

CIVIL LIABILITY OF DOCTORS AND THEIR INSURANCE (MALPRACTICE)

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Abstract: *Malpractice insurance of medical staff is probably the oldest professional liability insurance underwritten in the insurance market in Romania. The aim of our research is to theoretically examine in a qualitative inquiry the usefulness of insurance completion by the practitioners from the Romanian health system at both state and private, in order to improve a best practice medical insurance. The medical profession is practiced in Romania under the Code of Medical Ethics 30 March 2012 prepared in code that complies with international standards contained in the Geneva Declaration of 1948, as amended by the World Medical Association and the International Code of Medical Ethics. The forms of medical liability are: disciplinary, administrative, civil and criminal and only the civil liability can be taken into insurance because only it meets the conditions of insurability. Once we explain in general and the insurance liability in particular we show articles of the Romanian Civil Code which establishes the obligation the one that caused an injury to a third person for the repair or indemnify and conditions provided by the Civil Code as an act to be considered liability. Then we refer to situations where the patient may be damaged through the fault of the doctor or the doctor unit operates. The object of malpractice insurance is loss of money that the insured would have to pay a patient whom he caused injury as a result of acts or deeds of negligence committed to, during and in relation to professional activity. Risks taken in the insurance are personal injury, illness or death of the patient and / or moral damages. Regarding the excluded risks we have presented an overview of the more common contracts underwritten by Romanian insurance companies. We show the way of underwriting, the insured sums of the standard insurance and the additional one which subscribes moral damages, to companies in Romania agreed by bodies which organize and supervise the Romanian medical system. The current procedure for determining the guilt of a doctor and his patient complained of the amount of damages is a long and difficult. The procedure for determining the guilt of a doctor reported by his patient and the amount of compensation is a long and arduous one. In conclusions we have shown that along with the reform and reorganization of the Romanian medical system, the civil liability insurance of the medical staff, the way of contracting, the way of establishing the guilt of the applicant and the amount of compensation need to be reformed.*

Keywords: *doctors, liability insurance, malpractice, indemnity, compensation.*

JEL Classification: *G22, I14, I19*

1. Introduction

Any healthy person is exposed to the risk of injury or illness and being treated by a doctor in a medical facility. Every person hopes the service he will receive will be one of a good quality and will go home healthy. But unfortunately, doctors as other professionals, there are persons better or lesser prepared. Even the best trained can have a bad day and the case to be a medical failure.

The noble profession of doctor, practiced from ancient times, certainly under different names is done in order to protect the physical and mental health of human beings (Article 1 of the Code of Medical Ethics 30 March 2012). The professional act and all the work the doctor will perform without any discrimination based on age, sex, race, ethnicity, religion, nationality, social status, political ideology, or for any other reason, including the state of health or patient's chances of recovery (Article 2 of the Code of ethics).

The new medical ethics code developed by the College of Physicians from Romania on 30 March 2012 and published in Official Gazette No. 298 of May 7, 2012 comply with international standards contained in the Geneva Declaration of 1948, as amended by the World Medical Association International Code of Ethics and medical.

2. Short History and Malpractice in Other Countries

In terms of malpractice history it must be said that the oldest malpractice case described in history took place in 1375, in the United Kingdom (Văduva, 2010) at Royal Court John Cavendish. Agnes of Stretton has broken her hand and turned to Dr. John Swarlord for care and medical treatment. Because after a few days the hand had not healed, Mrs. De Stretton turned to another doctor who told her that Dr. John Cavendish had treated her incorrect, the patient taking action and suing first doctor who treated her. The process had been canceled due to a technical error.

In the United States, the first case of malpractice occurred in Connecticut, before the American Revolution, 1775-1776. Mrs. Cross had a problem with one of the breasts and consulted Dr. Guthery for diagnosis and treatment. Diagnosis was scrofula and amputation of the breast was recommended. After the patient's consent, the breast was amputated but after surgery the patient had a hemorrhage and died. Dr. Guthery expressed sympathy to the husband but after a few days sent him the bill. The husband, angry, sued, and in the process, the doctor had to pay substantial compensation (*Medical malpractice*, 2013).

Over the years, patients' demands have reached higher, so that more and more patients are suing medical staff, especially doctors who treated during illness or accidents, requiring substantial benefits. The amount of compensation that patients receive varies according to the legislation of the country in which the patient was treated.

Regarding the legislation of European states it should be noted that most of them do not have special legislation for malpractice cases. Instead of punishing medical professionals that were wrong, preferring compensation for the traumatized patient. In most states the provisions of the Civil Code and the Penal Code are applied (Perețianu, 2009).

