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Medical malpractice – an overview of the main traits of the Portuguese legal system

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1. Introductory Remarks

In Portugal, the legal framework applicable to the compensation claims arising from medical activity is the general legal framework applicable to civil liability.

Similarly to what is stated in other jurisdictions, in Portugal, “strict liability” is exceptional¹. Therefore the emergence of a compensation claim depends on the cumulative existence of five conditions: a conduct of a person, the wrongfulness of that conduct, the guilt of the person that adopted the mentioned conduct, the damage and, finally, the causal link between the tortious conduct and the damage.

¹ In the light of the article 483, paragraph 2 of the Portuguese Civil Code (hereafter referred as PCC), liability arises from non-fault acts only when it is expressly stated in the law. A right to compensation for damages caused by products may be grounded in strict liability under the product liability legislation adopted in the light of the Directive concerning that matter. Product liability is applied within medical malpractice cases, when the physician provides a product to the patient. It is the case of the application of a defective prosthesis.

As a consequence, medical's civil liability arises out from the occurrence of a damage caused to the patient – and, in some cases to a third person² – only if the conduct of the doctor produces the breach of a legal duty established to protect the interest of the injured party.

The nature – general or special – of the duty that is violated may vary and the kind of liability that will arise will vary accordingly – non-contractual liability³ or contractual liability. Irrespective of that, the consequence of the emergence of civil liability, will be that the person (the doctor, *in casu*) held liable for the damages will be due to compensate the person (the patient, *in casu*) who suffered the damage.

In the next pages, firstly, it will be discussed whether the medical liability is qualified as contractual liability or non-contractual liability, in Portugal, and subsequently the differences between both legal frameworks will be regarded (Section I); secondly, the contract to provide health care services will be examined (Section II); thirdly, attention will be drawn to the conditions that must be met in order to consider that a physician should be held liable for the damages produced to a patient (Section III); finally, we will focus on the compensation claim, considering its scope and the way to define its *quantum* (Section IV). In order to carry out this comprehensive analysis, the main traits of Portuguese law concerning medical malpractice cases will be examined⁴.

² As it will be explained *infra* in footnote 26.

³ Non-contractual liability will also be referred to as tortious liability or delict liability.

⁴ For further and deeper reflection on civil liability arising from medical malpractice, in Portuguese Legal system, taking into account the conclusions inferred from a comparative study of other legal systems, see R. Teixeira Pedro, *A Responsabilidade Civil do Médico. Reflexões sobre a noção da perda de chance e a tutela do doente lesado*, „Colecção do Centro de Direito Biomédico da Faculdade de Direito da Universidade de Coimbra”, no 15, Coimbra 2008 and A. Matos, *Responsabilidade civil médica: breves reflexões em torno dos respetivos pressupostos – Ac. Do TRP de 11.9.2012*, „Cadernos de Direito Privado”, no 43, julho/setembro de 2013, pp. 48 and ff.

2. Grounds for civil liability: Between contractual liability or non-contractual liability

One major distinction must be drawn when we consider the grounds for civil liability arising from medical malpractice: the public or private nature of the sphere within medical activity is practiced.

As a matter of fact, Portuguese doctrine upholds that when a physician practices his/her professional activity in a public hospital, it is not concluded any legal agreement, neither between the doctor and the patient, nor between the public entities that provide health services and the patient. As a consequence, in these cases, medical malpractice gives rise merely to non-contractual liability⁵.

Dissimilarly, when medical activity is practiced in a private hospital or a private office, as a rule, a contract is concluded between the doctor – or the person that owns the entity that provides health care services – and the patient. At the same time, considering that the interests medical activity deals with – life, health, physical integrity, moral integrity, etc. – are protected *erga omnes*, medical malpractice may be envisaged as a delict. As a consequence, usually, when medical activity is practiced in a private sphere, a medical malpractice case may give rise, simultaneously, to non-contractual liability and to contractual liability. This does not mean

⁵ It is discussed whether it should be applied the general legal framework of non-contractual liability stated in Portuguese Civil Code (articles 483 and ff) or the special legal framework stated in the Law 67/2007, dated 31st December. This law contains the rules applicable to the liability of State and other public entities, concerning the performance of legislative, administrative and judicial functions. Article 7 of the mentioned law, in its paragraphs 3 and 4, adopts the *faute de service* theory inspired in French legal scholarship. As a consequence, the State and other legal persons governed by public law shall also be liable when the damages have not resulted from the actual conduct of a particular agent, or when it is not possible to prove who was personally responsible for the action or omission, whenever the damages derive from the malfunction of the service. It is understood that malfunction exists when, taking into account the circumstances and average standards, the prevention of the damaged could be reasonably demanded.

that two different compensations will be paid. It simply denotes that the compensation claim may be grounded in two different legal bases and that the legal regime applicable to the case may differ at some points.

