MALPRACTICE IN THE ACTIVITY OF DOCTORS AND LAWYERS COMPARATIVE STUDY

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Abstract

The doctor's liability traditionally relied on the failure to give careful and conscientious care. In the case of a legal medical relationship, the rule is that the doctor undertakes to perform an obligation of means to the patient, respectively undertakes to make decisions and judgments of a medical nature, given the rights and interests of the patient and medical principles generally accepted in order to prevent or treat diseases. The applicant must prove that his doctor has not fulfilled its obligation of means, which compels him to provide careful medical care and comply with up to date science data. Regarding the nature of obligations assumed by lawyers through the legal assistance contract, we have to observe that the lawyer must submit all due diligence for the defence of liberties, rights and legitimate interests of the client. It is therefore expressly regulated that the lawyer has an obligation of means, i.e. diligence, and not an obligation of result.

Typically, the source of liability for the members of liberal professions such as lawyers is a contract between the client and the service provider and the fact that in the exercise of the public service entrusted the professional liberal may causes damages to his client. The lawyer can only act within the limits of the contract in relation to his client, except as provided by law.

Key Words: *Malpractice / doctor / lawyer / obligation of means / contract*

JEL Classification: *[K32]*

Medical activity is regulated by Law No. 95 of 14 April 2006 on health reform[1] which is completed by the provisions of the Civil Code. In the field of health, they also adopted the following laws: Law No. 46 of 21 January 2003 on patient rights[2], Government Ordinance No. 124 of 29 August 1998 on the organization and functioning of surgeries[3], Law No. 487 of 11 July 2002 on mental health and the protection of persons with mental disorders[4], Pharmacy Law No. 266 of 7 November

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[1] Law No. 95 of 14 April 2006 on health reform, was published in Official Gazette No. 372 of 28 April 2006.

[2] Law No. 46 of 21 January 2003 on patient rights, was published in Official Gazette No. 51 of 29 January 2003.

[3] Government Ordinance no. 124 of 29 August 1998 on the organization and functioning of surgeries, was republished in the Official Gazette no. 568 of 1 August 2002.

[4] Law No. 487 of 11 July 2002 on mental health and the protection of persons with mental disorders, was published in Official Gazette No. 589 of 8 August 2002.

2008[5], Law No. 118 of 2007 on the organization and functioning of complementary and alternative medicine activities[6]. The doctor's liability traditionally relied on the failure to give careful and conscientious care. Saying that a doctor's duty is one of means or results has created controversy in doctrine and jurisprudence regarding the "objectification" of medical responsibility and the switch from obligation of means to obligation of result[7]. There is an obvious tendency to indemnify the victims of a medical act in the absence of any fault of the doctor, justified to a certain extent by a change in the attitudes. Regularly bringing to the public's attention the alleged or actual progress of medicine, the media has given rise to excessive hopes. In our society, the citizen, actor of social solidarity, becomes animated by a philosophy of compensation, easily behaving as the victim of someone else, searching a source of funding and retribution in the risks and injustices of life. Coming from the US and spreading across Europe, this ideology explains in part the evolution of medical responsibility[8]. In part, because this movement goes hand in hand with the need for security that everyone shares today. That need translates into misunderstanding by the victim of a risk, namely medical, the aggravation of his/her physical condition following a surgery or medical treatment. The patient does not admit that the doctor, who promised an improvement in his/her health, ends up by worsening it.

The specific nature of the obligation of means is that the debtor does not guarantee the sought result to the creditor. The debtor is obliged to use all means necessary and possible, with diligence and prudence, in order to get the result. An obligation of means is the obligation of the physician to treat a patient[9]. The obligation incumbent on the physician is to act with the prudence and diligence required by science and medical ethics in order to achieve the desired result (healing the patient). If the result is not obtained it does not mean that the doctor failed his obligation, *ipso facto*. To act on the human body in an attempt to "repair"

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[5]Pharmacy Law no. 266/2008, was republished in the Official Gazette, Part I, no. 85 of February 2 2015.

