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Medical Malpractice Insurance: Protecting Patients and Healthcare Professionals

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Abstract. Medical malpractice is a complex and delicate issue, given the fact that errors or negligence in the provision of healthcare services can have serious consequences for the patients. From the patients’ perspective, medical malpractice insurance provides a level of safety and trust in the healthcare system. If they incur damages due to medical negligence, they have the option of seeking compensation through medical malpractice insurance policies. This insurance helps them obtain financial compensation for additional medical costs, further treatment, lost wages, and other damages. On the other hand, healthcare professionals may face allegations of malpractice, even in situations in which their actions were in compliance with professional standards.

Keywords. insurance, medical malpractice, risk, liability, medical

Introduction
Medical malpractice is the mistake or negligence of the healthcare professional which causes damage or suffering to the patient. Medical malpractice insurance has become an important solution for protecting both parties involved in these cases, reducing the risk of costly litigation, and making it easier to provide adequate compensation to the affected patients.

We intend to analyze the role and importance of medical malpractice insurance in Romania, in reference to incidental legal provisions, as well as to the challenges and opportunities it presents for the healthcare system in our country.

1.1. The context of medical malpractice in Romania
Medical malpractice has become an increasingly noticeable issue in Romania in recent decades. The increase in the number of cases can be attributed to several factors, including a greater awareness of patients’ rights, greater accessibility to information, an increase in quality standards in healthcare, and a change in patients’ attitude towards healthcare professionals.

However, the true rate of medical malpractice may be underestimated, given the fact that many cases are not reported or are not brought to court. Some patients may be reluctant to file a report on a healthcare professional for fear of reprisal or due to a lack of confidence in the legal system. Furthermore, some healthcare professionals may be reluctant to admit a mistake or to accept responsibility for possible negligence.
1.2. The role of medical malpractice insurance in protecting patients and healthcare professionals

Medical malpractice insurance is designed to protect both patients and their healthcare providers. This insurance represents a possibility for the person affected by an improper medical act to recover the damage caused by the professional error that occurred. At the same time, medical malpractice insurance protects healthcare professionals from the financial consequences of such events, ensuring their stability and ability to continue practicing their profession.

1.3. Regulations and obligations related to medical malpractice insurance

In Romania, Law no. 95/2006 on healthcare reform stipulates the obligation of medical malpractice insurance for all those involved in the medical act. The regulation of this compulsory insurance for the practice of the profession has the role of providing guarantees both for the personnel who provides healthcare services and for the beneficiaries of these services.

The law defines the term "malpractice" in relation to the activity of professionals in the field and to their liability for any damages causally related to the practice of their profession.

The damage caused by professional errors is, as a rule, covered by the insurance which all healthcare professionals are obligated to get, according to law. It should be mentioned that this insurance guarantees not only the coverage of damage resulting from professional errors, but also other damage resulting from non-compliance with all obligations specific to the profession.

Medical malpractice insurance falls into an important and representative category for the entire insurance system, namely civil liability insurance, based on the fact that any person is responsible for his/her actions, whenever they result in inflicting damage on other people. Civil liability insurance covers the tort liability of the insured person, with the insurer paying the compensation owed by the insured within the limits of the insured amount. As a rule, civil liability insurance is concluded either in relation to the activity of the insured, or in relation to the possession and use of some goods by the insured. Insurance related to the professional activity of the insured has emerged and diversified in order to cover any damage that the insured may cause to third parties through negligence in the practice of his/her profession. In general, professional liability insurance is mandatory insurance, qualified as such by the special legislation which regulates certain professions.

In order to comply with the legislation in force, healthcare professionals must get a medical malpractice insurance policy with an insurance company authorized in Romania.

According to a special law in the field, the practice of the profession is subject to the condition of having a valid insurance, without stipulating special rules regarding the content of the respective contract, which is why the general conditions applicable to the conclusion of any civil liability insurance become incidental.

Since malpractice insurance is a type of insurance specific to the medical field, the person who gets the insurance must practice the profession for the practice of which it is

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1 Republished in Official Gazette no. 652/2005, with the subsequent changes.
2 Article 653 paragraph 1 letter b of Law no. 95/2006.
required to get the insurance. Furthermore, the company with which the insurance is to be taken out must be authorized by the competent authority for the corresponding insurance class³.

