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Medical Liability in the Context of the Civil Liability “Crisis”

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Abstract

The theme of the civil liability crisis in the conditions imposed by the modern society is one of the major issues which concern equally, the ethical-legal research of the medical care, but also the medical world. The traditional institution of civil liability, the way it has been governed by the Roman law, and then modernized by the Napoleonic Code, cannot be applied to new legal situations such as organ donation and transplantation, assisted medical reproduction, the legal protection of the human embryo and so on. Our survey aims to present some of the details of a new approach to professionals’ liability within the medical field, adapted to the problems medicine and biomedical research are currently facing.

Keywords:

civil liability crisis, medical malpractice, defective products, medical negligence, warranty and risk of medical practice.

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Preliminaries

The medical liability, as a special assumption of liability for damages, in the search of its own identity, is currently experiencing profound changes (Moldovan, 2002; Trif & Astărăstoiaie, 2000; Boilă, 2009). The current problems that it faces, along with other assumptions of special liability as regulated by the European legal systems, are landmarks on the *current state* of the institution's liability as a whole (Radé, 2003; Larroumet, 1991). Their scientific analysis considers the trends manifested in doctrine and jurisprudence, caused by contemporary social and economic realities.

In the recent decades, more and more debates appear around the European legal literature² (Viney, 1994) regarding the “*the civil liability crisis*”, as it was ascertained that the legal and the moral principles that were the basis for the adoption of the Civil Code, with over two centuries ago, became insufficient for ensuring the compensation for the victims of the harm produced under industrial civilization (with reference to the traffic accidents, the damage caused to the consumers by defective products, environmental disasters, medical accidents etc.) (Boilă, 2002; Boilă & Boilă, 2009). The idea of *culpability* was traditionally associated with the *sanction* applied to the person responsible for the adopted conduct in society, destined to damage others. But the main objective of the civil liability is to compensate the victim, not to punish the perpetrator. So not the *culpability* or the *innocence* of the person who caused the injury must be in the center of the analysis, but the interest of the victim to obtain redress, and last but not the least, of the whole society, and the interest to restore the social balance destroyed by the damage produced. This reasoning structured in terms of a better protection of the injured people's interests caused a real seism likely to overturn the foundation of fault, *the eternal lady of civil liability*. (Boilă, 2009)

² The evolution of the liability insurance for damages brought into question the place held by the civil liability institution within the law systems and the goals that must be followed. The socializing risk led to the “overthrow” of civil liability, which ceased to be the only method of repairing the damages. This led to a new orientation of civil liability where its repairing function holds the primary role to ensure the repair of damages caused to victims.

Debates on the duality and unity of the civil liability

One of the controversial issues addressed by the legal doctrine consists of determining *the form of the civil liability*. Thus, the efforts for the scientific researchers are trying to determine whether the two traditionally recognized forms, tort and contractual liability must be separated from each other or, conversely, they are part of the same legal arrangement, with the sole aim to restore the social balance destroyed by causing an unjustly injury to another person (Pop, 2010). The supporters of the *duality theory* affirm trenchantly that the two liabilities have different sources, the law and the contract, which gives them distinctive features: the contractual fault is presumed while the negligence tort must be proven as the extent of repair is higher for tort liability which aims to restore the previous situation, while in the case of contractual liability it concerns only foreseeable damages, tort ability is broader than the contractual one etc. (Viney, 1994).

On another position lie those who affirm the “*unity*” of the civil liability when they appreciate that any breach of a duty settled by default is a “*wrongful act*” which draws the obligation for compensation, concluding that “*(...) the civil liability is always tort liability*”. In this respect, it shows that the “*duality*”, in reality, does not imply essential differences so that we do not have two separate legal institutions but a sole institution, *civil liability, which has two distinct modes of compensation, some arising from contract, contractual liability other from law – tort liability*.

The legal doctrine in our country, at this time, supports the idea of a “*unique civil liability, but non-unitary*” (Eliescu, 1970; Pop 2000; Tamba, 2009) where tort liability represents the common law and the contractual liability represents the derogatory, particular regime. In other words, whenever a legal relationship is governed by a legally binding agreement, the contractual liability is applicable for the non-implementation of the provisions within this legal document. In the other cases we will invoke the tort liability with respect to the damage caused by committing a wrongful act. We talk about *unity through diversity* where the differences are only of “*technical aspect*” and not substantive.

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In this respect the new Civil Code³ was drafted to reaffirm the idea according to which civil liability is a unique institution with two different legal regimes.

