

Compensation in medical civil liability – an utopia?

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Abstract

In order to protect against potential abuses the person receiving medical services, often characterized by indifference, negligence and incompetence, it was necessary to implement more restrictive provisions regarding the liability of the doctor. Therefore, the control and supervision of medical profession - as a liberal profession, implies prosecuting the violations of the rules of professional ethics, medical ethics and the rules of good professional practice which mainly attract special law enforcement.

That is why it must be given to the victim the opportunity to repair any harmful result, likely to affect the subjective rights or its legitimate interests.

Keywords: *delictual civil responsibility, medical civil liability, malpractice, illegal action, prejudice, causal link*

Introduction

Since ancient times, the doctor has played one of the most important roles in society. Whereas the doctor, considering his profession, takes care of the most precious "good" of man, namely the health and therefore the person's life, he must be an example of honesty and rigor in his professional activity. If in other branches of the labour law the implications and repercussions of such an error might not have a very large impact on the individual, the doctor's actions have direct consequence upon the person. Even a simple negligence can lead to permanent damage, both physical and psychological going up in specific cases even to the loss of life. In this extremely vulnerable position, it is medical professionalism that underpins the trust the public has in doctors. In order to protect against potential abuses the person receiving medical services, often characterized by indifference, negligence and incompetence, it was necessary to implement more restrictive provisions regarding the liability of the doctor.

"In this regard, we note that the current trend manifested in other european legal systems is to recognize a more wider category of repairable damages, by engaging the delictual civil liability in order to support the interests of the victims for a full reparation (moral damages caused by undermining the honor, dignity and reputation of a person, his liberty, family life; in the case of the damage to a person's corporal integrity – the damage consisting in psychological sufferings, aesthetic damage, recreational damage,

sexual damage, specific contaminating damage; in case of death of a person-the affectation damage suffered by the deceased loved ones etc.). " [1]

DAMAGE-INTERESTS

Damage-interests's evaluation time

At what point is born the victim's right to compensation?

If the evaluation of the damage suffered shall be made, as it normally is, on the date of the pronouncement of the judicial decision - whereas it is necessary to have a point of reference fixed – the damages granted being later indexed in accordance with the inflation rate, the right to repair is born from the occurrence of the prejudice moment, as art. 1381 of the Civil Code requires.

Evaluation of the damage

The judge, in order to grant the damages, in evaluating the prejudice must take into account two elements, namely:

- (a) **Damnum emergens** – the loss suffered by the victim;
- (b) **Lucrum cessans** – the gain from which the victim was deprived.

In order to be repaired, the prejudice must be:

- (a) **Certain;**
- (b) **Not yet repaired .**

A prejudice is certain when its existence is sure, undeniable, and at the same time, it can be evaluated in the present.

Future prejudice is also subject for compensation if there is a certainty in its occurrence, as well as sufficient elements to determine its extension.

In matter of delictual civil liability, the reparation of the injury aims to fully remove the effects of the illegal acts.

Under no circumstances, this may not constitute a source of gaining further incomes, in addition to the damage suffered, because it would be a matter of unjustified enrichment. In accordance with this principle, the victim is fully entitled to a single repair of the damage that could not combine two or more compensation for the same damage.

Material damages suffered by the patient**Violation of an obligation of means**

Generally, the doctor has an obligation of means, which means that, in order to be engaged the responsibility of the practitioner in question, it is subordinated to the victim's proving of the fact that the doctor has not submitted all the necessary efforts required in granting the medical care to his patient.

It is therefore incumbent upon the victim to make the evidence of any breach of this obligation, in which case, if the injury will be proved, the prejudice will be entirely repaired, both for the material damages, as well as for the moral.

Violation of an obligation of result

Although the doctor's obligation is generally one of means, he can also assume any obligations of result. In this case, the victim's task is much more facilitated, because the burden of proof overturns, the doctor or health unit being the ones who must prove the absence of causal link between the illicit act and the prejudice

For example, it is the case of the damages suffered as a result of a breach by the practitioner of the obligation of result for informing, in which case the doctor must prove that the obligation to inform the patient was carried out fairly and with due attention.

