Review **paper**

CIVIL LIABILITY FOR MEDICAL MALPRACTICE. DAMAGE RESULTING FROM DOCTOR'S NEGLIGENCE (BREACH OF PROFESSIONAL DUTIES)

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PRENAT CARDIO. 2015 DEC;5(4):43-45
DOI 10.1515/pcard-2015-0008

Abstract

Civil liability for medical malpractice may be attributed either to a doctor or a hospital when any of these persons' acts or omissions cause injuries to a patient; it may be also the hospital's liability for the damage caused by negligence of its staff (doctors and other personnel). The rules that govern this liability and the way of compensating the damage are different due to the grounds on which the doctor performs medical services and, in case of hospital's liability, the relation between a doctor and a health care institution. A doctor who runs his private medical practice bears civil liability individually and is obliged to pay damages if any of his patient suffers injury in connection with the treatment. However, a doctor who acts as employee of a health care institution is protected by the provisions of the Labour Code and exempted from civil liability to a patient. On the other hand, a so-called independent contractor's liability is joint and several with a hospital that has engaged him. However, case law seems to protect such doctors and treat them as hospital's employees if certain premises are fulfilled (like de facto subordination of the doctor to the head of the ward).

Key words: *medical malpractice, civil liability, pecuniary and non-pecuniary loss, independent contractor, compensation, birth-related injuries*

Civil liability for medical malpractice may be attributed to a doctor or to a hospital when any of these persons' own faulty conduct (acts or omissions) results in the damage. There may be also vicarious liability of a hospital for injuries caused by negligence (fault) of its staff – doctors and other medical personnel, like nurses, midwives, etc.

A doctor, who renders medical services individually (as an entrepreneur in the meaning of the Law on Freedom of Business Activity of 2 July 2004) and treats patients within his own private practice (including specialist's practice) may bear liability for any pecuniary and non-pecuniary loss that results from his negligence (breach of professional duties). This is a contract of medical service concluded between a doctor and a patient which gives rise to this liability, pursuant to Article 471 of the Civil Code. However a patient (the injured person) must not claim compensation of the grounds of the breach of that contract. There is a rule (adopted in the doctrine and the jurisdiction of the Supreme Court) that remuneration is possible when a doctor negligently breaches his general professional duty of care towards the patient and causes damage to him (in a form of bodily injuries, pain and suffering, etc.), pursuant to Article 415 of the Civil Code.

If a doctor who runs his private practice employs the medical staff in his office (nurses, midwifes, laboratory assistants, anesthesiologists, etc.) he may be also liable for the misconduct of the members of that staff. In such cases liability of a doctor is strict (objective, based on the so called principle of risk) and the doctor may not be exempt from it by proving that he selected his assistants carefully (diligently) or exercised adequate supervision over their conduct. However, a patient who has suffered the damage must prove that a perpetrator (a certain member of doctor's personnel) has been negligent (e.g. that a nurse has failed to observe the required standards of aseptic and hygiene while treating a patient at a hospital ward).

A doctor who does not work individually but renders medical services in a health care institution (a hospital, clinic or medical centre) may perform treatment on the

How to cite this article:
Bączyk-Rozwadowska K. Civil liability for medical malpractice. Damage resulting from doctor's negligence (breach of professional duties). Prenat Cardio. 2015 Dec;5(4):43-45

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Submitted: 2015-09-28; accepted: 2015-09-28

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grounds of a contract of employment (as a hospital's employee in the meaning of the Labour Code) or a civil law contract (as an "independent contractor").

A doctor who is an employee deserves protection under the provisions of the Labour Code which exempts him from individual liability for the damage inflicted on his patients, provided the damage has been caused in the course of treatment and due to that doctor's fault (Article 120 § 1). As a result, the injured person can claim compensation exclusively against a health care institution (an employer), which is obliged to pay damages in full, comprising pecuniary and non-pecuniary loss. The doctor, who has caused the injury, is not a party in the lawsuit (a defendant) but only a witness who shall present the circumstances of the case to the court. Hospital's liability of the damage caused by its subordinate staff (whether a doctor or other personnel) is objective (risk-based), pursuant to Article 430 of the Civil Code.