Professionals' liability – a new theory of liability

In the recent decades, a legal unprecedented situation was signaled in the case of the infringements committed by professionals in the exercise of their duties, which caused harm to others persons, such as injury caused to others due to the breach of security, by medical accidents. The medical field is characterized by the specific of the diagnostic, prevention, surgery and treatment activities, where the physician acts on the body of the patient to cure or at least to improve the health problems. Ensuring the security of the patient's body is the focus of medical practice, if we consider that the *life, the health and the physical and psychological integrity of all persons are equally guaranteed and protected by law*. In performing the medical act, every professional must act solely in the interest and welfare of the patient, social values that should prevail over the interests of science and society.

The current trend of jurisprudence is to establish a more stringent, stricter liability, where the security duty of the physician to his patient is to be recognized as an *obligation of result*, whose violation should draw the liability as a professional. In other words, whenever the patient's condition worsens for reasons other than those strictly related to the diseases he suffers from, for which he requested treatment or surgery, the physician will be forced to pay the damages for the breach of the security obligation, whether or not guilty of the situation created. This requires an assessment of his conduct in relation to the standards set at the current level of the scientific and technical research. The liability for medical accidents is prefigured as a liability objectively based on the *risk-taking professions*, where the main objective is the protection of patients and to ensure their compensation. *Culpability* disappears, as a

³ The new Civil Code was adopted by Law no. 287/2009, published in the Official Journal of Romania, Part I, no. 511 of 24 July 2009, it was implemented by Law no. 71/2011, published in Official Journal of Romania, Part I, no. 409 of 10 June 2011 and entered into force on 1 October 2011. The old Civil Code was adopted in 1864, during the reign of "Alexandru Ioan Cuza", being the legislative act with the longest applicability, 146 years. Over time, there have been two attempts to adopt a new civil code, one during the reign of Charles II and in the 1970s, which were not completed.

constituent component of the traditional civil liability, which we consider to be essential for involving the compensation obligation.

In terms of legal status, there is the goal of *stopping the contractualization of such liability* by recognizing a “*liability of the third kind*” that is neither contractual nor tort. (Pop, 2010) We draw attention here on a *special responsibility*, the medical professionals’ liability regulated by law, which seeks to establish the legal framework for providing compensation to patients. (Boilă, 2011)

New assumptions of civil liability

Notable in this regard is, in our opinion, the regulation of the *liability for damage caused by defective products*. The consumer protection, an area of utmost importance in the context of the consumerist movement, has a Community regulation⁴ (Viney & Jourdain, 1998) set by the *Directive no. 85/374/EEC of 25 July 1985 concerning liability for defective products*⁵, whose provisions have been transposed into the national law of the Member States, in our country by the Law no.240/2004⁶. Engaging

⁴ On 27 February 1977 the European Council adopted the Strasbourg Convention - *sur la responsabilité du fait des produits en cas de lésions corporelles et de décès*, but which has not entered into force due to the insufficient number of ratifications by the Member States. This treaty was initiated by the European Council, but it was signed by only 4 countries: Belgium, France, Austria and Luxembourg, without being ratified by the other Member States.

⁵ The Directive no. 85/374/C.E.E. of 25 July 1985 was published in the Official Journal of the European Communities no. 1.210 in 7 august 1985. the Directive distinguished through a laborious content, in a clear and concise style by defining the product (Article 2), the producer (Article 3), the fault (Article 6), the grounds for exemption (Article 7), the injury (Article 9), the limitation periods and revocation (Article 10-11). Subsequently, it was amended by the Directive no. 1999/34/C.E. of the European Parliament and of the Council of European Communities on 10 May 1999 published in the Official Journal no. L141 on 4 June 1999 and supplemented by detailed regulations on product categories, the so-called *vertical directives*, such as Directives 75/319/EEC and 81/851/EEC on pharmaceuticals, Directive 89/662/EEC on products of animal origin. General provisions on security products have been elaborated in the Directive 92/59 EEC of 29 June 1992, given the diversity of the products and the need to establish rules for those who had no proper rule. The content of the Directive is particularly important due to the defining terms of liability for the defective product, especially of the security requirement, among other obligations of producers foreseen in Article 3. (1) and (2).

⁶ Law no. 240/2004 was published in the Official Journal of Romania Part I, no. 552 of 22 June 2004.

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liability to all those involved in the production, launching and exploitation of certain *defective products* that do not meet the “*legitimate expectation*” of the consumers, even in the absence of a contractual relationship or the proof of a wrongful conduct, was judged as being “(...) *the first major intromission of the European legislator in the civil matters*” (Radé, 2003) In this respect, the Directive 85-374 EEC initiated debates on the need to *unify at the European level the law rules regarding tort*, eliminating apparent and significant differences between tort and contract. As noted in the French doctrine, these Community rules aimed to establish: “(...) *an autonomous compensation scheme which is a waiver from the common law of tort liability as well as to that of contractual liability, creating thus a specialized tort liability with specific rules, distinct from those of the common law*”. (Markovits, 1990; Viney & Jourdain, 1998)

The medical liability in the context of the civil liability crisis – a new legal approach

