



Medical Malpractice

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Introduction

Medical malpractice is defined as “professional negligence by a health care professional or provider in which treatment provided was substandard, and caused harm, injury or death to a patient“. [1]

This notion is very ancient, dating back to the Babylonians‘ code of Hammurabi that had 282 rules of which rule 218 that stated “ If a physician make a large incision with the operating knife, and kill him, or open a tumour with the operating knife, and cut out the eye, his hands shall be cut off [2].”

In the centuries that followed, there were periods where this notion was forgotten only to be brought back in the 19th century as we all know it.

In medical malpractice, two kinds of concepts can be drawn, “lege artis” and “non lege artis”. The term “lege artis” is applied to doctors that keep up with the law of the art, meaning they adhere to certain standardized protocols while “non lege artis” is when doctors don’t follow these standards. While “lege artis” poses no problems in situations in which the patient agrees with the physician through the signing of a consent form, it can lead to problems when the patient does not. Several examples of this kind of situation can be given but the best and most common ones relay upon end of life care such as in the situation where a patient is not able to swallow and the doctor recommends the usage of a feeding tube and the patient refuses, putting so the doctor in a dilemma about whether he should adhere to the “lege artis” concept

or respect the will of the patient. Other such ethical topics can be emphasized such as the application of this principle towards euthanasia [3].

Some ethnical populations can also cause concern such as that of the Jehovah's witnesses. Patients with these beliefs are strongly against receiving any kind of blood product, from platelets to whole blood but they will accept fluid replacement therapies as long as they do not contain blood [4]. Whilst they will be against receiving the "primary components" of blood (red blood cells, white blood cells, platelets and plasma), the acceptance of fractions of these is up to each individual patient. Patients can thus choose if they want to receive albumin, globulins, interferons, interleukins, haemoglobin and other such components of blood (Annex 1 [5]). Jehovah's witnesses being against allogeneous transfusions in all cases, they might consider autologous transfusion in a situation where the blood will not be separated from the patients' circulation at any time but they will always refuse preoperative blood auto donation. In these patients, it is performed a so called "bloodless surgery" so that there is no use of blood transfusions during these procedures. [6] Some other procedures such as dialysis, heart-lung equipment, intraoperative blood salvage without storage or therapeutic apheresis are dependent on a personal decision from the Jehovah's witness (Annex 2) [7]. In the case of this particular religious conviction, doctors are generally protected from malpractice suits since the faithful population tends to take some legal steps in order to protect themselves [4].

A very important medical subject in which this concept is proving impossible to implement is in research and clinical trials in which the use of standardized procedures goes against its

basic principle, that of discovery and novelty [3]. Whilst the violation of the “lege artis” concept might still be a reason to accuse a doctor of wrong doing, it might be exculpated in situations such as that reported in which doctors failed to make the right diagnosis due to the lack of time of hospital practitioners derived from their attempt to do things as fast as possible as a means to maximize profit [3, 8].

In France, we distinguish three types of courts in which doctors can be tried: criminal, administrative and civil.

Civil court is responsible for assessing several kinds of medical errors such as the doctor misinforming the patient, no signing of consent forms, lack of respect of the doctor towards the patient, breach of professional secrecy or technical mistakes like misdiagnosis, wrongful choice of treatments or performance to undertake. The plaintiff can make a claim both on moral and physical integrity grounds and he will be the prosecutor while the defendant will be the doctor. Judges will call to the stand medical experts that will not only explain the correct procedure in that situation but also try, if possible to justify the doctor’s attitudes. If some wrong doing is ascertained then the plaintiff will receive a monetary sum [9].

Administrative court is responsible to assess not a physicians’ responsibility but a hospital one in situations such as bad management or organisation of the healthcare staff, defects in the architecture and safety of hospital that can lead to a patient’s escape or fall. Unlike in civil court, in administrative court the patient does not have to present any evidence and it is the hospital’s responsibility to pay the plaintiff [10].

