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Natalia Motsonelidze*

Peculiarities of Doctor's Professional Insurance – Comparative Legal Analysis

A doctor plays invaluable role in maintaining human life and health. The society has special trust and positive attitude towards the representatives of medical field. However, alongside the above, there are strong requirements for high standards of performance set for doctors. The mistake made by a doctor is acutely perceptible and severely punishable. The damage caused by the doctor's mistake and the amount of compensation for such damage may exceed even the material resources of the doctor. In the modern world, the doctor's professional liability insurance is considered as one of the important tools for protection of doctor and the patient. The paper reviews the modern trends in doctor's professional liability insurance, its advantages and disadvantages, the problems that appear at the occurrence of liability insurance. In parallel with the above assessment, the factual circumstance existing in Georgia, challenges and prospects related to the introduction of a doctor's professional responsibility are displayed.

Key words: *Insurance, insurance company, insured, civil liability insurance, doctor's professional liability insurance, insured risk, damage, compensation, medical malpractice, patient, doctor, medical institution.*

1. Introduction

The expression “who makes no mistakes makes nothing”¹ is common knowledge; even professionals make the mistake. It is good if mistake is not harmful to anyone. However, there are cases when a small mistake can lead to a big loss. The obligation for damage compensation may bring serious financial loss to any organization or private entity; it may force him/her to direct his/her financial resources from the main activity to absolutely different direction, moreover, even lead to bankruptcy.

In modern civilized society, the liability insurance is considered as one of the means for neutralizing the professional risk. The professional liability insurance is a closed type of distributive relationship between its participants, which is based on formation of insurance funds, which are intended to compensate material damage incurred by physical and legal entities. The main feature of professional liability insurance is the insured object. Namely, the tangible interest of an insured physical person is related to his/her liability to compensate the damage to third parties generated during his / her professional activities.

Professional liability risk insurance is the most important element of social infrastructure. Effective functioning and sustainable development of its mechanism is an essential prerequisite for the performance

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¹ “It's only those who do nothing that make no mistakes, I suppose.”, *Conrad J.*, *Outcast of the Islands*, NY, 1896, 3.

of professional duties and improved quality.² Professional liability insurance bears a great economic significance.³ In microeconomics term, it relieves the insurer from not a very rare fatal risk. In addition, the liability insurance is of essential importance in general economic terms. A good demonstration of the above statement is the leading country in the field of insurance, Germany. According to statistical data of the insurance economy, in 2018, 49.19 million people owned the private civil liability insurance.⁴ And this, naturally, is reflected in the general economic condition of the country as well as the population.

2. The Role of Professional Liability Insurance in the Modern Society

In modern world, the need and importance of professional liability insurance is not any more the subject of discussion. The majority of states regulate the professional liability insurance not only by the general legislative rules, but most of the professions are subject to obligatory insurance, under the separate legislative acts. While the world is moving forward and the majority of states is committed to have the insurance covering most activity fields, in Georgia, the discussion on the importance and need for professional liability insurance, has only started to emerge.

The problem is strained by the fact that Georgian legislation regulates the civil liability insurance issues only under the several articles of the Civil Code of Georgia (hereinafter - CCG) and three legislative acts. Namely, the Articles 839-843 of CCG⁵ very briefly defines and regulates the rights and obligations of the insurance company and the insurer at the time of civil liability insurance. In addition to the above, there are separate acts, which regulate the obligatory insurance issues of professional liability for the professions, such as a private executor,⁶ notary⁷ and the auditor⁸.

In recent years, the number of complaints towards the doctors and medical institutions in Georgia has increased. Citizens are demanding the proper compensation for the wrong services. This

² *Gaist V. J.*, Professional Liability Insurance, Journal Lawyer's Counselor, № 1, 2010, <<http://www.s-yu.ru/articles/2010/1/4809.html>>, [15.01.2019].

³ *Littbarski S.*, in: *Langheid Th., Wandt M.*, Münchener Kommentar zum Versicherungsvertragsgesetz, Band 2, 2 Aufl., München, 2014, §100-124, Rn. 147 ff, referenced: *Bruns A.*, Privatversicherungsrecht, München, 2015, § 22, Rn. 2.

⁴ <<https://de.statista.com/statistik/daten/studie/266307/umfrage/versicherungen-besitz-einer-privaten-haftpflichtversicherung-in-deutschland/>>, [15.01.2019].

⁵ Articles 839-843, The Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

⁶ The order of the Minister of Justice of Georgia № 118 “on the determining of the amount and conditions of compulsory insurance for the civil liability of the private executor”, 29/06/2009.

⁷ The order of the Minister of Justice of Georgia № 158, “on the determining of the essential terms and minimum insurance amount of the mandatory professional insurance for notaries”, 17/03/2010.

⁸ Decree “on approval of the rules of determination of insurance amount and essential terms of professional liability insurance for auditor/audit firm”, № 12, the Head of Accounting, Reporting and Audit Supervision Service, 17/10/2016.

fact itself is not an indicator of low qualification of representatives of this profession.⁹ The above statistics indicate that the awareness of patient and client has improved. Compared to previous years, the users have learned how to protect their rights.

All this leads to the increased interest of the society towards discussed type of insurance. However, it is noteworthy that the increase in interest has not radically impacted the amount of premium attracted by the insurance companies in this field.¹⁰ This fact is conditioned by several circumstances. First - an imperfect legal base. In addition to the latter, the lack of experience of an insurance company as well as the insurer leads to their distrust towards the product and, therefore, less motivation to be engaged in similar type of insurance relationship.

One of the ways to eliminate the above factors is to fill the information vacuum. It is important that the potential contracting parties of insurance relationship are provided with the information on the factors that have conditioned civil liability and, accordingly, professional liability insurance to become top insurance products in the developed countries. What is its essence, advantages and disadvantages and the risk that this product may contain for the user? For this purpose, it is expedient to conduct in-depth study of issues such as the significance of civil liability insurance, the essence of the medical malpractice and the extent of the doctor's professional liability, the significance of insurance in the medical practice, the extent of responsibility of insurance company for the damage inflicted to the patient by the doctor. Indeed, the deep legal analysis of the above-mentioned issues is important for each party participating in the professional liability insurance. Increase of interest towards the professional liability insurance can only be possible if all participating entities have a clear understanding of their rights and obligations, fulfillment of a contract and achieving of result that the parties aimed at the initial stage of concluding the agreement, is not vague and suspicious.

