JOINT INTERNATIONAL CONFERENCES
10TH EDITION EUROPEAN INTEGRATION REALITIES AND PERSPECTIVES
5TH EDITION THE GLOBAL ADVANCEMENT OF UNIVERSITIES AND COLLEGES

Mediation in Medical Malpractice - Realities and Prospects

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Abstract: Medical professional liability is the result of specific breaches of the medical profession, which are contained in Law 95/2006 on health reform. Beyond the motivation of blaming medical personnel activity, there are many other aspects that may give rise to controversy in terms of medical ethics, from the informed consent of the patient and to the need for reaching criminal responsibility and compensation in cases of medical malpractice.

Keywords: medical profession; medical malpractice; medical practice guidelines; clinical audit; mediation

1. General Considerations on Public Health Insurance

Universal Declaration of Human Rights proclaims in article 3 “that every human being has the right to life, liberty and security of person” and the International Covenant on Civil and Political Rights has established in article 6 point 1 that “the right to life is inherent in the human person. This right shall be protected by law so that no one may be deprived of his life in an arbitrary manner”. Also, in the article 25 paragraph 1 of the Universal Declaration of Human Rights, enshrined the right of every man to “a level of living adequate for the health and welfare of him and his family, including food, clothing, housing, medical care and necessary social services, having in the same time the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood as a result of circumstances beyond his control”.

This is consecrated by the provisions of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (known as Title simplified by the European Convention on Human Rights and the Convention EC), which provides that “the right to life shall be protected by law”, thus constituting a guarantee of compliance the fundamental right to life of every person.

From the content of the right to life enshrined in the aforementioned provisions, it appears the negative primary obligation of signatory States to this Convention, to not affect this right by its agents that is not to cause death to a person, except as specified situations in the second paragraph of the text

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(Bîrsan, 2010). At the same time, from the provisions of that article, we find positive obligation imposed by state authorities that must take practical measures to be taken to protect the right to life of every individual, which resulted in the need to protect the right to life in public health because the holder of the right to file in an individual, in fact, only human person.

In this respect, the European Court of Human Rights held that positive obligations imposed to signatory states also apply to public health. This implies certain obligations for public authorities to adopt provisions to regulate public and private hospitals activity in order to protect the lives of sick persons, as well as the obligation of establishment of an effective and independent judiciary system to establish the causes of death of a person and making it possible, if the criminal liability of health professionals (Bîrsan, 2010). However, the Court held that if the undermining of life is not voluntary, the positive obligation arising from article 2 of the Convention does not necessarily imply in all cases recourse to criminal proceedings, as if proving the existence of medical negligence, the judiciary must give to interested persons an appeal before the civil courts, alone or with criminal courts with which to be able to establish medical liability, and also to obtain compensations, not being excluded any disciplinary measures to be taken against those who committed acts of medical negligence (Bîrsan, 2010).

In accordance with article 2 of the Convention are part of the provisions of article 34 of the Constitution, which enshrined the right to health; the state is obliged to take measures to ensure hygiene and public health (Bădescu & Andruş & Năstase, 2008). The method of practical application of these provisions shall be governed by the provisions of article 34 paragraph 2, which stipulates that "organization of healthcare and social security system for sickness, accidents, maternity and recovery, control the exercise of medical professions and paramedical activities, and other measures to protect physical and mental health of the person are established by law".

Under the provisions of article 374 of Law no. 95/2006 on healthcare reform, published in the Official Gazette no. 372, April 28th 2006, the medical profession is mainly aimed at ensuring health, preventing illness, promotion, maintenance and recovery of individual and community health. To achieve this end, throughout the profession exercise, the doctor must prove availability, reliability, commitment and respect for the human being so that decisions of a medical nature that it will take into account the interests and rights of the patient, medical principles generally accepted, non-discrimination between patients, respect for human dignity, the principles of medical ethics and deontology, patient health care and public health, which otherwise noted also by the provisions of article 1 of the Code of Ethics of Physicians of Romania, published in the Official Gazette no. 298 of May 7th 2012.

There may however be some incompatibility in the medical profession, by reason of the employee or the collaborator of units of production or distribution of pharmaceuticals or medical supplies, and if the physical or mental health of doctor is inadequate to medical practice. There are also some cases the doctor may be declared unworthy to exercise the medical profession, where he was sentenced for committing intentional crimes against humanity or a life in circumstances related to the exercise of the medical profession and for which has not intervened the rehabilitation, and if the punishment for the interdiction to practice the profession, on the period established by judicial or disciplinary decision.

