

The Physician's Legal Liability

Hekimin Hukuki Sorumluluğu

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ABSTRACT

Throughout history, the physician's legal and ethical approach to his/her patient has been debated, as has his/her professional competence. The treatment contract between the physician and the patient imposes certain duties and obligations on the physician. The physician's professional competence, knowledge, and medical license are the grounds for the obligations of care and personal performance. In other words, the physician must both be medically successful and observe the rights of his/her patient. This study was designed to inform and raise awareness among physicians about legal responsibilities, of which they are often not consciously aware. Relationships that give rise to rights and responsibilities within the scope of patient-physician law are based on contract, tort, or public service. For this reason, the physician-patient relationship (PPR) has two important legal bases: the law of obligations and administrative law. In the study, the legal regulations in our country have been briefly compiled, and examples of legal liability in different countries, based on this legislation, have also been addressed. The relationship between the physician and the patient, based on contract and tort, is regulated by the Law of Obligations, whereas the public service relationship is regulated by the administrative law in our country. Under the power-of-attorney contract, which is the legal basis for the PPR, physicians face compensatory, criminal, and disciplinary liability for their medical acts. Therefore, physicians must act with medical, ethical, and legal responsibility towards their patients.

Keywords: Physician liability, attorney contract, tort, physician-patient relationship, medical law

ÖZ

Tarih boyunca hekimin mesleki yeterliliğinin yanı sıra hastasına karşı hukuki ve etik yaklaşımı da tartışılmıştır. Hekim ile hasta arasındaki tedavi sözleşmesi hekime birtakım borçlar ve yükümlülükler yükler. Hekimin mesleki yeterliliği, bilgisi ve tıbbi ehliyeti, özen ve kişisel edim yükümlülüğünün temelini oluşturur. Yani hekim hem tıbbi açıdan başarılı olmak hem de hastasının haklarını gözetmek zorundadır. Bu çalışma, hekimlerin sıklıkla bilinçli olmadığı hukuki sorumluluk konusunda bilgilendirme ve farkındalık oluşturma amacıyla hazırlanmıştır. Hasta ve hekim hukuku kapsamında hak ve sorumluluk doğuran ilişkiler bir sözleşmeye, haksız fiile veya kamu hizmetine dayanır. Bu nedenle hekim-hasta ilişkisinin iki önemli hukuki dayanağı vardır: Borçlar Hukuku ve İdare Hukuku mevzuatı. Çalışmada bu mevzuat üzerinden farklı ülkelerdeki hukuki sorumluluk örneklerine de değinilerek ülkemizdeki hukuki mevzuat kısaca derlenmiştir. Ülkemizde hekim ile hasta arasındaki sözleşmeye ve haksız fiile dayalı ilişki Borçlar Kanunu ile düzenlenirken, kamu hizmeti ilişkisi İdare Hukuku tarafından düzenlenmektedir. Hekim-hasta ilişkisinin hukuki dayanağı olan vekalet sözleşmesi uyarınca hekimler, tıbbi eylemlerinden dolayı tazminat, cezai ve disiplin sorumluluğu ile karşı karşıya kalmaktadır. Bu nedenle hekimler hastalarına karşı tıbbi, etik ve hukuki sorumluluk bilinci ile hareket etmelidir.

Anahtar Kelimeler: Hekimin sorumluluğu, vekalet sözleşmesi, haksız fiil, hasta-hekim ilişkisi, tıp hukuku

Introduction

Medicine refers to all technical and scientific studies undertaken to cure, alleviate, or prevent disease. Law, on the other hand, can be briefly defined as the order formed by

the rules that regulate people's coexistence (1). Medical law, on the other hand, is a branch of health law that examines issues such as the rights and obligations of healthcare personnel, legal responsibilities, patient rights, drug law, and medical law, arising from the practice of medicine. Medical law is an interdisciplinary branch of law that involves



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aspects of constitutional law, criminal law, administrative law, and civil law (2). One of the fundamental legal issues in medicine is the legal responsibility of the physician in the doctor-patient relationship. This study aims to clarify the legal relationship between doctors, other healthcare professionals, and patients and to raise awareness of their legal responsibilities (including criminal, compensation, and disciplinary responsibilities).