Total or partial loss of the capacity of work

The New Civil Code brings as element of novelty the regulation of the loss of the ability to work, in terms of art. 1388-1389. The individuals who, because of that harmful fact, have been deprived- partially or totally – by the revenue or other results and advantages that could be achieved through work, are entitled to demand compensation for damage.

The new Civil Code goes one step further and regulates the method of establishing the loss or failure to achieve earnings from that work. Moreover, it is taken into account the existence of certain future earnings, even if the employment contract had not been put into practice.

Even if the person was not employed, but she is minor, she may receive compensation from "the date when, under normal circumstances, (...) she would have finished the professional training that she was receiving", having " the age required by the law to be party in an employment report".

The loss of a chance

The prejudice caused by the loss of a chance to obtain an advantage represents an innovative element inserted in our legislation with the adoption of the New Civil Code. Thus delictual liability may be engaged for those negative consequences caused directly by committing an illegal act, consequences which consist in missing one real and serious possibility of the occurrence of a favourable event in the victim's life which could have brought her fulfillments and accomplishments in the personal or economic plan, through the projects development.

We notice that, in the new wording of legal text, the loss of chance is also interpreted from the perspective of avoiding the occurrence of a damage, which would represent a real "advantage" for the victim. [2]

The birth of a child with disabilities

The prejudice in the case of a child born handicapped with the fault, even partially, of the doctor, does not consist in the loss of a chance, but even in the handicap suffered, which must be fully compensated. For example, the fact that the gynecologist did not inform the mother about the abortion opportunity due to some fetal handicaps, which led to his birth with serious deficiencies, attracts the liability of the doctor. [3]

Moral damages suffered by the patient**Physical and mental pains**

We summarize here the physical and psychological pains suffered by the victim of the illicit act. These are the most frequent and most common, but also the most serious consequences caused by corporal assaults and strikes.

From the physical point of view, the victim may suffer a decrease of the exercise capacity, creating her a physiological damage, biological, a functional deficit resulting from the malfunction of one or multiple organs of a person.

Moreover, the human being, through the whole bio-psychological, moral and social features which define it, illustrates the most obvious dialectical-indissoluble, objective relationship, connection between matter and conscience, between material and spiritual aspects of its existence. Any touch brought to physical integrity or health of a person translates into a whole string of negative repercussions, among which we can identify, almost always, patrimonial consequences and non-patrimonial as well.

As a form of moral damage, the physical or mental suffering is expressly hereinafter referred in the legal literature as "pretiumdoloris", naming that actually concerns the material repairs which the author of such damages owes to the victim and which she is entitled to pretend.

The psychological damage is the result from violating the doctors's obligation to inform and is subject to full compensation. If due to the brutal manner in which the victim was informed about a medical intervention she has developed a mental malady requiring regular psychiatric counseling, this damage must be fully repaired.

Recreational damage

The recreational damage, not regulated in the old legislation, gave rise to a multitude of interpretations and judgments, the practice of our courts being completely heterogeneous.

The recreational injury is the result from "defilement of the satisfactions and pleasures of life which consist in the loss of the opportunities for spiritual enrichment, entertainment and relaxation."

As innovation in the New Civil Code, the legislator has regulated in art. 1391 the recreational damage, defined by the doctrine as "arising from violating both physical and psychological integrity of the human being, being expressed both through physical pains that are consecutive to injuries and through mental sufferings as result to perceiving by the injured person of some restrictive situations regarding some recreations of life."

