Rom J Leg Med [30] 143-148 [2022]
DOI: 10.4323/rjlm.2022.143
© 2022 Romanian Society of Legal Medicine

STUDY ON MEDICAL MALPRACTICE INSURANCE IN ROMANIA

Rares-Vasile Voroneanu-Popa[1], Richard Constantinescu[1], Veronica Ciocan[2,*], Mircea Lazăr[3], Beatrice Gabriela Ioan[1,4]

[1] "Grigore T. Popa" University of Medicine and Pharmacy, Faculty of Medicine, Iasi, [2]"Victor Babes" University of Medicine and Pharmacy, Department of Forensic Medicine, Bioethics, Medical Ethics and Medical Law,Timisoara, [3]"Ion Ionescu de la Brad" University of Life Sciences, Faculty of Veterinary Medicine, Iasi, [4]Institute of Legal Medicine, Iasi, Romania

Abstract: *Introduction.* Malpractice insurance - professional liability insurance - is a subject of interest in both the medical and legal areas. It has a dual protective role: for the practitioner and for the patient. Our study aimed to analyse the legal provisions in Romania on medical malpractice and malpractice insurance and how they are reflected in insurance contracts.

Materials and methods. Six professional liability insurance contracts for medical specialties offered by insurance companies operating on the Romanian market were analysed for the proposed study.

Results. The legislation governing the medical field stipulates that malpractice insurance is mandatory, but insurance companies only cover certain damages and the contracts analysed have different clauses.

Conclusions. The different clauses in insurance contracts can make it difficult for the doctor if he or she does not have sufficient knowledge. The medical system needs to be shaped by legal provisions that outline a well-defined legal framework so that potential problematic situations are covered by law.

Keywords: malpractice, medicine, insurance, protection, damage.

INTRODUCTION

In Romania, the civil liability of medical personnel is regulated by Law 95/2006 on Healthcare Reform. According to Article 653, malpractice is "a professional misconduct in the exercise of the medical or medico-pharmaceutical act generating harm to the patient, involving the civil liability of medical personnel and the supplier of medical, sanitary and pharmaceutical products and services". The category of medical personnel includes: "doctor, dentist, pharmacist, nurse and midwife providing medical services" [1].

In the legal literature, different ideas have been outlined regarding the nature of liability in the case of medical malpractice. Thus, on the one hand, it is argued that we are in the presence of a tort or extra-contractual liability, and on the other hand it is argued that medical liability is contractual. However, the obligations of the medical professional do not arise by virtue of a contract, so we are entitled to consider that it is a professional liability specific to medical personnel, which intervenes for damage caused by a professional error or by the failure to fulfil obligations laid down by law through mandatory rules [2].

The civil liability of medical personnel can be incriminated either for the technical aspects of the profession (damage caused by error, i.e. negligence, imprudence or lack of sufficient medical knowledge, in the context of preventive, diagnostic or treatment procedures), or for non-compliance with legal provisions arising from the ethical principles underlying medical practice (damage caused by failure to comply with legal regulations concerning confidentiality, informed consent, the obligation to provide medical assistance, or by exceeding the limits of competence) [1].

Studies conducted in Romania that have analysed the issue of complaints made by patients or their relatives against doctors have shown that problems related to the relationship between doctors and their patients or their families - such as maintaining

*Correspondence to: Veronica Ciocan, Victor Babes University of Medicine and Pharmacy, Piața Eftimie Murgu 2, Timișoara 300041, Romania, E-mail: veronica.ciocan@umft.ro. All authors contributed equally to this article.

confidentiality, obtaining informed consent or poor communication - are important reasons for complaints [3,4].

Liability for damage created in the course of medical treatment is individual and proportionate. Liability is also personal, so guilt or fault will have to be proven. Moreover, the notion of professional error is not limited, but includes any mistake that the doctor may make. However, it is important that the patient has suffered harm as a result of the doctor's error. Nor should we forget that the doctor's obligation is one of means and not of result. Thus, the doctor does not guarantee that he/she cures a patient, but only that he/she makes every effort to achieve this result. There are also some exceptions to the principle of personal liability, in those situations where the damage is caused by a failure to fulfil medical obligations of result, such as the obligation of safety or the obligation to inform the patient [2].

