

PARTICULARITIES OF FORENSIC EXPERTISE IN MEDICAL MALPRACTICE

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Abstract

The medical malpractice situations are one of the most difficult to achieve forensic expertise. The medical documents are often incomplete, either with a high degree of redundancy, the complexity of the expertise is very high, involving very specialised knowledges, the private experts are frequently suspected of lack of impartiality and the complexity of the problem requires very specific knowledge. All these features make the medical malpractice forensic expertise one of the most difficult type of expertise, that requires a high level of professionalism and a team-work effort.

Key Words: *medical malpraxis, forensic expertise, medical responsibility, medical error.*

JEL Classification: [K32]

1. Introduction

Classical forensic literature makes a distinction between the concepts of medical error and medical mistake. Thus, the error was considered to be inevitable and unpredictable, even in prudent and competent behavior, and could be committed by any person in similar working conditions. The mistake, on the other hand, was predictable and, in the case of adequate professional conduct, it could be avoided. It is believed to be committed by those who do not comply with the rules of professional conduct.

The modern forensic literature has made an update of the terminology used in terms of legislative changes. Malpractice means “professional misconduct in the exercise of the medical or medico-pharmaceutical act generating harm to the patient, involving the civil responsibility of the medical staff and of the supplier of medical, sanitary and pharmaceutical products and services.”¹ Medical responsibility has valences that go beyond the notion of malpractice - which refers strictly to the civil aspects of this situation. Thus, in cases involving medical responsibility, it may be contraventional, administrative, disciplinary, civil and

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¹ Art. 653 from the Law 95/2006.

criminal. These types of responsibility are not excluded, in the sense that a patient who considers himself / herself injured can address to:

- The Commission for monitoring and professional competence for malpractice cases within the Public Health Departments.
- The College of Physicians for disciplinary sanction, if there is such a deviation
- The court or the criminal investigators.

In order to prevent these situations, a mechanism for monitoring the accreditation of sanitary units, has been introduced into medical legislation.² It introduces the notions of adverse events, the sentinel event and the “near miss” event. In principle, the adverse event leads to the responsibility of the sanitary staff involved, the sentinel / catastrophic event reflects the deficiencies of the policies and procedures in the health facility, and the “near miss” event is considered an incident that was avoided without harm, although it could have produced it. All these situations come to be reported and analysed on the basis of scientific evidence, within the forensic expertise required by the criminal investigators or by courts.

Medical responsibility is apparently the more obvious as the damaging consequences are more predictable. In fact, it is necessary to establish a causal link between inadequate performance / failure to perform a diagnostic or therapeutic medical act and the damage. Specific identified issues of forensic expertise in cases where the investigation is directed to evaluate a possible medical fault are:

1. increased ambiguity of medical documents
2. suspicions and / or unilateral or multi-directional pressures exercised on forensic experts
3. contradictory medical literature (doctrine)
4. the possible “mercenary” of the hired experts by one of the parties³
5. high complexity of cases⁴ which may raise issues of comprehension of documents by courts in the context of requiring medical knowledge for good interpretation of the case, which calls for additional explanations from the expert.
6. the need for an impeccable documentation of the expertise considering the maximum likelihood of subjecting it to all possible means of attack,

² GO 639/2016.

³ Perju-Dumbravă, D., Iliescu, D.B., Scripcaru, C., Siserman, C., Hadareanu, V., Chiroban, O., (2017), *A critical review of the practice of recommended forensic medical examiner in Romania for the last three years*. Romanian Journal of Legal Medicine 25(2)169-173(2017) DOI:10.4323/rjlm. 2017.169.

⁴ Fulga I., Perju-Dumbrava D., Bacalbasa N., Savciuc V., Crassas R., (2005), *Medico-legal proofs in anesthetics- Contributory Deaths in Romania and Republic of Moldova from 2002 to 2005*, Regional Anesthesia and Pain Medicine, Volume 33, Issue 5, Supplement 1, September-October 2008, page 250.

up to the level of the opinion of The Superior Commission for the Approval and Control of Forensic Documents.

7. the need to flexibly interpret some of the stipulations of the procedural rules regarding the carrying out of the expertise, the findings and other forensic work.
8. the lack of medical and medico-legal knowledge of the police officers and lawyers.

