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Medical Malpractice: Exonerating Cases of Medical Liability

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Abstract

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This article aims to present the way the legislator defines malpractice within the Law no. 95/2006, republished, with the analysis of the phrase „professional error” and the basis of the civil liability in what concerns the medical personnel (Article 653 uses the expression “error” along with concepts such as “negligence”, “recklessness” that require clarification).

The exonerating cases of liability governed by the New Civil Code are analyzed and seen as circumstances excluding liability because its elements are not fulfilled, being cases in which the guilt of the debtor regarding the damage cannot be considered or there is no causal link between the act of it and the damage produced.

There are analyzed the special cases provided by Law no. 95/2006, republished, where the medical liability is removed- Article 654. The medical personnel staff is not liable for damage and losses caused in the practice when they are due to working conditions, poor endowment with equipment for diagnosis and treatment of nosocomial infections, adverse effects, complications and risks generally accepted within the methods of investigation and treatment, of hidden vices of the sanitary materials, equipment and medical devices, the medical substances used. Law no. 95/2006 regulates an exoneration case regarding the liability of the medical staff when it acts in good faith, in emergency situations, according to the competence granted. The article presents an analysis of the concept of good faith in relation to the specific of the medical field as a cause that removes the guilt of the medical staff.

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Keywords: Medical malpractice; exonerating cases; medical liability; Romanian Law; causes which exclude civil medical liability.



1. Introduction. General considerations

Medical malpractice is defined in the Romanian law as the professional error committed within the medical or medical-pharmaceutical practice, tortious on the patient, involving the civil liability of the medical staff and of the medical products and services, healthcare and pharmaceuticals products provider (Art. 653 par. 1 b of Law no. 95 of 14 April 2006, republished, on the healthcare reform).

The medical personnel is liable for all harms produced by error, which include negligence, imprudence or insufficient medical knowledge in the practice by individual acts within the prevention, diagnosis or treatment procedures. The medical personnel is liable also for the damages arising from breach of regulations regarding this title on confidentiality, informed consent and mandatory medical assistance. The medical personnel is liable for harms produced in the profession practice also when they exceed the limits of their competence, except in cases of emergency where medical personnel with the necessary competence is not available (Art. 653 par. 2, 3, 4 of Law no. 95/2006).

Malpractice is a form of liability that occurs when certain individuals (professionals belonging to a professional body) violate certain rules of conduct (from statutes, codes of conduct, guidelines, etc.) established by law and/or specific professional body, and if the breach of the obligation produces a harm, the obligation of remedy arises (Cimpoeru, 2013). The act causing harm consists in the breach of the rules of conduct by the professionals. The professional who commits an act causing harm and violates a rule of conduct will be held accountable for malpractice, as a specific civil liability (Cimpoeru, 2013).

2. Medical liability- Medical malpractice. Foundation and conditions

On the *foundation* of civil liability of the medical personnel, there are two possible directions, namely: the subjective foundation of the civil liability of the medical personnel, linked to the idea of fault or an objective foundation of the civil liability, which is no longer based on the idea of fault. Regarding the *conditions* to be met for medical liability we must establish what the concept of medical personnel means, ie the doctor, dentist, pharmacist, nurse and midwife providing medical services (Art. 653 par. 1 a Law no. 95/2006).

The existence of fault while committing the harm is a *sine qua non* condition of engaging the civil liability of the medical staff as an argument for a subjective basis of liability; the civil liability of the medical staff for the damage caused to patients is a liability based on fault, and Art. 653 par. 1 letter b of the Law no. 95/2006 uses the concept of professional error (Mangu, 2010; Vida Simiti, 2010).