As a matter of fact, even if the conditions that must be proved to be awarded a compensation do not widely differ⁶ whether the claim is grounded in non-contractual liability or in contractual liability, there are some differences between the legal regimes that are applied to each one of those species of liability.

The most important differences concern the burden of proof of fault, the debt limitation time period and the liability for acts adopted by another person⁷.

Firstly, as a general rule stated in article 342, paragraph 1 PCC⁸, the claimant must prove the facts upon which the right to compensation is recognized – facts that reveal the conditions for civil liability: the conduct, the wrongfulness, the fault, the damage and the causal link between the conduct and the damage⁹. Otherwise, as far as contractual liability is concerned, a rebuttable presumption of fault applies, in the light of article 79⁹, paragraph 1 PCC¹⁰.

⁶ The differences exist regarding the “wrongfulness”, as it will be explained in section 4.2.

⁷ Another difference has been, traditionally, added to those three mentioned in the text: the compensation of non-economic losses. Article 496 PCC, that recognizes the right to compensation of non-economic losses is inserted in the section that rules non-contractual liability. As a consequence, in the past decades, Courts did not award compensation, when the claim was based on contractual liability. Today the opposite approach is widely predominant, as it is expressly recognized in the decisions of the Portuguese Supreme Court dated 23rd March 2017 (process number 296/07.7TBMCN.P1.S1) and 1st October 2015 (process no 2104/05.4TBPVZ.P.S1), concerning precisely a medical malpractice case. All the decisions referred to in this footnote are available at the address <http://www.dgsi.pt/jstj.nsf?OpenDatabase>, searching by the number of the process and the date the decision was issued.

⁸ Whenever we refer to an article without a reference to the law it belongs to, it is an article of the Portuguese Civil Code.

⁹ Regarding these conditions, see below section 4.

¹⁰ As far as non-contractual liability is concerned, exceptionally a rebuttable presumption of fault may apply if one of the circumscribed *factispecies* depicted in the law materializes. Regarding medical malpractice, it is of paramount

As a consequence, if a breach of duty to perform¹¹ by the debtor (the doctor, *in casu*)¹² and the production of damages causally related to it are demonstrated in Court, the burden to prove the lack of fault falls upon the debtor, i.e. the physician.

Secondly, the time period to exercise the compensation right vary whether the claim is grounded in non-contractual liability or in contractual liability. In the first hypothesis, considering the special rule stated in article 498, paragraph 1 PCC, the claim may be presented within a period of three years elapsing from the date on which the injured party was aware of his right to compensation, albeit without knowledge of the person liable for it and the full extent of the damage¹³. In the second hypothesis, no special rule applies and consequently the general rule stated in article 309 PCC must be respected: the claim may be presented within a period of twenty years elapsing from the date of the harmful event.

Thirdly, the conditions upon which liability for acts adopted by another person is grounded are stricter regarding non-contractual liability. As a matter of fact, in the light of tortious liability, a person

importance the presumptions of fault stated in article 493 PCC linked to the lack of surveillance of movable or immovable goods (paragraph 1) and linked to the dangerous nature of the activity or the dangerous nature of the means used to perform the activity (paragraph 2). In Portuguese case law, the first presumption has already been applied to the use of needles and bistouries and the second presumption has already been applied to administration of X-ray in treatment or examination of patients.

¹¹ The breach of a duty encompasses the conduct and the wrongfulness, as conditions upon which a compensation claim is grounded.

¹² For this purpose it will be considered that the contract to provide medical care is concluded with the physician. It is not always the case. If the contract is concluded with another person – namely the one who owns the entity that provides the health care services –, the debtor won't be the physician, but the party who has concluded the contract with the patient. In the latter case, the physician will be a debtor's assistant in the performance of the due conduct.