In this category we may include the so-called recreational injury reported to the fact that the victim was suffering for what are called generic joys of a normal life (family life, professional activity, the opportunity to practice a sport, travel, etc.). The French doctrine recognizes the right to compensation for all the losses suffered, including this recreational damage, even to the person in the vegetative state, thus unconscious, in so far as it can be demonstrated that it caused these serious consequences in the victim's existence. [4]

Aesthetic damage

Aesthetic damage involves the mental sufferings felt by the injured person when she realizes her mutilated person situation.

Furthermore, for certain categories of persons, this "disability" may be always annoying, which in return may cause mental diseases and complexes, having the effect of removing from society of the injured person or even marginalisation, also being affected the interhuman relations.

In addition, there are those "professional categories" such as mannequins, film and television stars, hostesses, stewardesses etc., for which the physical harmony is an essential requirement to fulfill their profession.

Chronic vegetative state

An important and highly disputable problem was whether the persons who are in a state of prolonged coma, more or less deep, could benefit from the right to identify the damage, being given the condition in which they are. An argument against repairing the damage in this case was that, being unable to realize their condition these persons are not likely to suffer, so that any compensation for their moral damage is excluded.

To put an end to this situation, the second civil chamber of the Court of Cassation of France stated that the damage must be objectively repaired in its entirety, irrespective of the representation of the person of its own reality. Vegetative state does not exclude the right to full compensation for damage. [5]

Prejudices suffered by ricochet

Although long accepted in French doctrine, the principle of compensation for the damage by ricochet was regulated in Romanian legislation through the coming into force of the New Civil Code. The damage by ricochet is that indirectly prejudice suffered by third parties, indirect victims, damage caused by the initial injury which affected the direct victim. Their predilect domain is the sphere of corporal injuries, but neither the sphere of moral damages can not be excluded.

The indirect victim is any person connected by a patrimonial interest or or non patrimonial relationship with the direct victim and who, due to the immediate corporal damage, suffers an economic loss or is injured in her affection feelings for the immediate victim.

The ascendants, the descendants, brothers, sisters and the husband/wife of the deceased are the persons entitled to compensation. However, the regulation also

mentions others persons who can exercise their right to compensation if, in return, they can demonstrate the existence of the damage in their patrimony.

REPAIRING THE DAMAGE

The principle of full reparation of the damage

By repairing the integral damage we understand the removal of all damaging consequences of an illegal act, for the purpose of restoring the previous situation of the victim, namely the situation in which the victim would have been if the injurious act would have not occurred.

Or, as the Supreme Court stated, "granted compensation for damages arised from illegal acts must always represent the full coverage of the loss suffered, so that the victim of the harmful act to be put, as much as possible, in the previous situation".

As reiterated in the Civil Code in article. 1357 para. (2) the gravity of guilt does not constitute a criterion in establishing the amount of damages, because the author of the damage must answer even for the easiest fault.

Consecrated in the old regulation, doctrinal and jurisprudential, the principle of full compensation for injury finds its express regulation in art. 1385 of the New Civil Code. So it is questionable, however, as was well pointed out in specialized literature [6], which was the reasoning for the establishment of the phrase "unless the law provides otherwise" and if, somehow, this prejudices the provisions of art. 6 ECHR.

However, even without an express consecration in the New Civil Code, the principle of full compensation for damage finds its applicability in the Methodological norms for the application of the Title XV of the Law. 95/2006.

In conclusion, full reparation of the damage is a fundamental right of the injured person which can not be limited.

The principle of the reparation of the damage in nature

Basically, the repair of damages must be made in kind. If this is not possible in nature, the repairing is made by equivalent in the granting compensations form. [7]

Although in doctrine [8] and jurisprudence was outlined the idea that the compensation through equivalent must come as a result of the impossibility to repair in the nature the injury, the new Civil Code introduces an element of novelty in this regard,

giving the possibility of the victim who is not interested in compensation in kind to demand a payment of damages.

Anyway, in the matter of medical law, we can not talk about compensation of the damage in nature in the event of an injury to health or corporal integrity whereas such repair is practically impossible.