In modern society, a physician is an individual who is granted the authority to practice medicine and perform medical interventions by the legal system. In general, medical intervention encompasses all activities of a physician aimed at healing. All activities and initiatives aimed at ameliorating a disease or disorder fall within the definition of medical intervention (3).

According to Article (Art.) 17 of the Constitution of the Republic of Türkiye (4), except for medical necessities and situations specified by law, a person's bodily integrity cannot be violated, and they cannot be subjected to scientific and medical experiments without their consent. The situation of necessity is one of the reasons that eliminate responsibility in both criminal and private law (5). It is a mechanism that prevents a person from being legally held responsible for committing an unlawful act (crime or tort) when there is no other option and in order to protect a higher value. According to Art. 63/2 of the Turkish Code of Obligations (TCO) (6), "acts committed in cases of necessity are not considered unlawful." In Art. 25 of the Turkish Penal Code (TPC) (7), it is stated that "acts committed with the necessity of escaping from a serious and certain danger that is directed towards a right belonging to oneself or another, which was not caused knowingly and for which there is no other means of protection, and provided that there is a proportion between the severity of the danger and the subject and means used, the perpetrator shall not be punished." Therefore, medical interventions applied by the physician, considering the patient's benefit and aiming to preserve the integrity of the human body, become lawful (2).

There are four conditions for a medical intervention to be lawful:

a) The person performing the medical intervention must be a physician (healthcare personnel), b) indication, c) informed consent of the patient, d) acting in accordance with the data of medical science (2,3,8).

The Legal Aspect of the Physician-Patient Relationship

The relationship between the patient and the physician or the health institution entails mutual rights and responsibilities for the parties. Relationships that give rise to rights and responsibilities within the scope of patient-

physician law are based on a "contract" established explicitly or implicitly beforehand, a "tort," or a "public service" (5,9). For this reason, there are two important legal bases for the physician-patient relationship (PPR): the Law of Obligations and the Administrative Law regulations. The relationship based on contract and tort between the physician and the patient is regulated by the Law of Obligations, whereas the public service relationship is regulated by Administrative Law in our country. On the one hand, there is a skilled and qualified doctor, while on the other hand, there is a weak and vulnerable patient. Therefore, the physician must always act in accordance with professional ethical standards towards the patient. The legal relationship between the patient and either the treating physician or a private or public institution providing treatment can be examined under three headings:

Legal relationship between the patient and the independently practicing physician: When a patient seeks treatment at the office of a freely and independently practicing physician, a contractual relationship is established as soon as the physician accepts the patient and begins the examination and treatment. The contract can be implicit (tacit) or explicit, and, if explicit, it can be written. In this case, the legal relationship between the patient and the physician manifests as a "Contractual Relationship", "Unauthorized Agency", or "Tortious Relationship" (5,10,11). A contractual relationship is established between the patient and the physician through free will and consent to initiate the process of diagnosis and treatment. The contract is not required to be in writing. This relationship gives rise to rights and obligations under the TCO and becomes effective in accordance with private law rules. The prevailing opinion is that this relationship is more akin to a power-of-attorney agreement than to a work or service contract. In some medical interventions, due to the nature of the situation or the patient, a contract based on free will between the physician and the patient may not have been established. In other words, the physician can proceed with a medical intervention in the patient's best interests without the patient's consent. Situations such as a traffic accident requiring emergency intervention, a heart attack, or the necessity to expand a surgery during the operation are examples of this. In such cases of necessity, the physician's intervention with the patient creates an "acting without authority" relationship (12,13). If damage occurs before a contract is established, liability arises from the principle of good faith (*culpa in contrahendo*). A patient who fell and injured their foot while waiting at the door of the outpatient clinic for their appointment is an example of this situation.

