FORENSIC FUNAMENTALS IN MALPRACTICE EXPERTISES

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Abstract

As a definition of malpractice, it is known to be a mistake, a professional negligence which could have been avoided and which has resulted in a injury, physical integrity or even loss of life.

To better understand the notion of malpractice we will try to understand the legal principles and relationships regulate the medical legal report. The subjects of the legal report are represented by the pacient and other individuals or legal entities that are directly involved in providing healthcare services. The content of the medical legal report is established by the rights and obligations that the subjects acquire, and the object of the report is given by their conduct, actions or inactions.

To establish the existence of malpractice in our expertise, there must be fulfilled some certain criteria. The case must contain a doctor-patient relationship. Physicians should be in a situation of negligence. This negligence needs to cause a injury to the pacient, and that injury needs to led to specific damages.

Another important aspect in malpractice is the compliance of the medical protocols in effect at the time of the injury. The presence or absence of these protocols is questionable, being influenced by the health care system health. In the forensic report we seeks fulfillment to all legal and procedural requirements in providing medical services.

At the moment legally it is a trend to resolve the malpractice cases through mediation, aiming to establish an agreement consisting in a economic compensation, conducted outside the judicial system.

Key Words: *Malpractice / medical law / forensic expertise / medical liability*

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1. Introduction

The coroner through his training, in his attributions of service, must carry out some expertise reports regarding some sort of research, concerning the correctness of the medical treatment applied on people involved in the legal aspects.

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Legally, the solicitation of an expertise report is regulated by *Art. 172.* When ordering the expertise for the establishment, clarifying or appreciation of facts or circumstances which are important for finding out the truth in question is necessary the opinion of an expert. The expertise shall be ordered, pursuant to article. 100, upon request or ex officio, by the prosecution, by reasoned order, and in the course of the judgment ordering the Court, by a reasoned conclusion. The application for the expertise must be expressed in writing, with an indication of the facts and circumstances, subject to assessment and clear objectives for the expert. The expertise can be carried out by expert officials from specialized institutions or laboratories or by independent experts authorized in the country or abroad, in accordance with the law. The forensic expertise shall be carried out within the forensic institutions. Expertise may participate in the conduct of independent experts, appointed at the request of the parties or to the trial subjects. The act for ordering the effectuation of the expertise must indicate the facts and circumstances on which the expert must establish, clarify and assess the objectives to which we must respond, the time in which the expertise must be conducted, as well as the institution or the nominated experts. In some areas of expertise, if strictly needed some specialized training or some evidence or are required certain specific knowledge or other such knowledge, the Court or the prosecution may ask the opinion of some other specialists.

The process of appointing the forensic experts is also regulated by Art. 173. The expert shall be appointed by order of the prosecution or by the Court. The prosecution or the Court appoints, as a rule, one expert, except in circumstances where, as a result of the complexity of expertise, specialized knowledge required from distinct disciplines is needed, in which case designates two or more experts. When the expertise is to be carried out by a forensic institution, by an Institute or a laboratory, the appointment of one or more experts is made by that institution, in accordance with the law. The subjects to the trial subjects have the right to request that at the expertise process to attend an expert recommended by them. When the expertise is ordered by the Court, the prosecutor may request that a recommended expert participates in conducting the expertise. The expert, the forensic institution, Research Institute or laboratory, at the request of the expert, may, when it considers it necessary, ask for participation of specialists from other institutions or their opinion.

In performing forensic expertises the forensic expert has certain rights and obligations stipulated by Art. 175. The expert shall have the right to refuse making expertise for the same reasons that the witness can refuse deposition testimony. The expert shall have the right to take cognizance of the material

needed for making expertise. The expert may ask the prosecutor for more data concerning certain facts of the case circumstances or other value information.

The expert may ask the subjects of the trail for some explanations, and with the consent of and under the conditions laid down by judicial organs. The expert can also benefit from protection measures, under the conditions laid down in article 125. The experts shall be required to present themselves in front of the prosecution or the Court whenever it is called to explain the expertise resecting the term-limit laid down in the act made by the prosecution or the Court. The term-limit issue or discharge may be extended, at the request of the expert, for valid reasons, without lengthening the total exceeds 6 months. The delay or refusal of unjustified expertise attracts the application of a judicial fines and civil liability of expert or institution designated to perform for the damage caused.