[6] Law on organization and functioning of activities and practices of complementary / alternative medicine, Law No. 118 of 2 May 2007, was published in the Official Gazette, Part I no. 305 of May 8 2007.

[7] P. Sargos, *Obligation de moyens et obligation de résultat du médecin*, Médecine et Droit, 1997, 24, p.2; Y. Lambert-Faivre, *Fondement et régime de l'obligation de sécurité*, Recueil Dalloz Sirey, 1994, 11e cahier, chron., p.81.

[8] Conseil d'Etat, *Raport public, Jurisprudence et avis de 1997, Réflexions sur le droit de la santé*, 1998, p.241.

[9] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.*, p. 31; W.C. Leung, *Law for doctors*, Bleackwell Science, Oxford, 2000, p. 112; B. Stark, H. Roland, L. Boyer, *op. cit.* p. 404-405; Fr. Terré, Ph. Simler, Yv. Lequette, *op. cit*., p. 7-8.

it, to restore the health of the patient, involves – through the nature of the performance – an action in an area where science has not quantified all possible side effects of the body, unique and different from patient to patient, in which diagnostic and therapeutic methods, although scientifically accepted and recognized, assume risks that both the doctor and the patient take when carrying out the treatment. Healing has a random nature, as it depends not only on the medical act itself, but outside factors - accepted medical risks of therapeutic techniques or the particularities and specific reactivity of the human body - still insufficiently scientifically known. The outcome cannot be guaranteed by the behavior of the debtor, as there are external factors influencing this result.

Differentiation of the two types of obligations matters, in terms of the liability of the debtor[10]. Thus, in case of failure to fulfill an obligation of result, the creditor does not have to prove the debtor's guilt. The debtor bourns a legal presumption of negligence, inferred from the failure to obtain the result he was bound to. Rather, in the case of failure to fulfill the obligation of means, simply not achieving the objective does not trigger the presumption of guilt of the debtor. Failure to achieve the result sought is not sufficient for liability of the debtor. The creditor will have to prove the fault of the debtor, in the sense that it did not make the needed efforts and did not use all the means which would have obtained the desired result. It is considered that the debtor has executed his performance if he used all means possible and necessary and showcased the necessary amount of diligence and prudence to be taken in those circumstances, even if the result was not achieved.

In an attempt to delineate the two categories of obligations, result and means, there exist several criteria for differentiation. People talked about the extent of collateral execution the creditor receives in any legal relationship[11], the obligation of result creating a genuine execution guarantee borne by the debtor, or the intrinsic or extrinsic nature of the result in relation to the obligation report of which it was born[12], the obligations of result the outcome being intrinsic as it is part of their content, the result sought being a right of the creditor and a duty of the debtor, or the randomness of the outcome[13] (operable criterion only for contractual obligations) when factors that are external to the debtor's activity can influence the result.

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[10] M. Fabre – Magnan, *op. cit*, p 21; G. Viney, P. Jourdain, *op. cit*, p 109; A. Weill, Fr. Terré, *Droit civil. Les obligations*, Dalloz, Paris, 1986, p 215; L. Pop, *op. cit*. p 62 - obligations to provide services means all obligations to do which consist of a debtor's own activity, except the object to hand over a certain good or generic goods or pay a sum of money. Among those obligations are listed medical obligation to treat his patient suffering from a disease.

[11] B. Stark, H. Roland, L. Boyer, *op. cit,* p. 41; J.L. Gazzaniga, *Introduction historique au droit des obligations*, Presses Universitaires de France Paris 1992, p. 43.

[12] I. Albu, *op. cit.*, Dacia Publishing House, Cluj Napoca, 1984, p 56.

[13] H. Mazeud, L. Mazeud, J. Mazeud, Fr. Chabas, *Lecons de droit civil, vol. I, Obligations. Theorie generale*, Montchrestien, Paris, 2001, p 83.