¹³ Another time limit has to be respected, as the claim cannot be presented more than 20 years after the harmful event (this is the general deadline to exercise rights, according to article 309 PCC). So the claim should be presented within the three years period mentioned in the text, but it cannot overpass the twenty year limit referred to in this footnote.

may be held liable for the consequences of the conduct of another person when the latter acts on behalf and under the supervision of the former (article 500 PCC). Otherwise, within the scope of contractual liability, the debtor shall compensate the creditor for all the damages whoever¹⁴ has performed the duties arising from the contract: the physician (the debtor) is liable for the acts of anyone who assists him/her in the performance of the duty to provide a healthcare service emerging from the contract¹⁵ (art. 800 PCC)¹⁶, even if the physician has no power to give instructions to those assistants¹⁷.

Considering the three topics above mentioned, the contractual liability regime is more advantageous to the patient, as he/she is exempted from the burden of proof of fault, as he/she may present his/her claim within a larger period of time and as he/she may obtain a compensation from the doctor for all the damages caused irrespective of the actual author of the damages.

¹⁴ The person who performs, if he/she is not the debtor, may be held liable solely in the light of non-contractual liability.

¹⁵ Consequently it is of paramount importance to identify who the debtor is. For instance, if the contract is concluded with the person who owns the entity that provides health care, the debtor is that person. In such a case, the physician may be held liable based in non-contractual liability.

¹⁶ As is stated in the mentioned article, the debtor shall be liable for the persons used to the fulfilment of the obligation, as if such acts were performed by the debtor himself/herself.

¹⁷ This may be of paramount importance in medical malpractice cases, as it will mean that the physician who has concluded the contract with the patient will be liable for the acts of another physician who assists him/her in the performance of the duties arising from the contract, even if the latter is an autonomous professional who does not have the duty to adhere to the instructions of the former. This issue is important in the relations between surgeon and anaesthetist, when the contract to perform the surgical intervention is concluded with the former who needs the assistance of the latter to fulfil the obligation that emerges from the contract. Regarding this problem, see the Decision of the Portuguese Supreme Court dated 28th January 2016 (Process no 136/12.5TVLSB.L1.S1). This decision is available at the address <http://www.dgsi.pt/jstj.nsf?OpenDatabase>, searching by the number of the process and the date the decision was issued.

3. Contract to provide medical care

Even if traditionally the agreement concluded between a doctor and a patient was not qualified as a contract¹⁸, today it is, unanimously, recognised that the relation between a doctor and a patient generated to the performance of a health care service by the former in benefit of the latter is a contractual relationship¹⁹.

Medical contract is an agreement between the doctor and the patient (who may be – legally or voluntarily – represented), binding both parties to duties, i.e., obligations. Regarding the core of the contract, the doctor is legally bound (has the obligation) to *treat* the patient, and the patient is legally bound (has the obligation) to pay the price of that technical service to the doctor.

These are the main obligations that bind the parties²⁰. But medical contract must be understood as a complex legal relationship²¹. Within this “framework relationship”²² multiple duties (obligations) are generated for both parties (doctor and patient), as the time goes

¹⁸ The rejection of the contractual character of the relationship between doctor and patient was based upon the high importance of the aims that medical activity is ordered to achieve (to heal the disease of the patient; to achieve his/ her survival).

¹⁹ The landmark decision of the French *Cour de Cassation's Arrêt Mercier*, dated the 20th May, 1936 had played an important role to the change of the perspective also in Portugal. About the change of paradigm in Portuguese Legal system, see R. Teixeira Pedro, *A Responsabilidade Civil do Médico*, pp. 56–62.

²⁰ „Primäre Leistungspflichten” or “Hauptleistungspflichten”, considering the expressions used by the German legal doctrine. See, for instance, K. Larenz, *Schuldrecht, I – Allgemeiner Teil*, München 1987, p. 7 and ff. For the influence of German theories in Portuguese Doctrine in this particular field, see R. de Faria, *Direito das Obrigações*, Volume I, Coimbra: Livraria Almedina, 1990, pp. 115 and ff, A. Varela, *Das Obrigações em geral*, Volume I, Coimbra, Almedina 2015, pp. 118 and ff and M. Leitão, *Direito das Obrigações, Vol. I. Introdução da Constituição das Obrigações*, Coimbra, Almedina 2016, pp. 77 and ff.