Public or private health establishments, as they are health care providers, are also liable for damage caused in the activity of prevention, diagnosis or treatment [1], in certain situations. Moreover, medical practice today is constantly evolving, and the organisational system of hospital units must comply with quality requirements, so that whenever healthcare is defficient, the institution is held liable [5].

Public or private health establishments will also be liable for damages caused, either directly or indirectly, to patients, resulting from non-compliance with the internal regulations of the health establishment. Health establishments are also liable in civil law for damage caused by medical staff who are employed jointly and severally with them, a situation covered by Article 1373 of the New Civil Code, i.e. the liability of the principal for the agents. Therefore, the principal (the hospital) will be obliged to repair the damage caused by its agent (the doctor), whenever the act committed is related to the duties or purpose of the functions entrusted to him [6].

Utility providers to health facilities, whether private or public, will be liable in civil law for damages that are caused to patients as a result of inadequate utility supply. As in the case where the mistake was committed by the doctor, in order for the suppliers to be liable, there must be: wrongful act, damage, causal link, fault [7].

Malpractice claims are a reality in Romanian medicine and have an upward trend [4]. A study that analysed the complaints submitted by patients or their family members to the Monitoring and Professional Competence Commissions for malpractice cases in the region of Moldova showed that the number of complaints increased from 6 in 2007 to 16 in 2019, totalling 153 complaints during this period [8]. The same upward trend is also recorded by the complaints analysed by the Superior Disciplinary Commission of the Romanian College of Physicians, from 112 cases in 2006 to 267 cases in 2018, with a total of 2394 cases in the period analysed [9].

Medical personnel, regardless of where or in which institution they work, are required to hold a malpractice insurance [1]. Although the obligation to hold a malpractice insurance for all medical staff in Romania has been stipulated in the legislation since 2006, a survey carried out in 2020 in our country shows a low level of confidence among doctors in the usefulness of an insurance. The reasons for this are: the low level of the amount that can be paid in case of a malpractice situation, the existence of many exclusion clauses and, mainly, the lack of coverage for moral damages, as well as the uncertain legal status of malpractice insurance [10].

Our study aimed to analyse the legal provisions in Romania on medical malpractice and malpractice insurance, and how they are reflected in insurance contracts.

MATERIALS AND METHODS

For the proposed study, six professional liability insurance agreements for doctors in medical specialties offered by insurance companies in Romania were analysed.

RESULTS

Risks covered

With regard to the risks covered, in principle, the contracts do not provide for major differences. Thus, the contracts cover those damages resulting from negligent acts resulting in bodily injury, sickness of patients or material damage to their property and the legal costs to which the insured person will be liable.

One of the insurance companies offers as a benefit the coverage of the amounts resulting from the proceedings before the Monitoring and Competence Commission for malpractice cases, in case the doctor can be held liable. This is in fact the cost that the patient has to bear, since, as stipulated in the provisions of Law 95/2006 on Healthcare Reform, the patient has to pay some fees in order to use the procedure before

the Monitoring and Competence Commission for malpractice cases.

There are many examples of risks that insurance companies do not cover, and they are in principle similar. So, if we look at insurance policies, we can see that, for example, they exclude compensation if the patient has been infected with HIV or other viruses (with regard to the latter, the examples are varied, ranging from "other viruses undetectable at the current level of medical science" to the hepatitis virus, and so on). Also not covered is damage in clinical trials resulting from the testing of drugs, the use of equipment that is not approved or genetic engineering activities.

With regard to the provisions that are only partly common, some insurance companies do not cover damages caused in the event that the doctor exceeds his/her competence. In the case of damage caused as a result of unfavourable working conditions in health establishments, some contracts stipulate that they will not compensate if the conditions of practice are unfavourable, while other companies do not lay down provisions to this effect.

Payment of moral damages

In all the insurance contracts analysed by us, it is stipulated that moral damages can only be covered by additional payments by the doctor.