According to the TCO, anyone who causes harm to another person through a wrongful and unlawful act is

obliged to compensate for that harm. In such a case, if the doctor is a self-employed practitioner, the injured party can claim compensation directly from the doctor under Art. 49 of the TCO (3,6,10).

Legal relationship between the patient and the doctor working in a private hospital: The relationship between the physician working in a private hospital and the patient is also based on contract, unauthorized act, and tort. The physician working at the private hospital and providing the treatment is not a party to the contract (according to Art. 116 of TCO, the physician acts as an auxiliary person or performer of the private hospital) (3,14).

The "Hospital Admission Agreement" is valid between the patient applying to the private hospital and the hospital (14). Under this contract, all hospital service obligations related to the patient's diagnosis, treatment, and care are covered by the private hospital. This contract can be either full or divided: in a full hospital admission contract, the hospital management is responsible for all services, while the physician serves in an auxiliary role. Under a divided hospital-admission contract, there are a treatment contract between the patient and the physician and a service contract between the hospital and the patient. Under the comprehensive hospital admission contract with a physician addendum, separate treatment contracts exist between the patient and the physician and between the patient and the private hospital. That is, the physician and the private hospital are jointly liable to the patient. When a patient wishes to file a lawsuit, they may do so against either partner (the physician or the private hospital). The legal relationship between the patient and the physician in a private hospital may also arise from "Unauthorized Representation" or "Tortious Liability", in addition to a "Contractual Relationship" (10).

Legal relationship between the patient and the physician working in the public sector: The healthcare services provided to patients in public hospitals and family health centers are of a public nature. The healthcare personnel are also public employees, and the services they provide are considered administrative actions under administrative law. The contract between the doctor's legal entity, whether working in a public hospital or as a family physician, and the patient falls under administrative law. In the event of damage, the patient can file a lawsuit against the administration to seek compensation for the damage, but cannot directly sue the physician; the hospital administration is liable for the damage under the principle of strict liability (3,10-14). In the Supreme Court's decisions, the "removable personal fault" of the physician working in a public hospital was mentioned not as the misuse of administrative authority by the public servant physician, but as the failure to act

in accordance with medical science while practicing their profession. The doctor, who was sued by a patient whose arm was amputated because gangrene developed after the doctor delayed treatment of the broken arm at the state hospital, was found guilty of personal negligence. Thus, it has been emphasized that the defendant physician's action, which distinguishes personal fault from administrative duty, cannot be evaluated within the scope of Art. 129 of our Constitution, which includes the principles of state responsibility and administrative assurance (15).

The legal relationship between the patient and the physician may also arise in the form of "Unauthorized Representation" or "Tortious Liability" in the public sector.

The type of contract commonly accepted between a patient and a physician is the "mandate contract." Accordingly, the physician's duty is the act itself rather than the result of the act; it is to show the necessary care and attention to achieve the result. The contract can be written or oral, and explicit or implicit (there is no requirement regarding form). The contract must be in writing only in cases specified by law (such as hysterectomy, organ donation, or major surgery) (3,10-14).

If there is any breach of contract between the doctor and the patient and the patient suffers harm due to the doctor's incorrect or inappropriate medical intervention, Art. 112 of the TCO applies. In short, the doctor becomes liable for breaching the treatment contract with the patient and is obliged to prove their innocence. It has been emphasized in the Supreme Court decisions that obtaining consent and proving this consent in writing are mandatory, as the physician acted contrary to the obligation to inform the patient. In cases where it is stated that complications developed and there are no documents, etc., in the patient file other than the physician's verbal statement regarding whether the patient was informed about all possible risks before the surgery and whether the patient gave consent knowing these risks, the higher court has deemed expert reports based on the physician's verbal statement sufficient and overturned lower court decisions that were made with insufficient examination.