3. The Essence of Civil Liability Insurance

Professional liability insurance is a form of civil liability insurance. The purpose of the civil liability insurance is to protect the insured from the property damage that can be originated for insured based on claim for compensation for losses incurred by the third person. Such type of insurance, by its nature, is similar to loss insurance, so-called passive insurance, during which the interest of the insurer is expressed in the exemption of its property from the burden of civil liability.¹¹

⁹ It is worth to mention the United States, where, according to statistical data, on average from 44,000 to 98,000 patients die per year due to the wrongful medical practice. *Eiff W.*, Risikomanagement, 2 Aufl., Heidelberg, 2014, 12.

¹⁰ According to statistical data of 2012 of the National Bank of Georgia, in the same year, only 1966 policies of civil liability insurance were signed in the fourteen insurance companies operating in Georgia. The number of these policies includes all types of agreement, where the person's civil liability is insured and not only the professional liability, <<https://www.nbg.gov.ge/index.php?m=489>>, [18.01.2019].

¹¹ *Piontek S.*, Haftpflichtversicherung, Grundlagen und Praxis, München, 2016, 1.

The CCG articles, relating to the civil liability insurance, do not provide a definition of the insured accident. The Article 839 of CCG provides only the obligation of the insurance company - to release the insurer from the obligation, which is imposed to the insurer due to the responsibility to the third person during the insurance period.

Similar to the Georgian legislation, the German Law on Insurance does not provide a comprehensive explanation of the insured accident in the case of liability insurance. The explanatory card of paragraph 100 of the German Law on Insurance indicates that, in accordance with the insurance agreement, the parties, according to their will, may determine the insured accident.¹² However, it generally describes the criteria that shall be met. The insured accident should be an event that occurs during the validity of the insurance agreement and generates the liability of the insurance company. For example, in case of insurance of general liability - damage-causing event, in case of insurance of architect's liability - the mistake made during the planning, in case of insurance of attorney and the notary - the legal mistake made by them, in case of doctor's responsibility – medical wrongful practice conducted by a doctor and etc.¹³

In the case of civil liability insurance, the insurance company bears double responsibility.¹⁴ In particular, it is liable to release the insurer from the obligation and, in addition, to protect the insurer. The obligation of release from the responsibility implies release of the insurer from the material-legal obligation to the third parties. And, protection of insurer is expressed in the liability of the insurance company to reject the unreasonable requests of third parties and to undertake the responsibility for related judicial and non-judicial costs.^{15 16}

The specified obligations clearly determine that the insured accident does not necessarily mean the material-legal liability of the insurer in case of civil liability insurance. In order to define the existence of an insured accident, it is sufficient to raise the issue of liability of the insurer by third parties. In terms of determining the existence of an insured accident, it does not matter, whether the request is fair or unfair.¹⁷ The obligation of the insurance company arises from the moment when the need for protection of an insured person is manifested; namely, from the very moment, when the injured party puts in claim towards the insured, inflicting the damage.

¹² RegE, BT-Drucks. 16/3945, S. 85, Betriebszeitschrift für Recht und Wirtschaft, 2697, 2007, <<http://dip21.bundestag.de/dip21/btd/16/039/1603945.pdf>>, [08.10.2019].

¹³ Gesetzentwurf der Bundesregierung - Entwurf eines Gesetzes zur Reform des Versicherungsvertragsrechts, BT-Drucksache 16/3945, 85, 20/12/2006, <<http://dip21.bundestag.de/dip21/btd/16/039/1603945.pdf>>, [16.10.2019].

¹⁴ *Bruns A.*, Privatversicherungsrecht, München, 2015, § 22, Rn. 9.

¹⁵ *Schneider W.*, in: *Beckmann R. M., Matusche-Beckmann A.*, Versicherungsrechts-Handbuch, 2 Aufl., München, 2009, §24, Rn. 3.

¹⁶ Comp. Article 841, The Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

¹⁷ *Bruns A.*, Privatversicherungsrecht, München, 2015, § 22, Rn. 9.

3.1. Three Parties Involved in the Insurance Relationship — the Legal Position of the Injured Party

It is unambiguously clear from the above mentioned that the peculiarities of the civil liability insurance are demonstrated in the relationship between the three parties.¹⁸ Essentially, there is a legal relationship between the insurance company and the insurer, such as at the occurrence of insured accident between the insurance company and the third person, but not the insurer and the third person.¹⁹

There is interesting opinion expressed in German legal doctrine - initially the essence of liability insurance was to protect the insurer's interest. However, together with development of this type of insurance, its purpose changed and the protection of third person's interest came to the fore.²⁰

Nowadays, the qualification of the Liability Insurance Agreement, as the agreement concluded in favor of a third party, is unanimously recognized. However, the essence of insurance relationship in general - protection of interest, should not be forgotten. It is not difficult to demonstrate that, in case of liability insurance, rather than insuring the beneficiary – third-party interest, the interest of insured or insurer is insured, which insures the risk of its liability by such type of insurance agreement. As far as the risk - is possible infliction of damage, so the liability risk - is the infliction of possible risk to the insured, in case of imposing the responsibility to him/her.²¹ Therefore, in case of liability insurance, the interest of a person, whose liability risk is insured, is protected. For this type of insurance, insurance compensation is being paid not to the person, whose interest is protected, but to the injured person. Of course, the interest of the injured is satisfied, but not because of the service provided, but because the services that shall be provided to the insured according to the insurance agreement, implies the satisfaction of the interest of injured.²² The beneficiary third person appears only to ensure the interest of insured in such type of insurance relationships.

Proceeding from the above mentioned, while concluding any type of civil liability insurance agreement, the insurer operates based on his/her interests. As far as, in return for paying a small insurance premium, he/she can be confident that if his/her civil liability occurs, he/she is not imposed any financial responsibility and obligation - to independently compensate the damage caused.²³

¹⁸ *Schneider W.*, in: *Beckmann R. M., Matusche-Beckmann A.*, *Versicherungsrechts-Handbuch*, 2 Aufl., München, 2009, §24, Rn. 3.