According to the principle of good faith⁴, which governs all matters relating to a contract, the parties are required to inform each other both in the pre-contractual phase and during the implementation of the contract.

In this regard, according to the general provisions on the subject matter⁵, the insurer must make available to the future insured persons detailed information on the insurance product offered. It is thus necessary to distinguish between two essential obligations which are incumbent upon the insurer not only in the pre-contractual phase, but also during the implementation of the contract, namely the obligation to advise the client and the obligation to inform him/her.

In the pre-contractual phase, advising the client is equivalent to presenting the insurance product offered, the conditions under which the conclusion of the future contract is foreseen and the pecuniary implications. This obligation, based on the apparent generosity of the insurer, is meant to substantiate the legitimacy of the consent given by the one who must understand exactly the obligations he/she will have by concluding the respective contract⁶. In this sense, the special legislation on insurance distribution obligates insurers to provide their customers with real data on the offered insurance product.

In the case of this type of insurance, as in the case of other types of insurance, there must be an exact specification in the policy regarding the risks it will cover⁷, as well as the risks excluded from the insurance. In accordance with the special law which stipulates the mandatory nature of this insurance, the policy must specify all those risks which are inherent in the practice of the professions in the medical and pharmaceutical fields, respectively all professional errors likely to be committed in the practice of professions specific to the field, as well as other situations which are causing damage related to the way in which the professional acts.

In general, professional errors result in damage likely to be assessed as being of a pecuniary nature, which is covered by specific insurance. Nevertheless, sometimes the specific activities of the profession can also affect the patient from a moral point of view. As a rule, insurers take on only financial damage and avoid covering the moral one⁸. Such an approach on the part of the insurers removes the final goal of establishing the mandatory nature of this insurance, since most of the time the malpractice appears as a situation that can no longer be physically repaired, but only "compensated" by paying for moral damages. The insurance policy must cover both material and non-material damage incurred by the patients as a result of medical malpractice. Therefore, in specifying the excluded risks, insurers must take into account not only the interest of the insured, but also the major interest of the beneficiaries of the services provided by healthcare professionals, taking into account the fact that an insurance covers not

³ Law no. 237/2015 on the authorization and supervision of the insurance and reinsurance activity, published in Official Gazette no. 800/2015, with the subsequent amendments.
⁴ Article 1170 of the Civil Code.
⁷ Article 2201 paragraph 1 letter c of the Civil Code.
only the material, but also the moral interest affected by a professional error made by the insured. Indeed, the subjective nature of moral damage, which prevents the possibility of direct evidence in this regard, could explain the inclusion of moral damages in the category of excluded risks. However, proof of the illegal act is sufficient since the existence of moral damages can be assessed from the existence of the illegal act. As in the case of other types of mandatory civil liability insurance, in the case of medical malpractice insurance, the incidental legal provisions should stipulate in detail the situations which entitle the insurers to exonerate themselves from liability.

The clauses included in the insurance contracts must be clear and differentiate between the existence of a causal link with the practice of the profession or a lack of a causal link and not exclude the coverage of the damage if it is proven that it resulted from the intervention of the insured. According to the general rules regarding the conclusion of an insurance contract, the future insured has the obligation to declare at the conclusion of the contract any essential circumstances for the assessment of the risks taken on by the insurer. In this sense, in the interest of the patients and in order to avoid the exoneration from liability of the insurers due to the reluctance of the future insured persons or non-compliance in terms of statements, insurers must check how the future insured persons provide essential information for the assessment of the underwritten risks and, if applicable, to provide them with the necessary support so as to avoid situations in which bad faith or reluctance in providing this information could be invoked, which would result in the insurer being exempted from liability and, as a consequence, in the violation of the patient's right to be indemnified. This insurance must provide the necessary protection to the insured, regardless of the situation, obviously, subject to the insurer's right to file a recourse action.

According to the compensation principle, the law stipulates the obligation of the insured to inform the insurer about the existence of any other insurance concluded for malpractice. The failure by the insured to fulfill this obligation could in no case entitle the insurer to refuse payment of compensation owed to the injured party. Such a situation is assimilated in the special law to a case of co-insurance which will give rise to the obligation of each insurer to bear the compensation in proportion to the insured amount. In the absence of a uniform regulation regarding the sharing of liability between insurers, there is a risk that the insured will not be adequately compensated.