The specific of this damage is that is very hard to accurately assess the damage caused to a person, whereas the health status of a person can quickly change, either in the sense of deterioration, either in the sense of its improvement.

Therefore, for these specific hypotheses that occur after the moment when the court decision remains final, the compensation can be modified by increasing or decreasing it, as appropriate.

Nevertheless, as rightly been claimed, if the infirmity decreases or even disappears, with the natural consequence of the decrease or disappearance of damage, the court may dispose the reduction or even the interruption of the payment, but only if the compensations were established as regular payments.[9]

The rationale behind this mechanism is derived from the temporary nature of the damages awarded in the form of regular benefits, compensations which were granted under the condition of maintaining the same health status of the victim as with the one which gave rise to compensation in first place.

However, this situation must not be mistaken with the one in which the victim adapts its living conditions. In this case, the payment of the compensation must not be stopped since, although apparently we could talk about a lack of injury, practically the victim submits an additional effort in adapting to the new conditions given, effort that she would not have been obliged to make if the prejudice in question would not exist.

Determining the moment in assessing the amount of compensation through monetary equivalent

In the juridical doctrine and the judicial practice there have been proposed various (and controversial) solutions in determining the correct amount of compensations.

We will analyze below the most important directions in this matter:

- a) To be taken into account the existing reality at the moment of producing the damage as a result of the commission of the culpable illegal act.
- b) The damages calculation to be made at the moment when the court is seized with the victim's in claims application.
- c) The compensation to be calculated at the moment of the court's pronouncement of the decision. [10]

Taking into consideration that between the moment of the producing the damage and the moment of the court's pronouncement of the decision, it could pass a long period of time, the first opinion was received by jurists and public opinion with reticence and criticism.

Setting the amount of compensation at the time of the request introduction of the person injured, has raised big discussions, because it was concluded that in such cases, the author of the illicit act will have to repair not just the initial damage, but also the damage which has its source in the price fluctuations between the moment of the initial damage and the moment of the legal action's introduction.

The third opinion seemed to be the most equitable of all, managing to give birth to a full compensation without leading to an increased or decreased compensation in comparison with the real value of the prejudice suffered by the victim.

Cumulation between the repair in nature and the repair through monetary equivalent

Even though it is also expressed the opinion that " it is used the cumulation between the repair in nature and the repair through monetary equivalent, imposing to the debtor defendant alternative obligations as to give, to do or not to do, and in case of failure, requiring just compensation", we support the contrary.

From our point of view, the cumulation involves both the repair in nature of the damage and the award of compensations through monetary equivalent. However, the up-mentioned situation exposed by the author does not imply that these two remedies shall be applied at the same time, simultaneously, but a situation of an alternative repair of the damage stated by the court, in the sense that, if the repair in nature of the damage it is not possible it will be applied the repair through monetary equivalent, without requiring a new action in this regard, the role of this alternation being to protect

the victim as well as possible and to ensure the repair of the damage by any means recognized by the law.

CONCLUSIONS AND LAW FERENDA PROPOSALS

Although the legal framework exists, the sanctioning of the doctors and the repair of the damage often remain an utopia, these being consecrated more on a theoretical level, rather than in practice. We consider that a reassessment of the "causal link" concept is necessary to regulate as specific as possible the consequences of an injurious medical act. In this optic, we think that we should have independent commission (to be objective) to analyze the cases of malpractice and to provide a fair analysis of the facts.

Nowadays, the trust in the medical system in Romania is in a continuous decline. What was once perceived as a noble profession, for the benefit of the society, it is to be seen now strictly as a machine of "making money", the attention to patient being non-existent in the majority of cases.

In these coordinates, it is beyond any doubt that, recently, the responsibility has established itself as a central concept, irrespective of the nature of the theoretical perspective from which it is approached. With the modernization of the national legislation and the enforcement of our four new codes also arises the need to orient the research towards issues relating to the implementation of the new law at european level, capturing the national system implications.

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