Specific to malpractice is the fact that the infringement of a non-contractual obligation (in which case liability is a tort with the possibility of adding liability for medical malpractice to the criminal liability on the grounds that they have different reasoning), the harmed party must prove, in addition to fulfilling the general conditions of liability (tort, harm, causal link and fault), and the existence of the contract/a pre-existing legal relationship between the harmed party and the professional. If the professional violates a contractual obligation that is in the same time a rule of conduct, than there is a specific contractual liability and the contractual obligation is supplemented by the extra contractual rules regarding the rule of conduct (codes of conduct, guidelines, best practices, etc.); but if a

professional obligation violated is also a rule of conduct, then we find ourselves in the presence of a contractual liability of common law; when the professional violates a contractual obligation and at the same time a rule of conduct, unrelated, there will be a concurrence between the two forms of liability (Cimpoeru, 2013). The liability of the medical staff can be tort, which requires the general conditions concerning the wrongful act to be fulfilled, the harm, causal link, fault, with the possibility of a pluralism with criminal liability, or it may be a contractual liability either of common law (when the conditions concerning infringement of contractual obligations by non-performance must be fulfilled, defective performance, late execution, harm, the causal link, guilt) or a specified liability (in case of a breach of a contractual obligation and a breach of a rule of conduct from codes of ethics, guidelines, standards, best practices, etc). For the existence of a contractual liability of the medical personnel for improper medical conduct there must be a valid contract.

To obtain remedy, the victim must prove both the existence of causal link between the wrongful act and the harmful result, and the causal link between the will of the perpetrator and the damage occurred, ie. a conformation of the will to the damaging outcome (Mangu, 2010); therefore to repair the damages, the existence of a culpable willingness must be proved. In addition, Law no. 95/2006 provides that all individuals will be responsible according to their degree of fault (Art. 654. par. 1). The subjective foundation of the medical personnel liability results also from the analysis of Art. 654 par. 2 letter b Law. 95/2006: the medical personnel are not liable for harm and losses caused in their practice when they act in good faith in emergency situations, according to the competence granted (Mangu, 2010).

To the contrary, the objective foundation of the medical staff liability (on which we have reservations) is argued on the idea that regardless the culpability of the medical conduct, the medical personnel liability will be engaged when there is an evidence of a causal link between the harm suffered and the professional activity with the ability to be held accountable even in cases of lawful and moral action, however – harmful (Boilă, 2009). In arguing this position, we start from the idea that the professional error has a wider content than that of negligence, error or good faith of the person responsible, as it includes any mistake committed willingly or unwillingly, intentional or culpable due to negligence or ignorance if the consequences were the injury of the patient during or in connection with the achievement of the medical care (Boilă, 2009). We support the view according to which the malpractice forms are confined only to the illegal act committed by negligence by the medical staff and the error rules out the intention, as a form of guilt manifestation as it always assumes the good faith which is incompatible with the intention (Mangu, 2010). The Law no. 95/2006 explains in Art. 653 par. (2) that “the damage caused by error include negligence, imprudence or insufficient medical knowledge in the practice (...)”, showing some forms of error which are forms of negligence.

3. Medical malpractice. Causes which exclude civil medical liability

The cases that exclude civil medical liability are the situations/circumstances where the legal requirements are not met in order to bring about the obligation to compensate the damage caused by committing the illegal act and can regard the injurious wrongful act, the causal link, the fault (Motica & Lupșan, 2008).

According to the structure of the New Civil Code (NCC, Law 287/17 of July 2009, republished), the cases that exclude the medical liability can be structured as follows: cases that remove the unlawful nature of the harmful act (the legitimate defence - Art. 1360, the state of necessity - Art. 1361, the disclosure of information - Art. 1363, fulfilling activities required or permitted by Law - Art. 1364); grounds of exemption from liability (force majeure - Article 1351, fortuitous event, the act of the victim or the deed of a third party, the exercise of rights - Art. 1353); other cases of exoneration newly introduced - Art. 1354, first thesis: the victim is unable to obtain compensation for the harm caused by the person who gave help selflessly unless he proves the intent or the gross negligence of the one who, according to the law, would have been liable (eg when a doctor grants first aid to a person in the hospital using the resuscitation procedure and produces a fractured rib, case where the victim can claim compensation because the aid was not disinterested, instead the doctor has performed his duties (Cimpoeru, 2013); grounds for removing the fault - the good faith of the medical staff and the contribution of the victim.