The judge examines whether there is an appropriate causal link between the doctor's improper medical intervention and the patient's harm. If the harm to the patient does not result from the physician's improper medical intervention, the physician cannot be held liable (3,8). Sometimes, instead of a mandate contract, a "work contract" may be established between the parties, where the outcome of the treatment is exceptionally guaranteed (such as dental prosthetics and aesthetic surgeries). Under employment contracts, if the desired result is not achieved (for example, if the dental prosthesis is not fabricated with

the appropriate color and material or if the tattoo mark is not removed and the skin is not restored to its original state), the patient may sue the doctor (3,12). In different decisions of the Court of Cassation, there may be varied approaches to the work contract. In the case where the desired result was not achieved in an aesthetic nose surgery, but rather the nose collapsed, the face became ugly, and the doctor was sued, the court accepted the work contract; whereas in the operation aimed at removing a tumor from the body of a patient for treatment purposes, it accepted the mandate contract (15).

Under German or Austrian law, unlike in our country, it is based on the PRR service contract. From the perspective of physician liability, the obligation to inform is very important and the most common subject of malpractice lawsuits. In Switzerland, it is based on the PRR mandate contract, as in our country. In England, the basis of physician liability is negligence, which is one of the bases of tort liability. In the United States (US), as in English law, medical malpractice cases in recent years, which have become increasingly frequent, are due to negligence and technology use. In the US, regarding medical liability, PRR is based on mutual agreement; if the patient does not consent, the physician is under no obligation to provide treatment. In countries such as Belgium, Portugal, and Hungary, errors in medical practice are investigated by medical chambers, and, in addition to disciplinary penalties, sanctions such as revocation of medical licenses can be imposed when necessary. The traditional view prevailing in Italian Law was that a direct legal relationship could not be established between the doctor and the patient, and it could only be based on a tort action. This view has been gradually replaced by the understanding that obligations arise from contracts. In Finland, there is an insurance system based on strict liability for wrongful practices by healthcare personnel (no-fault system). Unlike in other countries, the doctor cannot be blamed or sued for their mistake. Damage to the patient is covered by no-fault liability insurance (15-17).

The Concept of Liability in Medical Law

Attitudes and behaviors contrary to legal rules give rise to liability. In private law, liability is defined as the obligation of a person to compensate another person for damage caused by an unlawful act (18). When one fails to do what is required or does what is prohibited, responsibility arises. In private law and, consequently, in medical law, the fundamental principle is "fault liability".

The damage caused to another person by a person's (the physician's) unlawful act and behavior (malpractice) is subject to compensation under the principle of fault-based liability. To establish the physician's fault-based liability,

four conditions must be met, and if these conditions are not present, the physician cannot be held liable for fault:

- Illegality (resulting from breach of contract or tort)
- Fault
- Damage
- Causal link (between action and result) (19,20)

Illegality: The failure of a person to do something that the law commands (active behavior, such as causing injury to someone) or doing something that the law prohibits (passive behavior, such as failing to take necessary precautions).

Fault: For liability arising from breach of contract, the debtor must have neglected to perform the obligations undertaken under the contract. In this case, the fault is generally associated with a specific obligation. The debtor's intentional and willful breach of his contractual obligations is termed intent, and his failure to exercise the care and diligence expected of him to prevent the breach is termed negligence. In private law, negligence includes carelessness and imprudence. However, in contractual liability, the type and degree of fault are not important, as the debtor will be liable for all kinds of fault as a rule. In other words, breaches of contract characterized by intent or negligence give rise to liability. However, in medical practice, negligence is more common than intent (21). Fault is an essential element of fault-based liability. In the absence of fault, there is no responsibility. Negligence, on the other hand, is the failure to exercise the care and diligence required by the situation to prevent an unlawful act, even though such an act is not desired. The person lacks the intent or will to commit an unlawful act, but they lack sufficient will or ability to prevent the unlawful act. In medical law, actions performed by a physician due to negligence are referred to as "professional fault". Carelessness and inexperience are examples of slight negligence; ignorance, inability, and lack of diligence are examples of severe or gross negligence.

Severe negligence: Not knowing what everyone knows, not doing what everyone does.