²¹ Inspiration comes from the German scholarship, as it is said that contractual relationship shall be envisaged *als gesamte Rechtsverhältnis*, K. Larenz, *op. cit.*, p. 26.

²² *Rahmenbeziehung*, borrowing german terminology. F. Herholz, *Das Schuldverhältnis als konstante Rahmenbeziehung (ein Rechtsgrund für negative In-*

by and the circumstances change. It is a dynamic process that evolves continuously²³.

As a consequence, besides the main obligations, other obligations (duties) may arise. On one hand, there are lateral duties or secondary duties²⁴, whose performance is needed in order to the full compliance of the contractual program. For instance, if a doctor has concluded a contract to perform a surgical intervention, he is not due exclusively to adopt the technical behaviour inside the operation room. He must implement other conducts that guarantee the accuracy of the surgical intervention: therefore some complementary exams are also in debt to assure the intervention may be successful.

On the other hand, behavioral duties (*Verhaltenspflichten*) emerge from the need to respect the “Good faith Principle”²⁵ in the performance of the contract²⁶. Those duties may be qualified as protection duties, information duties or loyalty duties²⁷. As a consequence the debtor of a health care service must adopt the conducts that prevent the occurrence of damages, while performing the contractual obligation – v.g. the medical devices have to be in good conditions

teresseansprüche trotz Rücktritt und Wandlung), in: *Archiv für die civilistische Praxis*, 130, 1929, pp. 257 and ff.

²³ About this idea of process that develops as time elapses, see K. Larenz, op. cit., p. 28.

²⁴ *Nebenleistungspflichten* or *sekundäre Leistungspflichten*, as it is expressed in German. See footnote 20.

²⁵ As is stated in article 767, paragraph 2 PCC, “The parties shall proceed according to good faith, in the fulfillment of the obligation, as well as in the exercise of the corresponding right”. This provision is line with article 227 that states that, in the process of negotiating a contract as well as in its formation, parties must act in accordance with the good faith principle. About this principle, see the study of A. Menezes Cordeiro, *Da Boa-fé no Direito Civil*, Coimbra, Almedina, Coleção Teses, 2001.

²⁶ These duties that are derived from the principle of good faith may exist in the benefit of third persons who are closely related to the parties. When the breach of these duties causes damages to those persons, they may claim a compensation grounded in contractual liability, benefitting from the more advantageous regime that was previously depicted in text.

²⁷ *Schutzpflichten*, *Aufklärungspflichten* and *Treuepflichten*, considering the expression used by the German legal doctrine. See footnote 20.

to be used. He/she has the duty to provide the appropriate information to the patient in order to assure that the latter can express his/her informed consent to the medical intervention²⁸. Finally, the debtor of a health care service is obliged not to disclose the information he/she comes to know in the context of this contractual relationship. These duties fall also upon the patient. For instance he/she has to provide accurate information²⁹ when asked to do so during the anamnesis.

4. The conditions of the compensation claim

As it was said above, irrespective of its ground, the emergence of a compensation claim depends on the cumulative existence of five conditions: a conduct of a person, the wrongfulness of that conduct³⁰, the guilt of the person that adopted the mentioned conduct, the damage and the causal link between the tortious conduct and the damage³¹.

The requirement of these conditions may be derived from the article 483 PCC³², as far as non-contractual liability is concerned, and from article 798 PCC³³, as far as contractual liability is concerned.

Let's consider briefly each one of these conditions.

²⁸ About the duty to inform, its scope and the way it have to be performed, in Portuguese Doctrine, see A. Dias Pereira, *O consentimento informado na relação médico-paciente. Estudo de Direito Civil*, Coimbra 2004, pp. 349–475.

²⁹ To define the scope of these duties, the judge must bear in mind that the patient is a layman.

³⁰ Usually the first and the second conditions (conduct and wrongfulness) are referred to as breach of the duty to perform.

³¹ For a comprehensive study of these conditions, see R. Teixeira Pedro, *A Responsabilidade Civil do Médico*, pp. 83–164.

³² The paragraph 1 of this provision states that “A person who, intentionally or negligently, unlawfully violates a right of another person or a legal provision directed to the protection of an interest of another person, is owed to compensate the damaged caused by that violation”.