Exercise of the medical profession is performed in accordance with article 370 of the Act on Health Reform, by individuals holding a formal qualification in medicine, represented by medical degree awarded by a medical or pharmaceutical higher education institution accredited in Romania; specialist certificate issued by the Ministry of Public Health; diploma, certificate or other title in medicine

awarded in accordance with the norms of the European Union by the member states of the European Union, the states being member of the European Economic Area or the Swiss Confederation; diploma, certificate or other title in medicine acquired in a third country and recognized by a Member State of the European Union or belonging to the European Economic Area or to the Swiss Confederation, or the equivalent in Romania.

2. The Concept of Malpractice in light of the Provisions of Law No. 95/2006 on Health Reform

In carrying out its work, the doctor is in a medical legal report, volitional, governed by the legal standard care in which participants are manifested as holders of rights and obligations by which exercise is performed the end of the legal norm, the doctor being able to establish legal relations with individuals, represented by doctors, patients, nurses, as well as legal persons represented by hospitals, clinics, Home insurance or Medical College.

The medical profession is exercised based on the Certificate of Membership of the College of Physicians in Romania, dentist profession is exercised based on the Certificate of Membership issued by the College of Dentists, and the pharmacist, based on the Certificate of Membership of the College of Pharmacists, which are approved annually based on the liability insurance for *mistakes in the professional activity*, i.e. various cases of *malpractice*, which can engage with civil liability of medical personnel and of medical products and services provider, healthcare and pharmaceuticals regulated by the provisions contained in Title XV of Law no. 95/2006 on healthcare reform, and a disciplinary liability, and in some cases even their criminal liability.

In this sense, by provisions of article 642 paragraph 1 letter b of Law no. 95/2006, the legislator establishes a definition of *malpractice*, as being the professional error committed in the practice of medicine or medical-pharmaceutical, tortious the patient, involving civil liability of medical staff (which include the doctor, dentist, pharmacist, nurses and midwives providing care) and the provider of medical products and services, health and pharmaceuticals.

As regards the doctrine and practice of medicine, they are constant in the appreciation and request of the following *conditions for the existence of malpractice cases*, i.e. it is about the existence of an professional obligation of the healthcare provider in the doctor-patient relationship; existence of *a certain standard of medical practice*, to be observed, depending on the specialty and level of expertise and experience of the doctor; breach of professional duty by the healthcare provider, its failure to fulfill its flawed; production of patient injury; the existence of a causal link, such as cause and effect, between the breach of the medical professional obligation and the damage caused to the patient (Simion, 2010). In support of these allegations, we mention that in health care, medical personnel has the obligation to apply therapeutic standards, establishment by practice guidelines in the specialty, nationally approved, or, failing that, applying the standards recognized by the medical community of respective specialty.

In medical procedures application, in accordance with these standards, assessment of health risk will be always made from the perspective of the rights and correlative obligations of the physician and patients, the doctor having the right to be informed by the patient about symptoms, evolution and specific reactions to the treatment given, but on the other hand, the doctor has also the right to terminate or refuse the continuation of the medical treatment.

In Romania, for the performance of his duties with regard to setting standards of quality of care, Medical College of Romania has initiated a program of developing national guidelines for diagnosis and treatment, resulted in the emergence in 1999 of the first volume of these guidelines.

Based on this experience and continuous consultation of committees of scientific experts in the field, it came to creating a uniform methodology of developing clinical practice guidelines, these presenting the steps that need to follow the doctor in the investigation and drug administration, meanwhile constituting an efficient health care system, which should regulate how are treated the patients, but also a means by which to control the spending of financial resources allocated to health. These documents were made by experts from the committees of the Ministry of Health following the European models underlying the development of therapeutic protocols.

These, however, must be translated into some application protocols specific to each category of hospital as guides contain general information on the diagnosis and treatment of various diseases, while the protocols are the ones that really clarify the situation in detail. We can say, however, actually, that the Ministry of Health does not verify if these guidelines are complied with and if hospitals have specific protocols for diagnostic, medical procedures, treatment, in Romania still not existing a verification and monitoring mechanism of the care in hospitals. Consequently, deviations are not found, neither sanctioned, but when there is a prior complaint from a patient, in which case is reviewed by the Medical College Malpractice Commission and not by the Ministry of Health, so most of the abuses do not fall into medical error and is therefore likely that any statements complained to not be always punished.

The next important step, however, for the activity of verifying compliance of duties of doctors will be setting up Clinical Audit, concept that in Romania is still not used, but it works in other countries and is considered an audit of medical practice, but from the perspective of the clinician.

Clinical audit would be an institution under the Ministry of Health that will have as attributions just the verification of compliance of best practice guidelines and protocols of medical practice, especially since the medical activities always involve a legitimate risk, consciously accepted and therefore justified, if it satisfies the following conditions: saves from greater danger with a lower risk accepted; the danger is real, actual and imminent and unavoidable fact; good value at risk is less than the damage that might have occurred (Scripcaru & Terbancea, 1999). Moreover, American medical practice in hospitals reminds about establishment in public and private health units of some *risk management* departments performing specific activities that include primarily to identify potential hazards associated with the activity of health professionals, followed by the implementation of measures required to eliminate or at least mitigate risks related to them, and in the event of disputes in court, all these departments make reports for registration of all circumstances in which the injury occurred to a patient (Walston-Dunham, 2006).

