key words: *Prejudice, profession by the medical staff, culpable, malpractice*

1. Introduction

This scientific endeavour aims to identify the notion of medical malpractice, by invoking the implications and specifics of this notion on a social and legal level and in regard to certain crimes committed by the medical staff in the exercise of their profession, namely providing medical care within a legal, authorized facility. To the same extent, the article describes, starting from the definition of malpractice provided by national law, the cases in which the court of law can rule on disciplinary, civil or criminal liability, as the deed is considered to be a crime according to the law, thus respecting the character of *ultima ratio* of criminal law.

Liability for acts of medical malpractice, as it is a professional one, I believe it needs to be analysed by each of its components: disciplinary, civil and criminal. For this reason, we intent to point out the procedural background in which these institutions are determined and applied on an administrative or legal level. Also, we must describe the doctrinarian approach which is the engine of the legal practice in this area, as it is known that many malpractice cases end up being dismissed for various reasons or others end

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up in court, but just and correct solutions are not provided. There are several such examples in ECHR jurisprudence in which the Romanian state is forced to pay moral damages for rights which have been violated in malpractice cases.

As an example, the conclusions of the Court in cases which have seen Romania convicted by the ECHR were pointed at retaining some inconsistencies in coordinating the parties which are involved in treating the patient, superficial medical investigations, delays in providing medical care and appropriate emergency treatment, delayed investigations and other such matters in regard to difficulty on a procedural level.

What is certain is that an inquiry in a specific case which is brought before the court of law entails several resources, such as money, time, a lot of patience and a difficult exercise of accepting unwanted situations which occur during the criminal trial and, not lastly, the consideration of unjust or absurd solutions which lack any judicial relevance.

2. The Notion of Public Servant

For a better understanding, we will reference the notion of public servant in the understanding of article 175 first alignment letter b and the provisions of article 175 second alignment, namely article 308 of the Criminal Code in order to better understand the notion of medical doctor. This discussion can start from Decision no. 26 of December 3rd, 2014 (Decision no 26 of December 3rd, 2014) by which the court ruled that a medical employee who holds an employment contract in a medical facility of the public health system has the quality of public servant as stated in article 175 first alignment letter b second thesis of the Criminal Code, reasoning that *“the provisions of article 375 second alignment, the current article 381 second alignment of Law no 95/2006 (Law no 95/2006, 2015) regarding the health reform, with subsequent changes and alternations, according to which the doctor is not a public servant and can't be considered as such, are not likely to exclude him from the sphere of public servants as regulated by the Criminal Code, as the text refers exclusively to the nature of the medical profession and the fundamental obligations of the doctor towards his patient”*.

The following question arises: if a member of the medical staff who is employed in a private medical facility is a public servant, an assimilated servant (article 175 second alignment of the Criminal Code) or a person stated in article 308 Criminal Code (“private servant”). Including these people in the category of those regulated in article 308 of the Criminal Code can intervene in the situations in which the person respects the legally regulated conditions; relevant to this matter is Decision no 1 of January 19th, 2015, (Decision no 1 of January 19th, 2015) in which the supreme court of law correctly ruled that article 308 must be qualified as *an attenuated form of the crimes it regards*.

If we discuss the situation in which a doctor exercises his profession within an individual practice, this situation might fall outside these categories, thus criminal liability is excluded. Such a hypothesis is controversial in judicial practice.

2.1. Disciplinary liability

Within this section, I will succinctly point out certain aspects regarding the easiest and most used form of medical liability, namely disciplinary liability, as it is not the object of our analysis since we aim to particularly analyse civil liability and criminal liability.

According to the provisions of article 450 of Law no 95/2006, *“the doctor is disciplinary liable for the disrespect of all laws and regulations of the medical profession, the Code of Medical Deontology and the rules of good practice, the statute of the Medical College of Romania, for the disrespect of mandatory decisions passed by the governing bodies of MCR, as well as by deeds committed in relation with the profession, which are likely to cause prejudice to the honour or prestige of the profession or of MCR”*.

Disciplinary liability does not exclude criminal, contravention or civil liability.

The Medical College is the body which ensures the correct enforcement of all regulations which organize and regulate the medical profession, which ensures the respect by all medical practitioners of all their obligations in regard to the patient; this body also organizes the trial of all cases regarding violations of medical ethics rules, medical deontology or professional good practice.