³³ This provision states that “The debtor who, by his/her fault, fails to comply with the obligation becomes liable for the damage he causes to the creditor”.

4.1. Conduct

Firstly, it has to be identified a conduct that a person will be accountable for. The conduct may be either a positive or a negative conduct. As a consequence, civil liability may arise from an action or an omission.

It must be stressed that in the latter situation, it must exist a duty to act – to adopt the absent action that would have prevented the damage – that derives from a legal provision or from a legally binding agreement (v.g. a contract), in the light of article 486 PCC.

We may illustrate what we have just said offering two examples extracted from the Portuguese case law. A doctor may be held liable for the damages suffered by the patient if the former fails to diagnose the disease presented by the latter or if the first fails to provide the appropriate information to the latter. A doctor may also be held liable for the damages suffered by the patient if he/she applies to much X-rays or if he/she operates the wrong leg.

4.2. Wrongfulness

Secondly, the conduct must be qualified as wrongful, as it has violated a duty directed to the safeguard of a right or an interest worthy of legal protection of the damaged person. The infringed duty may be a general duty or a specific duty

In the first case, it will be a general duty that is imposed to all persons for the benefit of the legally protected interest of a particular person. By the infringement of that duty, a violation of an absolute right (right to life, right to physical integrity, right to health...³⁴) of the injured party takes place. It gives rise to non-contractual liability based on the practice of a delict.

³⁴ In Portugal there is not a list of interests that are protected *erga omnes*. In fact, in article 70 PCC, it is included a general clause that provides protection to all manifestations of personality.

In the second case, the violated duty will be a specific duty (an obligation) arising from a preexisting (contractual) relationship between two (or more) persons, as it usually exists between a doctor and patient, when medical care is provided outside the public health care system³⁵. By the infringement of that duty, a violation of a relative right of the injured party (the creditor, *in casu* the patient) takes place³⁶. It gives rise to contractual liability. As a consequence, wrongfulness, in this situation, is a devaluation judgment directed to the conduct that infringes the debtor's duty to perform. It means the failure to comply, as a deviation between the promised behavior (obligation) and the behavior actually adopted by the physician.

Here it usually is encountered a difficult problem in medical malpractice cases. The *vexata quaestio* may be summed up by asking: When can it be said that there has been a failure to comply by the physician? The lack of the desired result (the elimination of the health problem, the healing or the survival of the patient) does not mean that there has been a failure to comply. As a consequence, it emerges the need to define for each medical act, which conduct represents a correct fulfillment of the physician's duty. In this delicate operation, it is of paramount importance the distinction between the *obligations de moyens* and the *obligations de résultat*³⁷.

When an obligation is qualified as an *obligation de moyens* – as it often happens within the medical activity – the debtor does not guarantee the achievement of the result: he merely has the obligation “to apply the means” or “to apply the due diligence” in order to attain the result.

When an obligation is qualified as an *obligation de résultat*, the debtor is due to obtain a result. As a consequence, if this is not achieved, the debtor will be held liable for the damages suffered by the creditor. In the past few decades, Portuguese Courts, in an

³⁵ See above section II.

³⁶ The lack of performance, the delay in performance, and the imperfection of the performance may give rise to contractual liability if those conducts are a result of tortious actions or omissions by the physician (or by the person(s) the physician employs to perform the obligation).

³⁷ Regarding this distinction, see R. Demogue, *Traité Des Obligations en Général*, Paris 1925, t. V, no 1237, pp. 538 and ff.

increasingly number of situations, have qualified some medical obligations as *obligations de résultat*. It happened regarding aesthetic surgeries, surgical procedures, design of prosthetic devices and clinical exams that have achieved a high level of accuracy³⁸.

4.3. Fault

The conduct has to be negatively evaluated yet in another perspective. Besides being wrongful, it must be practiced with fault. In fact, to make the physician accountable for the damages, it must be concluded that he/she should have acted differently, in the circumstances of the case. A diverse behaviour ought to be demanded from the doctor in the situation he/she had behaved.