There is the possibility of **removing medical liability by contractual clauses** (based on the principle of will autonomy). In this case, the injured person may waive compensation for harm repair resulting from the non-performance of contractual obligations of the other party or the parties may freely determine the consequences of non-performance of an obligation after the failure to perform (Mangu, 2010). It is about a consent with respect to a harmful act committed by another person not consent to cause damage, but the perpetration of an act that could cause damage. The existence of such disputes in the case of contractual liability is accepted, with limits, however not in tort, though it can be accepted in case of a very light misconduct (Motica & Lușan, 2008; Tudor, 2010). Such clauses do not suppress obligation, but the duty to remedy. They were considered inadmissible on what concerns the obligations related to body integrity, but it shows that they are accepted because compensation is waived, not the body immunity (Turcu, 2010; Vida Simiti, 2013). Liability for harms to physical health or mental integrity cannot be removed or diminished only according to the Law (Art. 1355 par. 3 NCC).

The contract may include clauses for exoneration, limitation or aggravated liability (eg accountability in cases of force majeure, however an aggravation clause is not considered valid when for example a doctor guarantees a patient who is suffering an incurable disease that he will cure him (Mangu, 2010) although there is also a contrary opinion), by complying with the rules of Art. 1355-1356 NCC.

Regarding the **consent of the informed patient**, there may be a clause of exemption from liability of the medical staff on the risks related to reporting, based on the idea that the harmed victim may waive in advance the legal protection which the common law of civil liability offers by accepting the risk (case where it is considered that there is a transfer of responsibility from the medical personnel to the patient conditioned by the informed consent of the patient, ie by the patient's acceptance of the risks) (Mangu, 2010); exoneration of liability will not operate in case of culpable misconduct medical personnel that caused the risk. According to Art. 660 of Law no. 95/2006, in order to be subjected to methods of prevention, diagnosis and treatment, with potential risk to the patient after explaining by the doctor, dentist, nurse/ midwife according to the power of his understanding, the patient consent is

required in writing (with information on diagnosis, nature and purpose of treatment, the risks and consequences of the proposed treatment, viable treatment alternatives, risks and consequences, prognosis of the disease without treatment).

Referring to the complete and clear information to obtain the patient's consent, the provisions of Art. 654 of Law no. 95/2006 must be considered, meaning that medical personnel is not liable for damage and losses caused in the practice when they are due to complications and risks generally accepted of the methods of investigation and treatment, of hidden defects of the sanitary materials, equipment and medical devices, medical and sanitary substances used.

Regarding the *cases that remove the unlawful nature of the prejudicial act*, Law no. 95/2006 does not refer expressly to *self-defence* (cases when the medical personnel must restrain aggressive patients). The New Civil Code, provides provisions on self-defence (Art. 1360) the one who, being in self-defence, harmed the aggressor, does not owe compensation, but the one who committed a crime by overcoming the limits of self-defence could be ordered to pay appropriate and equitable compensation. Self-defence is not defined, to which reference is made in Art. 19 par. 2 of the New Romanian Criminal Code (New Criminal Code-Law no. 286/2009), the self-defence being a justified self-defence (par. 1 provides that the act provided by the criminal law committed in self-defence is justified), which takes effect on the act (*in rem*). Thus the person committing the act to remove a material, direct, immediate and unfair attack which threatens him or another person, their rights or interest, if the defence is proportionate to the seriousness of the attack than it is considered self-defence (Toader et. al., 2014). However, there is the opinion that self-defence cannot be a ground for exonerating the medical liability (Vida Simiti, 2013).

Regarding the *state of necessity*, Law no. 95/2006 refers to the danger threatening the life, health in the state of emergency. On the one hand, there is the obligation of medical care; the doctor, dentist, nurse/midwife are obliged to accept the patient in emergency situations, when lack of medical care can endanger seriously and irreversibly the health or life of the patient (Art. 663 par. 3), cases where the medical staff will not be held accountable to repair the damage caused to patients. Then, according to Art. 654 of Law no. 95/2006, there is the case where the medical personnel are acting in good faith in the state of emergency, in compliance with the competence granted. In addition, the provisions of Art. 653 par. 4 Law no. 95/2006 should be considered, according to which the medical personnel is liable for the damages produced while practicing and when the professionals exceed the limits of competence, except in cases of emergency where no competent medical personnel is available.