Retroactive date

The retroactive date is an important component of professional indemnity insurance policies. It can be defined as the date from which the insured's malpractice acts, resulting in harm to patients, for which they first make written claims against the insured during the period of insurance, are covered [11]. All the contracts analysed provide for a retroactive date, but in different ways.

One of the contracts states that the doctor is covered retroactive for a period equal to 3 years. However, the insurance company imposes an additional condition: there must have been a previous insurance policy with the same company, with no periods of time not covered.

The contract from another insurance company states that the retroactive date is 36 months, and if the policy has been renewed with the same insurer and there are no break periods, the 36-month period can be extended and negotiated by both parties. Other companies have also chosen to regulate this issue in a simpler way: those claims that are incurred 36 months before the insurance is taken out will also be covered, without offering any other benefits or compensation.

Obligations of insured persons

With regard to the obligations of policyholders stipulated in the contracts, we can see that there are remarkable differences. For example, some companies require that the claim be notified within 3 days of becoming aware of the damage, while others stipulate a period of 5 days. Moreover, perhaps one of the most questionable clauses is the one found in a contract which stipulates that notification will be made immediately, but at the latest by the time the policy expires, of any claim of which the doctor has become aware and which is directed against him/her.

In all the contracts analysed, there is also an obligation of honesty on the part of the doctor, namely, to declare, in a truthful manner, details of the professional activity that he/she carries out, as well as the obligation to inform in the event of essential changes in the profession carried out, which could influence the contractual clauses. Failure to provide the required information may result in penalties or even termination of the contract.

Territorial scope

With regard to the territorial scope, the policies under consideration are only effective in the event of an injury if the medical assistance was provided in Romania.

Termination clauses

As to how the insurance contract can be terminated, the provisions of the New Civil Code must also be considered, so the doctor must send a notice at least 20 days before the date from which he/she wants the policy to be invalid. The insurance company also has the right to unilaterally terminate the contract if the obligation to pay the insurance premium is not met and if it finds that the data declared by the doctor are not real.

DISCUSSION

The idea of insurance arose because of the certainty of the existence of risk and the need to avoid and share the consequences of its occurrence [12]. Operations based on insurance have historically been an important component of companies, both legally and economically.

In a document dating back 6500 years, it is mentioned that the stone cutters of Lower Egypt set up

a relief fund, made up of contributions from everyone to cover the damage caused by various disasters, such as earthquakes or floods [13]. In Babylon, the people who owned caravans or transport ships made various agreements whereby, if they fell victim to a robbery while the goods were being delivered to their destination, they would jointly bear the expenses.

In Greece and ancient Rome, there was a type of loan contract known as foenus nauticum (Marine interest), which involved taking out a loan for the payment of goods to be transported by ship at sea, to be repaid only if the ship reached its destination [14].

Thus, insurance arose from the individual's need to have a security over his/her property against risks which may arise, over which he/she has no control and by the occurrence of which he/she may suffer considerable damage [15]. By paying a reasonable sum, the individual is placed under the protection of a company against events which cannot be foreseen. In the event of the occurrence of a so-called "insured risk", the insurer will pay an amount which is determined in proportion to the amount of the premium paid.

Currently, in Romania, as a condition for the validity of the individual employment contract, as well as the right to practice of medical personnel, a malpractice insurance is required [1].

Law no. 32/2000 on the activity and supervision of insurance and reinsurance intermediaries establishes that the insured is the person (natural or legal) who concludes the legal insurance relationship with the insurer [16]. The insured risk is the possible but uncertain future event for which the insurance is concluded [17].