3. Negotiated Justice in Cases of Medical Malpractice

In carrying out medical activities, in terms of medical malpractice definition provided in article 642 of Law no. 95/2006, we understand that the act or omission that violates the doctor's professional duty that must follow and in virtue of the social role it holds, must be committed to the shape of guilt fault in one of its modalities (imprudence, negligence, unprepared, easiness), but may be situations where the physician acts intentionally or when may retain the shape of guilt of praeterintention.

Moreover, the commission of an act of malpractice is not only the premise of civil or disciplinary liability of the doctor, as apparent from the wording of article 642, but may result in criminal liability for the commission thereof of the following types of crime (according to Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 510 of July 24th 2009: murder (article 188), causing or aiding suicide (article 191), involuntary manslaughter (article 192), hitting or other violence (article 193), injury (article 194), bodily injury causing death (article 195), negligent injury (article 196), termination of pregnancy (article 201), fetal injury (article 202), in which situation, criminal liability of a doctor for committing one of these offenses will be made through criminal proceedings in a criminal trial. If injury to the patient is the result of a crime, criminal proceedings with the right to be born a civil right of action in order to repair the prejudice (Lorincz, 2015) in accordance with article 1381 paragraph 1 of Law no. 287/2009 on the Civil Code, published in the Official Gazette no. 511 of July 24th 2009, which provides that "any injury entitles to reparation".

In this case, if it were to relate to the above, it follows that in terms of the essential requirements concerning civil liability, are asked to be met the following conditions: to have committed an offense under the criminal law, the act to be committed with guilt required by law to be able to held criminal liability of the doctor, to exist an injury and to be a causal link between the wrongful act and the damage. In these circumstances it is necessary that the interested party to prove that there is a professional duty at a level of standard of therapeutic practice and this professional obligation unduly was not performed or was performed inadequately provided in standard therapeutic medical practice guidelines, creating in this way a patient injury, between professional breach and the damage there is a cause-effect link (Simion, 2010). By adopting the provisions of Law no. 135/2010 on the Criminal Procedure Code (published in the Official Gazette no. 486 of July 15th 2010), were introduced separately in article 23 the provisions according to which "in the criminal proceedings on civil claims, the defendant, the civil party and civilly responsible party may enter into a transaction or mediation agreement, according to law".

Currently, Western statistics show that most often disputes arising from injury to patients as a result of medical malpractice cases do not always get to court, with opinion lately that leans towards solving their non-contentious. In this respect, the European doctrine raises both conciliation and mediation or arbitration as alternative ways of resolving conflicts arising from inadequate provision of medical services (Moreno & Hernandez Gil & Hernandez Gil, 2002). In this respect, conflict mediation agreement has emerged as a more acceptable solution and to implement than a sentence imposed, the very existence of expression "consensual justice" or "negotiation" as the institution of criminal law meaning at first sight a paradox, if we consider the traditional format of criminal law that does not allow discussions, concessions or compromises (Pradel, 1988).

In Romania, was adopted the Law no. 192/2006 on mediation and organization of mediator published in the Official Gazette no. 441 of May 22nd 2006 profession, law transposing at an issue that was required to be introduced by laws, following the international trend of using alternative methods of dispute resolution outside the state judicial system by procedure conducted by a third party, neutral, in which situation the mediation is an important component, being regulated in wording of articles 67-70, which contain specific provisions on mediation in criminal cases (Beligrădeanu, 2006). The provisions of article 1 point 13 of Law no. 115/2012 amending and supplementing Law no. 192/2006 on mediation and the organization of mediator, published in the Official Gazette no. 462 on July 09th 2012, profession were introduced the provisions of article 601 where at the letter d it is disposed on the need for "the parties in the conflict to prove participation in briefings on the benefits of mediation, where professional liability way be undertaken for malpractice cases, whether by special laws is not

provided another procedure", currently on medical malpractice cases, with no provisions in Law no. 95/2006 to regulate the use of "negotiated justice" as mediation to resolve amicably a medical malpractice cases notified by patients or their relatives.

In order to regulate a procedure to resolve amicably malpractice cases there have been numerous proposals, among which Law Project on medical malpractice in 2005, which, in chapter 6 was containing provisions relating to the "conciliation procedure of malpractice cases" and in 2014, Law Project to amend the provisions of Title XV on Civil liability of medical personnel and provider of medical products and services, healthcare and pharmaceuticals, where the contents of Chapter VII was containing provisions on the "procedure for amicable settlement of incidents of malpractice".