¹⁹ BGHZ 7, 244, 245; OLG Düsseldorf VersR 1983, 625.

²⁰ *Beckmann R. M., Matusche-Beckmann A.*, *Versicherungsrechts-Handbuch*, 2 Aufl., München, 2009, §24, Rn. 12.

²¹ *Fogelson Y.*, *The Insurance Law; Theoretical Foundations and Practice of Application*, Moscow, 2012, 421.

²² *Ibid.*, 422.

²³ *Ibid.*, 421.

4. Medical Practice – Specialty with High Risk of Responsibility

Proceeding from the specifics of the profession, the risk of responsibility is high especially for doctors. The reason for this is that the doctor has a direct contact with such a special goodness as the human life and health. Due to the fact that the human life and health is invaluable in material terms, there is high probability of occurrence of great material damage during medical practice.²⁴ According to the European practice, patients often demand compensation for material as well as the moral damages. The amount of compensation increases annually. For example, if in the 90s the defendant had to pay 75,000 Euros²⁵ for compensation of moral damages caused by the brain damage, nowadays, the court can impose as much as 600,000 Euros over the doctor in similar disputes.²⁶ The cost of treatment of the patient has also increased. In developed countries, in some cases, the amount can even reach as much as five million. The reason for the above - as a result of wrong medical practice, the injured often needs constant supervision from the professionals. In addition to the treatment costs, the court may even impose the doctor to reimburse the non-received income of the patient, which ultimately requires substantial material resources from a doctor.

The fact that the doctors bear greater responsibility when fulfilling their professional activities is quite natural. The function of human body is not so well known and studied to always provide the accurate and effective treatment. Accordingly, the risk of making mistake is an integral part of medical practice. On the other hand, as the human's health and life is exceptional and invaluable, there is a huge loss for patient or its relatives that may follow a wrongful medical practice.

5. Compulsory Insurance of a Doctor's Professional Liability — Better Protection Guarantee for the Society

For decades, developed countries apply to professional liability insurance for mitigation of doctors' material responsibility. In Germany, for example, doctors' professional liability insurance has been effective since 1887. Even during the first stage, when the doctor's liability insurance, in moral terms, was considered as non-insurable risk, in Stuttgart insurance union,²⁷ there were about 6500 agreements²⁸ of liability insurance for doctors and pharmaceuticals.

The European states are constantly working to ensure that professional liability insurance can cover as many as possible doctors. Every doctor, no matter, whether he/she owns a private clinic or is

²⁴ *Terbille M., Höra K., Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 64, 65.*

²⁵ *Comp. BGH NJW 1992, 2962=MedR 1993, 67, referenced: Laufs A., Katzenmeier Ch., Lipp V., Arztrecht, neu bearbeitete Auflage, München, 2015, Rn. 124.*

²⁶ *Comp. Schlösser M., MedR, 2011, 227, referenced: Ibid.*

²⁷ *According to 1901 data, comp. Bergmann K., Wever C., Versicherungsrecht, Bühren H. W. (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn. 6.*

²⁸ *Comp. Möhle J., Die Haftpflichtversicherung im Heilwesen, Frankfurt-Main, 1992, 9. Referenced: Bergmann K., Wever C., Versicherungsrecht, Bühren H. W. (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn. 6.*

employed on the basis of a labor contract, shall consider and envisage that for professional negligence he/she may be imposed to compensate for damages and the amount of compensation may exceed his/her material resources.

It is not obligatory to have professional liability insurance for medical practice in Germany. However, in accordance with paragraph 21 of the General Rules of the Doctor's Professional Code of Conduct, doctors are obliged to provide adequate insurance protection for the responsibility that could arise within their professional practice.²⁹ Proceeding from Article 70 of the Constitution of Germany, which gives the right of legislative competence,³⁰ the separate federal land determines itself and establishes the issue of professional liability insurance for doctors.^{31,32} It must be noted that assignment of decision making power on mandatory nature of professional liability insurance to the specific land legislation or doctor's will has often been criticized. The parallel is drawn to the lawyer's professional liability insurance, which is mandatory throughout Germany and without which a person cannot enter the mentioned profession. The same applies to the obligatory insurance of civil liability of automobile transport owners and it is indicated that in case of damage to the car frame the person is more protected than a patient, who takes his/her most valuable goodness - the health and life into the doctor's confidence. In case of treatment with a doctor having no insurance, in case of damage, the doctor is liable with personal property, but if the doctor is insolvent, then the bearer of 100% of risk is the patient himself/herself.³³ According to one of the authors, when a person with no civil liability insurance cannot become a traffic participant, or cannot enter the lawyer's profession, the state's approach towards the doctor's professional liability insurance is unfair. According to the representative of the patient's rights in the German government, "to protect patients' interests, it is expedient for all the doctors to have the professional liability insurance, in order to fully compensate the damage incurred."³⁴ Therefore, only the request is not sufficient. It is urgent and necessary to adopt such a law under which the insurance of doctor's professional liability is necessary precondition for implementation of medical practice.³⁵

²⁹ (Muster-)Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte – MBO-Ä 1997 –in der Fassung der Beschlüsse des 121. Deutschen Ärztetages 2018 in Erfurt geändert durch Beschluss des Vorstandes der Bundesärztekammer, 14/12/2018.

³⁰ See <http://www.gesetze-im-internet.de/gg/art_70.html>, [23.02.2019].

³¹ *Terbille M., Höra K.*, Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 5.

³² The lands, where the doctor's professional liability is introduced as mandatory, are: Brandenburg, Baden Württemberg, Bremen, Hamburg, Nordrhein-Westfalen, Sachsen-Anhalt, Schleswig-Holstein, Bayern, Mecklenburg-Vorpommer.

³³ *Scholz I.*, Ist ein Arzt nicht versichert, ist der geschädigte Patient der Dumme, August, 2011, <<https://ihr-anwalt.com/blog/ist-ein-arzt-nicht-versichert-ist-der-geschadigte-patient-der-dumme/>>, [14.03.2019].