Analysing each of the issues listed above,

1. The increased ambiguity of medical acts is a cause of:

- complex documentation, ordered according to specific criteria, different from those of temporality, often with at random inserted documents. Medical files are either too large or too lapidary, or incomplete.
- anecdotal illegible doctor's hand-writing – partially surmounted by the request - sometimes repeatedly - of the release of readable copies
- attempts of the medical staff to alter medical documents in the conditions in which the possibility of a malpractice charge lies (interlacing, erasures, full recovery of the medical record with the same writing and pen from one end to the other), enclosed in the proximity of the Criminal Law's notion of forgery.
- the use of standardized color-coded auto-copying forms whose subsequent photocopying is questionable.

2. Regarding the possible suspicions, as well as the attempts to influence the expert, they can come from different directions:

- the complainant patient - who will suspect that “Dog does not eat dog”
- the case prosecutor will be suspicious of the same thing or that the expert could be corrupted
- the accused doctor will suspect that the forensic doctor is “homo homini lupus” towards his colleagues

3. Medical literature (doctrine), in some situations, is contradictory.

If the hired expert of the injured patient or the hired expert of the physician who is investigated for malpractice will have a tendency to quote only some sources and not the others, the position of the official expert is very difficult when contradictory sources have comparable credibility:

4. The possible “mercenary attitude” of the hired experts is always a problem in the discussion of the Superior Council of Legal Medicine. The sanctions for supporting certain theses meant to defend the cause of the client without a scientific basis, go until to the temporary suspension of the title of expert!

5. The high complexity of cases, which may raise issues of comprehension of documents by courts in the context of requiring medical knowledge for good interpretation of the case, prompts the request for additional explanations from the expert. The question arises in these cases: The official expert has the duty to appear before the court to give further explanations? Possible answers:

- Yes. Contra argument: this activity is not shown in the job description. Consequence: if the expert has waited for 6 hours in court to give explanations, but at 14 o'clock, he has not yet been heard, he can go home because his work day is over!
- Not. So, not being a job obligation, he must be paid for this activity. How, if he is an official expert and he does not have the status of hired expert?

6. The need for impeccable documentation and argumentation of the findings of expertise derives not only from the possibility that the document generated by an expert will also be examined by other colleagues, belonging to higher professional levels, but also by the duty to reveal the truth in the case in question.

7. The need to flexibly interpreting some of the articles of the Procedural Rules for conducting expert assessments, findings and other forensic work should not be confused with “instigating” the violation of these rules.

8. The forensic expertise are drawn up at the request of the police investigators, of the prosecutors or of the court. In the documents through which the expertise is requested, the expert is asked to answer to certain questions, that could be suggested to the court by the attorneys. There is a common situation that the questions are formulated with a missed attempt of using medical terms or the questions are redundant or ambiguous. The recommended solution for the problem could be the request of assistance from a qualified medico-legal expert when the attorney are drawing up the questions for the forensic experts.

2. Materials and Methods

Case report 1:

The patient S. E. was the victim of a road accident as a pedestrian hit by a car; he died at the scene of the accident despite the medical care provided by the paramedic crew arrived at the site 3 minutes after the event. Intervention card records “patient found in dorsal decubitus in cardiac and respiratory arrest”.

Cardio-pulmonary resuscitation manoeuvres were being established, but they remain without result. After 50 minutes the death is declared. Forensic autopsy (see alternative *virtopsy*⁵) finds a fracture of the nose's bones and liquid

⁵ Perju-Dumbravă, D., Anitan, S., Siserman, C., Fulga, I., Opincaru, I., 2010, *Virtopsy - an alternative to the conventional autopsy*, Romanian Journal of Legal Medicine, vol XVIII, Nr 1, March, pp. 75-78.

blood in the bronchi below the level of carina (the point where the trachea is dividing into the two bronchi) and in the pulmonary parenchyma. At the laryngeal level and at the upper limit of the trachea there is evidence of blood infiltration of the mucous membrane that attests the intubation of the patient. The cause of death is reported to be “acute respiratory failure following a pulmonary and tracheo-bronchial blood aspiration with a source of bleeding from the fracture of the nose's bones”. Apart from minimal lesions (abrasions, bruises, parchments) in the lower limbs, there are no other signs of violence. The intervention sheet specifies that upper airway aspiration and oro-tracheal intubation have been performed.

Following the request of the legal representative of the perpetrator (the driver), the Police requires the completion of a forensic expertise supplement, with the objectives “if in the first aid provided by the paramedic crew there were deficiencies in general and if, in the circumstances that, according to the intervention sheet, the airway suction and the oro-tracheal intubation were performed, how to explain the presence of blood in the bronchi and lungs?”