2.2. Civil liability of medical personnel

Law no 95/2006 defines, in article 653 first alignment letter b) the notion of malpractice as *“the professional error performed in the exercise of the medical or medical-pharmaceutical act, which is likely to generate prejudice on the patient and entails the civil liability of the medical personnel and the supplier of medical or pharmaceutical services”*.

In its current form, Law no 95/2006 distinguishes between civil liability of medical personnel, which can only be engaged in case of malpractice based on guilt established by the court of law (article 653 of Law no 95/2006) and the liability of the medical facility which supplies the medical products and services, which can be engaged separately and distinctively from the guilt of medical staff.

The protection of health is one of the main rights of the patient, for which reason we believe the decision of performing a medical procedure does not lay with the doctor and must not be taken arbitrarily by the doctor. Such a vision would be incompatible with the professional statute of the doctor or the ethics and deontological regulations. The basis of medical civil liability has given rise to numerous controversy, as the liability of the doctor is whether tort or contractual. *“In arguing the torts nature, it was shown that the relation between a patient and his doctor, even the relation between the medic and the supplier of medical services is an extra contractual one, especially in the case in which medical care was provided within the public medical service which belongs to the state”*.

The provided argument has emphasized that, in this case, there is no contract, as there are situations in which the patient does not choose his doctor, but merely accepts and consents to be provided the necessary medical care (in case of public health facilities, which are free of charge, as, in principle, in these facilities, the patient is not allowed to choose his doctor). Furthermore, *“the life, health, physical and mental integrity can't be the object of a contract and if such legal acts would be concluded, they would have to be considered as null and void as their object is a good outside of the civil circuit”*. Another opinion (Lipcanu, 1999, p. 248) states that, regardless of whether medical assistance is provided in public or private medical facilities, the physician provides medical care based on the consent of the patient.

In regard to the distinction between tort civil liability and contractual civil liability, in case of the judicial medical relation, there is an opinion according to which the

distinction must be made between the legal relation which occurs within the private system and the one that occurs within the public system of health. In the private system of health, liability for malpractice is a civil contractual one, whereas within the public system of health, liability would be of contractual nature, but an administrative one as the contract which is the basis of performing medical services is an administrative one (Vida Simiti, 2010, p. 133). In order to engage the doctor's liability, the victim must first prove the guilt of the medic, the prejudice he suffered and the causality relation between the medical error and the prejudice it caused.

3. Criminal Liability

In exercising a profession with a high degree of risk, the possibility of error is high; however, engaging liability of the medic or the medical staff is justified as the protection of health is a right guaranteed by the Romanian Constitution in article 34. Within the present context, medics are confronted with unprecedented situations and the human resources in hospitals, the existing conditions in Romanian hospitals, as well as the organization of the Romanian medical system are all factors which exponentially increase the number of malpractice cases, a reality which is the least bit surprising.

From the many cases of malpractice which are brought before the court of law, it is up to the judges to establish, in each specific case and considering all the circumstances of the case as well as all other factors who played a role in causing the specific result and the causality relation between the medical error which represents the crime and the outcome it produces and if the physician's criminal liability can be engaged. Other European countries see an increase in civil and criminal complaints against physicians based on malpractice, which proves that the patient's perception has changed and the blind trust in the physician and the medical acts he performs are now gone.

Surely, there are numerous examples in judicial practice in which the court of law has ruled, considering all of the evidence that the physician is not liable for the bodily harm of a person or even their death, as there were other circumstances which led to that result. *The physician is seen in a double role: in case he doesn't intervene he might be liable for the deed as he failed to provide emergency medical care and when he intervenes, he might be liable for his actions* (Bogdan & Şerban, 2020, pg. 84). In regard to the body that must make a decision in case of malpractice, national law, in article 679, points to the Supervision and Professional Competence Committee for malpractice cases organized according to Law no 95/2006 and functioning within each Public Health Division of each county and in Bucharest.

