THE ROLE OF MEDICO-LEGAL EXPERTISE IN CASES OF MEDICAL MALPRACTICE. ELEMENTS OF MALPRACTICE VIEWED FROM A MEDICO-LEGAL POINT OF VIEW FROM THE LAWYERS PERSPECTIVE

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Abstract

Malpractice is a matter of public debate in Romania, both in the medical and in the legal environment, due to patients' lack of knowledge of their rights and the ambiguity of a concise and well-developed legal framework. Malpractice is regulated by art. 642 of Law no. 95/2006 on "Civil liability of medical personnel". In 2017 the Superior Council of Forensic Medicine approved Norms regarding the participation of the recommended expert in the medico-legal works, giving a legal frame work for some forensic doctors to asses in order to provide more evidence for the courts. Patient advocates are most often addressed in cases involving surgical specialties, most commonly gynecology or plastic surgery. The expert has at his disposal a whole medical and legal informational arsenal, which allows him to identify very quickly and accurately any medical faults. The New Code of Criminal Procedure, in art. 173 and art. 177 disposes of the elements by which the appointment of the expert is made.

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1. Introduction

On the occasion of the recent passing away of the late Prof. dr. Ciomu Naum Nicolae, accused and convicted of malpractice, the topic has once again become one of social and medical topicality.

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The term "malpractice" results from the composition of the words "mal = malus lat = bad" and "praxis from Greek = practice" and thus could be translated as bad practice. The dictionary defines malpractice as "incorrect or negligent treatment applied by a doctor to a patient, which causes him harm of any kind, in relation to the degree of impairment of physical and mental capacity (1)".

Malpractice is a matter of public debate in Romania, both in the medical and in the legal environment, due to patients' lack of knowledge of their rights and the ambiguity of a concise and well-developed legal framework.

2. Discussions

In fact, malpractice is regulated by art. 642 of Law no. 95/2006 on "Civil liability of medical personnel", which points to para. 1 lit. b) "malpractice is the professional error committed in the exercise of the medical or medico-pharmaceutical act, causing damage to the patient, involving the civil liability of the medical staff and the supplier of medical, sanitary and pharmaceutical products and services."

By simply analyzing the law text from above, we can answer the question regarding liability in cases of malpractice, which rests with the medical staff and the medical service provider.

The same law 95/2006 clearly defines by art. 642 para. 1, lit. of who is the medical staff and says the following: "the medical staff is the doctor, the dentist, the pharmacist, the nurse and the midwife who provide medical services".

Through this paper we propose to discuss certain aspects of the phenomenon of sanctions applied to mistakes/errors in the provision of medical care in Romania; especially from the point of view of the request of the employer lawyers who insist on the participation of independent recommended medico-legal experts (conf. art. 172 CPP - Authorized independent expert, correlated with art. 32 and 33 H.G. 774/2000).

We can state that currently, on the territory of our country, related to malpractice, there are two major medico-legal opinions: a so-called "pro-patient" trend and a diametrically opposite one, which supports the medical side.

Analyzing a multitude of cases of medical malpractice, within the medico-legal units, as well as some of the Disciplinary Commissions of the College of Doctors in Romania, I noticed that all lawyers with experience and who demonstrate legal professionalism end up requesting the participation of an independent forensic doctor expert.

The expert, has at his disposal a whole medical and legal informational arsenal, which allows him to identify very quickly and accurately any medical faults.

After an in-depth analysis of the medical documentation provided in the file and after the careful examination of the person (if alive) or the performance of the medico-legal necropsy/exhumation, the expert elaborates a opinion, responding to the formulated objectives (3).

The status of the independent Medical Forensic Expert is legislated within the Methodological Norms regarding the participation of the recommended expert in the medico-legal works, approved in 2017 by the Superior Council of Forensic Medicine.

In practice, a medico-legal symbiosis of a professional nature is created between lawyers and forensic doctors who together manage to write a plea as close as possible to correctness and truth.

We mention that in Chapter VII of the New Code of Criminal Procedure, respectively art. 172, regarding ordering the performance of the expertise or the medico-legal assessment, para. 2 shows that: "expertise is ordered upon request or ex officio by the criminal investigation body, through a reasoned ordinance, and during the trial it is ordered by the court through a reasoned conclusion". In paragraph 6, of art. 172 it is said that "the order of the criminal investigation body or the decision of the court appoints the institution or the designated experts".

Returning to the differences in the lawyer's perspective, depending on the type of the client they represent, respectively the doctor or the patient they undertake to represent, we have identified some general aspects:

1. Patient advocates are most often addressed in cases involving surgical specialties, most commonly gynecology or plastic surgery. This differentiation by medical specialties can be explained by society's general approach to the interpretation of certain diseases.

The Romanian collective mentality usually considers that a patient suffering from cancer is either saved due to religious beliefs, through a divine intervention or, most of the time, death is the only expected and at the same time accepted way.

On the other hand, if a 13-year-old pregnant minor patient is hospitalized in a gynecology service, society expects a heroic intervention from the gynecologist, who must necessarily discharge 2 alive patients (the mother and the newborn fetus), the death of one being intensely criticized and publicized.

We have found that the lawyers who represent the patient choose to attack either the medical unit (legal entity), or directly the attending physician, or both, because by generalization they consider their joint and several liability.

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The problem reported in Romania, unlike e.g., by the United States of America, is that the sued hospital prefers to place the responsibility on the doctor.

Instead of helping their employed physician, with all the associated legal costs, hospitals choose to abandon them, leaving them to fend for themselves without the ability and resources to defend themselves fairly and equitably. Their justification is the existence of medical malpractice insurance, mandatory for every doctor with the right to practice freely in Romania.