In the case of a legal medical relationship, the rule is that the doctor undertakes to perform an obligation of means to the patient[14], respectively undertakes to make decisions and judgments of a medical nature, given the rights and interests of the patient and medical principles generally accepted in order to prevent or treat diseases. We are talking about *duty of care*[15] which implies that the doctor has an obligation to care for the patient with the care and caution conferred by his professional training and the objective level of knowledge in the field at the time. Duty of care is divided into two levels: personal level of expertise and the objective level of science at the time. The two limitations make the result of medical care impossible to guarantee.

In the Code of Medical Ethics, Article 10 states that "the doctor will not guarantee the cure of the condition for which the patient came to him"- thus confirming the rule of obligations to care of means, not excluding obligations of result or undertaking of the result by the doctor for an obligation of means, thereby converting the obligation of means into one of result[16].

Thus, the doctor undertakes to do its best to treat a patient with an infectious disease (e.g. pneumonia). In this regard he examines the patient, sets a diagnosis and therapeutic conduct to be followed in order to heal the patient. By prescribing drugs and establishing an appropriate dosage and a schedule, the doctor does not guarantee the outcome (cure), which is expected to occur in the absence of random circumstances (e.g. different patient tolerance to medication, fortuitous discontinuation of treatment). However, the doctor must comply with generally accepted medical principles[17]. There are times when the doctor's duty is one of result. Thereby, an X-ray, or a dental prosthesis or a tooth extraction, aesthetic breast enlargement operations, or in vitro fertilization clearly involve getting a result.

Medical responsibility has always been a subject of proof of medical mistakes in carrying out an act of care[18]. The applicant must prove that his doctor has not fulfilled its obligation of means, which compels him to provide careful

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[14] M. Harichaux, *Relativité des données de la science et responsabilité medicale*, Dalloz, Paris 2000; L. Pop, *op. cit*, p. 66 – a classic example of obligations of means that until recently was not disputed is the legal relationship between a doctor and his patient. Lately, though, in principle, it is argued that it is an obligation of means, and the existence of exceptions in certain situations is admitted, when this report is assessed as falling into the category of obligations of result.

[15] I. Popa, *Medical Liability*, Law Magazine no. 1/2003, p. 46.

[16] A. Corhan, *Compensation by monetary equivalent*, Editura Lumina Lex, Bucureşti, 1999, p. 124. The author defines duty as doctor's duty to provide the patient the right treatment and to grant him conscientious and careful care, according to science data and sanitary rules in force.

[17] Article 4 paragraph 3 of Law No. 306 of 28 June 2004 on the exercise of the medical profession and the organization and functioning of the Medical College of Romania published in Official Gazette No. 578 of 30 June 2004.

[18] Cass 1re Civ., 27 mai 1998, D. 1999, p.21, note S.Porchy; Cass 2e Civ. - 21 February 2008, N° 07-14.293; C.A. Paris, 6 December 2006.

medical care and comply with up to date science data[19]. This principle was set out at the famous ruling of Mercier, given by the Civil Chamber on May 20, 1936[20]. By law, the duty of a doctor is not to achieve a result – healing, but to give care conscientiously, carefully and under the reserve of exceptional circumstances, in accordance with data acquired by science. In other words, the doctor's failure to fulfill his duty of means involves demonstrating not the absence of a cure, but the absence of medical care that do not meet quality requirements.

Regarding the obligation that arises in the physician's duty it is important to distinguish between an obligation of means or obligation of result. The question is whether the doctor is held only by an obligation of means or can be obliged to obtain a result? And if so, what is the distinction criterion between situations where the physician has an obligation of means and an obligation of result? In the first question, the answer can only be yes: it is possible that in a particular field the doctor has an obligation of result. However, the obligation of result is an exception to the rule of obligation of means.

Some obligations may concern a determined benefit, a precise materialized effect, pursued independently of the behavior of the debtor. Within these obligations, the debtor creditor guarantees promised that the result will be obtained. These are obligations of result that create a genuine guarantee of execution against the debtor, assumed by the creditor by agreeing to conclude a contract or imposed by law.