In Germany, malpractice insurance is not mandatory in most provinces. But the majority of those who practice medicine prefer to ensure because insurance premiums cover the risk of paying compensation to a patient dissatisfied with the services received. Every medical practitioner ensures the sum he considers

abundant to indemnify the dissatisfied patients. It should be noted that allowances granted are only measurable (sick leave, prosthetic devices, etc.), not related allowances suffering, pain, or to reward a person sentenced to confinement due to infirmity caused by medical error - moral damages.

Netherlands was the first country where medical special provisions have been introduced in the Civil Code. This solution was necessary because health system characteristics such as the need to keep medical records, consent is requested, using patient information in research.

In the U.S., the country with the most cases of malpractice in the world, 10 times more than in Canada (*Medical malpractice*, 2013), healthcare providers, healthcare professionals and medical facilities are not required to enter professional indemnity insurance but nobody could afford to practice without malpractice insurance because of frequent complaints and the high volume of claims required by those who consider themselves injured by medical acts.

In New Zealand, there is no professional liability insurance, because there is also law that employers are required to compensate employees who are injured, including medical malpractice. Therefore there are no compensation processes requesting medical institutions or doctors (Perețianu, 2009).

In Romania, the first time reminiscent of professional liability insurance for healthcare in Law 145/1997 on social health insurance, which in art. 41 was stated: "The health insurance funds are obliged to organize a system of civil liability for providers of the security system. The provision was ambiguous and was never implemented."

Above-mentioned law was replaced by Ordinance 150/2002 on the provision and operation of the social health insurance system, and they requested the doctors to practice freedom of contract concluded with Health Insurance to provide liability insurance professional indemnity.

Currently under Law 95/2006 - Title XII, physicians exercise their profession based on the certificate to the College of Physicians of Romania approved annually based liability insurance for mistakes in work, valid for the year.

3. Medical Personnel and Civil Liability

According to Article 642 of Law 65/2006 in the name of health care are included: doctors, dentists, pharmacists, nurses and midwives. We will deal only with the responsibility of the accused doctors when a patient was not treated properly and calls for material and moral damages.

As we have shown the medical profession is one of the oldest in the world. Although he had many names: Doctor, medicine man, healer, the purpose of their activities was defending physical and mental health of community members in which they worked.

Etymology of the word "doctor" is in ancient Greece. Archiatros or archiater (after latinization), mean person considered primary healer or one who deals with prevention, recognition (diagnosis), treatment and follow-up of diseases and accidents.

"A medical career begins long before they enter a college field, somewhere in childhood told a reputed surgeon. Once you begin to understand which way to go through what steps to climb and that you learn all your life, you feel like giving up but then true professionals are sieved. "

Although the steps of a medical profession are numerous, from a fresh faculty graduate to the primary specialist in a branch of medicine, not all have the same

degree of training. The degree of training is an essential condition to achieve performance. Skills is vital, but it is, in any case, the only ingredient for success. Equally important are solid preparation, compassion, correct reasoning, communication skills, clinical sense, theoretical knowledge and exemplary professional conduct to successfully meet the needs of patients.

Successes and failures in treating patients can be had by those Well and less trained. Perhaps the better prepared have many numerous successes and the others failures. Liability in case of failures have each of those who treated the case. As shown in our work on ensuring civil servants in art. 75 of Law no 188/1999 on the Statute of civil servants, and now the doctors are public servants, stated that the violation by the guilt of their duties and the rules of professional conduct and civic prescribed by law and constitutes a disciplinary offense and attracts liability (disciplinary, administrative, civil and criminal), as appropriate. Forms of liability does not exclude each other, if the deed meets the various forms of liability, they may apply simultaneously. Therefore, the doctor may be sanctioned with specific forms of accountability measures.

We define the forms liability (disciplinary, administrative, civil and criminal) of the doctor because we want to show which of them may be subject to insurance.

- *Disciplinary* - are deviations from the Code of Medical Deontology / 30.03.2012. Acts of misconduct are reviewed by the College of Physicians and disciplinary sanctions are applied (reprimand, warning, suspension of work, sales employment contract);
- *Administration* - are deviations from the Labour Code. Is instrumented by the employer (the Board of Directors of the hospital, office, clinic, etc.). Penalties are administrative (Law 95/2006 are called all disciplinary related internal regulations of the employer) and consist of demotions, reductions in salary, moving to another department, etc. (Article 263 of Law 95/2006);
- *Criminal* - when there is injury and / or death. Is determined by the courts under the Criminal Code and instrumented by the Prosecution;
- *Civil* - is established and dealt with by the courts under the Civil Code and the penalties are pecuniary damages awarded to the injured.

