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Medical Law – Challenges in Bosnia and Herzegovina

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REVIEW

SUMMARY

There are four types of responsibilities that arise on the basis of medical errors: a) Disciplinary (Punishment of the competent Association for restriction or revocation of the license); b) Civil liability (compensation); c) Criminal responsibility (protection of individual interests to protect the interests of the society); d) Violation (fine for minor damage) To increase the number of criminal proceedings mostly influenced the lack of compensation system for harm because the injured party considered that after the positive completion of criminal proceedings can easily make a claim. Therefore they do not address the local Association or Ministry of Health to investigate a case, but to the criminal proceedings to try to get compensation. It turned out that this is a dispute that is usually long lasting, with an uncertain outcome, which does not bring satisfaction to the plaintiff, and had a series of negative consequences in the general approach to the treatment of patients known as “defensive medicine”. As a result of the increased number of lawsuits due to medical errors are caused the following negative consequences: a) Great vigilance of physicians in communicating with patients, who must sign a 2-3 statements when entering the hospital, and that sometimes are not really familiar with the nature of illness and required treatment; b) Significant increase in the number of unnecessary tests which are required by doctors to insure themselves from the potential liability, which at a given moment are not really necessary; c) Lack of medical error reporting system allows individuals to avoid their reporting, which affects the course of treatment and prognosis; d) Often avoidance by the doctors to perform some necessary procedures that are risky, with increasingly open refusal to cure a poor prognosis case which they left to the next level of treatment. Disappears so called “heroic approach” to the treatment in the B&H health system known from the war period and gives way to extreme caution, because the doctors expect that their every procedure will be under scrutiny; e) All of these factors create a mode known worldwide as “defensive medicine”, which increases the cost of treatment and lower level of health care; f) Reduced volume of education, because older physicians are reluctant to let residents decide on specific work procedures and operations; g) There is already a critical shortage of some medical specialties, and inevitably follows increase in price from these service areas and increase of the waiting list.

Keywords: medical law, challenges, Bosnia and Herzegovina.

Growing problem of complaints against the medical institutions and doctors of negligence and “unconscientiously treatment”, as well as many unresolved ethical and legal issues in our health system are the main reasons for making this kind of publication (1, 2, 3).

During the last year the doctors for the first time met with lawyers to speak openly about what bothers and concerns us which is good and important beginning of open discussion about the doctor’s responsibility and guilt, security and quality of medical services, medical errors, medical experts credibility in the courts, unscrupulous lawyers who “hunt in restless waters”, and many other

challenging and current issues. Medical law is not closed system of norms that are gathered in one legislative act, it is a different corpus of ethical standards and legal regulations that determine the medical activity and properties of people who carried out this activity and their relationship to the users of health services.

Legal texts which treat a wide area of health rights belong to different areas of law such as constitutional, criminal, civil, administrative, family, occupation, social, international, etc. However, there is a tendency that these different sources of medical law should be collected in one place, to form a new discipline that would just be to

teach at the biomedical and legal faculties. At least 15 to 30 hours of instruction during one academic year should be given to the elements of medical law, basic concepts of quality assurance and safety of health care, knowledge of the mandatory minimum should be tested during professional medical/doctor (“State”) examination of health care professionals and specialized exams.

Sad fact is that young doctors and nurses, pushed upside-down in practice, does not have the basic knowledge about quality assurance and safety of health services, nor have the basic information about what are the medical and non-medical risks to health, which are the medical errors and how to prevent them in practice. On the contrary, they emerge from the classroom with two deeply rooted myths – the one about perfection and the one about punishment, which is broadly supported and placed by the media.

The myth of perfection says: If people try enough, the error cannot happen, while the media add: health professionals must be sinless, because they are dealing with the human life! Another myth says—if you punish people who make mistakes, they will not do them anymore or will reduce them. Media add: find the responsible for the mistake, and it is known—a doctor! The situation is no better in health care institutions: the first reaction occurs when an error is to blame someone, even when it is obvious that the error is caused by many different reasons. But, blaming an individual does not change the factors that led to errors and it is certain that the same or similar error will happen again.

Prevention of errors and improvement of safety for patients requires a *systematic approach* in order to act in those situations that contribute to the emergence of errors. Employees in the health care system are, probably, most educated workforce and most dedicated profession compared with any branch of the economy or industry. The problem is not in people, the problem is the system that must be created in such a way that provides maximum safety for all patients. That is why today is not about *medical error*, but the *medical error*.

Our mistakes are a clinical dark side of the moon, always present but invisible. About the medical errors we are reluctant to speak, adverse events are covered up and pushed under the carpet, leading to the same or similar errors that could be prevented. This is what medical profession of developed world clearly understood, and now all of them work to improve the environment in which adverse events will be reduced to a minimum so that the health institutions build the culture of safety. Patients forums growing everywhere and are increasingly involved in strengthening their own security by organizing number of conferences dedicated to risk management, drawing up recommendations for improving the security services, patient safety are placed in the forefront of all health projects and initiatives that actively involve WHO, Council of Europe, European Commission, OECD, Ministries of Health of many countries, etc.