Defined by Art. 2199 para. (1) of the New Civil Code as the agreement whereby "the insured undertakes to pay a premium to the insurer, and the insurer undertakes to pay compensation, as appropriate, to the insured, the beneficiary of the insurance or the injured third party in the event of the insured risk occurring" [6], the insurance contract is: consensual, because written form is required ad probationem and not ad validitatem [18]; synallagmatic, because both the rights and the obligations of the contracting parties are reciprocal and interdependent; random, because, for the insured, the value of obtaining the benefit depends on an uncertain event, which may or may not occur; onerous, because, in concluding it, the parties have in view the obtaining of pecuniary benefits. Depending on the way in which the obligations are performed, they are either sequential or instantaneous, also known as uno ictu. From a legal point of view, the classification is important in the event of non-performance for which the debtor is responsible or for improper or late performance [19]. Whereas a legal act with immediate performance has a subject-matter consisting of either one or more elements which are executed instantaneously, a legal act with successive performance involves the execution of obligations over time. Thus, we are dealing either with a continuous performance, which lasts for the entire period for which the agreement was concluded, or with performances which are repeated and which are consumed at certain intervals.

Regarding the content of the contract, as already mentioned, it is a synallagmatic contract, which means that both parties have both rights and obligations. The main obligation of the medical personnel is to pay the agreed insurance premium. The legislator considered that, for the security of the civil circuit, both the level of the premiums and the terms of payment are negotiated in advance. Moreover, the legal provisions lay down the obligation for the doctor to inform the insurance company if he/she takes out a new policy with another insurance company and the obligation to notify the existence of an action for compensation within a period not exceeding three days from the date on which the defendant became aware of the existence of the action.

The insurer's main obligation is to pay the damages caused by the tort. However, in order for the insurance company's obligation to continue, there must not be any causes of liability or exclusion from the insurance contract. If the doctor's actions caused the patient's death, the obligation will be enforced against the patient's heirs. If the civil liability of the insured is established with certainty, compensation may also be awarded amicably [20].

Regarding the minimum legal limit of insurance, the current law provides for the following thresholds: family doctors and general practitioners - 12,000 euros; specialist doctors- paraclinical specialties - 20,000 euros; specialist doctors - medical specialties - 37,000 euros; specialist doctors - surgical specialties - 62,000 euros [21].

Current legislation provides that the insurer is obliged to pay compensation for damage caused by the insured to persons who have been subjected to medical malpractice, and for the costs of the court proceedings, regardless of whether the action or inaction of the medical staff in question resulted in personal injury or death. The legislation therefore provides a legal framework that insurers must comply with and, in this respect, all the insurance contracts we have analysed comply with the requirements.

Damages can be classified according to several criteria, from whether or not they could have been foreseen at the time they occurred, to their intrinsic, pecuniary, or non-pecuniary nature. From the point of view of the issue of moral and material damages in the area of liability for malpractice, of interest are pecuniary and non-pecuniary damages. The former is based on an economic content, which means that it can be valued in money. Non- pecuniary damages, on the other hand, are harmful conditions of the wrongful act which cannot be evaluated in monetary terms and result mainly from damage to human personality, such as damage to a person's honour, reputation, dignity, or prestige [22]. The amount of moral damages that a patient is entitled to claim is not subject to any objective method of quantification; the amount of moral damages that a patient ends up receiving is assessed by the courts on the basis of subjective criteria [10]. Moreover, our study shows that moral damages are covered by insurance companies, subject to additional payment by the doctor. However, the need for coverage of moral damages is a reality. While material damages will be easily proven and there is some predictability, moral damages, as already mentioned, are established on subjective considerations. The court can therefore decide whether or not to grant such damages, but it will assess the amount in the light of all the evidence in the case. The reimbursement of additional payments to cover non-pecuniary damage appears both as a security for the doctor and the patient and as a necessity in a system of law which has not provided for certain and objective criteria for assessing moral damages.

Material damage therefore has the advantage of being materially determinable. An eloquent example is the act of a doctor who, as a result of an incorrect medical intervention, has partially or totally reduced a person's capacity to work, so that the person's income is reduced either to a certain extent or totally. Also, if the patient has died, the funeral expenses incurred are also material damage. Article 1390 of the new Civil Code is also of interest in this respect, stating that "Compensation for damage caused by the death of a person is payable only to those entitled by law to support from the deceased" [6]. Thus, the law does not give any person the right to claim compensation for the loss of a loved one, but only those persons who are entitled, such as descendants. However, para. (2) of the same article provides that the court may also award compensation to another person who was the deceased's current dependant, even if there is no legal obligation to do so.