None of the three forms of liability set could not be taken in an insurance contract because the risks to be insured must meet several insurability criteria (Ciurel, 2011):

- to be calculated, can be probabilistically calculated,
- cannot be avoided,
- they may not be acknowledged,
- be bearable,
- to be compensatory, that insurer to compensate the financial loss resulting from their production,
- Be consistent with the regulations in force, moral and insurer profitability.

The first two forms of legal liability (disciplinary and managers) not meet the conditions a, b and c and criminal liability does not meet the last condition of insurability, that is inconsistent with applicable law, the moral and social ethics.

We left the medical professional liability for last, because it may be subject to an insurance contract, as we will show.

4. Civil Liability of Medical Staff and Its Insurance

The fundamental role of insurance is to protect the financial compensation of the losses caused by the occurrence of a risk, compensation provided from the insurance fund established by adding and fructification of the insurer, the insurance premium that the policyholders pay (Pintea, 2011).

Liability insurance (Ciurel, 2011) covers all sums which the insured is obligated to pay by law for property damage, moral and / or injury caused by him to a third party. In most contracts court fees are added. The interest of the insurance is to avoid the lowering of the insured patrimony as a result of his civil liability to injured persons.

In a terminological approach civil liability is a legal obligation that the person who caused an injury to another person shall repair the damage to the product (Bistriceanu, 2001) and under the obligation of responsible for causing injury to the repair from the provisions of the new Civil Code or rather its two key institutions namely crime and qvasicrime.

In matters of tort, the new Civil Code governing the civil liability of those who harm others injured, giving art. 1349, that "every person has the duty to respect the rules of conduct imposed by law or local custom and do not affect by actions or inactions of its rights or legitimate interests of others, who with discretion, violates this duty responsible for all damages, being obliged to fully compensate them. "Art 1350, states that" the borrower is obliged to repair the pecuniary damage caused to the creditor contractual nonperformance, defective performance or delay in benefits to which he is indebted under a valid contract ended "

Articles 1357 and 1359 of the same Code Civil concerning liability for his own deed, provide that "he who causes harm to another by an unlawful act committed with guilt, is obliged to pay compensation" and "illicit offender is obliged to repair the damage and when it is caused because of the damage of another's interest if the interest is legitimate, serious, and how that manifests itself, creates the appearance of a subjective right"

Theory of civil law specifies that there are two types of liability: tort and contract, their common element consisting in that both are based on the idea of repairing damage caused to another by an unlawful act.

Tort involves a person's obligation to repair the damage caused to another through an extra contractual unlawful act or the damage for which he is called by law to answer for.

Contractual civil liability of a debtor assumes duty obligations arising from a contract to repair the damage caused to the creditor or by non-performance due to delay its execution or improper execution of them.

Since between the two forms of liability there are no major differences, the legal classification of the liability situations both tort and contract envisages the cumulative meeting of the three following target conditions:

- contractual unlawful act consisting of non-contractual benefits owed by the debtor;
- damage caused to the creditor;
- the causal link between the wrongful act and the injury to third persons

Proof of damage caused to the creditor (the patient) or the causal link between the wrongful act and the injury must be demonstrated by the third person who has suffered damage. Proof of illegal act (if tort) or non-enforcement, inadequate or delayed execution of contractual obligations (in case of contractual liability), all of the

damage back to the person who suffered the damage, using the bodies granting sanctions - College of Physicians and courts of Romania.

The doctor must feel safe when practicing, his whole capacity should focus on the medical act and not be altered by the fear of error. To achieve this goal the notion of malpractice and the way they protect themselves from the error repercussions through professional insurance liability-malpractice must be understood.

Etymologically, the word malpractice, consists of the Latin word "mal", "malus" - evil and word of Greek origin "praxis" - practice. Therefore the meaning of malpractice is bad practice, poor practice, the wrongly practice of medicine.

Definition of malpractice law is quite specific meaning. Malpractice is the professional error committed in the exercise of the medical act or medical-pharmaceutical, generating harm to the patient involving civil liability of medical personnel and healthcare provider, healthcare and pharmaceuticals (Art. 642). Basically, Law No. 95 of 14 April 2006 on healthcare reform, (published in Official Gazette 372 of 28 April 2006) with its numerous amendments provides that medical personnel, including doctors, dentists, pharmacists, nurses and midwives providing care patient liability for damages caused by error. The error may appear in the prevention, diagnosis or treatment and causes of error are cited by law: negligence, carelessness, and insufficient medical knowledge in the profession through individual acts in the framework of the prevention, diagnosis or treatment.