³⁴ *Zöller W.*, Grundlagenpapier Patientenrechte in Deutschland, März, 2011, <<https://www.hamburg.de/contentblob/3152236/fc9b94cc57b2d3051baea67e90869239/data/bgv-patientenrechte-grundlagenpapier.pdf;jsessionid=2E0905784E2C6D5F37A1710BC1FA8E09.liveWorker2>>, [14.03.2019].

³⁵ *Scholz I.*, Ist ein Arzt nicht versichert, ist der geschädigte Patient der Dumme, August, 2011, <<https://ihr-anwalt.com/blog/ist-ein-arzt-nicht-versichert-ist-der-geschadigte-patient-der-dumme/>>, [14.03.2019].

In Georgia, as noted above, insurance of the doctor's professional liability is not obligatory. According to Article 97 of the Law of Georgia on Medical Practice, an independent medical practitioner shall have the right of professional liability insurance for proprietary or non-proprietary losses inflicted to a patient as a result of professional errors.³⁶ As European experience demonstrates, the voluntary nature of this insurance is not sufficient and the state, still proceeding from the interests of its citizens, shall be more rigorous. Experience shows that compensation for the losses imposed to a doctor by the court is reflected in direct proportion in the cost of medical service. The doctor, who pays more than half of his/her income to injured patient, also increases the cost of his/her service. Insurance is a mean of neutralizing the risk and releasing from compensation using the personal property. The statistics in Georgia clearly demonstrate the increased awareness of patients on their own rights. They are increasingly applying to the court and request compensation for losses. In addition to providing financial guarantees, insurance can become sort of measurement tool for the patient. Namely, the insured doctor always represents a guarantee that he/she has the appropriate qualification, as far as, when signing the insurance agreement, he/she is required to meet strict criteria. Of course, the insured doctor does not automatically mean the faultless treatment; however, it means that the doctor has proper qualification, license and the financial guarantee.

6. Legal Basis for Doctor and Patient Relationship

6.1. Medical Services Agreement

The insurance contract concluded between the doctor and the insurance company is essentially based on the legal relationship between the doctor and the patients. Therefore, well-established legal base, regulating the doctor-patient relationship, is the basis for the well-organized insurance relationship.

In Georgia the main legal act, regulating the doctor-patient relationship, is CCG, as well as the Georgian Law on Patient Rights³⁷ and the Law of Georgia on Medical Practice. Like Georgia, a large part of European states implements the legal regulation of the doctor-patient relationship under the Civil Code.³⁸ Even Germany has been following this practice for years, however, the gained experience and practice showed that regulation of this relationship with only general norms would generate many problems. On February 26, 2013, the amendment was made to the GCC (hereinafter the German Civil Code). Sections A-Z were added to the paragraph 630 of GCC, which directly relate to the medical practice and the relationship between the doctor and patient.³⁹ As stated in the doctrine,

³⁶ Law of Georgia on Medical Practice, SSM, 18, 08/06/2001.

³⁷ Article 10, Law of Georgia on Patient Rights, SSM, 19, 05/05/2000.

³⁸ For the example of Switzerland see: Wichtige Aspekte der Arzthaftung, Haftpflichtversicherung für Ärzte und Spitäler, winterthur, 2011, <<https://www.axa.ch/doc/abtc7>>, [19.09.2019].

³⁹ See, <<https://www.gesetze-iminternet.de/bgb/BJNR001950896.html#BJNR001950896BJNG026900377>>, [10.02.2019].

the doctor's responsibility law has been developing on the basis of judicial law over the past hundred years and the mentioned fact is the first case of its codification.⁴⁰

In the legislative initiative concerning the addition of chapter on the patient's rights to the GCC, it is noted that the lack of special norms on the medical wrongful practice and the doctor's responsibility in the law and assigning it only to the judiciary law, makes it difficult for the parties of medical relationship to clearly understand their rights. Due to the complexity of medicine and diversity of treatment, a legislative framework, which gives a clear understanding of their rights to each party and increases their self-confidence, is required. Effectively introduced and balanced rights will ensure the equality of doctor and patient.⁴¹

German experience has shown that as a result of discussed changes patients' rights became transparent and balanced. In addition to the above, judges were given an essential impetus to interpret and define the norm.⁴² The willingness to regulate doctor-patient relationship at a legislative level is conditioned by strive towards achievement of fair judicial decisions, which, in parallel with the interpretation of the court, is achievable only based on the existing laws and recognized principles of the law.⁴³

The only special provision in the CCG, which determines compensation for losses inflicted by the medical institution, is the Article 1007.

It is recommended that the Georgian legislators also share the German experience and make appropriate changes to the CCG; especially on the background of annually increased number of claims against the medical institution and doctor. It is justifiable that the patient and the doctor have a clear understanding of their rights that are not regulated by general norms but are subject to special regulation. One of the problems specified at the beginning of the article, which impedes the development of doctor's professional liability insurance in Georgia, is clearly the ambiguity of the parties' rights. The introduction of this regulation will be a step forward in the development of insurance sector.

⁴⁰ On early attempts see: *Francke R., Hart D.*, Charta der Patientenrechte, Rechtsgutachten für die Bundesländer Bremen, Hamburg, Nordrhein-Westfalen, 1999. Referenced: *Rehborn M.*, Das Patientenrechtgesetz, Zeitschrift für Arztrecht, Krankenhausrecht, Apotheken- und Arzneimittelrecht, 12 Jahrgang, Heft 5, 2013, 257, <http://www.gesr.de/gesr_2013_05_aufs.pdf>, [13.03.2019].

⁴¹ Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Verbesserung der Rechte von Patientinnen und Patienten, Deutscher Bundestag Drucksache 17/10488, 17 Wahlperiode, 15/08/2012.

⁴² For detail, see: <https://www.robbers-verlag.de/dokumente_neu/pdf/2014-08-ArzhRGrundl.pdf>, [12.02.2019].

⁴³ Grundlagen des Arzthaftungsrechts unter Berücksichtigung der neuen gesetzlichen Regelungen des Patientenrechtgesetzes. For details, see: <https://www.robbers-verlag.de/dokumente_neu/pdf/2014-08-ArzhRGrundl.pdf>, [05.02.2019].