According to Art. 662 of Law no. 95/2006, the emergency is combined with the lack of discernment and the impossibility to contact the legal representative. The medical staff is liable when the patient's informed consent is not obtained, unless the patient lacks discernment and the closest representative / or the next of kin cannot be contacted. It can lead to a situation that allows the physician to act without the patient's consent in emergency situations, when the time until the expressed agreement would jeopardize irreversibly, the patient's health and life.

It is considered that in emergency cases the procedure of informed consent is not required and the decision is determined by the medical context, the need for immediate treatment and the interest for the patient's health and life (Toader, 2016).

According to Art. 1361 NCC, the one who, in a state of necessity, destroyed or damaged the property of another to defend himself or his property from harm or imminent danger is obliged to repair the damage caused, according to the rules applicable to unjust enrichment. The state of necessity is a case which removes the unlawful nature of the act and entitles a legal action for restitution based on the principle of unjust enrichment (Cimpoeru, 2013). The provisions of Art. 20 New Criminal Code on the state of necessity are also relevant, which is a justifying case with objective effects on the act (in rem) (Toader, et. al., 2014). The state of necessity cannot be invoked by the patient who steals drugs more expensive than those legally offered (Tudor, 2010).

The state of necessity is related to the idea of *justified occupational hazards* that are accepted, but the issues regarding the temerity of the medical personnel performing medical acts in a state of emergency are highly questionable, in which case it is preferable to take justified risks compared with not taking the risks which would be useful to the patient (Mangu, 2010; Trif & Astărăstoae, 2000; Moldovan, 2002). What is saved should be more important than what is lost (Moldovan, 2006) and it should be all about removing an imminent danger, however, the act of forgetting a gauze into the wound of the patient in urgent situations is not a state of emergency because even the medical negligence is an indispensable act which removes the imminent danger (Mangu, 2010; Vida Simiti, 2013). The accepted, justified risk is the one who saves the life/health from a real higher danger, which cannot be avoided otherwise, and the treatment is based on the science data and medical practice; the risk is accepted in the patient' interest, it must be freely accepted by the patient and with no foreseeable negative effects (Cimpoeru, 2013; Moldovan, 2002). In one case, a patient of 23 years old, is having an abortion in the second month with a local anaesthesia by injection of lidocaine, appears the cyanosis of the face and of mucous membranes and the death occurs in two minutes. The autopsy reveals cerebral edema, pulmonary edema and visceral congestion and the report shows that death was due to anaphylaxis (hypersensitivity reaction) amid the unpredictable allergic reaction to lidocaine (Moldovan, 2002).

Disclosing the information (Art. 1363 New Civil Code) is a case that removes the unlawful nature of the act and the liability for damages produced by secret disclosure if the disclosure of the professional secrecy is justified by serious circumstances relating to public health or safety.

Fulfilment of certain activities required or permitted by law (Art. 1364 New Civil Code) is a cause that removes the unlawful nature of the act, however, it does not exonerate from responsibility the one who was aware of the illegal nature of his act committed in such circumstances (*eg* treatment/hospitalization against the patient's will to carry out mandatory psychiatric expertise, disclosure of professional secrecy (Tudor, 2010)). According to Art. 21 NPC (the exercise of a right or the performance of an obligation) the act provided by the criminal law consisting of the exercise of a legal right or the performance of an obligation imposed by law is justified if it complies with the conditions and limitations set out therein, as well as the one that consists in the fulfilment of an obligation imposed by the competent authority, as provided by law, unless it is conspicuously illegal (Toader, et. al., 2014).

The Law no. 95/2006 contains provisions on the mandatory medical assistance and denial of giving medical care to the patient (Art. 664 and 665). Law no. 95/2006 contains provisions relating to

violation of privacy in Title I on the public health care. With regard to the acts committed in the performance of duties imposed by law, the doctor who runs obligation to report to authorities a condition that threatens the public health and detrimental to the patient in breach of the obligation of confidentiality is not liable, as the company's interest takes precedence over the right to privacy of patient (Mangu, 2010).

Regarding the *patient's consent* (Art. 382 Law no. 95/2006), the physician must respect the patient's will and the refusal of medical intervention, except in cases of force majeure, emergency or in cases with the impossibility of the patient/representative to express consent; medical liability ceases if the patient does not comply with the prescription or medical advice.