Slight negligence: The failure to exercise the care that a careful and diligent person would show.

The physician's responsibility is so great that they are liable even for the slightest negligence. In the case brought by the patient, who came to the doctor with a small bleeding in the 10th week of her pregnancy, followed the doctor's medication and advice, attended the check-ups, but later had her uterus removed due to uncontrollable bleeding caused by repeated abortions after a miscarriage, the doctor was found guilty and held responsible for all the faults within his professional field. The decision emphasized that the doctor is responsible for potential complications and for managing them appropriately (22).

Damage: Reductions in a person's assets that occur against their will. In cases of unlawful acts arising from a contract, the party causing the damage (the physician) must prove that they were not at fault. In the TCO, damage is defined as death (treatment and funeral expenses, loss of support from the deceased) and bodily harm (treatment expenses, loss of earnings, loss of working capacity, or loss of economic future) (3,8,9,20). According to Turkish regulations, the physician has three types of legal responsibilities arising from the patient harm to the patient caused by faulty medical practice (23):

- Compensation liability according to the TCO
- Criminal liability according to the TPC (imprisonment or fine)
- Disciplinary liability under Administrative Law

The subject of medicine is human health, its aim is healing, its subject is the physician and its object is the patient. Therefore, the physician must always act in accordance with the rules of professional ethics towards his/her patient. The physician's primary duty is to provide health care services in accordance with ethical and legal standards. The physician is obliged to be highly competent and successful in his/her profession, to make the right decision, to exercise necessary care, and to serve without errors. When a physician violates the legal conditions for medical intervention, liability arises. The four conditions known for a medical intervention to be lawful: a) The person performing the medical intervention must be a physician (healthcare personnel), b) indication, c) informed consent of the patient, d) acting in accordance with the data of medical science. Since a physician cannot be unaware of the first three conditions, violating these conditions gives rise to "intentional liability" for the physician. However, the failure to perform a careful and diligent intervention in accordance with medical standards, which is the 4th condition, usually arises from an unintentional negligent act by the physician, and therefore, liability due to negligence is involved (8). In criminal law, intent refers to a voluntary act performed knowingly and willingly. In medical law, doctors generally do not intentionally commit crimes. In cases of negligence, on the other hand, an action is performed intentionally, but the negative outcome that may result from it is not desired and is not foreseen. In cases of conscious negligence, although the adverse outcome is foreseen and not desired, it is considered unlikely to occur. For example, a person performing a medical intervention while under the influence of alcohol may foresee that the patient will suffer adverse consequences, but they believe they can succeed and that harm will not occur. The fact that the physician cannot foresee the possibility of harm due to negligence, recklessness, or carelessness (his fault) is considered a fault.

In medical interventions carried out by a team, such as those involving multiple doctors or nurses, everyone takes responsibility to the extent of their fault (23).

Table 1 summarizes the crimes listed in the TPC that are frequently committed by physicians and the subjects of malpractice cases.

In cases of injury and death resulting from a doctor's negligent medical intervention, the crimes of negligent injury and negligent manslaughter apply. According to the TPC, euthanasia, organ and tissue trafficking, experimentation on humans, and the unlawful provision of data constitute prohibited crimes that doctors may commit. Doctors are obliged to report the crimes they witness (3,23).

Finally, the disciplinary offenses for which the state-employed physician can be held responsible following a faulty medical intervention are defined by Art. 125 of the Law on Civil Servants No. 657 and are enforced by the physician's disciplinary superior (23).

- Warning
- Reprimand
- Salary deduction
- Suspension of the progress of the level
- Dismissal from civil service

Conclusion

According to Turkish Law, the contract between the patient and the physician or the accepted patient-physician relationship is a mandate contract. The physician is responsible not for the outcome but for having demonstrated the necessary care and diligence to achieve the outcome. If there is a breach of the treatment contract and the patient suffers harm due to the doctor's incorrect or inappropriate medical intervention, the doctor becomes liable to the patient for acting contrary to the treatment contract. All attitudes and behaviors that are contrary to legal rules give rise to liability in the patient-physician relationship. However, the judge seeks an appropriate causal link between the damage and the doctor's action in the given situation. In other words, it examines whether the damage to the patient resulted from the doctor's inappropriate medical intervention. If harm to the patient is not caused by an inappropriate medical intervention by the physician (in cases of complications), the physician cannot be held responsible.