6.2. Legal Nature of Medical Service Agreement

The legal basis for relationship between a doctor and a patient is a civil-legal agreement concluded under the rules envisaged by the CCG. Generally, at the initial stage of relationship, the parties reach an agreement not in writing, but verbally and via concluding actions. The agreement between the doctor and the patient is concluded by agreement of visit time with the doctor and, later, by submitting the personal documentation.

It is true that relationship between the medical establishment or the doctor and the patient is a contractual relationship, however, for a long time, the question on which category of agreement included the agreement concluded between a doctor / medical institution and a patient was disputable among the lawyers. The solution of the mentioned issue was important not only in political and legal terms, but, first of all, in practical terms.

Despite the development of modern medicine, due to the complexity and unpredictability of the processes in the human's body, it is impossible to require from a doctor to fulfill a specific "work" and achieve a successful outcome. As a contract party, the doctor undertakes the liability to fulfill the services, conduct the examinations and use the methods of treatment that are relevant to the modern medical achievements. Due to the abovementioned features of the medical service agreement, the agreement concluded between a doctor and a patient belongs to a service agreement. The doctor is responsible for the properly provided treatment and not for the recovery or the outcome of treatment. Therefore, regardless of the doctor's efforts, in case of failure to achieve the relevant outcome, the patient does not gain the right to request free treatment in the future or request to return the amount back.

In 2013, the record was made in GCC, where it was uniquely determined by sub-paragraph "B" of paragraph 630, that applicable rules to the service agreement are applied to the medical agreement. The mentioned classification is important for the precise definition of the rights and obligations of the parties and, accordingly, for determining the boundaries of claims for the contracting party.

The Georgian legislation does not contain the specific instruction on the classification of the agreement concluded between the doctor and the patient. However, the term established in the practice "medical service agreement", indicates to its legal nature. In addition, the Georgian judicial decisions clearly indicate that failure to achieve outcomes in the medical practice does not imply improper fulfillment of the obligation. For example, in one of its decisions, Tbilisi Court of Appeals indicated that unsuccessful treatment or negative outcome of treatment does not necessarily entail the responsibility for medical personnel.⁴⁴ In addition, according to the Supreme Court of Georgia, the proper treatment, even if it has a negative outcome, does not entail a doctor's responsibility.⁴⁵ Consequently, inadequate outcome does not necessarily mean existence of wrongful medical

⁴⁴ Decision of September 3, 2018 № 2b/1843-17 of Tbilisi Court of Appeals.

⁴⁵ See the decision of June 27, 2011 № AS-260-244-11 of the Supreme Court of Georgia.

practice;⁴⁶ i.e. doctor cannot guarantee the specific outcome. That is why it is different from service agreement, where the parties enter into a legal relationship to achieve specific results.⁴⁷

It must be noted that classification of the agreement concluded with a doctor as service agreement also applies to the denture treatments and cosmetic surgical procedures. Even in this case, the doctor undertakes the responsibility for the patient, in accordance with the medical standard, to fulfill the maximum of his/her capabilities. The doctor cannot guarantee the positive change, beautification and other outcomes.

Although, the agreement between the doctor and the patient is a service agreement, but regulatory norms for contractor's agreement of CCG,⁴⁸ as the closest norm, applies to it. However, some special norms can be applied only to the contractor's agreement,⁴⁹ due to its exceptional nature.

In addition to the service agreement, proceeding from the specificity of the work, the contractor's or procurement agreement, mixed agreements could be present.⁵⁰ For example, when the parties agree to produce and supply the prosthesis of any part of tooth or body. In this case, unlike the service agreement, the patient has the right to request a correction.⁵¹

In addition to contractual-legal provisions, non-contractual norms apply to the relationship between a doctor and a patient. Namely, there could be a tort-legal relationship or performing others works without receiving an assignment. The latter takes place when the patient is taken to medical institution in unconscious condition or, being under the effect of anesthesia, an urgent need for further medical manipulation arises.⁵² Generally, in such case, the agreement is concluded immediately upon the recovery of consciousness.

As for the tort relationship, the right for claim for compensation of losses may arise not only from the agreement as well as from tort.⁵³ Tort requirements are especially important when the contract is not in place or the patient's request is directed to the employee of the medical institution, which is not the immediate party of the agreement.⁵⁴ The doctor's professional liability insurance usually covers the claims made to the doctor for compensation of material as well as moral damages. A patient or its family member makes claim for compensation for damages when the patient is dissatisfied with medical services, namely, with the outcome of the treatment. However, every unsuccessful treatment is not a wrongful medical practice and accordingly, the basis for responsibility

⁴⁶ Similarly, in the decision of May 11, 2018 № AS-111-111-2018 of the Supreme Court of Georgia.

⁴⁷ *Krophollder J.*, German Civil Code, Study Comment, 13th ed., *Darjania T., Tchetchelashvili Z.* (trans.), *Chachanidze E., Darjania T., Totladze L.* (eds.), Tbilisi, 2014, § 631, para. 1 (in Georgian).

⁴⁸ Chapter 10, Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

⁴⁹ Decision of November 1, 2013 № AS-223-215-2013 of the Supreme Court of Georgia.

⁵⁰ For details, see, *Pepanashvili N.*, Compensation for Losses Caused by the Medical Institution, Tbilisi, 2016, 112-113 (in Georgian).

⁵¹ <http://www.medizinrecht-ratgeber.de/medizinrecht/vertrag/index_02.html>, [19.03.2019].

⁵² For details, see. *Brennecke P.*, *Ärztliche Geschäftsführung ohne Auftrag*, Heidelberg, 2010, 62.

⁵³ Article 413, the Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997.

⁵⁴ *Rehborn M.*, *Das Patientenrechtgesetz*, *Zeitschrift für Arztrecht, Krankenhausrecht, Apotheken- und Arzneimittelrecht*, 12 Jahrgang, Heft 5, 2013, 257.

of the doctor and then the insurance company. If the existence of an error in the doctor's action is proved, the patient is given an opportunity of compensation, in the form of compensation for damages. The Georgian legislation clearly provides the right of the patient to apply to the court and claim the compensation for material and moral damages.⁵⁵ At the same time, the claim shall be made within the time prescribed by law.

