

THE LEGAL REASONING IN THE INVESTIGATION OF MEDICAL MALPRACTICE COMMITTED IN HOSPITALS

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Abstract: *The aim of this article is to emphasize the main investigation features in the criminal cases involving the death or the health injuries caused to the patients by the medical malpractice occurred in hospital. It is an analysis of the steps to be taken in order to establish the legal condition for criminal liability of the doctors or the other medical personnel.*

Keywords: *Medical malpractice, medical conduct, risk analysis, loss of chance, commissive conduct, should have foreseen, able to foresee, minimum threshold.*

INTRODUCTION

The medical malpractice is today a very widespread topic in Romania and raises lively debates both from the point of view of the quality of medical services provided by doctors and hospitals and from the perspective of the criminal liability of people who commit offenses while providing medical services. From this point of view, we appreciate that investigating the medical malpractice requires certain characteristics that qualify it as a special one. Is the reason for what we have laid down certain steps in successfully carrying out such an investigation.

Step 1: First of all, must be established the premises of the case, i.e. what should have been done so that the malpractice would not have been committed

For this purpose, it is determined what the performed medical act ideally entails: an abstract evaluation of the professional rules; outlining the standard conduct; from the standard conduct, a sum of professional obligations associated with the medical act is obtained. Establishing professional rules means identifying the conduct prohibited by the law, identifying those rules whose violation is included in the constitutive content of the offence (*actus reus* and *mens rea*) (Călin, 2014:247). On this occasion, it is established whether the medical act necessarily involves certain physical sufferings; if there are such consequences and they are inherent in the medical act, they will not be considered as a ground for criminal liability. The identification of the professional standard involves the determination, in the abstract, of the correct conduct, establishes what should have been the result of the medical act and identifies what exactly the doctor had to foresee in order not to fall within a medical malpractice (Luntrar, 2018:30).

Step 2: Establishing the concrete conduct

After identifying the correct conduct, in the abstract, it is to be established what was done concretely, which implies an analyze of what exactly did each of the people involved in the medical act. In this endeavor, it will be established how the professional obligations, both

those of diligence and those of result, were fulfilled. Due diligence obligations include: establishing the diagnosis; prescription of treatment; treatment application. In order to establish how the obligations of result were fulfilled, it will be taken in consideration some aspects such as: the use of safe medical devices and equipment; prevention of nosocomial infections; the integrity of the surgical operating rooms, during the surgical intervention or in the post-intervention period; the way in which the patient was supervised.

Step 3: Check if there is a causal link between the wrongness of the medical act and the death/injury; the theory of objective imputation of the result

In the situation where a medical malpractice is analyzed, there is a need to analyze a double causal link: between the act committed and the dangerous result provided for by the criminalization norm and between the wrong nature of the medical intervention from a professional point of view and the harmful result suffered by the patient (Călin, 2014:247). It is necessary to specify that, in order to analyze this aspect of causality, in medical procedures, it must be considered that the medical act intervenes, in most situations, on a pre-existing pathological background. On the other hand, it is a natural horizon of expectation that by their nature, medical acts involve certain bodily injuries or may even have an accepted lethal injury potential. Consequently, in order to establish which of the medical interventions entails the criminal liability of the medical staff, it must be specified that only those sufferings or injuries that exceed the permitted risk will be considered (Călin, 2014:247).

There is, however, a hypothesis in which, the bodily injury which is normally caused in the medical act is considered as an offence. It is about the situation in which the medical act was provided without the patient's consent. In this context, the dangerous consequence previewed by the incriminating law must be considered even if the suffering or bodily injuries do not exceed the inherent threshold of the medical act. Only those medical acts performed without the patient's consent that were performed under the conditions of justifying cause or a state of necessity (e.g. a surgical intervention performed as a result of a road accident that requires emergency and the patient is in a state of unconsciousness) are excluded from criminal liability.

In determining the criminal liability of medical personnel and institutions, a very important aspect in evaluating the dangerous consequences of the act is the "loss of chance". It represents a minimum threshold that must exist in order to attract criminal liability and is met when the criminal investigation can prove that the medical act performed erroneously resulted in the loss of all chances of healing or, as the case may be, of survival (Decision no. 209/2018 of the High Court of Cassation and Justice, p. 107).

Step 4. Risk analysis

Another, very important aspect in establishing criminal liability for medical malpractice is the analysis of the risk created for the patient's health. From this point of view, the task for investigator is to establish if the risk assumed by the medical personnel is one impermissible and it represents a wrong medical conduct, which does not correspond to the ideal. Being so, it is able, *de plano*, in the abstract, to produce a dangerous result for the patient's health or life. The commissive conduct exists when the medical act itself produces an injury or if it aggravates

a pre-existing injury with the consequence of producing an injury with no chance of recovery or death. There is, also, a medical malpractice when it overlaps with a pre-existing risk. The threshold of criminal responsibility will be realized both in the situation where the pre-existing risk is increased and, in the situation, where it is not diminished.

