THE MEDICAL LIABILITY IN SPAIN

The present article is trying to provide people who know nothing about the subject a summary of the different systems to demand medical liability in Spain although the complexity of the issue cannot be totally brought together in such a short space.

Medical civil liability.

Two aspects should be distinguished: the one which derives exclusively from the careless conduct of the doctor and the responsibility hold to the medical centre.

It is important the distinction between the responsibility arisen from a contractual and extra-contractual relationship, as their foundations are different and their deadlines to execute the action are different as well, in the last case much shorter.

Generally, the civil liability can be exercised on the margin of the criminal responsibility if the civil action has been kept in criminal proceedings. It will affect damages occasioned by the private medical centres, opposite the patrimonial liability of the Public Administration which will be kept for the action of public hospitals.

Any action or omission that causes damage for any kind of fault or negligence will provoke the birth of the civil liability of the health worker and/or the medical centre. Unlike offenses, where the civil liability will arise only if the described behaviour is included in certain articles of the Penal Law, in the case of civil liability its acceptance will be taken by the Judge in accordance with the articles of the Civil Law, its jurisprudence and the proven result of the lawsuit.

Essentially, the distinction between the two big fields of civil liability (contractual and extra-contractual) will be done according to if there is a contractual entailment of if there is not or if the behaviour –even existing an extra-contractual entailment- is alien to the contract, as long as we are dealing with private doctors or medical centres. The regulation of both cases is different (contractual or extra-contractual), although the purpose of both systems is to compensate for the damages.

Let’s keep in mind that the current health professional usually works in a team, although sometimes they work individually, that is why it is important to distinguish the performance of each member of the team in the production of the damage.

In order to have liability we need an action or omission which produces damage, a bond or tie between one and the other and that there is no obligation to put up with the damage as it is antilegal.

About the medical issues, these questions will be related to the performance of the health worker according to the “lex artis”, that is to say: the habitual medical practice and techniques suitable for the patient according to the medical advances and the available means and resources.

Furthermore, the relation of the contractual bond with the health worker has been seen as a contract for a specific project or result if it is not a case curative medicine but voluntary (ex. cosmetic surgery or ophthalmology to avoid the use of glasses, according to recent jurisprudence). On the contrary, the purely curative medicine will impose the use of all the scientific means of the centre and, therefore, there is not a obligation to obtain a result but a leasing of a service.

In the curative medicine the Spanish jurisprudence has been establishing an obligation of means, that is to say, it is not a leasing of a project with obliges to produce a favourable result but, just like the relation between lawyer and client, it is a leasing of services, medical services to develop the curative process (in order to get some improvement and/or recovery) with all the technical and human means within their reach, because the doctor, as a Supreme Court states, is not obliged to cure. The voluntary medicine (not curative) might be more like a contract for a specific project or result, but normally our Courts deal with the leasing of services.

The fault of the medical professional, with omission of the demanded diligence, will be stated in each case according to the above mentioned circumstances: the obligation of having all the means and knowledge but not the result.

The conclusion is that if there is a harmful result as a consequence of a negligent behaviour, there will be the right of compensation except if the evidence is not reflected in that behaviour and there is damage all the same. That is to say, the guilt or negligence will have to be proved and this proof corresponds to the plaintiff. It is convenient to emphasize that the Supreme Court has already stated that the legislation on consumers does not apply to medical liability as such, only to the organization of health services, but not to the responsibility of the medical professionals.

Liability in the Administrative scope: Public Health.

Even it does not seem so, proceedings against the Autonomic Administration must be opened within a year since the service or the recovery took place or the definitive effects were determined.

By means of an administrative file of patrimonial responsibility that in all probability, will be refused and will end in a case before the judicial administrative-litigious order.

In order to have a right of being indemnified, it must be proved, apart from the damage, the consequence of the wrong operation of the public service. In this case the medical responsibility is not different from the common patrimonial responsibility of the Administration, but there are certain features typical of the medical field.

Although the casuistry is varied and some jurisprudence has been objectifying the public medical responsibility to a larger extent the private one (“objective” responsibility means that is independent from the fault or negligence when there is a causal bond between the damage and the administrative performance), generally the responsibility will be “by means” and not “by result”, according to the abovementioned section referring to civil responsibility.

Although there are a great many of resolutions as far as the waiting list is concerned and, above all, the medical emergency public service where the service is rendered under an emergency situation and the professional must follow a series of protocols and minimum rules in his performance beyond diagnosis and tests possible or not in those delicate moments. In those cases it will be necessary a causal link between the medical error and the produced damage or, in other words, a real and effective damage, financially evaluable and that the patient should not bear. To justify the relation or link of causality the most important proving element for the plaintiff will be a medical expert report and it will be convenient to obtain the complete medical history of the patient. This request will be submitted to the autonomic regulation, and it will not be refused to the patient or his heirs. This medical history will be extremely important for the expert that is doing the report, beyond the documentation of the performance which produced the damage.

The liability in the criminal field.

If we excluded the genetic manipulation and abortion, the typical behaviour of medical professional when they are accused in the criminal sphere will be injuries and homicides, when life or personal safety is injured.

There is an important second group into the demand of civil responsibility derived from the criminal offense that is, the performance without the consent of the patient or when it is inadequate or incomplete.

There are another offenses of different variety: omission of help, emission of false certificate, intrusiveness, violation of professional secret, drug-taking, change or simulation of medicines, etc.

The offense of the refusal of health assistance or its retirement is not related with the cases when the assistance is rendered but it is incorrect or insufficient as in this case we are speaking about offenses against life or injuries.

In Spain the percentage of sentences against health professionals in the criminal field is a small percentage with regard to the number of proceedings which end in a trail. Nevertheless, the proven facts of a criminal sentence link blind the judges of different legal frameworks (civil, labour, administrative) and the affected person will able to exercise both the criminal and civil responsibility at the same time or, on the other hand, he can exercise only the civil responsibility and keep the civil action for the future.

Actually, the criminal law is an extreme option in view of the existence of another jurisdictional scopes (principle of minimum intervention of criminal law), being the gravity, both of the result and above all the lack of skill or the particular error, the criteria the judge will consider to apply this principle closing or not the criminal case, as well as judging the possible offense in the case of a trial.

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