Fault means intentional or neglectful harm to the interests of the damaged person. As a consequence, the behaviour of the doctor must be either a negligent conduct or an intentional conduct (*dolus*). It will be qualified as a negligent conduct when the performance of the physician does not satisfy the standard of care, in the light of the *leges artis*, under the *bonus paterfamilias* criterion (article 487, paragraph 2 PCC), as he/she has deviated from the behaviour expected of a competent and reasonable physician.

There is intention when the physician held liable for the conduct adheres to the harmful consequences of his/her conduct. This

³⁸ See the decisions of the Portuguese Supreme Court dated 23rd March 2017 (Process no 296/07.7TBMCN.P1.S1), 1st October 2015 (Process no 2104/05.4TBPVZ.P.S1), 2nd June 2015 (Process no 1263/06.3TVPRP.P1.S1). In the decision of the same Court dated 26th April 2016 (Process no 6844/03.4TBCSC.L1.S1), regarding the contract for the provision of medical and surgical services with placement of prostheses, it is drawn a distinction between the acts of preparation of the prosthesis device appropriate to the anatomy of the patient – concerning these acts, the physician is bound to the fulfillment of an obligation of result) and the acts of application of the same device in the body of the patient according to the *leges artis* – concerning these acts, the physician is bound to the fulfillment of an obligation of means). All the decisions referred to in this footnote are available at the address <http://www.dgsi.pt/jstj.nsf?OpenDatabase>, searching by the number of the process and the date the decision was issued.

can happen when he/she is aware that his/her conduct will be the necessary cause or the contingent cause of the damage of the patient and he/she does not refrain from adopting the conduct. Lastly, there will be also an intentional tortious act if the physician acts in order to achieve that harmful consequence.

As far as civil liability is concerned, the role played by the species of fault is not decisive. A duty to compensate may arise from a negligent or an intentional behavior. The distinction may, however, be important for the quantification of the amount of compensation (article 494 PCC)³⁹.

4.4. Damages

The occurrence of damages is an essential requirement for the emergence of civil liability claim, given the reparatory purpose that is assigned to it⁴⁰.

In Portuguese legal system, compensation is awarded regarding economic damages and non-economic damages. As far as the former kind of damages is concerned, the compensation should cover not only the decrease of wealth but also the loss of increase of that wealth (loss of pecuniary advantages), in the light of article 564, paragraph 1 PCC. Consequently, the doctor held liable for the damage suffered by a patient may be condemn to pay an amount to reimburse him/her of the expenses incurred as a consequence

³⁹ See below section 5.

⁴⁰ The damage represents any loss caused in legally protected interests. At present, there is a trend to increase the circle of compensable damages. On the one hand, legal protection encompasses a growing number of interests that are elevated to the category of legally protected interests, and on the other hand, a greater diversity of attacks on such interests happens. Regarding this trend in Portugal, see M. M. Barbosa, *Lições de Responsabilidade Civil*, Cascais 2017 and R. Teixeira Pedro, *Da ressarcibilidade dos danos não patrimoniais no direito português: a emergência de uma nova expressão compensatória da pessoa – reflexão por ocasião do quinquagésimo aniversário do Código Civil*, in: *Obra dos 20 anos da Faculdade de Direito da Universidade do Porto*, Coimbra, Almedina, (being printed).

of the medical malpractice as well as an amount to compensate him for the lack of the profit he would have had benefited from, if he had not been the victim of the medical wrongdoing.

Portuguese Civil Code contains a general clause that recognizes compensation for the non-economic damages. As it is stated in article 496, paragraph 1, non-patrimonial damages have to be considered in the compensation *quantum* when they are “severe” enough to worth legal protection.

As a consequence, compensation may be awarded, for instance, for physical and mental pain (*pretium doloris*), aesthetic damages, loss of amenities of life or damage to sex life. The loss of life itself is a compensable damage under the Portuguese Legal system⁴¹.

4.5. Causation

Finally, it must be demonstrated the existence of a legally relevant link between the tortious conduct and the damages, under the provisions of article 562 and article 563 PCC.

The causal link plays a dual role. It is a condition for the emergence of civil liability (*an respondeatur*), as well as it represents the measure of the obligation to compensate (*quantum respondeatur*).

In Portugal, the prominent doctrine upholds that the wrongful act must be an adequate cause of the damage, in the light of the “adequate causality” theory⁴². As a consequence a twofold judgement is demanded in order to assess if the physician’s conduct is the *conditio sine qua non* of the damage, on one hand, and to assess if the physician’s conduct is an “adequate” cause of the damage, on the other hand⁴³.