Also, health care and civil liability for damages of error arising from non-compliance on the patient's informed consent and mandatory medical assistance when they exceed the limits of its competence, except for emergency cases where competent medical personnel is not available.

It should be noted that not only the doctor's unlawful act may cause the patient injury. There are clearly situations specified in the law, which may cause harm to patients and the doctor is not responsible. These are the following:

- when they are due to working conditions, insufficient endowment equipment diagnosis and treatment of nosocomial infections, adverse effects, complications and risks generally accepted methods of investigation and treatment, addictions hidden sanitary materials, medical equipment and devices, substances medical and sanitary use;
- He acts in good faith in an emergency, respecting the granted competence.

For damage to the patients by these circumstances, the medical unit in which the physician works will be responsible and will have to compensate the injured patient with appropriate monetary compensation.

Like any profession, medicine is carried out under the control of a professional body (the College of Physicians, National Health Insurance) to which the doctor's membership is mandatory. When the doctor as a professional, making a gesture unintentionally detrimental to someone, the state provides the citizens it protects that injured patient will not remain uncompensated.

Professional liability insurance (malpractice) addresses individuals possessing the degree of doctor issued by a medical university institution in Romania or abroad, equated by law and authorized by the Ministry of Health, according to medical staff status. It also can provide other health professionals: nurses, lab technicians and other professionals with specialized secondary education, and health care facilities: hospitals, maternity hospitals, clinics, dispensaries, nursing homes, private clinics and so on, on behalf and for their servants.

The object of professional liability insurance for doctors and health professionals is the financial loss that the insured would have to bear whenever a patient caused his injury as a result of acts or acts committed by negligence to the during and in relation to professional activity, within the jurisdiction conferred by permit free circulation, for which he is liable under special laws, rules and the profession, the rules of ethical conduct and professional ethics, and is required to repair.

Damage may consist of personal injury, illness or death of the patient situations where the patient receives an allowance and / or moral damage, the amount of all benefits and compensation as determined by the courts. There are cases expressly provided (specific exclusions) in most of the companies that underwrite such insurance, it is not possible to award damages, namely:

- damages arising from plastic surgery / cosmetic, unless it is provided only as a necessity of correcting the consequences of an accident and / or congenital deformities;
- treatments / services provided to cause pregnancy, surgery to produce sterility, sex change operations, in-vitro fertilization;
- personal injury (including emotional distress or psychological trauma or phobia) damage that is caused or claim to be caused or are in any way related to AIDS or hepatitis;
- treatments (including medication and diet) to reduce weight;
- manipulation / genetic damage;
- Carried out by dental general anesthesia or any work done under general anesthesia unless they occur in special clinics with specialized assistance.

Compensation by insurance companies in Romania may represent, as appropriate:

- costs of the proceedings made by the applicant for legal formalities in order to oblige the insured to pay compensation if the insured was required to pay their final and irrevocable court judgment;
- costs of the proceedings made by the insured in the lawsuit if he was forced to compensation by the final and irrevocable court decision, including where prosecution is not driven costs and remain civil action in criminal courts;
- costs and expenses incurred by the insured, the insurer's written consent and for investigations, tests, surveys, and so on;
- Value to pay moral damages which the insured was bound by the final court decision.

Premiums paid for malpractice insurance (liability in case of medical mistakes) are tax deductible. Maximum size depends on the amount and type of compensation provided under the contract (property damage, injury and possibly moral damages) In recent years the College of Physicians of Romania and Health Insurance have signed agreements with leading insurance companies, only contracts with such companies being agreed by the bodies mentioned above.

According to the College of Physicians of Romania for 2013 professional liability insurance medical insurance cover ends on the following:

- General practice / family medicine - 15,000 euro
- Laboratory medical specialties -20,000 euro
- Clinical medical specialties - 37,000 euro
- Medical and surgical specialties - 62,000 euro

Amounts provided are related to damages and personal injuries, known by most insurers at standard conditions. Insurance premiums vary by subscribing insurance company and the insured specialty.

Those who want the insurer to pay injured patients as potential moral damages, most insurance companies are limited to a certain maximum amount secured more than € 20,000, an amount too small to moral damages set by the court of malpractice cases in Romania. The first additional insurance coverage related to underwriting and moral damages is 4-5 times higher than corresponding insurance premium standard.