The provisions of Article 22 New Criminal Code regarding the consent of the injured person are also relevant, in that the act under the criminal law committed with the consent of the injured person is justified (Toader, et. al., 2014) if it could dispose lawfully the harmed social value or endangered, with no effects in cases of offenses against life and when the law excludes it's supporting effect.

One cannot derogate from the intangibility principle of body integrity, life and health only for therapeutic needs and only with the patient's consent (by default, the act would be culpable), and if there is a consent the patient cannot claim repair from the doctor for the damage caused; however the patient's consent cannot remove any of the professional fault (Mangu, 2010; Turcu, 2010; Tudor, 2010). The patient chooses between the pros and cons of medical interventions, and by consent, the natural risks are transferred to the patient and in the absence of the consent, the doctor is held liable (Moldovan, 2002).

It is considered that the duty doctor to save a patient's life does not prevail over the commitment to respect his will, but it is alleged that a doctor does not commit any wrongful act and shall not be liable if contrary to the will of the patient (Jehovah's witness who refused administration of blood products) in order to save his life, performed a blood transfusion (Mangu, 2010). We have reservations about this point of view; we believe that the doctors do not have to apply emergency treatment without the consent of the patient or against his will, if it is known that the patient refuses treatment. The patient's wishes and authorizations previously expressed on a medical intervention must be taken into account (Art. 16 on implied consent within the Code of Medical Deontology of the Romanian College of Physicians - 30 March 2012).

Regarding the *cases exonerating the liability*, the provisions of Art. 1351 NCC are relevant for *force majeure* and *fortuitous event*: liability (both civil and contractual) is exonerated when the harm is caused by force majeure or fortuitous event, unless otherwise stated. Force majeure (*vis major*) is defined by law as any external event, unforeseeable absolutely invincible and inevitable, and fortuitous event is an event that could not be foreseen or prevented by the one who had been liable in case the event occurred (Eliescu, 1972; Cimpoeru, 2013; Motica & Lupșan, 2008; Tudor, 2010; Vida Simiti, 2013). Fortuitous event begins where fault stops and ends where force majeure starts, and excludes the existence of fault and liability of the medical staff (Mangu, 2010).

The specifics of the medical profession involve taking risks regarding the effects of interventions and treatments and doctor's activity is characterized by tenacity, innovation, perseverance, boldness. The conscious assumption (intentional/negligent) of a foreseeable risk engages liability for professional

error committed in case of injury, and not the unpredictable risk, consequence of certain exceptional complications (Boilă, 2009; Boila, 2009).

On the medical field, force majeure exempts medical personnel who committed the act, eg during surgery, injuries caused by scalpel cutting resulted because of an earthquake of high magnitude that interfered with the action of the surgeon and led to injuries to the patient (Mangu, 2010). We bring into question the concept of *fortuitous therapeutic risk* and *the alea terapeutica* is a concretization of force majeure in the medical field, leading to the exemption from liability of the doctor in the event of sudden reaction of the patient's body, by the lack of any causal link between the medical activity and the damage occurred (Mangu, 2010; Emese, 2008).

The notion of *useful risk to patient*, is sometimes assimilated to fortuitous events, which questions the medical error by abstention; thus, taking useful risk (related to disease progression, requirements, competence, information and consent) will attract the exemption from liability of the healthcare professional who performs the medical act, but the risk created by the medical staff does not imply a fortuitous event (eg, the physician with the task of remedying a bone accident committed a diagnostic error perfectly avoidable, followed by administration of a completely inadequate treatment, the child remained crippled and the physician deprived the child of the chances to heal) (Trif & Astărăstoae, 2000; Mangu, 2010); the injury suffered by the patient is due to the nosocomial infections, side effects, complications and risks generally accepted of investigation methods and treatment (Art. 654 par. (2) of Law no. 95/2006).

The act of the victim and of the third party removes liability even if they do not have the features of force majeure, but only those of the fortuitous events, however only in cases where required by law or by agreement between the parties, the fortuitous events exonerate the liability (Art. 1352 NCC). All persons involved in the medical act will be liable in proportion to the degree of guilt (Art. 654 par. (1) Law no. 95/2006).