6.3. Beginning and End of the Claim for Compensation for Damages in Connection with Insurance Claim

In accordance with the Section 1, Article 806 of the CCG, insurance enters into force at twenty-four hour on the day of concluding a contract and ends at twenty-four hours of the last day of the term envisaged by the contract. At a first glance, the mentioned rule is clear and it is suitable for all types of communications. However, the issue becomes complicated when the event and the outcome of this event do not coincide in time, more specifically with the validity of contract. The most obvious example is the medical service and the outcome occurred based on this service. Over the last ten years, lawyers have been discussing the timing of specific contracts such as the doctor's professional liability insurance.

It is obvious that there can be a long gap between the wrongful medical practice and cognition of occurrence of damage and, therefore, the patient may claim the compensation. According to CCG a three-year period of limitation is applied to tortious as well as contractual obligations. A similar rule applies to the limitation of a damage inflicted as a result of wrongful medical practice.⁵⁶ The Article 130 of CCG specifies beginning of the limitation period and specifies that the limitation begins from the moment at which the claim arises. The claim shall be deemed to have arisen from the moment at which the person detected or ought to have detected the violation of the right.⁵⁷ The GCC goes much further and applies thirty years' limitation period on claims for damages based on injury to life, body, health or liberty, notwithstanding the manner in which they arose and notwithstanding knowledge or a grossly negligent lack of knowledge.⁵⁸ Accordingly, proceeding from the wrongful medical practice, the claim for compensation for damage may arise even in a few decades after the treatment.⁵⁹

When, in the context of insurance, it refers to the time of occurrence of damage, the question about the existence of obligation of insurance company arises; namely, whether the insurance

⁵⁵ Article 10, Law of Georgia on Patient Rights, SSM, 19, 05/05/2000.

⁵⁶ Articles 1008, 129(1), the Civil Code of Georgia, Parliamentary Bulletin, № 31, Registration № 786, 26/06/1997. Similar to Germany, see, §195, Bürgerliches Gesetzbuch Deutschlands, 18/08/1896.

⁵⁷ Similarly, standard limitation period commences at the end of the year in which the claim arose and the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence, §199.1, Bürgerliches Gesetzbuch Deutschlands, 18/08/1896.

⁵⁸ Ibid, Section 2.

⁵⁹ *Bergmann K., Wever C.*, in: *Hubert W. van Bühren*, *Versicherungsrecht*, 6 Aufl. 2014, Bonn, § 11, Rn. 109, 110.

company is obligated to pay losses, which occurred at a time when the insurance agreement is no longer available. For visualization purposes, one example is quite interesting.⁶⁰ In 1998 a woman, after an unsuccessful surgical contraception, gave birth to an unwanted but a healthy child in 2001. The woman was claiming compensation for moral and material damage caused by unwanted pregnancy. The doctor had been engaged in the medical activity and enjoyed professional insurance until the end of 1999. The Court satisfied the claim of plaintiff, however, the question on how much the insurance company was obligated to compensate the damage, was raised.⁶¹

According to the German insurance practice, insurance companies do not envisage any special rule in the contract for determining the timing and indicate the rule of law on the standard conditions of liability insurance.⁶² Unlike other insurance agreements, where the death of a person is the basis for termination of the insurance agreement,⁶³ in case of insuring the doctor's liability, his/her death or termination of his/her professional activity does not automatically cause the exemption of insurance company from the liability. The responsibility of the insurance company is related to occurrence of damage. However, in legal terms it can be problematic to define which moment is considered as the time of occurrence of damage in particular case. In the above example it is interesting, what should be considered as the moment of occurrence of damage, the wrong medical intervention, the pregnancy of a woman or birth of a child.

The German Federal Court develops two theories, the theory of causality and the theory of occurrence of damage. It is interesting that in one of its decisions, the Federal Court of Germany indicated that "the event" is not the only reason of damage, but also directly the occurrence of damage, as an external expression of event, that caused the infliction of damage directly to person or property.⁶⁴ If the above case is considered, insurance protection is related to realization of the risk that the doctor has taken i.e. related to the conceiving or birth of a child and not to the medical action of a doctor. Proceeding from the abovementioned, the responsibility of the doctor is obvious, though according to this theory, the insurance company is not obliged to compensate for damage. According to the theory of occurrence of damage, in order to implement insurance protection, it is necessary to cause damage directly during the validity of the contract. Consequently, the insurer doctor is fully responsible for the damage occurred later.

Later, the Federal Court of Germany established the practice entirely different from the above-mentioned approach and pointed to the theory of causality. The court generally discussed the definition of insurance provision in time and, for insurance protection purposes, considered significant

⁶⁰ ZfV 1990, 55 (76). *Bergmann K., Wever C.*, in *Hubert W. van Bühren*, *Versicherungsrecht*, 6. Aufl. 2014, Bonn, § 11, Rn. 109, 111.

⁶¹ *Ibid.*, Rn. 111.

⁶² *Ibid.*, Rn. 112.

⁶³ *Terbille M., Höra K.*, *Versicherungsrecht*, *Münchener Anwaltshandbuch*, 3 Aufl., München, 2013, § 19, Rn. 64, 65.

⁶⁴ BGHZ 25, 34 (34) Referenced: *Bergmann K., Wever C.*, *Versicherungsrecht*, *Bühren H. W.* (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn. 113.

the time when the action or inactivity took place, based on which the legal claim was generated to the third party.⁶⁵ The case reviewed by the court concerned the insurance of industrial liability. In particular, the injured, when performing official duties related to care for the plants, used the plant poisoning, following which the damage has occurred. For resolving the issue of responsibility of the insurance company, the court considered significant to determine the time of use of poison and not determine when the substance affected the person. Since the use of poison coincided with the period of validity of the insurance agreement, the insurance company was imposed to compensate for damage. Proceeding from the above mentioned, the German court practice, for classification of insured accident in time, considers important not determining the time of occurrence of the accident, but defining and determining the event, which is the basis for the insured accident, so-called causal connection.⁶⁶