In Article 10 are the statements about the need for the adoption of a Charter of Patients’ Rights in B&H, which

points out the fundamental right to patient safety. The latest recommendations of the Committee of Ministers of the Council urges the European member states to build a security system of the patient who relies on creating a culture of safety, security assessment of patients in health care facilities using indicators, reporting on incidents that impair the safety, better use of data and sources of information on patient safety, strengthen the role of patients and citizens, education, research in this area, implementation of national quality policies and established legal frame.

Another sad fact is that our Association of Physicians have defined codes of ethics that would track the rate of rapid progress in health, health technologies, and medicine in areas of transplantation, artificial insemination, various aspects of patients rights, such as informed consent to medical procedures, the right to access to medical records, patients’ rights to be informed, the right to choose medical institutions and doctors, the right to another opinion, right to self-determination (e.g. euthanasia), the right to data protection (Law on Data Protection in Health Care in Federation has not yet been adopted!).

Also undefined are: liability for any damage caused by medical devices, new methods of treatment, clinical studies and research on people (e.g. genetic testing); acceptance of gifts and corruption, relations between doctors (e.g. unconventional practices and abuse of other doctors), self-profession and continuing medical education, re-evaluation of knowledge and skills of physicians, physician liability in cases of torture and inhumane actions, involuntary treatment, medical publicity and advertising, conflicts of interest in health, the doctor as the expert and expertise, new forms of communication (e.g. electronic mail), ownership of medical/patient information, confidentiality and disclosure of health information to insurance companies; sexual maltreatment in medical practice, self-treatment or treatment of closest family members; HIV infected patients and doctors, etc, etc.

Particular issue is medical expertise. In short, there are no clear criteria for the election of physicians as court experts, or are consult the academic institutions during election which are—the professional associations – most relevant to assess the competence of candidates for experts in a particular clinical area. Also, there is no system of supervision and evaluation of medical expert. Unfortunately, the Physicians Association so far did not taken any actions in the regulation of medical expertise and comprehensive information to members on the legal framework for governing medical liability for damages incurred as a result of medical errors, nor anything is undertaken to prevent any aggressive actions of lawyers who run a very tendentious disputes against doctors and health facilities, in order to get certain benefit.

Particularly interesting and important are questions of liability insurance that must be introduced into our health care system. The new Scandinavian security model in which the fault does not require the institution and/or a doctor but the patient suffered damage will automatically receive limited benefits under the defined tables for compensation. This model of insurance is necessary if

one wants to implement the legal requirement to free medical report (confidentially or anonymously) of all incidents to learn from them and to be committed that mistakes in the future could be prevented. Legal experts in our country believe that there is no basis for passing the Law on Insurance of the injured from criminal liability and for compensation.

Also, the Criminal Law of FB&H cover the most contentious issues relating to the criminal responsibility of health workers, but it is questionable how much in practice these legal provisions are implemented. It is not a problem in the legal arrangements which mainly cover everything that could be subject to criminal law liability, however, the question is how many doctors themselves, as the court assistants, with their professionalism and professional knowledge can help criminal judge to determine the legal status of matter. In this sense it would be properly to determine whether or not there is criminal liability of physicians or other health care professionals, and if that is the case, it is very important whether it is planned, and for carelessly should be followed by the penalty in relation to those previously qualified.

In order to avoid the resulting negative trends for patients and physicians in FB&H, in relation to the responsibility of physicians, it is necessary to try to create a medical liability system that will

- Really work in the current circumstances in FB&H;
- To protect patients from the mindless actions of individuals or medical damage resulting in failure to provide quality of services that guarantee the current level of patient health care in FB&H;
- which will protect doctors from unfounded charges. Currently the best solution would be immediate introduction of compulsory insurance of medical institutions and physicians from deleterious responsibility. At the same time we should actively work on the introduction of the regulation of so-called civil liability system “no fault compensation”–system of pecuniary and pecuniary damage which is best demonstrated in a number of developed countries. In our country, given the system of financing should

be introduced “no fault compensation” system who participated in the solidarity of health institutions, physicians and health insurance institutes. Introduction of the Institute’s health insurance system to ensure patients greater impact on the engagement of the Institute to increase the quality of services and granting rights to the insured more pursuant to the financial possibilities.

It would also be necessary (1):

- Introduce a legal obligation of making a medical expert analysis on the monitoring of errors, complications, failures, and identify individual areas and situations that often produce errors;
- Sanctioning responsible persons of institution who fail to provide such a monitoring of mistakes and take measures for their elimination;
- Reporting all identified errors to corresponding doctors chambers, which must implement the procedure;
- Introduce an obligation of cooperation of justice (Prosecutor) and the competent doctors association in all cases with criminal charges against doctors;
- The introduction of clinical guidelines and guides in everyday practice;
- Affirmation of the legal role of the Agency for accreditation and licensing of physicians in the introduction of new methods through the association, in a unique way in FB&H;
- Exponentiation of patient’s responsibility with regard to the instructions of physicians.

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