The expertise report must meet certain criteria laid down in article 178. After making the expertise, findings and assessments, clarifications, the expert opinion all of them shall be recorded in a report. When there are more experts shall be a single expert report. Separate opinions shall state the reasons in the same report. The expertise report shall be submitted to the judicial body that has arranged for that expertise. Most often in cases of malpractice, the coroner must carry out an expertise report or a new expertise to examine the person or on the basis of laws, as applicable.

2. Malpractice

Malpractice is defined as: The act committed without intention, by a doctor or medical personnel related to the exercise of a medical profession, that produces a injury to the patient for which the doctor is liable because, under the same conditions, another physician with the same training, would not be generated that injury.

Malpractice can be classified as: The act of fault produced by commission, the act of fault through omission, ”eligendo”, or ”vigilendo”.

The fault made by commission: Also named fault by ”agendo” or by the lack of medical equipment - this type of fault is caused by failure in respecting the professional obligations.

It is *classified as:*

a) Lack of professional knowledge (through ignorance, incompetence)

b) The fault by negligence that translates the physical position of the doctor which do not foresee the outcome of its dangerous offence although it had and could provide.

c) The fault by carelessness when the doctor although provides the outcome of his deed he is not accepting it as possible, counting that the outcome will never occur.

d) The fault by inadvertence generated by low-interest of the physician exercising his profession, attention being focused in a different direction.

Malpractice by omission: also known as ”omitendo” or the fault through inaction, which can be considered a fault of tactic (skill), this type of fault is characterized to decrease the patients survival chances, given that there are omissions or delays in treatment by physician;

This kind of malpractice may be presented under the following forms: a) the fault of the physician by denial to grant medical care services. This situation outlines two alternatives: the refusal of emergency medical assistance, to save the patient's life or to prevent the formation of some certain complications that cannot be corrected later. The refusal of medical care that can target both the initial treatment and maintenance, which would be tantamount to abandonment of the patient.

b) The fault by failure to patient's right to a second medical opinion such a failure to carry out medical examination of the patient by another physician or an interdisciplinary team;

c) The professional fault by failure in obtaining the informed consent of the patient and presenting the methods of diagnosis and/or treatment that will be submitted with obviously the exception given emergency situation, when such a requirement cannot be met due to the imminent danger and threatening life aspects and the patient is not accompanied by a person who has the quality of signing a legal agreement for the treatment to be applied in such circumstances.

Medical malpractice *through ”eligendo*”: when the doctor or the medical personnel make a wrong choice of therapeutic procedures or, more commonly, in the delegation's own obligations of other persons, with or without right of action on the patient.

3. Medical error

Is the act committed without intention, during the exercise of the medical profession, although it causes injury to the patient, it is not attributable to the doctor in question because, under the same conditions another physician would do the same damage to the patient.

In case of a medical error, the subjective representation of negative consequences is based on a condition, situation or circumstance caused by imperfections of scientific technical medical terms or certain peculiarities of reaction of the body of the patient, which could not be known so that, although the doctor was cautious as it deems necessary, and deposited the injury still was.

Malpractice in the current legal norms is regulated by law 95/2006 on healthcare reform, with subsequent amendments and additions, by the Title XV The civil liability of medical personnel and the supplier of medical products and services, sanitary and pharmaceutical, legal framework of malpractice in Romania.

Medical professional liability may be singular or concurrently in many forms:

a) Legally liability -civil or/and criminal
b) Disciplinary liability
c) Administrative liability

4. The civil liability

This form of legal liability is involved in the situation in which the subjects involved in a wrongful medical act has connection with the exercise of the medical profession or the conditions for applying that medical act. Civil medical liability may be liable for the person that made the act or for the act of another person.