Prerequisite for a company to pay damages for the harm in case of poor medical practice is to fit the object of insurance / risk insured and the injured person to prove entitlement to compensation. The hardest thing to prove is that the doctor was wrong and that the patient's right. Medical negligence is established by a committee for monitoring and professional malpractice cases. Between the years 2006-2011 there was a total of 725 notified cases of malpractice (Report Romania/2011 Medical College) and a total of 916 doctors were accused of malpractice, of whom only 198 were sanctioned and punished and only 11 have been prohibited from practicing medicine. These figures do not indicate the number of cases that were not reported, which could reach several thousand thanks to the difficult system of establishing guilt of the applicants and the amount of compensation. In Table 1, we show how the number of doctors accused of the sanctioned and the number of final decisions issued by the disciplinary committee of the Medical College evolved, and in Figure 1 we show graphically the same.

Table 1- *Evolution of the number of reported doctors, the sanctioned and the decisions of the CSD in the 2006-2011 period*

years	2006	2007	2008	2009	2010	2011
Reported doctors	112	135	171	157	154	187
Sanctioned doctors	19	16	51	48	38	26
Nr of CSD decisions	123	118	148	95	106	135

Source: Report Medical College of Romania / 2011

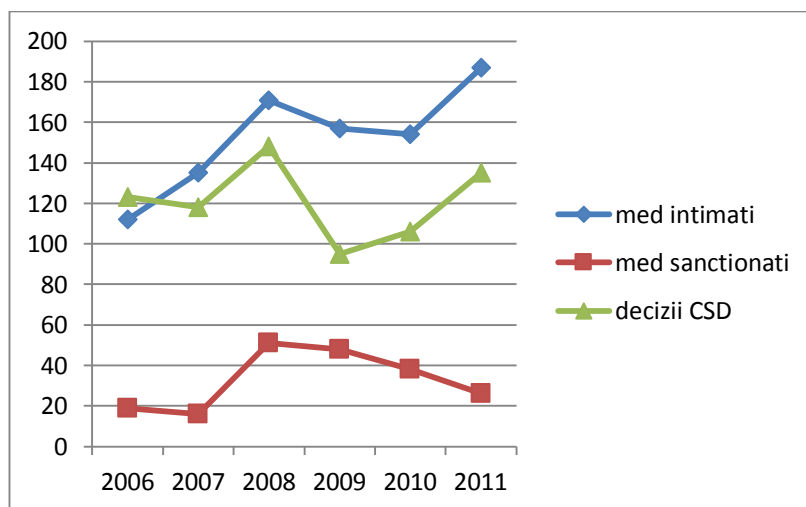


Figure 1: *Graphic evolution of the number of doctors reported, sanctioned and decisions of the CSD in the period 2006-2011*

The Commission will appoint malpractice before a panel of experts and the review will determine whether or not it is a malpractice case and will communicate its decision to all interested parties, including the insurer. The size of compensation is determined only by the courts of Romania. The period of establishing the degree of guilt of a doctor accused of malpractice is very long, to which the trial period known to process in Romania are added, known to be very long. So from bringing charges of malpractice and to compensate the injured it reaches a period of 5-6 years.

5. Conclusions

Romanian health system is in an unacceptably long crisis. This is manifested in all sectors: financial, material and human resources but perhaps the most difficult is the organizational.

Given that more and more patients dissatisfied with the services they received in medical institutions in Romania addressed the Disciplinary Board of the Medical College to claim malpractice cases and to filing the complaint and to collect damages for an extended period of time passes conclude that along with the reform and reorganization of the Romanian medical system needs to be reformed and liability insurance to medical personnel, the way of contracting, the way of establishing the guilt of the applicant and the amount of compensation.

In terms of how liability insurance must be reformed we conclude that it should include more types of insurance cover for standard ensuring every medical specialty and different types of insurance cover for any compensation for moral damages, the potential provided to able to choose the subscription according to any damages which it believes will be required next year insurance and insurance premium they can afford to pay.

Regarding the malpractice insurance we will show that it should be contracted with all insurance companies licensed to underwrite risks in the Romanian market, not just those approved by certain protocols and due to competition between insurance companies insurance premiums would decrease more.

Perhaps the most important change would be made to establish the guilt of the applicant and the amount of damages awarded. College of Physicians territorial area in which the complaint was made to determine whether the applicant is guilty in a fixed period determined malpractice law and then the amount of compensation to be established by direct negotiation between the insurer of the guilty doctor and the harmed patient.

Only when malpractice insurance will work in a reformed health system performance in the presented form or close to it will be a reliable aid to medical personnel in Romania.

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