There are also obligations whose object is a certain behavior of the debtor, which in this way is bound to use and to highlight all the means at its disposal, with due diligence and prudence, in order to achieve a specific result in favor of its creditor. In this case the debtor does not guarantee the result to the creditor. To the extent that the debtor is acting in fulfilling its obligation by all means available, with due diligence and prudence required to obtain the result, the performance he undertook is deemed executed, whether that result was obtained or not. The debtor's behavior in terms of obligation of means is analyzed, in principle, *in abstracto*, by comparison with the behavior of a *bonus pater familias*.

Regarding the criteria of distinction there are several solutions. The first criterion was that of considerable risk. Proponents of this solution argue that in the absence of risk, a doctor's obligation is an obligation of result, as the promised outcome appears to be safe enough to be the object of the obligation[21]. Conversely, the presence of risk entails an obligation of means. Risk precludes the obligation of result because it makes uncertain the success of the operation. In this case the obligation materializes in the debtor's behavior (diligence and

[19] Cass. 1re Civ., 6 June 2000, JCP, G, 2001, 10.447, note G.Mémeteaux.
[20] Cass, 1re civ, 20 May 1936, D. 1936, I, p. 88, cl. Matter P, note E.P.
[21] A. Tunc, *op. cit*, p. 452.

promptness in fulfilling its obligations). In this way we easily understand why the doctor is bound, in principle, only by an obligation of means. The medical act itself takes much risk, for the healing of the patient depends not only on timely care, it is in part determined by unpredictable factors, beyond the power of the physician. The presence of risk significantly impedes the debtor from ensuring the outcome. The risk involves external factors whose interference causes the result not to depend exclusively on debtor behavior and thus make the result random[22].

Subsequently, another solution was launched. It is based on the role of the parties in the contract[23]. So, when he remains safe in his movements, his acts, when he retains an active role and remains independent in action, the debtor is not bound only by an obligation of means, for the non-performance will result from his own behavior. Conversely, when the debtor is passive, the liability is one of result. This criterion is exaggerated when applied to medical responsibility. Indeed, never does a person have a more passive role then when it abandons his/her body in the hands of a surgeon and his team.

Liberal professions are those professions regulated by law which shall be exercised on the basis of relevant professional qualifications, certified by a certificate issued by the educational institution legally registered and recognized by the state, which offers intellectual services, including conceptual. Members of the professions are constituted into distinct professional bodies, which are based on their own status, adopted under the law and under which they may undertake and be responsible for the professional act they carry out, their work being in the service of protecting and achieving both a public and a private interest, in return for payment which is called "fee"[24].

Perhaps the most representative of all professions is that of a lawyer. Today, the profession is regulated by Law No. 51 of June 7, 1995 for the organization and performance of this profession, through the Statute of the profession of lawyer, adopted by the U.N.B.R. Council Resolution No. 64/2011 concerning the adoption of the Statute of the profession of lawyer[25] and the Code of Ethics in the European Union.

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[22] H. Mazeaud, L. Mazeaud, J. Mazeaud, Fr. Chabas, *Lecons de droit civil, t. II, vol. I. obligations. Theorie generale*, Montchrestien Publishing House, Paris, 1998, p.14, G. Viney, P. Jourdain, *op cit* , p.460, A. Benabet, *op.cit*, p. 411.

[23] B. Starck, H. Roland, L. Boyer, *Obligations, 1, Responsabilité delictuelle*, 5e édition, Litec, Paris, 1996, p 406; P. Le Tourneau, L. Cadiet – *Droit de la responsabilité et des contracts*, Dalloz, Paris, 2002, p. 740.

[24] Gh. Moroşanu, *op. cit*, p. 51.

[25] U.N.B.R. Council Decision no. 64/2011 concerning the adoption of the Statute of the legal profession was published in (Official Gazette no. 898 of 19 December 2011) and amended by:
- Lawyers Congress Association. 7/2012 amending and supplementing the Statute of the legal profession, adopted by Resolution of the National Union of Bars of Romania no. 64/2011 (Official Gazette no. 594 of 20 August 2012);

The legal profession is exercised only by lawyers registered in the bar to which they belong, bat that belongs to the National Bar Association of Romania. In practicing this profession, the lawyer is independent and subject only to the law, the profession statute and the code of conduct (article 2 para. 1 of Law No. 51/1995), these regulations confirming the liberal nature of the profession.

