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The Legal Extent of Malpractice in Romania. A Glance

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ABSTRACT: This article aims to focus on the phenomenon of malpractice with its causes, conditions and causality, as well as how it is regulated from the legal perspective. The aim is to take into account the causes that can lead to errors occurring in the exercise of a profession, to deepen the idea of accountability of the professional causing harm, to establish possible solutions for avoiding malpractice events. In the first instance, the concept of malpractice was analyzed and subsequently, following the documentary analysis, taking into consideration that the casuistic and specialized literature are focused on the medical field, this route was taken by focusing on this sphere of interest. It is a reality that, not long ago, the malpractice lawsuits were practically non-existent, but with the passage of time their number has most definitely increased. Thus, a first question to which I wanted to find an answer is: What are the underlying causes of this phenomenon? The specialized literature refers especially to the medical field, but not so much in terms of how physicians are exercising their profession, but, rather being focused on the legal and judicial aspects of the matter, namely the ways of recovering the damages, and how the guilty professional shall be held accountable for his harmful actions.

KEYWORDS: causal link, guilt, injury, malpractice, phenomenon, tort

Introduction

The focus of this work is the professional who is part of the legal, probative relationship established between him and his client and who, in breach of his obligations, turns into the causer of the damage, being liable for tort and to the consequences resulting therefrom. It is worth mentioning that any kind of civil liability implies the fulfillment of the cumulative general conditions related to the illicit deed, the injury, the causal link and the guilt.

Over time, the concept of *malpractice* has been used particularly in the medical field, being associated with the professional work of the medical staff and to the provider of pharmaceutical products and services. However, currently, the notion of *malpractice* has expanded to other *non-medical professions* such as: the profession of notary public, the profession of attorney-at-law, the accounting expert, the evaluator, etc. (the legal basis of interest regarding the medical malpractice and the related civil liability being Law no 95/2006, and for the rest the Deontological regulations being set). Consequently, a first conclusion that can be drawn is the existence of a common denominator of these professions, namely the original meaning of the term *malpractice* (inappropriate practice), the fact that all these professions belong to its own regulatory body that issues rules of conduct (codes of conduct, good practices, statutes, guides, etc.), regulated by the law (Cimpoeru 2013, 4). For instance, in the case of lawyers and their clients, we are dealing with the existence of a legal assistance contract concluded in written with the client, and in the case of the doctor-client relationships, although there is often no written form of the agreement, the legal relationship exists *de jure*.

Consequently, as a general definition of malpractice, it can be taken into account that *"it is a form of civil liability that occurs when certain categories of individuals - generically named professionals - violate certain rules of conduct (included in statutes, codes of ethics, guides, good practices, standards, etc.) established by law and / or by the professional regulatory body; in the event these breaches of the obligations cause injuries to another individual, then the obligation to repair the damage is born"* (Cimpoeru 2013, 5). This general definition of malpractice facilitates the extraction of several important features of the phenomenon:

Various forms of liability

We are dealing with a supposed existence of a legal relationship between two subjects, namely between the professional and his client (patient), which implies, in addition to certain obligations, the partial or total breach of these obligations. It is therefore appropriate to obtain the legal liability of the professional concerned. The injured person will be subject to the legal obligation to prove the existence of the legal relationship (medical-patient, lawyer-client, etc.) between him and the

professional who has caused him the damage, its materialisation being possible in various forms (legal representation contracts, patient hospitalization cards, etc.) (Niculeasa, 2006, 28).

According to the law, the damage does not appear to be an underlying condition of criminal liability. However, if we are in the situation where the illicit act of causing harm is the same as that which constitutes an offense, both criminal liability and tort will be committed. There will therefore, be two possible actions: a civil case and a criminal one that can be judged either jointly or separately. Article 14 Alin. (2) of the Romanian Criminal Procedure Code provides that the civil case can be judged in the criminal trial together with the criminal proceeding on the assumption that the injured party is constituted as a damaged party by applying the rules specific to each individual legal scenario. However, it must be borne in mind that under the rule of law *electa una via, non datur recursus ad alteram*, the injured person that has been constituted a civil party in the criminal proceedings cannot bring a separate trial before the civil court in which to ask for the same claims, unless according to art. 20 of the Romanian Criminal Procedure Code, the criminal court following the final judgment has not settled the civil action or if, from new evidence, the fact that the damage and the moral damages have not been fully repaired will result. If the cases are to be judged separately, the principles laid down in Article 19 (2) Romanian Criminal Procedure Code shall apply: "Judgment before the civil court is suspended until the criminal case is finally settled".

