THE PARTICIPATION OF THE MEDICAL MALPRACTICE INSURER IN THE ROMANIAN CIVIL PROCESS

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ABSTRACT: *The medical and the legal fields are sciences between which the causal relationship can sometimes be difficult to identify for lay people. In a context in which globalization is a phenomenon, the populations are aging, in addition the difficulties created by the pandemic period, so the medical services are increasing exponentially compared to these conditions, therefore the medical staff is facing more and more situations in which medical malpractice is invoked.*

Incuring the medical liability of the doctor and of the employing unit is justified by the regulation in the Romanian Constitution of the right to health, but, equally, they must be offered professional independence through the compulsory insurance of professional medical malpractice, also meant to protect the patient.

KEYWORDS: *assured; medical insurer, medical malpractice, civil process.*
JEL code: *K15*

The right to health care is a fundamental right, expressly regulated in the content of art.34 para.1 of the Romanian Constitution[1]. Therefore, the Romanian State, through its institutions, must effectively ensure the realization of this right through all the levers at its disposal.

Regulated as a right-claim, at the heart of the medical process through which the health of Romanian citizens is protected, is the medical staff, and the constitutional guarantee of the right to health justifies the liability of the medical staff in case of errors.

However, as the possibility of making mistakes is extremely high in professions that involve a high degree of risk, as happens in the medical field, there is a need to create a balance between the constitutional imperative to protect the health of the citizen and the need for medical staff to carry out independently and comfortably its activity. In this context, and in close connection with the provisions of art.34 para.3 of the Romanian

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[1] The Romanian Constitution amended and supplemented by the Law on the revision of the Romanian Constitution no. 429/2003 published in the Official Gazette of Romania no. 758 of October 29, 2003 approved by the national referendum of October 18-19, 2003 and entered into force on October 29 2003, the date of publication in the Official Gazette of Romania of Romania of the Decision of the Constitutional Court no. 3 of October 22, 2003 to confirm the result of the national referendum.

Constitution, appears the regulation by Law no. 95/2006[2] on the reform in the field of health, of the obligation to conclude the insurance for medical malpractice.

In such a situation, in which the legislator in the positive law established the obligation on the part of the medical staff of the liability insurance for medical malpractice, the present study aims to analyze the conditions of participation of the medical liability insurer in the civil trial that aims to establish medical malpractice and the consequences thereof.

All this given that the jurisprudence is not uniform as regards the participation of the medical liability insurer for malpractice in cases having such an object, some courts considering that the introduction of the insurer in the case law is imperative, by law, the court following to use the provisions of art.78-79 of the Romanian Code of Civil Procedure, which allow the judge to introduce *ex officio* a third party in question, in case the insured party does not express its intention to call the insurer as collateral.

On the other hand, there is another point of view embraced by the courts which considers that the forced introduction of the insurer in question is an issue that remains only at the discretion of the interested party, not obliging the court to a procedural step in this regard.

The relevant legal provisions provide in art.667 of Law no.95 / 2006 on health care reform that *"Medical personnel defined in art.653. .will conclude a malpractice insurance for cases of professional civil liability for damages caused by the medical act.*

A copy of the medical liability insurance will be presented before the conclusion of the individual employment contract, being a mandatory condition for employment… ".

In other words, the conclusion of a professional liability insurance for malpractice is a condition for the activity of the doctor, the legislator seeking through this provision, first of all, to protect the patient from possible insolvency situations of those responsible for malpractice, medical services being a **public service**, managed by the Romanian state.

Going further, the provisions of art.668 of the same Law no.95 / 2006 on health care reform, provide that: *"The insurer grants compensation for the damages for which the insured doctors are liable, **based the law**, to the third parties subject against which there has been established a medical malpractice, as well as the legal costs of the person harmed by the medical act."*

Going further, the provisions of art.668 of the same Law no.95 / 2006 on health care reform, provide that: *"The insurer grants compensation **based the law** for the damages for which the insured doctors are liable, to the third parties subject against which there has been established a medical malpractice, as well as the legal costs of the person harmed by the medical act."*

According to art.19 para.2 from the Methodological standards for the application of Title XV of Law no.95 / 2006 "Civil liability of medical staff…", *"**The damage (injury)** will be compensated **by the insurer within the insured amount**, **based on the final court decision**, and in in the case when **the damage exceeds the insured amount**, **the injured party** may claim from **the perpetrator the payment of the difference amount**, until its full recovery".*

However, the mentioned legal provisions determined an uneven judicial practice.

[2] Law no. 95/2006 on health care reform, completed and amended, republished in the Official Gazette of Romania no. 652 of August 28, 2015.

For example, the Court of first instance from Bucharest, in the case solved by pronouncing the civil sentence no. 1784/2012, maintained by Decision no. 150A / 2013 of the Bucharest Court of Appeal, the court of first instance, regarding the insurer's participation in the civil process that has as object the establishment of the malpractice act and of the compensations requested as a consequence of this act, withhold: *"Given that the professional liability insurance is mandatory (art. 656 Law 95/2006) and that the insurer provides compensation for damages for which the insured are liable under the law, the claims for the introduction of the insurance company are not in order to pay a fee for that.*

Moreover, since the insurance is compulsory and the civil medical liability is based on the law, the court ex officio must order the introduction of the insurer in case the insured would not have done so. This procedure can take place at any time during the process" invoking in this sense the provisions of art.19 para.2 of the Methodological Standards for the application of Title XV of Law no. 95/2006.