The relationships between the patient and the physician that give rise to rights and obligations are based on "contract" outside of the context of agency without authority, a "tort," or a "public service". For this reason, there are two important legal bases for the PPR: the Law of Obligations and Administrative Law regulations. Because the relationship based on contract and tort between the physician and the

Table 1. The crimes and corresponding penalties listed in the Turkish Penal Code that are frequently committed by physicians and are the subject of malpractice cases

Article number in the TPC	Name of the offense in the penal code	Corresponding penalties
81	Deliberate homicide	Life imprisonment
83	Intentional homicide by negligent behavior	15-20 years of imprisonment
85	Negligent homicide	2-6 years of imprisonment
86	Intentional injury	1-3 years of imprisonment
87	Aggravated injury as a result	2-6 years or 3-9 years of imprisonment
88	Intentional injury with negligent behavior	A 1-3 year prison sentence can be reduced by 2/3
89	Negligent injury	Imprisonment from three months to one year or a judicial fine
90	Experimentation on human	1-3 years of imprisonment
91	Organ or tissue trafficking	5-9 years of imprisonment
99	Child abortion	5-10 years of imprisonment
101	Human sterilization	3-6 years of imprisonment
105	Sexual harassment	Imprisonment from three months to two years or a judicial fine
106	Deprivation of liberty of a person	Imprisonment from three months to two years
135	Recording personal data	1-3 years of imprisonment
136	Unlawfully giving or obtaining data	2-4 years of imprisonment
141	Theft	1-3 years of imprisonment
151	Damage to property	Imprisonment from four months to three years or a judicial fine
155	Abuse of trust	Imprisonment from six months to three years or a judicial fine
157	Fraud	Imprisonment from one year to five years and a judicial fine of up to five thousand days
204	Forgery of official documents	2-5 years of imprisonment
205	Distorting, destroying or concealing an official document	2-5 years of imprisonment
207	Forgery of private documents	1-3 years of imprisonment
212	Cumulation (forgery of documents + use in another crime)	The total penalty for forgery and other crimes
231	Changing the child's ancestry	1-3 years of imprisonment
235	Bid rigging	3-7 years of imprisonment
247	Embezzlement	5-12 years of imprisonment
250	Extortion	5-10 years of imprisonment
252	Bribery	4-12 years of imprisonment
257	Abuse of office	Imprisonment from six months to two years or a judicial fine
259	Trading of a public official	Up to 6 months in prison or a fine
260	Abandonment or non-performance of public duty	Imprisonment from three months to one year or a judicial fine
262	Unlawful assumption of public office	Imprisonment from three months to two years or a judicial fine
280	Failure of health workers to report the crime	Up to 1 year in prison
287	Genital examination	Imprisonment from three months to one year

TPC: Turkish Penalty Code

patient is regulated by the Law of Obligations, while the public service relationship is regulated by Administrative Law in our country.

As a result, the subject matter of medicine is human health; its aim is healing; its subject is the physician; and its object is the patient. The physician's action, i.e., a medical intervention, is within the scope of public service. The physician-patient relationship differs slightly from other legal relationships. This is because on one side is the skilled and qualified physician, whereas on the other side is the weak and powerless patient. Therefore, the physician must always act in accordance with the rules of professional ethics towards his/her patient. It is evident that distinct legal relationships and civil and criminal consequences may arise either between the patient and the physician or between public and private health institutions. The main duty of the physician is to provide health care services in accordance with ethical and legal rules. The physician is obliged to be very good and successful in his/her profession, to make the right decision, to pay attention to the necessary care and to serve without making mistakes.

Footnotes

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