The dangerous result for the patient's health that attracts criminal liability occurred when the erroneous medical conduct that created a state of potential danger, turned into a concrete consequence in which the patient's medical condition was irremediably aggravated, respectively it was not diminished.

In practice, there are, also, situations in which a risk, initially created by the medical act, is ultimately diverted, which implies that the causal chain of the crime is interrupted, and, implicitly, absolves from criminal liability. There is also the equal risk, the one that appears in the hypothesis that even if the doctor had had a correct medical conduct, apart from any mistake, the result would have been the same.

Step 5: Establish Guilt

For the existence of a minimum standard of criminal responsibility, it is necessary that, from a professional point of view, the doctor who undertook the medical act "should have foreseen" the dangerous consequences for the patient's health, when he chose a certain medical conduct. To practice his profession, the doctor is obliged to know the generally accepted medical standards, to know the information with general applicability, to access reputable and scientifically confirmed documentation sources. The second condition for the existence of this minimum standard of responsibility is that the doctor, according to the concrete situation, which must be analyzed on a case-by-case basis, must have been "able to foresee" the dangerous outcome for the patient's health. In establishing this threshold, the criminal investigation must establish whether, depending on the concrete premises in which the medical act was carried out, it is objectively foreseeable the result, because it is foreseeable by any other medical staff acting in the same circumstances as those had by the investigated doctor. An eloquent example of jurisprudence, under this aspect, is the one retained from Criminal Decision no. 614/2019 of the Court of Appeal of Iași: "The sudden change in health status after an infusion applied to a patient with high risk of pregnancy, who registered a sudden increase in heart rate to 160, low blood pressure, should have signaled to the doctor the fact that there is a problem. The condition could be relatively easy to check by a clinical examination and laboratory examination, but the signs of this complication were misinterpreted. The differential diagnosis of chorioamnionitis should have been made. The correct interpretation of the circumstances in which the fact occurred, as well as the concrete possibilities of prediction - uterine rupture - could not be prevented but could be suspected as a diagnosis, since certain sudden clinical signs appeared, related to the infusion with oxytocin."

The public health law, article no. 663, para. (3), also provides for the situations in which the doctor who intervened, in emergency situations, exceeding his professional competences, is not to be punished. In this situation, if it is beyond doubt that the medical intervention was done as an emergency because the patient's life was in danger and there was no alternative possibility to intervene a specialist doctor in a reasonable time, the inability to foresee a result, due precisely to the lack of specialization, exonerates from criminal liability.

Step 6. Establishing the existence or non-existence of justifying and imputable causes

In the case of the investigation of a medical malpractice, as in the case of any crimes, there is the possibility of some circumstances that exonerate the perpetrator of the act from criminal liability, if those situations that the criminal law regulates in this regard, are found. One of the most frequent situations of this kind, encountered in medical activity, is represented by the consent of the victim. Specifically, this aspect represents a transfer of responsibility for the risk of an undesirable outcome for the patient's health or life, from the doctor to the patient, in the situation where the latter was made aware of the potential dangers of intervention and he/she assume this risk. Therefore, in case of bad consequences for his health, if they are part of the risk explicitly assumed by the patient (Cimpoeru, 2013:151), it exonerates the doctor from criminal liability, if the medical conduct was within the limits of professional standards.

The article 382 para. (1) of the Health Law provides that: "With the exception of cases of force majeure, emergency or when the patient or his legal or appointed representatives are unable to express his will or consent, the doctor acts respecting the patient's will and his right to refuse or stop a medical intervention."

Therefore, in the absence of the consent, there is no obligation for the doctor to perform the medical act and his passivity does not contravene to any professional standard. On the contrary, if the doctor acts even though the patient's refusal is beyond doubt, the doctor is responsible, except when he can invoke the existence of a state of necessity.

CONCLUSIONS

The investigation of a medical malpractice is undoubtedly a typical approach, which involves a thorough analysis of the rules specific to medical institutions and those of good professional practices. Beyond the liability standards established by the legal norms, which are valid for all crimes, in the case of these offenses, a number of objective factors must be taken into account: the medicine is an exact science, based on experiment and professional standards, but standardized medical acts does not ensure the same result for all patients; any medical intervention involves a certain risk; there are diseases and medical conditions for which there is no answer from medical science; the medical act represents, in its essence, a noble approach, to help or save a person from a critical situation, therefore, the specific horizon of expectation is the good faith and the knowledge of professional standards by the doctor and the gross negligence is the exception; in certain circumstances, the failure to take medical decisions with potential risk, inherently implies death or health impairment, therefore, within reasonable limits, such borderline decisions should not be interpreted as irresponsible gestures.

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