Therefore, a point of view that considers imperative the participation of the malpractice insurer in the civil case which has as object the establishment of the malpractice act and the analysis of the consequences deriving from it.

On the other hand, for example, the Târgu-Mureș District Court, in case number 11398/320/2018, considered that, although the Romanian legislation stipulates the obligation for the medical staff to conclude a malpractice insurance, this aspect cannot lead at the conclusion of the exemption from the payment of the judicial fee duty on a warranty for guarantee request of the insurer, as long as the legislator did not provide such a case derogating from the rules concerning the judicial fees, nor in GEO no. 80/2013 concerning the judicial fees and nor in Law no. 95/2006 on health care reform. The court also pointed out that, moreover, even in the case of the compulsory motor third party liability insurance, with which it the case was understood to make a comparison, the judicial practice is uniform regarding the obligation to pay the judicial fee in the situation we are not in one of the derogatory situations provided by GEO no. 80/2013.

In other words, a diametrically opposed point of view, in which the court considered that the participation of the medical malpractice insurer in the civil case concerning the act of malpractice and the consequences arising from it, is the exclusive prerogative of the insured doctor, under the procedural conditions provided by the Romanian Code of Civil Procedure on a warranty of guarantee request, and only after the prior payment of a judicial fee.

We consider that the point of view of the court previously exposed is not in accordance with the reason considered by the legislator when it regulated the conditioning of the medical profession by the obligation to conclude civil liability for medical malpractice, through the provisions of Law no.95 / 2006.

Thus, the regulation in the Romanian legislation of the obligation of the doctors to conclude the medical malpractice insurance had, among others, its origin in the Codarcea v. Romania case[3].

In that case, the applicant relied on Articles 6 and 8 of the European Convention on Human Rights, claiming **the excessive length** and **ineffectiveness** of the procedure for

[3] The decision pronounced by the ECHR on the 2nd of June 2009, regarding the application registered under no.3167/04.

the medical civil liability of the doctor who underwent surgery on her eyelids without validly seeking her consent and without informing her of the possible consequences, an intervention that included errors in the surgical technique by the surgeon who performed the operation and which led to facial hemiparesis by touching the facial nerve.

In relation to the head of claim regarding the violation of art.8 of the European Convention on Human Rights, the Court found that the applicant had, formally, access to a procedure which enabled her to obtain both recognition of the fault of the doctor who had operated on her and an obligation to pay her compensation. On the other hand, that amount was never collected by the applicant because of the doctor's insolvency and the absence, in Romanian positive law at the time, of an insurance mechanism for the doctor's civil liability.

The Court convicted the Romanian State under Article 8 of the Convention, mainly because, although the applicant had suffered a serious injury to her health and integrity, the Romanian legal system failed to provide her with any compensation, allowing all persons who could have been held liable to avoid civil liability.

In the same decision, the ECHR judges reproached the Romanian judicial system for the fact that the hospital institutions are not responsible for the civil crimes committed by the employed doctors either, the European Court suggesting the regulation of such liability in their case as well. The Romanian state has assumed by adopting the Convention certain positive obligations, including that of ensuring, through coherent legislative and judicial measures, the real and effective observance of the rights of persons under their jurisdiction.

From this point of view, the irresponsibility of the medical institution for the medical fault of employees is a mean to avoid legal liability, not to ensure respect for the fundamental rights of patients, in terms of their physical integrity and health. A medical institution exercises control over the medical activity of all doctors and medical staff employed, so that it seems natural to be liable for the damages they cause due to poor professional training.

Following this conviction suffered by Romania at the ECHR, from the perspective of the responsibility of the medical institution in which the doctor operates, the legal regulation clearly distinguishes at this time between the civil liability of the medical staff for malpractice and the civil liability of providers of medical services, medical equipment, medical devices and medicines (Bulcu, 2016).

Moreover, from this perspective, the High Court of Cassation and Justice of Romania, established[4] that as long as the Romanian law expressly regulates the malpractice insurance of medical staff as a separate form of insurance in its charge, concluded individually, distinct from any form of insurance concluded by the employing medical institution - which covers medical damages caused as a result of events related to the activity carried out by the institution, it is obvious that the insurance contract concluded between the medical unit and the insurer does not include insurance for malpractice, and as such, the insurer of the medical institution is not liable for damages caused by doctors in performing the medical act.

[4] The High Court of Cassation and Justice of Romania, Second Civil Section, Decision no. 2658 of September 24, 2014.

However, the participation of the malpractice insurer in a case that concerns the liability of the doctor or of the medical institution for medical malpractice remains clearly unregulated, causing **non-unitary judicial practice**.