In 2014, the amendment was made to the general rules of liability insurance of the German Law, which states that "within the framework of insured risk the insurance coverage is valid if, due to the insured accident that occurred during the validity of an agreement, the third party makes the claim to the insurer to compensate for personal or property damages. The damage event is an event, as a result of which the damage was incurred by the third party. The time of occurrence of damage, which is caused by a specific event, does not bear the significance."⁶⁷ As indicated in the doctrine, this record of the legislator should put an end to heterogeneous practice established by courts over the years.⁶⁸

The Anglo-American approach, so-called principle of claim coverage (claims-made-coverage), used in professional liability insurance, is also quite interesting. In order to define, whether the insurance protection is valid or not, first of all it is identified, whether the occurrence of damage coincides with the insurance contract period or not. As the insurance companies indicate, the advantage of the mentioned rule is that transparency of insured accidents during the year allows the insurance company to calculate the amount of damage and determine the adequate premium of risk for the insurers. The insurer permanently has an insurance amount at hand that can be disposed freely. At the same time, the problem of compensation for damages caused later does not arise further. However, to oppose this system, it must be noted that due to the long-time interval between the action and occurrence of damage, so-called emptiness may arise, and the damage can take place following the expiry of contract term, which creates a problem for both the doctor and the patient.

French legislation is more specific and precisely determines the responsibility of the insurance company in time. In particular, if within five years from the expiry of the term of the contract the person incurs damage as a result of the action carried out during the validity of the contract, the

⁶⁵ BGHZ 79, 76 (89).

⁶⁶ *Terbille M., Höra K.*, *Versicherungsrecht*, Münchener Anwaltshandbuch, 3 Aufl., 2013, München, § 19, Rn. 58.

⁶⁷ *Allgemeine Versicherungsbedingungen für die Haftpflichtversicherung (AHB)*, 2016 Ziff. 1.1., <<https://service.comfortplan.de/bedingungen/Axa%20Privathaftpflicht%20Bedingungen.pdf>>, [15.02.2019].

⁶⁸ *Bergmann K., Wever C.*, *Versicherungsrecht*, *Bühren H. W.* (Hrsg.), 6 Aufl., Bonn, 2014, § 11, Rn 121.

insurance company is obliged to compensate for damages, if the insured does not have any other insurance contract with other insurance company.⁶⁹

The American as well as the European experience shows that the insured persons typically need protection after the expiry of the term of insurance agreement. Proceeding from the specifics of medical practice, the question of compensation for damages may be put forward by the patient after few years. Unless there is no united judicial definition about the time of occurrence of damage, in Georgia among them, the parties will permanently remain under uncertainty. In order to avoid generation of “emptiness” (gap) during occurrence of damage following the expiration of the validity of the insurance contract, the practical men advise the insurance participants to conclude further liability insurance agreement, after the expiration of insurance contract validity or after the completion of medical practice. This is the way, by which the security will be provided.⁷⁰

7. Relationship of Doctor and Patient in Constitutional-legal Context

7.1. The Patient’s Right of Self-determination

It is difficult to find such field of social relationship, where ethical and legal aspects are so strongly interconnected with each other, as it is in the medical practice. The doctor-patient relationship is much more than a simple contractual relationship, - noted German scientist Eberhard Schmidt in his work.⁷¹

The key fundament for the doctor and patient relationship is the trust between them.⁷² Commercialization, labor division, profit distribution and other factors complicate the possibility to maintain the ideal picture. The relationship between a doctor and a patient is more than a contractual-legal relationship.⁷³ On the basis of these relationships the patient can share his/her pain to a doctor, which is assessed by a doctor on the basis of his/her knowledge and who makes the conclusion regarding the treatment.

⁶⁹ *Lutterbeck A.*, in: *Wenzel F.*, Handbuch des Fachanwalts Medizinrecht, 3 Aufl., München, 2013, Kap. 5, Rn. 90.

⁷⁰ *Bergmann K., Wever C.*, in: *Bühren H. W.*, Versicherungsrecht, 6 Aufl., Bonn, 2014, § 11, Rn. 126. Also, *Terbille M., Höra K.*, Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 77.

⁷¹ *Schmidt E.*, Der Arzt im Strafrecht, in Ponsoldt, Lehrbuch der gerichtlichen Medizin, 2. Aufl., Leipzig, 1957, 2. Referenced: *Bischoff R.*, Festschrift für Karmann Geiss, Hamburg, 2000, 437.

⁷² *Deutsch E., Spickhoff A.*, Medizinrecht, 6. Aufl., Berlin, Heidelberg, New York, 2008, Rn. 17. Referenced: *Schneider L.*, Neue Behandlungsmethoden im Arzthaftungsrecht Behandlungsfehler – Aufklärungsfehler – Versicherung, Berlin, Heidelberg, 2010, 9.

⁷³ BGH NJW 1956, 811, 813. Referenced: *Schneider L.*, Neue Behandlungsmethoden im Arzthaftungsrecht Behandlungsfehler – Aufklärungsfehler – Versicherung, Berlin, Heidelberg, 2010, 9.

At different times, there were different definitions of a doctor-patient relationship. The oldest is the paternalist definition in which the doctor played a role of defending father for his/her patient, and the patient was so called "illiterate child", for whom the doctor was the authority and controlling party.

Proceeding from such an understanding of the relationship, there was a danger that the patient could lose the right for self-determination and there was a threat that the doctor could abuse his/her rights.⁷⁴ Therefore, together with the development of the society and the medicine, the doctor-patient relationship transformed from paternalist relationship into partnership relationship, where, in order to achieve a better outcome, joint discussions and mutual cooperation was taken to the forefront. This, first of all, includes the patient's awareness. The relationship between the doctor and the patient primarily considers providing complete information on existing condition to the patient. Familiarity with the comprehensive information gives him/her an opportunity to weigh everything and, based on this, make a decision.⁷⁵ Of course, this does not mean transferring of all risks to the patient. On the contrary, the partnership relationship between the doctor and the patient implies incorporating their cooperation within the relevant framework for achieving the best outcomes.⁷⁶

The legal relationship between a doctor and a patient is related not only to contractual law and law of torts, but it is also closely related to constitutional law. Medical treatment relationship is a highly sensitive relationship, the boundaries of which reach the fundamental rights of a human.⁷⁷

If we base our discussion on the European experience, the specialized courts are required at constitutional level to use the basic rights as guiding principles while using the civil law norms.