According Article 3 of Law No. 56/1995 the activity of a lawyer is achieved by:

a) legal consultations and inquiries (can be given in writing or verbally in areas of interest to the client, such as drafting or providing legal advice and information on issues sought to be analyzed, drafting legal opinions, drafting legal projects and assisting the client in negotiations relating thereto, drafting of legislation, participation as a consultant in the work of deliberative bodies of a legal person, any other legal consultations);

b) legal assistance and representation in court, the prosecuting authorities, of authorities having jurisdiction, notaries and bailiffs, public administration bodies and institutions and other legal entities;

c) drawing up legal documents, attesting the identity of the parties, content and date of documents submitted for authentication;

d) assistance and representation for individuals or legal entities before public authorities interested with the possibility of certifying the identity of the parties, the content and date of documents concluded;

e) defense and representation of means of specific legal rights and interests of individuals and businesses in their relations with public authorities, institutions and any Romanian or foreign person;

f) mediation activities;

g) fiduciary activities carried out under the Civil Code;

h) establishing temporary headquarters for companies in the professional office of the lawyer and their registration in the name and on behalf of the client, the parties of interest, the shares of companies so registered;

The lawyer can practice its profession in one of the following forms: individual office, associate office, professional civil company, professional company with limited liability.

The lawyer's right to assist, to represent or to exercise any other profession specific activities arises from the legal assistance agreement concluded in writing between lawyer and client or agent. The lawyer can only act within the limits of the contract with his client, except as provided by law. According to art. 109 para. 1 of the Statute, in the course of his activity, the lawyer is independent.

- Council Decision U.N.B.R. no. 769/2013 amending and supplementing the Statute of the legal profession (Of. No. 497 of 7 August 2013);
- Resolution of U.N.B.R. no. 852/2013 (Of. No. 33 of 16 January 2014);
- Resolution of U.N.B.R. no.966/2014 (www.unbr.ro);
- U.N.B.R. Council Decision no. 1069/2015 (Official Gazette no. 173 of 12 March 2015).

According to article 121 of the Statute, the legal assistance contract is concluded in writing, *ad probationem*. It acquires a certain date by its registration in the official register of the lawyer, regardless of the manner in which it was concluded. The legal assistance contract may be also concluded by any means of communication. The legal assistance contract may be concluded by any means of distance communication. In this case, the contract date is the date on which the agreement of will intervened between lawyer and client. It is alleged that the lawyer was informed of the conclusion of the contract on one of the following dates:

a) the date on which the contract arrived by fax or e-mail (electronic signature) at the professional office of the lawyer; if transmission by facsimile occurs after 19:00, it is presumed that the lawyer has knowledge in the working day following the transmission;

b) date of receipt of contract signed by registered letter with acknowledgment of receipt.

The legal assistance contract may take the form of a letter of commitment stating the legal relationship between lawyer and recipient of the letter, including lawyers' services and fees, signed by the attorney and sent to the client. If the client signs the letter under any express condition of acceptance of the contents of the letter, it acquires the value of a contract for legal assistance.

The legal assistance contract shall be deemed to have been concluded tacitly if the client has paid the fee referred to therein, paying this fee signifying acceptance of the contract by the client, in which case the contract date is deemed to be the date stated in the contract.

The legal assistance contract may be concluded, exceptionally, in oral form. In this case, a written contract will be concluded as soon as possible.

If the lawyer and the client agree, a third person may be the beneficiary of the services established by the contract, if the third party accepts, even in a tacit manner, the conclusion of the contract in such conditions.