Slowly but surely, medical liability is configured as a special case of civil liability for damage caused unjustly to the patients which requires legal regulations and an ethical approach distinct from other cases. In this regard, we note that one of the characteristics of the positive law development is the expansion and diversification of the new regulations of *new assumptions of civil liability for damages*. Thus, facing the danger of increased risks of damage, some of them anonymous, to protect the victims, in some areas, was established by law the obligation of compensation, by designating the responsible persons and the conditions of engaging liability without relying on a particular “*form*” civil liability. (Boilă, 2008) The deadlock created refers to the establishment of a legal obligation for repairing the damage by the person responsible, even in the absence of a rigorous contractual framework or the committing with guilt, intentionally or negligently, a “tort action”. Naturally, facing this new legal reality, the question emerged: to what extent a “framing” of the liability assumption as being contractual or tortious is needed, whereas the law determines the conditions and the effects they produce?

The problem arises acutely in the medical liability, an area with a special legal regulation, but which unleashed many interpretations. The current debates from the medical field criticize the approach of the medical act from the perspective of medical negligence, stating that it

must be recognized that the medical profession involves certain risks, so that in the event of harming the patient there must be established effective procedures to compensate the victim, either amicably by negotiation, drawing and insurer's liability under the contract of insurance, or by setting up a compensation fund for the victims of medical accidents along with the patterns set by other states. The professional organizations are militating in favor of a new approach to the medical profession in order to stop the blame for the consequences of the physicians, so publicized and which contribute to the defamation of this profession. In this regard, the President of the Physicians' College, PhD. V. Astărăstoaie ([http://www.mediafax.ro/social/noul-proiect-al-legii-sanatatii-despre-malpraxis - 9853165](http://www.mediafax.ro/social/noul-proiect-al-legii-sanatatii-despre-malpraxis-9853165)) emphasized that “*Romania, on this constabulary way, determines the patient to appeal to costly lawsuits and the physician, too. In Romania, the culture of conflict is promoted as we are interested in bloodshed. We do not have the culture of dialog and so the medical act is affected. Even the intervention of politicians in the medical field affects the medical status*”. Given the fact that the medical act is based on trust, “*(...) distrust can only produce losses for the patient. In a society of conflict, there is also a bushy legislation. There are so many laws that one does not know when the law is violated*”.

Tendencies regarding the objective substantiation of the medical liability

A key element in the analysis of the legal nature of the relationship between the doctor and his patient is constituted by the new arguments on *substantiating the liability for the damages* caused by medical accidents. This is actually a logical legal principle that triggers the entire mechanism of involving the obligation to repair the damage, taking into consideration either the responsible person or other considerations, independent of the perpetrator's mental structure, objective in nature, such as *risk, security, equity*.

Thus, within the institution of civil liability, the European legal doctrine noted that we find ourselves in times when the civil liability crisis is manifested by orientation towards the objective grounding of *certain assumptions of liability*, which led, in practice, to the engagement of the obligation for compensation to the responsible person even in the absence of a culpable conduct. It invokes more and more a *liability for the*

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breach of duty towards the victim where the mental attitude of the person who produced the injury is not important, only the fact that there are negative consequences, which must be removed. Moreover, by discussing about the fault as a constituent component of liability, we analyze its content from a new perspective, this time an objective perspective, geared especially towards the abnormality of the injurious behavior and, to a lesser extent, towards psychic processes preceding and accompanying the act, on the other hand⁷. (Jourdain, 1996)

We note that in the medical field as well, the *culpability as a constituent element* brings into question important issues related to the “*crisis and the future*” of liability for malpractice. We are witnessing a profound transformation of the traditional liability rules to adapt them to the current state of medicine and biomedical research, aiming at the creation of a legal framework that ensures the patient the remedy for the suffered damages.

But all these issues do nothing but reaffirm the idea that we need a real *reform in the civil liability field*, by adapting it to the new social needs. (Viney & Jourdain, 1998)

Inevitably, the problems it faces, these moments put their imprint also on the medical liability. *Subjective* and *objective*, *unity* and *diversity*, *consistency* and *dysfunctionality*, *competence* and *professionalism*, *carelessness*, *negligence* or *ignorance* - they could all be the current defining features of the medical malpractice, which, in this context, acquire new meanings.

The national and European legislator pays an increased attention to the *reparative function* of the liability in relation to the *preventive and educational function* which sanctions the culpable conduct of the person responsible. Thus the professional’s liability, the health institutions, the manufacturers and suppliers of drugs and medical devices and even the whole society are held responsible, ultimately by appealing to the sense of *social solidarity*, through the special guarantee funds established for the repair of damages.

⁷ The author examines the place and the role of the culpability within civil liability to conclude “the civil fault largely lost its social value as an instrument of measuring the anti-social behavior” so that “(...) its preventive function and legislative role have been seriously affected”.

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