Tort embraces many forms that are more or less specific to malpractice.

Taking into account that civil liability under malpractice is committed when the professional has cumulatively violated a professional conduct rules together with another malpractice underlying condition, the pre-existence of a legal relationship between the professional and the victim, we have to deal with the form of responsibility *for his own deeds* (a malpractice-specific form and also the main form for tort or for civil liability) and not for acts caused by other individuals or for acts caused by other things except those governed by law, when, as a result of having caused various harms to the individual, the author will not be held liable: legitimate defense, the state of necessity, the disclosure of professional secrecy generated by serious circumstances and activities required by the law.

Art. 1357 (1) of the Romanian New Civil Code clearly provides that "the person who causes damage to another one by an unlawful act committed by guilt shall be obliged to repair it" as well as the general premises underlying tort: a) the existence of the damage; b) the existence of an illegal act; c) the existence of a causal relationship between the act and the damage; d) the existence of guilt.

All these general requirements are accompanied by a special condition, namely the existence of a legal relationship between the author and the victim. The burden of proving the existence of that legal relationship lies with the victim, who can bring in any kind of evidence. In the case of the legal relationship established between a lawyer and his client as a probative means is the legal assistance agreement concluded between him and his client in written is the actual proof. In the case of the legal relationship between a physician and his patient, although we are in the absence of a written form, it can be easily derived from the law.

The existence of guilt

In order for the author of the action to be held liable, a certain mental state needs to be present at the moment of committing it, both in terms of the action and to its consequences. Thus, in order for the deed to be attributable to the author, after the damage has been caused to the injured person, the author must have acted guiltily. We therefore have to deal with an intelectual (consciousness) factor through which the author, by means of an internal process, foresees his choices, actions, conduct, and consequences, and with a volitional (will) factor that "materializes in the mental act of deliberation and decision-making on the behavior to be adopted" (Bulai 1992, 60).

The result/ the injury

The damage is the negative result of the offense committed by the author against another individual. The damage must cumulatively meet the following conditions in order to be reprehensible:

- To be certain. Its existence must be provable and measurable. The law provides, in addition to repairing the actual damage that has already occurred at the time of requesting its repair, also repairing future damages in accordance to Art. 1385 (2) New Civil Code and Art. 1357 (1) NCC;

- To not have been repaired yet.

The causal link between the caused damage and the illicit act is extremely important in relation to the engagement of tort. This connection must be concrete and not generic, in conformity with Art. 1357 (1) of the Romanian New Civil Code.

Medical Malpractice

Living in a time of globalization, increasing medical services, and due to the diversification of activities in the everyday life of the population, the family physician as well as the other more specialized physicians can permanently face medical malpractice lawsuits that are continuously growing, but also with the significant traumatic emotional experiences that this can generate.

Medical responsibility arises from the particularities of the medical profession, the patient's confidence in the doctor's decisions, as well as the possibility that the medical act is sometimes unpredictable or irreversible.

The existence of medical malpractice cases is possible at any moment of the medical activity due to the number and selection of the patients, the type of medical investigations (more or less invasive), the implementation of new techniques with state-of-the-art equipment, incomplete experience, etc. In this context, the definition of a good physician is represented by a significant practice he has, his professional competence that justifies his reputation, but also a smaller number of personal cases of medical malpractice. The danger represented by such cases of malpractice in the work of a doctor is of a dual nature: for a doctor, representing the loss of his reputation, his lack of control over the current activity, the loss of financial resources and even the freedom, and for the patient, an aggravation of his suffering condition, the amputation of healthy organs, sometimes even physical or mental disability for life, or even death.