For his professional activity the lawyer is entitled to a fee and to have all his expenses covered, made in the interest of his client. Fees will be determined in relation to the difficulty, extent or duration of the case. Establishment of attorney fees depends on each of the following elements:

a) the time and workload required to execute the mandate received or activity required by the client;
b) the nature, novelty and difficulty of the case;
c) the importance of the interests involved;
d) the fact that accepting the mandate given by the client obstructs the lawyer from accepting another case from another person, if that fact can be ascertained by the client without further investigation;

e) notoriety, titles, seniority, experience, reputation and specialization of the lawyer;
f) cooperation with experts or other professionals required by the nature, scope, complexity and difficulty of the case;
g) the benefits and results for the client's profit as a result of the attorney's work;
h) the financial situation of the client;
i) time constraints in which the lawyer is bound by the facts to ensure efficient legal services.

The fees are determined and shall be provided in the legal assistance contract on its conclusion between lawyer and client, before the start of assistance and / or representation of the client. Fees may be determined in foreign currency, provided that payment complies with the statutory payments provisions.

Regarding the nature of obligations assumed by lawyers by the legal assistance contract, we have to observe the provisions of Article 110 of the Statute, according to which the lawyer must submit all due diligence for the defence of liberties, rights and legitimate interests of the client. It is therefore expressly regulated that the lawyer has an obligation of means, i.e. diligence, and not an obligation of result.

Typically, the source of liability for the members of liberal professions such as lawyers is a contract between the client and the service provider and the fact that in the exercise of the public service entrusted the professional liberal may causes damages to his client[26]. The right of the lawyer to assist, to represent or to exercise any other profession specific activities arises from the legal assistance contract, concluded in writing between lawyer and client or agent. The lawyer can only act within the limits of the contract with his client, except as provided by law (Article 108 of the Statute).

The nature of the client obligation is expressly governed by Article 110 of the Statute, which establishes an obligation of means (of diligence) in the lawyer's duty. According to the text previously mentioned, the lawyer must act with due diligence in protecting the liberties, rights and legitimate interests of the client. Therefore, the lawyer does not assume an obligation of result for his client. The lawyer will represent his client with the diligence of a good professional, within the law (Article 134 para. 1 of the Statute).

The lawyer is obliged to advise the client promptly, conscientiously, fairly and expeditiously. Probity, honesty and spirit of justice of a lawyer are conditions of credibility of the lawyer and of the profession. The lawyer is the client's confidant regarding the case entrusted. The confidentiality and professional

[26] Ghe. Moroianu, *op. cit*., p. 438.

secrecy ensures confidence in the lawyer and represent the fundamental obligations of any lawyer.

According to article 133, paragraph 4 of the Statute, assisting and representing the client requires adequate professional diligence, thorough preparation of cases, files and projects, promptly, according to the nature of the case, professional experience and his creed. Professional competence involves the analysis and scrutiny of the facts, the legal aspects of legal issues, proper preparation and constant adaptation of the strategy, tactics, techniques and methods specific to the evolution of the case, the file or work for which the lawyer is hired.

The legal assistance contract to be concluded between a lawyer and his client is a kind of mandate, taking all of the characteristics of a mandate contract governed by the civil code.

Summarizing, we can say that a lawyer's civil liability may intervene in the case of infringements of the following obligations:

- the exercise of any activity specific to the profession of lawyer by an individual who is not a lawyer registered with a bar of lawyers or, where appropriate, by any legal person, with the exception of the lawyers professional company with liability limited
- providing legal consultancy and petitions or legal assistance and representation (including fiduciary activities) defectively
- the obligation of confidentiality and professional secrecy concerning any aspect of the case which has been entrusted to him, unless expressly provided by law
- unfair professional competition
- the obligation of loyalty to his client, whose interests he cannot harm, the lawyer being obliged to give the client the appropriate legal advice according to the law and act only within the law, the statutes and the code of conduct, according to his professional credo
- failure to avoid a conflict of interest
- exceeding the powers conferred by the mandate from his client
- breach of the duty to inform the client about the circumstances of the case, the current situation, possible future developments and possible outcomes, reasonably, appropriate to the circumstances of the case.

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