If a treating physician is directly targeted, then the lawyer, through the recommended medico-legal expert, will try to look for and identify as many errors of conduct and application of guidelines and medical treatments as possible.

From the point of view of the lawyers who represent the doctors, their approach is different. If the accused is a legal person, a medical unit for example, then the same recommended expert will try:

a) to prove the infection of the patient with nosocomial pathology, in parallel with the filing of a criminal complaint against the doctors, participants in the therapeutic act (other than the client doctor).
b) to excuse the client by looking for mistakes of form or substance on the part of the patient.
c) to deny any medical mistake by asking colleagues to write helpful specialist reports.

Medical personnel suspected and indicted for medical malpractice often hire lawyers specialized in malpractice, being guided by friends, other lawyers or people with legal competences.

Accused doctors who have not had medical responsibility courses in their university curriculum are at a disadvantage in the face of the lawyers' aggression.

In the last period of time, with the specialization and increase in the number of lawyers, as well as the development of the media presentation of malpractice cases, doctors, lawyers and finally magistrates learned about the possibility of requesting the opinion of recommended medico-legal experts.

Until recently, the participation of the recommended experts (chosen by the parties) was restrictive, the expertise being carried out in a restricted environment, only with the participation of the commission. With the opening of justice to transparency and equity, the courts began to apply the provisions of the criminal and criminal procedure codes. Thus, the courts began to implement the provisions of Chapter VII of the New Code of Criminal Procedure, respectively art. 172, regarding ordering the performance of the expertise or the medico-legal assessment, which in para. 4 says that "the expertise can be carried out by official experts from specialized laboratories or institutions, or by authorized independent experts from the country or abroad under the conditions of the law." In the same article 172, para. 8 it is stated that "authorized independent experts, appointed at the request of the parties or main procedural subjects, may participate in the performance of the expertise."

Next, the New Code of Criminal Procedure, in art. 173 disposes of the elements by which the appointment of the expert is made, and is reiterated in para. 4: "the parties and the main procedural subjects have the right to request that an expert indicated by them participate in the performance of the expertise. If the expertise is ordered by the court, the prosecutor can request that an expert recommended by him participate in the expertise."

At art. 177 of the new code of criminal procedure, in the Expertise Procedure, in para. 4 it is mentioned that: "the parties and the main procedural subjects are informed that they have the right to request the appointment of an expert recommended by each of them, to participate in the performance of the expertise."

An important legal interpretation in the field of medico-legal expertise is represented by the rules developed by the Superior Council of Forensic Medicine, regarding Ministry of Health Order No. 938 of 07/09/2005 regarding the approval of the criteria for attesting the quality of medico-legal expert as well as the methodological rules regarding the participation of the party expert in the medico-legal works, rules approved by the Superior Council of Forensic Medicine in 2017.

We would like to mention that within an exhaustive legislation there are involuntarily different interpretations regarding the applicability of these measures in medico-legal practice. In this sense, it should be mentioned the decisions of the Cluj Court of Appeal regarding the annulment of some

provisions of the Methodological Norms regarding the activity of the forensic doctor as an expert appointed by the judicial bodies at the request of the parties, such as art. 18 point 1 d) and art. 22 para. 2a).

With all this legislation, the courts have the final say on the application of the regulations in force and in this sense the majority choose to approve the participation of a forensic expert chosen by the party in the performance of the expertise.

As a final note, we want to show that the role of lawyers dedicated to their clients can also be manifested by mediating agreements between parties, namely doctors and patients.

A final point would be that not all cases are unmistakable elements of medical error / malpractice. Art. 643 of Law no. 95/2006 para. 2 states "Medical personnel are not liable for damages and injuries caused in the exercise of the profession: a) when they are due to working conditions, insufficient equipment for diagnosis and treatment, nosocomial infections, adverse effects, complications and generally accepted risks of the methods of investigation and treatment, hidden defects of sanitary materials, medical equipment and devices, medical and sanitary substances used; b) when acting in good faith in emergency situations, respecting the competence granted."

A comment on this article would refer to the moment of imputability of the medical act in terms of diagnosing the existence of nosocomial infections.

Conclusions

1. Accused doctors who did not have medical responsibility courses in their university curricula are at a disadvantage in the face of the lawyers' aggression.

2. In the last period of time, with the specialization and increase in the number of lawyers, as well as the development of the media presentation of malpractice cases, doctors, lawyers and finally magistrates learned about the possibility of requesting the opinion of recommended medico-legal experts.

3. Until recently, the participation of the recommended experts (chosen by the parties) was restrictive, the expertise being carried out in a restricted environment, only with the participation of the commission.

4. With the opening of justice to transparency and equity, the courts began to apply the provisions of Chapter VII of the New Code of Criminal Procedure, respectively art. 172, para. 4 regarding the recommended medico-legal experts.

5. They have the final word on the application of the regulations in force and in this sense the majority choose to approve the participation of a forensic expert chosen by the party in the performance of the expertise.

Bibliography

1. Codul de Procedură Penală (Law no. 135/2010), published in the Official Gazette of Romania, 486 from 15 July 2010.
2. Dexonline, no date, https://dexonline.ro/definitie/malpraxis, accessed: 13 january 2023.
3. Law no. 95/2006, Răspunderea civilă a personalului medical si a furnizorului de produse și servicii medicale, sanitare și farmaceutice (The civil liability of the medical stuff and of the supplier of medical, sanitary and farmaceutical products and serviciess). Published in the Official Gazette of Romania, no. 372 from 28 april, 2006.
4. NORMELE METODOLOGICE privind participarea expertului parte în cadrul lucrărilor medico-legale 2017 (aprobat de Consiliul Superior de Medicină Legală).