The conditions for a civil liability: the existence of an illicit act; the existence of a material injury; the existence of a causal link between the illicit act and injury; the guilt.

Some examples he damage caused by medical professionals: The fault committed in the exercise of the medical and pharmaceutical or medical acts; Overcoming skills, except in case of emergency in which there is no available competent medical personnel; Violation of the right to confidentiality and privacy of the patient; violation of the rules governing patient consent to the medical act; Failure to comply with the obligation of medical assistance. In assisting medical and/or health care services, medical staff required therapeutic standards set by practical guides in specialization, approved at the national level or, or the standards recognized by the medical community (national and/or European) for their respective specialty.

Material damage caused by the health unit: Made especially in the activity of prevention, diagnosis or treatment. Nosocomial infections, unless it turns out a foreign cause what could not be controlled by the institution; Known defects of medical devices and if equipment is misused, without being repaired; Use sanitary materials, medical devices, medicinal substances, after expiry of the warranty or validity thereof;

The damage that involves a essential element of medical liability lies in the negative result suffered by the patient, as a user of medical services as a result of unlawful acts perpetrated by the subjects or units providing medical services.

The prejudice resulted after faulty medical act may be: Patrimonial or real being immediately assessable, consisting, for example in medical expenses for the restoration of the state of health, current income loss, loss of future revenues, expenses necessary for recovering work capacity, offset of work capacity etc.

Moral prejudice - without an economic content, which consists of damage to health and bodily integrity brought. Moral damages are: -tangible damages grouped as: damage that consists in physical or mental pain (”pretium doloris”), aesthetic damage (”pretium pulchritudinis”), loss of life expectancy, injury indirectly (”pretium affectionis”), physical and psychic sensitivity, feelings of

affection and love. -damages resulting from human personality rights with respect to achieving dignity and honor, prestige, rights relating to life' s privacy etc.

The causal report between illicit deed and injury: for a civil medical liability, it is necessary that between the illicit deed an injury to be a causal report, meaning that the damage needs to be done by that illicit deed. According to doctrine law and judicial practice, causal link includes a direct cause or an indirect one. In order to establish the causal link between the wrongful medical act and injury is necessary to determine, on scientific grounds, all correlations between the facts and the circumstances, establish those which have a direct or indirect, mediated or unmediated relation with the injury and those that make possible the identification of secondary, internal, external, and concomitant conditions who mediated the action causes.

Legal medical acts: The medical law is a discipline of border between medicine and law, supports the achievement of the right to human health, based on the fact that the human person is intangible, and the respect for life goes up to respect for death. Medical law becomes a meeting place of legal norms, technical or moral ideal, with the medical concrete realities.

Characteristics of medical legal report: The medical legal acts are some legal relationships established between people who have a special quality and to which the law imposes a certain conduct. This legal relationship, volitional as a result of the free will of the legislator- embodied in legal form, and following the will of the parties- embodied in the expression of consent. In this situation the subjects lie on the positions of legal equality, that are not subordinate to one from the other.

The subjects of the medical acts you are represented by: a) An individual, healthy or sick, who uses health services- known as patient; b) Individuals who provide medical services respectively, doctor, dentist, pharmacist, nurse, midwife nurses employed; c) Legal entities directly involved or associated in assisting in medical services, i.e. public or private health providers, as medical service providers, equipment manufacturers, medical devices and medicinal substances and sanitary materials, suppliers of utilities by public or private health units.

The medical legal report content: the totality of the rights (subjective) and obligations (correlations) that you acquired, respectively, which are kept the legal relationship of the parties law, within the limits of the legal norms, medical, community or international ones.

5. Patients' rights

The right to health care of the highest quality. The right to be respected as a human person, without any discrimination. The right to information. The right to express consent regarding medical intervention. The right to confidentiality and to privacy. The right decision in the field of reproduction. The right to treatment and medical care.