The conditions for the correct approach of a malpractice case are found on a national level both in civil and criminal law. Thus, the lawmaker passed a new and revolutionary approach in regard to the medical profession starting from the marginal name of the law, namely "The Health Reform". However, despite the fact that the title points to civil liability, article 653 fifth alignment clearly states that "*civil liability regulated by the present law does not remove criminal liability, if the deed which caused prejudice is a crime according to the law*". Criminal liability is, without a doubt, the most severe form of legal liability. The crimes which pertain to the exercise of professional activities can consist of the following crimes: manslaughter (article 188 of the Criminal Code), murder on demand of the victim (article 190 of the Criminal Code), determining or encouraging

suicide (article 191 of the Criminal Code), involuntary manslaughter (article 192 of the Criminal Code), bodily harm of involuntary bodily harm (article 194, namely article 196 of the Criminal Code), the termination of pregnancy (article 201 of the Criminal Code), the injuring of the foetus (article 202 of the Criminal Code), depriving a person of necessary help or preventing the providing of such help (article 203, namely article 204 of the Criminal Code), rape (article 218 of the Criminal Code), the violation of professional secret (article 227 of the Criminal Code), stealing or destroying documents – such as medical documents (article 259 of the Criminal Code), failing to denounce a crime or omitting to denounce a crime, fostering of the perpetrator, withholding information (crimes regulated and punished by articles 266,267,269, 270 of the Criminal Code), obstruction of justice, influencing statements, perjury, stealing or destroying evidence or documents (articles 271,272,273, 275 of the Criminal Code), bribery (article 289 of the Criminal Code), traffic of influence (article 91 of the Criminal Code), abusive behaviour, abuse or neglect during the performance of duties, usurpation of function (articles 296, 297, 298, 300 of the Criminal Code), forgery and use of forgery (articles 320-323 of the Criminal Code), computer forgery, false statements (articles 325,326), the exercise of a profession or activity without right (article 348 of the Criminal Code), failing to take measures or disrespecting measures which pertain to employment health and security (articles 349,350 of the Criminal Code), failing to take necessary measures to prevent illness (article 352 of the Criminal Code), illegal harvesting of tissue or organs (article 384 of the Criminal Code).

The physician's civil liability is engaged when, during the exercise of his profession, he commits a crime as regulated by criminal law, which meets all the essential conditions of a crime and violates the professional obligation he was meant to respect in performing his duties. As an example: establishing a wrong diagnosis, failing to provide emergency medical care, providing inappropriate treatment. In all these cases, the physician is held to respect the therapeutic standards accepted within the speciality he practices. Subsequently, I will analyse the characteristics of criminally liable medical guilt, by considering the specifics of the crime of manslaughter (article 192 of the Criminal Code), as this crime has certain specifics.

We will direct our attention to the second alignment which has the following content: *„manslaughter as a result of disrespecting legal provisions or precautionary measures for the exercise of a profession or for performing certain activities”*. In a general understanding, medical conduct is considered to be culpable when, in a specific case, the physician did not perform the medical conduct which medical science would have expected from him (Ulsenheimer, 2008, p. 68). This is why, across time, medicine has established certain medical standards which should be respected by all doctors in performing medical acts. If it is proven that the medic respected all these standards, he will not be criminally liable. *Judicial practice, when there was doubt in regard to the cause of the medical condition which resulted in the death of the patient and this doubt did not allow for a clear causality relation between the culpable conduct and the death, ruled that failing to meet all essential conditions of manslaughter meant the physician is not to be held criminally liable* (Galati Appeal Court, decision no751/R of May 22nd, 2012). Also, judicial practice has seen numerous situations in which the court of law, based on insufficient evidence and the lack of a clear causality effect between the

physician's culpable conduct and the injuring of the patient, has applied the principle *in dubio pro reo*.

4. Conclusions

Medical malpractice is a complex, controversial and unpredictable subject, given its legal and procedural regulations, as well as the jurisprudence in this matter which is diverse and often contradictory. The culpable attitude of the medical professional occurs in cases in which he has failed to provide a reasonable level of knowledge, preoccupation, attention, as well as the necessary skills which are normally held by people who perform in this field of activity, depending on their clinical speciality. All these lead to maintaining a therapeutic standard which is regulated in a unified manner.

Whether conscientious or not, the relations between doctor and patient have suffered numerous changes and are still in permanent transformation; this is owed to the current perception of the patient in regard to the physicians, the medical act and the rights he holds in accordance with Law no 46/2006 regarding the patients' rights (Law no 46/2003, 2003), a law which expressly regulates the obligation to inform the patient in regard to the risks and consequences of the treatment.

As a conclusion, we believe there is a case of medical malpractice when a person suffered a prejudice (physical, mental, emotional, material and so on) which he would not have otherwise suffered if the medical care which he was provided was not a negligent one and the prejudice he suffered was the result of that negligent/inappropriate treatment.

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