The right of self-determination of the patient is in the center of the responsibility of doctor and the constitutional justice. Proceeding from this idea, in one of its decisions, the German Supreme Court notes that the right for self-determination, which includes the right to make decision freely and the right of human dignity, unconditionally requires the patient's awareness.⁷⁸ Here the court adds that, in general, any interference in the human's body is an injury of a body that requires the patient's consent.⁷⁹

Providing comprehensive information to the patient and the need to obtain patient's consent during the narcosis, surgery, injection, irradiation or other manipulations, is necessary for realization of the right for self-determination. Providing explanation to the patient should ensure patient's full awareness. The doctor has no right to oversimplify and embellish possible risks to the patient. In addition, as the European practice shows, the consent of the patient shall apply to all the doctors involved in the treatment process, whether it is a surgeon or anesthesiologist.⁸⁰

⁷⁴ *Bürger C.*, *Patientenorientierte Information und Kommunikation im Gesundheitswesen*, Wiesbaden, 2003, 19 ff.

⁷⁵ *Ibid*, 20 ff.

⁷⁶ *Schneider L.*, *Neue Behandlungsmethoden im Arzthaftungsrecht Behandlungsfehler – Aufklärungsfehler – Versicherung*, Berlin, Heidelberg, 2010, 10.

⁷⁷ ZfS 1983, 99/100. Referenced: *Bischoff R.*, *Festschrift für Karmann Geiss*, München, 2000, 437.

⁷⁸ BGH AHRS 3150/3. Referenced: *Ibid*, 438.

⁷⁹ BGHZ 124, 52. Referenced: *Bischoff R.*, *Festschrift für Karmann Geiss*, München, 2000, 438.

⁸⁰ *Geiss K.*, *Greiner H.*, *Arzthaftpflichtrecht*, 7 Aufl., München, 2014, C, Rn. 6 ff.

Of course, providing information to a patient does not mean a complete and exhaustive familiarity with the approaches existing in the medical science, but it relates to the impact the specific interference can have on the patient. The form and severity of interference should be explained. In addition, it is not necessary to provide explanation with a medical accuracy.

One important aspect shall be also emphasized in this regard - patient's consent for this or that action does not relieve the doctor from the responsibility.⁸¹

7.2. The Importance of Patient's Further Information Awareness — the Boundary between Providing and Recognition of Information

The issue of providing the information does not lose its significance even after completion of medical treatment or provided service. However, unlike the supply of information based on the right for self-determination, the doctor shall be more prudent while providing the information and explanation following the treatment.

Naturally, the main task of quality management of medical practice is to achieve patients' satisfaction. Dissatisfied patient can spread negative information about the hospital and its medical staff; furthermore, often the patient's dissatisfaction, according to his/her point of view, conditioned by the wrong treatment by a doctor, is manifested in the form of verbal abuse. Therefore, the communication and exchange of information between the doctor and the patient is important at all stages. In some cases, the patient's claims against doctor disappear, when the doctor via the communication with the patient attempts to answer the questions – what were the medical basis for the treatment not having the desired outcome, why does the patient have an opinion that everything could have different outcomes, in some cases, such expectation could be unjustified and etc. Quite often the patient and his/her relatives are looking for answers to the questions themselves. Because of this disappointment, the patient or his/her relatives can make decision to approach the lawyer.

Often, the need for the legal procedure would not become necessary if a doctor, as mentioned above, would give a timely, lengthy and clear explanation to the patient. However, during this type of conversation, it is necessary to be very careful. A doctor shall refrain from the expressions, which indicate that he/she somehow acknowledges a mistake made during the treatment. For example, the German legislator unequivocally indicates that, if a patient claims compensation for damage from a doctor and the doctor recognizes the request in the presence of the patient, then the doctor, on the basis of the mentioned recognition, becomes liable before the patient, and at the same time, the insurance company is liable to the extent, as it would be in case if the doctor did not recognize the fault, based on the circumstances of the case and legal justification.⁸² If the doctor, evading the law, in his/her own opinion recognizes the right for claim for compensation of losses by the patient then he/she is respon-

⁸¹ *Steinmeyer H., Roeder N., Medizin-Haftung-Versicherung, Festschrift für Karl Otto Bergmann, zum 70. Geburtstag, Eiff von W. (hrsg.), Berlin, Heidelberg, 2015, 171.*

⁸² *Meichner O., Steinbeck R., Das neue Versicherungsvertragsrecht, 2 Aufl., München, 2011, § 3, Rn. 12.*

sible against the patient, to the extent, he/she would be responsible in case of absence of insurance.⁸³ Before talking to the patient, the doctor shall be warned to abstain and limit to the explanation of medical facts only. It is always impractical and loss-making position, when a doctor conducts the written communication with the patient in similar situation, without the consent from the insurance company. Any written opinion presented to the person claiming compensation for damages shall not be made through the doctor allegedly involved in wrongful medical practice, but through the insurance company, which is entitled to conduct such correspondence with the claimant for damages, as well as obliged to do so under the agreement. As mentioned in the German literature, the doctor must remember that in such a situation he is just like a dilettante and unprofessional lawyer, as non-doctor person in medical field.

8. Conclusion

One of the ways to approach the international standards of doctor's professional insurance is well-established legislative base. Even in those countries where the mentioned insurance product is popular and had many consumers for a decade, in order to adapt to modern requirements and standards, the legislation is continuously improving and developing. It is expedient to add the relevant article to the CCG, which will regulate the doctor-patient relationship in detail. The second important step is to fill the informational vacuum and eliminate distrust. On the background of increased judicial disputes, the number of doctors bearing material responsibility increases statistically. Often, the hearing is not only a serious material burden for the doctor, but also cause for the damage to the business reputation. As mentioned at the beginning of the work, even professionals make mistakes; accordingly, wrongful medical practice does not always mean it is conducted by an unprofessional doctor. Insurance protection often protects the doctor from noisy judicial proceedings as well as material damages. All parties must take into consideration that protected doctor implies a protected patient, which would be a success achieved by each member of the society.

⁸³ *Terbille M., Höra K., Versicherungsrecht, Münchener Anwaltshandbuch, 3 Aufl., München, 2013, § 19, Rn. 64-65.*

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