As mentioned above, some courts have held that the introduction of the medical malpractice insurer as part of the civil case is a request up to the parties, who follows the rules of a simple claim, on the other hand there have been courts that have considered that the legal obligation to conclude such an insurance and the conditioning of the exercise of the medical profession by its conclusion creates the obligation for the court to introduce the insurer in the procedural framework that derives from a cause of medical malpractice.

The legal reasons for the compulsory participation of the medical malpractice insurer in such cases, also embraced by us, were set out in a civil litigation[5] concerning the awarding compensation for an act of medical malpractice in which the court ordered ex officio the introduction in the case of the insurance company that issued the medical malpractice insurance policy on behalf of the defendant as a "civil liability insurer", noting that in terms of its procedural position, the third party intervener is not assimilated to a "defendant ", so that, for example, he cannot be obliged to pay compensations.

It is known that, as a rule, the judgment in the civil cases produces legal effects *inter partes*; sometimes, however, for certain reasons, it is necessary for the decision to be opposable to other persons.

Therefore, it is shown by the court, that the introduction of the insurer in the frame case is made strictly in order for the court decision to be pronounced to be opposable to him as well.

The fact that the judgment is also opposable to the forced intervener has basically advantages because the facts settled by the court`s judgment fall within the force of *res judicata*, so that a possible new trial between the parties having another object, will have to take into account the first court decision already handed down (Cimpoeru, 2017).

On the other hand, the obligation to conclude medical liability for malpractice also opens the debate on the possibility for the injured party to file a direct action for damages arising from such an act of malpractice directly against the insurer.

Regarding the insurer, he can become a defendant under the conditions of art. 2224 of the Romanian Civil Code, which stipulates that he: *"may be sued by the injured persons within the limits of his obligations under the insurance contract"*. It is up to the injured party by the act of malpractice to decide whether he wants to enter in a legal battle only with the doctor, or with him together with his insurer.

It is true that given that we are speaking about a professional civil liability insurance, the doctor sued by the injured person, will be able in turn, pursuant to art.72 of the Romanian Code of Civil Procedure to formulate a on a warranty for guarantee request.

Indeed, the insured party (the doctor) has this procedural means to attract the insurer in the process to be responsible within the limits of the insurance contract. However, it often exposes him to the payment of a judicial fee, as we have previously argued, under the conditions of the taxation of the main proceedings.

[5] Civil sentence no. 9190 of May 20, 2016 pronounced by the Bucharest District 1 Court in file number 31053/299/2014.

Thus, the main proceedings, being a tortious civil liability action, assessable in money, the overwhelmingly majority of the Romanian courts oblige the insured doctor to pay the judicial feel proportional to the value asked for by the main proceedings, under the sanction of canceling the warranty for guarantee request.

This situation is financially disadvantageous, depriving the doctor of the rights conferred by the insurance contract (Cimpoeru, 2017), the insured, although he has concluded an insurance policy for which he has paid a price, will not be able to benefit from it unless, in advance, paid the court the judicial fee.

But how, as a rule, in such proceedings, the amount of compensation is high, the insured party (the doctor) is put in a situation if he does not have financial means, nor he does not fulfill the legal provisions to benefit from public legal aid, he will not to be able to promote a warranty for guarantee request.

This situation is also immoral because, on the one hand, the doctor is forced to conclude malpractice insurance, but, on the other hand, taking into account the financial constraints imposed by the payment of the judicial fee, he will not be compensated under this insurance (Cimpoeru, 2017).

We consider that, related to the legal texts incident in situations of medical malpractice (art.668 para.1, corroborated with art.669 para.1 and art.674 of Law no.95/2006 on health care reform), the insurer's liability arises from the provisions of the specific legal norm, above the contractual liability, the insurer's liability being a direct one, expressly provided by law, the injured person having the possibility to request compensations from the perpetrator of the malpractice ONLY for the damage exceeding the insurer's obligation.

From the corroboration of the texts invoked above, given the fact that the malpractice insurance is compulsory and the civil liability takes place in this case under the law, in case the insured party would not have proceeded to the introduction of the insurer by promoting a warranty for guarantee request, the court *ex officio* must order the introduction in the frame case of the insurer, and this procedure can take place at any time during the process, finding us in a situation derogating from the provisions of art.73 para.3 of the Romanian Code of Civil Procedure.

The situation is relatively similar to the insurer of the compulsory motor third party liability policy under the Romanian legislation.

Moreover, a legislative amendment that would remove the non-unitary practice of the Romanian courts, regarding the participation of the medical malpractice insurer in civil proceedings, would be the identical solution to the incidental legal regulation in case of traffic accidents, in case of compulsory auto civil liability insurance.

In these situations, the action of persons injured by vehicle accidents owned by the insured persons in Romania, is exercised directly against the compulsory motor third party liability insurer, who becomes a defendant, while the insured acquires the status of forced intervener.

This solution it is required even more necessary as between the two types of insurance contracts, malpractice and motor liability, there are similarities from a legal point of view, both being mandatory, and the insured event is the civil liability for damages caused to persons, being useful to all participants in the medical act.

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