If the insured person has taken out more than one insurance policy, compensation will be paid in proportion to the amount insured by each insurer. The insured person is also obliged by law to inform the current insurer of the conclusion of new insurance contracts. The obligation to inform is closely linked to the good faith of the contracting parties in the performance of the contract. Good faith is presumed and the person claiming bad faith must prove it [18]. The performance of the contract must be done in such a way that both parties benefit from what they intended when they entered the contract, and this requires proper conduct.

The insurance company has the right to bring an action against the natural or legal person responsible for causing the damage in certain situations, such as: the occurrence of the damage due to: "intentional violation of healthcare standards", as a result of "hidden defects in medical equipment or instruments or unknown side effects of the medicines administered", non-compliance with the medical standards in force, lack of informed consent of the patient, but also in cases where the damage was caused by administrative deficiencies of the medical establishment [1].

In Romania, the institution responsible for authorising, regulating, supervising, and controlling entities whose object of activity is insurance and reinsurance is the Financial Supervision Authority. In order to provide social security, this institution has drawn up two extremely useful guides for both insurance companies and professionals in the medical sector: "Guidelines for medical malpractice insurance" and "Consumer's guide. Medical malpractice insurance".

According to these documents, the doctor has the right to be fully and accurately informed, even before concluding the contract, of all the conditions it contains and of the possibility of additional risks to be borne by the insurance company [23].

The insurance contract must contain information on: the definition of each insured event and the indemnity payable under the insurance in the event of the insured event; the maximum limit of indemnity; exclusion clauses; the time when the contract takes effect and the time when it ceases to have effect; the contractual arrangements for the execution, suspension or termination of the insurance agreement; information on the retroactive date; procedures for settling any disputes arising from the execution of the contract [24].

In conclusion, the healthcare system needs to operate within a well-defined legal framework so that potential problematic situations are covered by law.

Taking out professional indemnity insurance (malpractice insurance) is a real challenge for doctors. Even if, at first glance, contracts covering damage caused by the practice of the profession contain the same clauses, in reality they are different, which can make it difficult for a doctor if he/she does not have sufficient knowledge. Although in principle the risks covered by insurance companies are similar, there are also notable differences which insured persons should consider. Also, as each medical activity has its own specificities, there is also the possibility of adding customised clauses so that protection is enhanced.

Malpractice insurance plays a key role in the medical profession, protecting the rights and interests of the patient as well as the doctor. This is why it is important to make an informed choice, with the guidelines issued by the Financial Supervisory Authority providing important support.

Conflict of interest

The authors declare that they have no conflict of interest.