6. The rights and obligations of the medical personnel

The right to exercise independent and free profession. The right decision on the judgment of a medical nature. The right to refuse a patient within the limits of the law. The right to dignity. The right to pay the equivalent value of medical services. *Obligations*: To achieve a curative-preventive healthcare quality, without discrimination, to contribute to maintaining the health and prolong the life expectancy of patients; To inform the patient on the therapeutic possibilities and the actual state of health/illness so that it can express an informed consent in an autonomous manner; To stay up to date with medical advancements in its field of activity in order to achieve optimal medical assistance; Not to deny medical and surgical emergencies, not treated in a timely and competent, can cause consequences cannot be remedied at a later date or death of the patient; Of professional secrecy; To respect the dignity of the patient.

The object of the medical legal report it is represented by the conduct of the subjects, respectively, the action or inaction of the active subject-the patient, and the inaction of the passive subject-medical staff, supplier of medical products and services, and pharmaceuticals.

7. Criminal liability

Is involved in the situation in which medical personnel are committing a wrongful act, criminalized by law as a crime. The following items are assigned to such situations: Art. 193-Hitting or other violence, Art. 194- Personal injury, Art. 195-Hitts or injures that cause death, Art. 196- Personal injury through negligence, Art. 304- Disclosure of secret or nonpublic information's. Other criminal implications that can be attributed to criminal environment: Killing at the request of the victim (article. 190), Omission of notification (art. 267), Abuse in service (art. 297), Negligence in service (article 298), Conflict of interest (art. 301), Forgery of official documents (material art. 320).

8. Disciplinary liability

According to art. 442 of L. 96/2006, the physician responds disciplinary for his actions, for failure to comply with the laws and regulations of the medical profession, the medical code of ethics and rules of good professional practice, the status of the College of Physicians from Romania. For non-binding decisions adopted by the governing bodies of the College of Physicians from Romania. For any acts committed in connection with the profession, which are likely to damage the honor and prestige of the profession or College of Physicians from Romania.

Implementation of disciplinary liability: the disciplinary action against the physician fires within 6 months from the deed or the date of knowledge of the harmful consequences, the complaint to the person concerned or ex officio board, filed college whose member is a physician or college in the whose radius doctor

citizen of a member of the European Union operates. The disciplinary action against the doctor, supported by the professional committee of jurisdiction, shall be heard by the disciplinary commission of the Territorial College respectively. Disciplinary Committee decides on the disciplinary action- extinction if the deed this does not constitute misconduct; -or one of the prescribed disciplinary sanctions: admonition, reprimand, censure vote, fine from 100 to 1500 lei, prohibition to exercise the profession or certain medical activities during a period from one month to one year, the withdrawal of the membership of the College of Physicians from Romania.

Within 15 days of communication, the sanctioned, the person who made the referral, the Ministry of Public Health, Chairman of the territorial College or College of physicians President from Romania, may appeal the decision of the disciplinary committee taken by the territory college. The appeal shall be heard by the superior committee of discipline. Disciplinary liability does not exclude criminal liability, contravention or civil, according to legal regulations.

9. Administrative Liability:

Corresponds to punish the doctor by the management of the hospital employer under the rules in force at the moment in the Labor Norms Code.

10. Conclusions:

There is an advanced legal system that tries to classify every act made in professional area, and once broken it attracts some kind of liability. On the other hand in the medical system are some drawbacks regarding resources, materials, methods of applying the medical act and the lack of practice guidelines.

We have some multiple practical guidelines but they are made by different institutions, some are antagonistic, or they can not applied. Protocols / based medical practice guidelines Ministry of Health: There are some national protocols find on http://www.ms.ro/?pag=181.

It remains that the medical jurisprudence and law individualize precisely the medical liability and realize the principle “nulla poena sine culpa” (no conviction without fault), to define failure by mistake, to make possible precise knowledge of the facts and their interpretation into medical and legal context, at the intersection of scientific truth and the relationship between the offense charged and the legal norm requirements.

To avoid starting a court case is preferable that the characteristic conflict in malpractice between patient and health care provider or medical products and services, sanitary and pharmaceutical settlement to undergo an authorized mediator.

Such mental and physical stress undergone by the system and the subjects involved would be much lower, with an even better solution for them than a final decision after a trial.

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