However, a health care institution which has indemnified the patient, has a recourse claim to the doctor and may ask reimbursement from him for the money paid to the injured party. Pursuant to Article 119 of the Labour Code, the scope of recourse is limited to the threefold monthly remuneration of a certain employee. The right to claim recourse comprising the entire damage arises only when the injury was caused intentionally (which hardly ever happens in practice, e.g. when a doctor refuses to treat a patient in an emergency situation), when the doctor acted outside the course of treatment (e.g. he takes care of a "private" patient at hospital during his working hours), when the hospital is improperly insured or insolvent. In order to be successful in claiming recourse (whether full or limited), a hospital must prove both that the doctor was negligent while performing his professional duties and demonstrate the scope of the damage as well as establish the causal link between that damage and the doctor's faulty acts or ommissions. The recourse is not possible if an individual perpetrator cannot be found or indentified. No grounds for recourse obviously exist if the patient's injury has been indemnified by an insurance company which a hospital has entered into a contract with (OC).

A doctor who performs treatment in a hospital on the grounds of a civil law contract (a contract of rendering services of Article 750 of the Civil Code or a contract of an order to perform treatment regulated in Article 27 of the Act of Healthcare Activity (*Ustawa o działalności leczniczej*) of 15 April 2011 is not protected under the provisions of the Labour Code (Article 120 § 1). Consequently, he may bear civil liability for any damage caused to patients in the course of treatment. However, liability of an independent contractor is "joint and several" with a health care institution which engaged the doctor to treat his patients (pursuant to Article 27 p. 7 of the Act of Healthcare Activity and Article 441 of the Civil Code). This injured party may then recover all the damages from any of the defendants (a doctor or/and hospital) regardless of their individual share of the liability. In the great majority of malpractice cases patients decide to sue a health care institution since it seems an easier way to get recovery. If a hospital pays remuneration, the recourse to a doctor is possible pursuant to the provisions of the Civil Code and its scope depends on the circumstances of a certain case (Article 441 § 2 and 3). However, according to the recent judgements of the Supreme Court, even if a doctor - independent contractor causes the damage while rendering medical services at hospital, he may be treated as a hospital's employee and protected in a lawsuit under provisions of the Labour Code (Article 120 § 1). However it must be proved that despite the civil law contract between a health care institution and a doctor, the latter was *de facto* treated as an employee (e.g. his work at a ward was continuously supervised by a superior doctor, the head of the ward), which qualified his relation with a hospital as a typical employee-employer one. This solution seems to protect independent contractors engaged by hospitals, because – as mentioned above – it exempts them from individual liability for the damage inflicted on patients (see the judgement of the Supreme Court of 26 January 2011; IV CSK 308/10 published in OSP 2011/1/11).

The case law proves that in the last recent years the majority of medical malpractice cases concern damages inflicted on patients as a result of negligence of doctors and other medical staff who act as hospital's employees or independent contractors. The reason is that most "medical injuries" appear in connection with organized care rendered

in health care institutions like hospitals, medical centres and clinics and not in private offices. The health care institutions use professional equipment, sophisticated methods of diagnosis and therapy, perform complicated operations and treatments which are necessary to cure more and more new diseases but, on the other hand, include significant risk of injuries. Many of the malpractice cases concern so called birth (delivery)-related injuries (encephalopathy, celebral palsy, brain damages and paraplegias, etc.) suffered by newborns. Analysis of the case law shows that the negligent doctor's conduct which gives rise to the above mentioned injuries consist inter alia in an improper diagnosis of the condition (*welfare*) of the foetus resulting in a wrong decision about the method of parturition (natural delivery instead of necessary and medically justified caesarian section). Sometimes the reason of the injury is the delay of a caesarian section or the lack of improper supervision over the woman during the labour. In the judgement of 21 February 2006 (I ACa 69/06) the Appellate Court in Lublin ruled that a hospital was vicariously liable for a doctor (its employee) who was negligent in reading CTG reading and had ordered caesarian section with delay. Consequently the child, due to the lack of oxygene, had suffered the severe celebral palsy. Instead, the Appellate Court in Poznań in the judgement 19 April 2000 r. (I ACa 1146/99) concluded that the injury (encephalopathy), that the child had suffered, was due to the lack of adequate supervision over the woman in a labour. In the courts's opinion, the doctor was aware of complications that appeared during the delivery but he ignored them and did not took any special precautions (like e.g. recommending of continuous supervision by a midwife) required from a qualified member of medical profession (obstetrician).

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