Firstly, it must be ascertained whether the act of the physician was, in that particular case, a necessary condition for the production of the damage. Thus, the judge has to reconstruct the chain

⁴¹ As it can be inferred from paragraphs 2, 3 and 4 of article 496 PCC.

⁴² See R. de Faria, *op. c it.*, pp. 494 and ff, A. Varela, *op. cit.*, pp. 898 and ff.

⁴³ Regarding this twofold judgement, see R. Teixeira Pedro, *A Responsabilidade Civil do Médico*, pp. 148 and ff.

of events that preceded the consummation of the final state in which the patient is, removing from this factual *iter* the tortious act practiced or omitted by the physician. If, in this intellectual operation, it is concluded that, in such an hypothetical event, the patient would not have suffered the damage, then the tortious act of the physician constitutes the necessary condition for the verification of the harmful consequences.

Secondly, it must be assessed if the type of acts, as the one the physician has adopted, is appropriate, in general, to produce the kind of damage the patient has suffered.

In medical malpractice cases, very often, the problem arises on the first judgement because of the high difficulty to conclude what would be the exact development of the facts if the right act was performed by the physician⁴⁴.

This difficulty can be illustrated with an example of a situation in which the physician fails to diagnose a cancer because he/she behaves wrongly and negligently. Consider that the patient had had 60% of chances of survival, at the moment the right diagnose should be performed, and that the patient had solely 20% of survival, at the moment the disease is actually diagnosed. In such a case, if the patient dies, it is almost impossible for the heirs of the patient to prove that the doctor's wrongful act was the condition *sine qua non* of the patient's death⁴⁵.

As the burden of proof falls upon the patient – either if it is non-contractual liability or if it is contractual liability – the risk arising from the uncertainty of judicial awareness and comprehension of the factual situation will be borne by the patient.

⁴⁴ For further explanation of this problem, see eadem, *A dificuldade de demonstração do nexo de causalidade nas acções relativas à responsabilidade civil do profissional médico – Dos mecanismos jurídicos para uma intervenção pro damnato*, „Revista do Centro de Estudos Judiciários” 2011, nº 15, Lisboa 2013, pp. 9–62.

⁴⁵ The difficulty in the assessment of causality has increased in modern society. As a consequence the problem we are referring to in text is a problem that transcends medical malpractice cases. For a transversal study, see *Proportional Liability: Analytical and Comparative Perspectives*, eds. I. Gilead, M. D. Green, B. A. Koch, Berlin-Boston 2013, <https://doi.org/10.1515/9783110282580>.

Reacting to this difficulty, Portuguese Courts have already applied procedural mechanisms⁴⁶ to simplify the evidentiary task of the patient – v.g. judicial presumptions. On the other side, there was a so-called revolutionary decision that has accepted the compensation for the damage of loss of a chance, in a medical malpractice case⁴⁷.

5. The obligation to compensate

If the above mentioned conditions are met, an obligation to compensate will emerge. In that case, the same rules apply, irrespective of being based upon non-contractual liability or contractual liability.

As stated in article 562 PCC, the main aim of the obligation to compensate is to put the patient in the situation in which he would have been if the physician's tortious act had not happened. To achieve that goal, not only present damages, but also future damages may be compensated. The compensation of the latter depends on the foreseeability of its production (article 564, paragraph 2).

If it is possible to reconstruct the situation that would have existed, the compensation will be implemented *in natura* (art. 566 PCC). A surgical procedure may be performed, for instance.

Obviously, non-economic damage can only be compensated with the payment of a monetary sum, that will be defined by the court, in

⁴⁶ Regarding these procedural mechanisms, see R. Teixeira Pedro, *A Responsabilidade Civil do Médico*, pp. 327–373. As an example of a decision where the application of those mechanisms was discussed, consider Decision of the Portuguese Supreme Court dated 15th October 2015 (Process no 08B1800).