References

1. Parlamentul României, Legea nr. 95/2006 privind reforma în domeniul sănătății, publicată în Monitorul Oficial nr. 652 din 28 august 2015, disponibilă la https://legislatie.just.ro/Public/DetaliiDocument/71139
2. Pop L, Popa I, Vidu I. Curs de drept civil. Obligațiile, București: Editura Universul Juridic; 2015.
3. Hanganu B, Manoilescu IS, Paparau C, Gheuca-Solovastru L, Buhas CL, Szalontay AS, Ioan BG. Why Are Patients Unhappy with Their Healthcare? A Romanian Physicians' Perspective. Int. J. Environ. Res. Public Health. 2022; 19: 9460.
4. Hanganu B, Ioan BG. Should we be afraid of medical malpractice complaints? The doctors' perspective. Rom J Leg Med. 2020; 28: 189-194.
5. Tudor G. Răspunderea juridică pentru culpa și eroarea medicală, București: Editura Hamangiu: 2010.
6. Parlamentul României. Legea nr. 287/2009 privind Codul civil, publicată în Monitorul Oficial nr. 505 din 15 iulie 2011
7. Simion R. Malpraxisul medical: oportunitate sau realitate? București: Editura Humanitas. 2010.
8. Hanganu B, Iorga M, Muraru ID, Ioan BG. Reasons for and facilitating factors of medical malpractice complaints. What can be done to prevent them? Medicina (Kaunas). 2020;56(6):E259
9. Dumitrescu RM. The Romanian physicians' disciplinary liability – a retrospective study. Mod Med. 2019;26(3):119-127.
10. Hanganu B, Ioan BG. Medicina sub asediu? Impactul reclamațiilor privind răspunderea profesională medical. Iași: Editura "Gr.T.Popa". 2022.
11. Ioan BG, Nanu A, Rotariu I. Răspunderea profesională în practica medicală, Iași: Editura Junimea, 2017.
12 Nemeș V. Dreptul asigurărilor, Ediția a 4-a, București: Editura Hamangiu:, 2012.
13. Sferdian I. Contractul de asigurare de bunuri, București: Editura Lumina Lex, 2004.
14. Joandrea-Moga PD. Contractul internațional de asigurare CASCO, București: Editura Universul Juridic. 2011.
15. Tăbăraș M, Constantin M. Legislația privind asigurările și reasigurările în România, București: Editura C. H. Beck. 2010
16. Parlamentul României: Legea nr. 32 din 3 aprilie 2000 privind activitatea și supravegherea intermediarilor în asigurări și reasigurări, publicată în Monitorul Oficial nr. 148 din 10 aprilie 2000, disponibilă la https://legislatie.just.ro/Public/DetaliiDocument/21754
17. Moțiu F. Contractele speciale, București: Editura Universul Juridic. 2015.
18. Ungureanu CT. Drept civil. Partea generală. Persoanele, București: Editura Hamangiu. 2016.
19. Boroi G, Anghelescu CA, Nazat B, Nicolae I. Fișe de drept civil. Partea generală. Persoanele. Drepturile reale principale. Obligațiile. Contractele. Moștenirea. Familia, București: Editura Hamangiu. 2019
20. Ministerul Sănătății, Ordinul nr. 1411 din 12 decembrie 2016 privind modificarea și completarea ordinului ministrului sănătății publice nr. 482/2007 privind aprobarea normelor metodologice de aplicare a titlului XV „Răspunderea civilă a personalului medical și a furnizorului de produse și servicii medicale, sanitare și farmaceutice„ din Legea nr. 95/2006 privind reforma în domeniul sănătății, publicată în Monitorul oficial nr. 1027 din 21 decembrie 2016, disponibilă la https://emedic.ro/ordin-nr-1-411-din-12-decembrie-2016-privind-modificarea-si-completarea-ordinului-ministrului-sanatatii-publice-nr-482-2007-privind-aprobarea-normelor-metodologice-de-aplicare-a-titlului-xv-raspun
21. Casa Națională de asigurări de sănătate, Ordinul nr. 346 din 8 august 2006 pentru aprobarea Normelor privind stabilirea limitelor de asigurare pentru furnizorii care intră în relații contractuale cu casele de asigurări de sănătate;
22. Dogaru I, Drăghici P. Drept civil. Teoria generală a obligațiilor, București: Editura C. H. Beck. 2014.
23. Autoritatea de Supraveghere Financiară, Ghid de recomandări privind asigurarea de malpraxis medical, disponibil la https://asfromania.ro/uploads/articole/attachments/60587c364ebe3395539436.pdf?TSPD_101R0=08cc9ed8fdab200024db49f8a19eef02d3e6dafd126487afbbaf7af1b8511ff9299088dfaa28519608cc58c414143000ca65519e3bd309c6c232e6885be22af4.
24. Autoritatea de Supraveghere Financiară, Ghidul consumatorului. Asigurarea privind răspunderea civilă a personalului medical, disponibil la https://asfromania.ro/uploads/articole/attachments/60587c35b52ad942356491.pdf?TSPD_101_R0=08cc9ed8fdab20002360b717258128bc8474ce198c4ba0b6040a233f4662923def7fa0c0727dbd8508853b067114300065df86dffe269645454cc215f5d496beeebb16af3181f0b27767ea15bbb448aba8c6d42ff305146072c13b1f3f5ca30;