Harm may be caused in whole or in part by the third-party and the third party may be a person involved in the medical act (third party to the teammate, for example the wrongful act of the doctor who prescribed suppositories with codeine to a new-born, intended only for adults and who eventually died, removes the liability of the pharmacist who mistook the dosage) or not, the doctor being exonerated from liability (the physician prescribing a drug that can become toxic by indicating dosage is not liable, but the one who cares for the sick, despite being warned, mistakes in the administration of the dose) (Eliescu, 1972; Mangu, 2010). The medical staff is not liable for damage and losses caused in the practice when they are due (...) to working conditions, poor endowment with equipment for diagnosis and treatment, nosocomial infections (Art. 654 par. (2) of Law no. 95/2006), on the idea of a safety obligation to the hospitalized patient and for ensuring specific conditions (Boilă, 2009), and on the idea that the endowment of hospitals improve the quality of medical care (Tudor, 2010). Nosocomial infections may qualify for fortuitous events or as an act of a third party, ie the medical unit (Mangu, 2010; Vida Simiti, 2013). If the wrongful and culpable act of the victim contributed to the harm, the victim loses the right to compensation, totally or partially (Eliescu, 1972).

If damage is caused by the **exercise of rights**, there is no obligation to repair it (Art. 1353 NCC), unless that right is exercised abusively (Art. 14 concerning the exercise in good faith, Art. 15 NCC concerning the abuse of law).

In terms of **cases that remove fault**, on the **contribution of the victim** the question is the dosage of the offender's accountability (Cimpoeru, 2013). The medical responsibility ceases if the patient does not comply with the medical advice (Tudor, 2010; Vida Simiti, 2013) (Art. 382 Law no. 95/2006). There are relevant provisions in Art. 1371 NCC (common fault, multiplicity of causes): if the victim contributed intentional or by negligence to the occurrence or to the increase of the harm or did not avoid the injury although he was able to do so, the liable one will be held responsible only for the injury he caused the, regardless to the act causing injury contributed both the author (intentional/negligent) and force majeure, fortuitous event or the act of the third party for which the author is not liable.

The **good faith of healthcare professionals** is a cause that removes fault, according to Art. 654 par. 2 lit. b of the Law no. 95/2006, republished, stating that medical personnel is not responsible for harm in their practice when they act in good faith in emergency situations, respecting the competence granted. Medical personnel must act in good faith in emergency situations where delay could endanger the life and health of the patient and the psychological pressure of the situation is capable of removing the intellectual element of the fault, by respecting the competence to limit the mistakes (Mangu, 2010). In assessing medical negligence, the physician's behaviour is assessed in the abstract by reference to the attitude that another doctor could have embraced in similar circumstances (Turcu, 2010). Provisions regarding the lack of consent in emergency situations exist in Art. 15 of the Code of Medical Deontology of the Romanian College of Physicians - 30 March 2012, meaning that in cases of emergency situations, when the appropriate consent cannot be obtained, the physician will proceed immediately to any intervention indispensable in medical terms for the health of the person concerned.

4. Conclusions

Given the fact that for the existence of civil liability of the medical personnel the fulfilment of conditions regarding injury, wrongful act, causation and fault are necessary, there may be situations where conditions are not required by law mandatorily to bring the obligation for compensation, situation where there is a case which excludes civil liability.

Based on the former Civil Code, the cases which exclude the medical liability were structured as follows: cases removing the unlawful nature of the prejudicial act (self-defence, state of necessity, fulfilling legal duties or order, the victim's consent, the exercise of a right); cases that exclude the existence of causal link ("foreign cases" Art. 1082: force majeure, fortuitous event, the act of a third party, the act of the victim); cases for removing the guilt - the good faith of the healthcare professionals. According to the New Civil Code (Law 287/2009), cases which exclude the medical liability are: cases that remove the illegal nature of the harmful act (self-defence, state of necessity, disclosing secrets, performance of activities required/permitted by law); grounds of exemption from liability (force majeure, fortuitous event, the act of the victim or a third party, the exercise of rights);

other new introduced cases of exoneration - Art. 1354, thesis I (aid granted disinterestedly); cases of removing the fault - the good faith of the medical staff and the contribution of the victim.

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