The idea of inserting a preliminary procedure in which to be able to meet and negotiate physician, medical facility, the insurer and the patient is a good idea that would benefit all stakeholders if desired shortening cumbersome procedures involved solving cases to be decided, but the provisions are still incomplete, and may give rise to comments. First we specify that the procedure was not differentiated by gravity of malpractice cases encountered in practice, that makes no distinction between cases of malpractice that cause the patient's death and of those that cause body injuries because, according to article 673 of the Project, even if involuntary manslaughter occurs by fault of the patient, the parties may negotiate criminal responsibility for crimes against life, which if it were to relate to article 681 paragraph 2 of the project would lead to *"the extinction of legal liability of the doctor or health care provider, regardless of its nature, if the offense was committed by malpractice negligence", in which situation a question may arise as to remove criminal liability of the doctor or health care provider".*

In fact, the amicable settlement procedure was intended to be of short term, short deadlines being provided, and also a simplification and accessibility of the procedure in care provider so that any person who considers injured by an act of malpractice to can submit a cover injury application to the healthcare provider and they are expected within 15 days of receipt of the request to collect all documents and records relating to the provision of healthcare, conformity of duplicates and draw up a declaration of integrity in relation to the data held and will notify the applicant and co-insurance company with which he and the medical staff have concluded a civil malpractice insurance. In this situation, evaluating and establishing professional error would be made by medical experts appointed by the parties under the mutual agreement procedure (the injured party, the insured and the insurer). The experts will prepare a report within 30 days on the case, report that will be communicated simultaneously to all parties and the insurance company will be obliged within 15 days to decide and notify the parties the cover of the injury. For the negotiation of the amount of the injury, in accordance with article 680 of the Project, parties may contact a mediator according to Law no. 192/2006.

The procedure can however give rise to abuses, the law does not limit the number of time or medical expertise to which the patient is required to submit, not specifying which institutions will be able to perform these examinations (only forensic institutions - in this moment, the only evidence useful, relevant and conclusive is the forensic expertise prepared in accordance with the Order 1134/2000 - or to other units, including the hospital where works the doctor accused of malpractice) (Murariu & Iepure, 2014). Nor is stated in the text of the law who bears the expense of such expertise and patient's travel costs, if he can move, not provided any sanctions, if not respected procedural deadlines provided in the text of the Project.

4. Conclusion

Although the Amendment Project of the Law 95/2006 does not give significant improvement to patients-victims of medical malpractice, however, these provisions attempt to comply with legal rules governing the liability of healthcare professionals and the healthcare provider, healthcare and pharmaceuticals. However, at one year from the aforementioned legislative proposal, the situation of the patients-victims of medical malpractice is resolved as before, as a result of the aforementioned provisions remained only in the early stage of the project, without being part integral of the law. On the other hand, despite the balancing efforts made by European legislation to promote quasi procedures, we believe that it will not be refused to the parties involved in a case of medical malpractice, the right to waive the conflict settlement in court as long as the law allows, and this is backed up by the will of those directly affected.

5. References

Bădescu, M. & Andruş, C. & Năstase, C. (2008). *Constitutional Law and Political Institutions*. Craiova: Sitech.

Beligrădeanu, Ş. (2006). Correlations between Law no. 192/2006 on mediation and the organization of the mediator profession and employment law. *Law Journal*, no. 10/2006, p. 87.

Bîrsan, C. (2010). *European Convention on Human Rights, Comment on articles, 2nd edition.* Bucharest: C. H. Beck.

Lorincz, A. L. (2015). *Criminal Procedure Law under the new Code of Criminal Procedur.* Bucharest: Universul Juridic.

Moreno, H. J. & Hernandez Gil, M. L. & Hernandez Gil, A. (2002). Responsibility for medical malpractice: the extrajudicial way. *Books of Legal Medicine* no. April 28th, IV, Andaluzas Jordanas (2001). About evaluation of body injury, Sevilla, May - June 2001, p. 10.

Murariu, O. & Iepure, M. F. (2014). Formulations contradictory in legislation on forensic expertise, with special reference to forensic expertise in medical malpractice cases. *Law Journal*, no. 10, pp. 126-127.

Pradel, J. (1988). Consensualisme en droit penal comparé/Consensualism in Compared Criminal law. *Boletim da Faculdade de Direito de Coimbra/Bulletin of the Faculty of Law of Coimbra*, pp. 1-46.

Scripcaru, G. & Terbancea, M. (1999). *Coordinates of the medical ethics*. Bucharest: Medical Publishing House.

Simion, R. M. (2010). *Medical malpractice: opportunity or reality?* Bucharest: Humanitas.

Walston - Dunham, B. (2006). *Medical Malpractice. Law & Litigation* USA: Thomson.