Following graduation from medical studies, the graduates are required to take the Oath of Hippocrates (updated by the World Medical Association in the 1975 - Declaration of Geneva) at the end of the university's closing ceremony, which includes the moral duties of a physician in the exercise of his profession. Therefore, the doctor has a responsibility to the supreme authority, but also to his patient (Rosenbach, Margo and Stone 1990, 9:176–185).

Malpractice - civil vs. criminal proceedings

In fact, there are no big differences in the conduct of the trial before the Courts of Law, between a civil case of tort or contract liability and the civil side of a criminal trial.

One of the similarities is that the guilt, respectively the fault, both in the criminal and the civil matters, is established within the trial of the main claim.

The main difference lies in the fact that common law lawsuits on civil liability are not preceded by a precursor and institutionalized research phase of the deed, as is the case in criminal proceedings.

On the other hand, while establishing the existence of an injury is an important step in determining the conditions of the liability, in both cases, its size is of different importance. Thus, in the case of the civil case, assessing the extent of damages is precisely the essence of the application for a lawsuit, whereas in the case of the civil aspect of the criminal case, the establishment of the amount of the compensation has mainly an influence on the determination of the effects of the offense in terms of the danger to society.

As for the burden of providing evidence, differences still exist, despite the similarities. In both cases, the burden of proof in establishing the guilt / culprit belongs to the injured party. The difference lies in the fact that, in the criminal proceedings, the main injured is, in reality, the concept of social value, the defendant of which is the State and, only after that, the injured person, while in a civil claim, the injured person is the only one directly interested in the outcome of the trial.

Conclusions

As a general idea, as priorly mentioned from the very beginning, the most common form of malpractice in Romania remains that relating to the profession of physician. Undoubtedly, the

profession of physician is one of the oldest human professions dealing with the prevention, recognition (diagnosis), therapy and the consequences of illnesses and accidents. However, this profession entails a degree of both moral and legal responsibility on the part of the practitioner, and the existence of malpractice cases that are constantly growing is now being noted. Therefore, an in-depth analysis of the phenomenon is necessary in order to reduce the occurrence of these cases, even if we start from Seneca's old diction – *Errare humanum est sed perseverare diabolicum*, due to the fact that the traumatic emotional experiences it generates are significant. Although the vast majority of health care professionals and professionals in the areas mentioned above (lawyers, notaries, accountants, assessors, etc.) exercise their professional duties carefully, however, they remain human, and people are prone to make mistakes.

In the exercise of medical activity there is a risk that doctors assume in order to restore the patient's state of health. Physicians may have a series of solutions to prevent malpractice events:

- Preventing negligence: limiting the number of patients treated by an appropriate selection, correctly informing the patient and caregivers, proposing a surgical procedure that can be done with the facilities of the medical unit, but also for which there is sufficient expertise gained by study, practical activity, continuing medical education;
- Permanent communication with the patient during treatment so that he/she feels the physician's support, more frequent visits, overseeing complications and treatment, and seeking to provide medical information as complete as possible;
- The occurrence of a complication should be properly dealt with, justified to the patient, so that the patient, possibly the lawyers discern that it was an inevitable complication and not a negligence;
- The correct presentation of the facts - their hiding will be finally discovered;
- Involvement in the patient's recovery so that he will, ultimately, become the main defender of the physician;

I believe that in malpractice situations both physicians and the hospital should be jointly responsible. The hospital is a factor that facilitates the presence of this phenomenon. How can we expect doctors to perform at their best, under disastrous working conditions? How do we expect a sick individual to recover if he or she can enter in contact with in-hospital infections, due to the unproper sterilization of the equipment or hospital accommodation conditions?

The hospital, as a service provider, should ensure the good performance of the medical act with regard to the provision of performant devices, medicines of any kind, continuous monitoring of the patient, anesthesia, properly equipped rooms, lack of which causes harm to the patient.

The analysis of the data revealed that if the image of malpractice could be changed in Romania, it would be to make changes in the educational system, to motivate the professionals to assume their human responsibility, to inform the general public. Unfortunately, in Romania, the current legislation on malpractice is not clear enough to protect both the professional and the injured party: the professional defends himself the professional body defends the profession more than the professional.

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