The insured amount varies depending on the medical specialty and the level of risk associated with the practice of the profession. The maximum limits of the insurance indemnity are established for a calendar year in relation to the quality of the person who caused the damage for each underwritten risk.

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9 Bucharest Court, civil decision 2542/2011, published on https://legeaz.net/spete-civil-2/decizie-tmb-2542-2011
10 For example, RCA (Civil Auto Liability) civil liability insurance.
11 Article 2203 of the Civil Code.
13 Article 671 paragraph 2 of Law no. 95/2006.
14 Article 671 paragraph 1 of Law no. 95/2006.
15 Chapter III of the Rules regarding the establishment of insurance limits for suppliers entering into contractual relations with health insurance funds, adopted by CNAS (National Health Insurance Fund) Order no. 346/2006, with the subsequent amendments.
1.4. Challenges and opportunities in the implementation of medical malpractice insurance in Romania. The implementation of this insurance has encountered various challenges, including:
- the lack of information and awareness regarding the importance of medical malpractice insurance among both healthcare professionals and patients;
- difficulties in establishing adequate and fair rates for medical malpractice insurance. Rates can vary significantly depending on medical specialty, the level of risk and the professional experience, which can lead to discrepancies between insurance costs and the ability of healthcare professionals to bear them. This can create financial barriers for certain doctors and discourage young professionals from enrolling in certain medical specialties;
- the procedure for investigating and solving cases of medical malpractice;
- the abuse of rights of the patient.

On the other hand, the implementation of this insurance also presents benefits:
- increasing the level of protection and safety for patients and healthcare professionals. Malpractice insurance contributes to strengthening trust in the healthcare system and to increasing the quality of the healthcare services;
- the transparency and responsibility in medical practice. The implementation of medical malpractice insurance can incentivize healthcare professionals to adopt preventive measures and to engage in the continuous development of their skills and knowledge;
- this assurance can contribute to the identification and analysis of the errors and the factors which lead to malpractice, facilitating the implementation of efficient strategies for the prevention and improvement of the quality of healthcare services.

1.5. Conclusions

Medical malpractice insurance is an important tool for the protection of patients and healthcare professionals in Romania. Its implementation has encountered challenges, but it has also provided opportunities for improving the quality and safety of healthcare services, as well as for strengthening trust in the healthcare system.

In order to maximize the benefits of medical malpractice insurance and to overcome existing challenges, collaboration between healthcare professionals, regulators, insurers and patients is essential. This primarily involves increasing the level of information and awareness of the importance of medical malpractice insurance, both among healthcare professionals and among patients. Information and education campaigns can help demystify the concept of malpractice and promote a culture of accountability and transparency in the healthcare field.

At the same time, efforts must be intensified in order to regulate the insurance market and to establish fair rates for medical malpractice insurance. Regulators and insurance companies must work together so as to develop pricing models that reflect the level of risk and the specificity of each medical specialty, while ensuring financial accessibility of insurance for healthcare professionals.

Improving the process of investigating and solving malpractice cases, in order to reduce the length and complexity of legal proceedings and to ensure prompt and fair compensation for the affected patients, is necessary. This may involve the development of alternative dispute resolution mechanisms, such as mediation or arbitration, that provide a faster and less expensive way to solve medical malpractice cases.

Finally, there is a need for a preventive approach in medical practice, by identifying and analyzing the factors which contribute to malpractice and by implementing efficient strategies for the prevention and improvement of the quality of healthcare services. This may
include, for example, organizing continuous education programs for healthcare professionals, developing protocols and good practice guides, and encouraging a culture of error reporting and analyzing in the healthcare system.

In conclusion, medical malpractice insurance represents an important step in the direction of protecting patients and healthcare professionals in Romania and improving the quality and safety of healthcare services.

References

Legislation
[2] Law no. 95/2006 on healthcare reform, Republished in Official Gazette no. 652/2015, with the subsequent amendments;
[3] Law no. 237/2015 on the authorization and supervision of the insurance and reinsurance activity, published in Official Gazette no. 800/2015, with the subsequent amendments;

Specialized works
[1] Mina Elena-Maria, Încheierea și interpretarea contractelor de asigurare [Conclusion and Interpretation of insurance contracts], Editura C.H. Beck, București/Publishing House C.H. Beck, Bucharest, 2006;

Other sources
[1] Financial Supervisory Authority, Recommendations Guide on medical malpractice insurance,