⁴⁷ It was the decision of the 1st Instance Portuguese Court of Lisbon, dated 23rd July, 2015 (Process no 1573/10.5TJLSB). The full text of the decision is available at the internet address http://www.verbojuridico.net/ficheiros/jurispr/pcivil/higinacastelo_negligenciamedica_perdachance.pdf (access: 25.03.2018 r.). About this decision, see R. Teixeira Pedro, *A perda de chance de cura ou sobrevivência: um remédio necessário para o funcionamento da responsabilidade civil médica? – a revisitação de um tema*, in: *Direito da Saúde – Estudos em homenagem ao Prof. Doutor Guilherme de Oliveira, Vol. II. Profissionais de Saúde e Pacientes. Responsabilidades*, coords. J. Loureiro, A. Dias Pereira, C. Barbosa, Almedina 2016, p. 83.

a judgement implemented in the light of equity, taking into account the degree of fault of the physician held liable for the damage, his/her economic situation and the economic situation of the patient, as well as other relevant circumstances of the case (article 494 PCC *ex vi* of article 496, paragraph 4 PCC).

Considering the same standards, courts may decide to reduce, in its extent, the amount of compensation for economic damages, in the sole case that the physician has acted negligently. As a matter of fact, this possibility does not exist when the damage is intentionally inflicted, as it is stated in article 494 PCC. According to this provision, the discretion of the court is exercised on an equitable basis.

It must be highlighted that contributory fault may play an important role in the extent of the compensation claim. If the patient does not follow the medical prescriptions and consequently new damages are produced or the already existing ones are aggravated, the courts have the power to reduce the extent of compensation or to completely eliminate it (article 570 PCC).

Usually compensation is payed as an *una tantum* pecuniary sum. Diversely, when continued damages are produced – as it often happens, in medical malpractice cases – the court may, at the request of the injured patient, give the compensation, totally or partially, the form of a temporary rent that can be updated, if circumstances change (article 567 PCC).

6. Concluding Remarks

In Portugal, civil liability of the physicians is regulated by the general rules of civil liability inserted in the Portuguese Civil Code.

This legal framework does not take into account the asymmetric nature of the relation that is established between the doctor, as a professional, and the patient, as layman.

As a matter of fact, in the light of the traditional distribution rules, the burden of proof falls upon the patient and the difficulty in the ascertainment of the conditions of civil liability works in detriment of him/her.

The patient, as consumer of a specialized service provided by a qualified professional should benefit from a special protection. Even if the legislator has not introduced any amendments in the law to correct the problem, courts have already tried to solve it, applying procedural mechanisms or innovative theories, such as the theory of the loss of a chance.

Any amendments to the legal *status quo* cannot neglect the noticeable dangers of over-accountability of physicians that will, probably, lead to the exercise of defensive medicine, in detriment of the patients.

STRESZCZENIE

Błędy w sztuce lekarskiej – przegląd głównych cech portugalskiego porządku prawnego

Niniejszy artykuł stanowi przegląd portugalskich ram prawnych w odniesieniu do roszczeń odszkodowawczych z tytułu działalności medycznej. Badaniu poddane zostaną podstawy odpowiedzialności cywilnej z tytułu błędów w sztuce lekarskiej, zaś w dalszej kolejności autorzy dokonają analizy warunków, które należy spełnić celem stwierdzenia, czy lekarz powinien ponieść odpowiedzialność za szkodę wyrządzoną pacjentowi. Szczególna uwaga poświęcona będzie kwestii związanej z świadczeniem opieki medycznej w oparciu o umowę oraz różnicom pomiędzy odpowiedzialnością umowną i pozaumowną. Na koniec rozpatrzony zostanie zakres oraz sposób określania kwot roszczeń odszkodowawczych.

Słowa kluczowe: błędy w sztuce lekarskiej; odpowiedzialność cywilna; odszkodowanie; porządek prawny Portugalii

SUMMARY

Medical malpractice – an overview of the main traits of the Portuguese legal system

This article offers an overview of the Portuguese legal framework applicable to compensation claims arising from medical activity. The grounds for civil liability concerning medical malpractice cases will be examined, and

consequently the conditions will be analyzed that must be met in order to consider that a physician should be held liable for the damage caused to a patient. Special attention will be drawn to the contract to provide medical care and to the differences between contractual liability and non-contractual liability regimes. Finally, the scope and the way to define the *quantum* of the compensation claim will be regarded.

Keywords: Medical Malpractice; Civil Liability; Compensation; Portuguese Legal System

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