In order to elucidate the case, it was assumed that a small number of paramedics had the competence to perform an oro-tracheal intubation with the laryngoscope, most of them being entitled to use only devices like Combitube or the Yankauer probe. The crew was trained only for the use of these two types of probes and not for the use of the laryngoscope. They were analysed both the competencies of the paramedics who intervened in the field and the sanitary materials that were used.

It has been found that Yankauer probes have been used for desobstruction, whose suction possibilities are limited to upper level of the respiratory airways.

The specialised literature⁶ states that “a rigid suction tube with large holes (Yankauer) is used to remove upper airway secretions (blood, saliva and gastric fluid).” The bronchi - the level at which blood was found - come out of the sphere where this probe works.

It was concluded that the solution of tracheo-broncho-pulmonary aspiration came out of the scope of the therapeutic possibilities on the spot and the professional competence of the intervention crew. The blood from the bronchi's and the pulmonary tissue could be accessible only by a broncho-alveolar lavage, which can be performed strictly in hospitalized conditions. The assumption of a medical mistake of the SMURD crew was thus invalidated.

Case report 2:

1. Introduction:

“When preparing forensic expertise, the forensic doctor or the designated commission has the following obligations:

⁶ <http://www.cardioportal.ro/files/pdf/ghiduri/GRSUPORTUL%20VITAL%20AVANSAT.PDF>.

- a) to consider certificates, medical reports and clinical observation sheets issued by health units of the Ministry of Health and Family or accredited by it
- b) to verify whether the documents referred to in a) presents the following safety features: registration number, stamp of the medical unit, signature and doctor's stamp, which must mention the specialty and the code of the doctor, and in the case of photocopies the mention “according to the original”, certified by the responsible doctor.

The forensic medical practitioner may not consider information contained in medical records other than those referred to in paragraph 1, such as referral tickets, prescriptions, prescription counselling, medical leave, discharge notes.⁷

In what context and to what extent did the documents listed under item 2 of art. “Referral tickets, prescriptions, prescription counselling, medical leave, discharge notes” is still necessary to be taken into account when assessing a situation where a medical mistake is involved?

2. Case report:

Miss M.G., age 32, following to a dental extraction with insufficient antibiotic protection, suffered a dental infection that expanded at the soft cervical tissues (neck region) and jugal (the region of the face) that required wide surgical interventions that led to obvious aesthetic damage.

The dentist who performed the extraction, being consulted two days after the onset of the infection, recommended a consultation with a Oral and maxillofacial Surgery Cabinet, the surgeon in question releasing both a recipe recommending a broader antibiotic and emergency hospitalization into a specialised Surgery Clinic.

The forensic examination carried out as a result of the patient's complaint, in which he accused the medical mistake of the dentist who carried out the extraction but also of the surgeon from the Oral and maxillofacial Surgery Cabinet to whom he was later referred. The medico-legal expert took into consideration the referral slip of the surgeon recommending the emergency hospitalization in the Clinic of Oral and maxillofacial Surgery, thus disrupting it, since the recommendation was timely and appropriate. Does this represent a violation of the Procedural Rules or just a flexible interpretation of them? The information in the referral note was not really taken into account, but only that reference note was mentioned, which, by its mere existence, has exculpate the surgeon.

In the same situation, the experts that received incomplete documentation of cases where the medical mistake was invoked, the medical prescriptions or referral tickets that were quoted in the expertise but were not taken into account

⁷ Art. 10 – of the 459/2000 Law regarding the Procedural Norms on the Examination, Findings and Other Forensic Practices.

(they did not constitute real evidence), but they had the beginning of a proof, causing the requesting to the sanitary units to issue copies of the documents attesting the carrying out of the examinations or consultations that led to the release of the documents in question.

Conclusions

1. In medical malpractice cases, the forensic expertise requires a complex interpretation and even claims of exhaustive analysis of the existing evidence.
2. The inherent suspicions, the contradictory doctrine, the “mercenary” of the hired experts represent the main difficulties encountered in drawing up this type of expertise.
3. Consultation and inclusion into the expertise commission of specialized physicians in the specialty of those accused are mandatory, this type of expertise being among the most complex of the forensic activity.
4. The lawyers should consult a legal medicine expert before formulate the objectives of the forensic expertise into the malpractice cases.

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