Criminal court can condemn doctors that have been proven to have false diplomas, committed violence voluntarily, involuntary man slaughter, euthanasia, human sterilisation without therapeutic ends, illegal abortions, breach in medical secrecy, experimental procedures without human consent and for not assisting a dying person. Since these situations are quite hard to prove, most commonly doctors do not suffer any consequences unless there is absolute certainty [11].

In the United States, medical malpractice is considered a civil offense in which negligence occurred. To prove this alleged malpractice, four elements must be verified and proved by the plaintiff: The supposed physician was treating this specific patient, the physician broke the rules relating to the standard of care, the plaintiff was injured due to the doctors errors, deserving so a compensation [12].

In the United States it is said that 75 to 99% of practicing doctors will be sued over their career, [13] being amongst the most commonly threatened specialities, the surgical ones [14].

Jiam et al compiled all the medical claims in the NPDB (National Practitioner Data Bank) between 1990 and 2011, finding out the top 10 procedures for which the patients claimed money in the pretences of either permanent, temporary or emotional injuries. The conclusion reached was that the most common causes for the plaintiff's lack of satisfaction were for improper performance of the physician, improper technique and the inability of the doctor to detect a complication. An interesting category is the category of „never events“ that also

figures amongst the top claims and includes errors such as leaving a sponge inside the body and taking out the wrong organ from the patient [15].

In Italy, not only the number of claims but also the monetary reimbursement for the plaintiff is increasing yearly. Italy being the country in Europe where more physicians are subject to criminal action related to medical malpractice. As in the United States, the doctors who have the highest possibility of being sued are also surgeons. The primary causes of complaint being deficient follow up, wrong diagnosis and faulty performance of surgeries in patients [16].

Sweden operates according to a „no fault system“ in which insurance adjusters, conversing with medical experts, have one year to decide whether or not the patient is entitled to receive any extra amount of money. The doctor is not involved in this process and doesn't have to prove he proceeded in the correct way. If the victims are unsatisfied with the decision of the adjuster, they can appeal to an Independent Patient Claims Panel that is made of judges and doctors appointed by the government but this rarely happens [17].

Even though doctors have a lot of pressure on them, in most countries in the world they can rely in Colleges (for instances in England, Portugal and France) or Boards (for instance in the United States) that will protect them in a first instance. For example, in the United Kingdom, if there is a suspicion for malpractice, the colleges will inform the individual in question not only of this problem but also of the possible consequences that might arise from it. The plaintiff will have the right to defend himself and appeal from the College's decision. In case,

the College finds the situation too serious to be tried by them, they can report it to the police, civil or criminal courts [18].

Discussion

Several countries in Europe and in the United States have different systems each with their own advantages and disadvantages.

While in the Mediterranean countries (Portugal, Spain and Italy) and in the United States, physicians are tried in court houses, subjected to criminal penalties and very severe money compensations; in Scandinavian countries such as Denmark, Sweden and Finland, physicians are not tried in any way, being the victims compensated directly by insurance adjusters causing much less burden both to the doctors and economically to their countries but not reprehending the doctor in any way for any possible grave mistake he might have committed.

In United States, due to the very frequent claims, doctors are practicing more and more a so called „defensive medicine“, ordering excessive diagnostic tests and performing additional therapeutic interventions that might harm the patient to a bigger extent, not to mention putting a strain in the health care costs. Furthermore, this system is causing also a psychological toll on doctors leading them to either change speciality (to a speciality with lower risk of getting sued) or quitting their profession entirely [19].

A new approach towards avoiding malpractice suits in the United States, is disclosing medical errors to patients. While this promotes transparency, it is bound with legal implications and can lead to problems with the reputation of the physician [20].

Whilst the American system can correlate to the Mediterranean system, the numbers of medical malpractice claims are quite different. For instance in Portugal, there were 184 alleged cases in 2013 [21] while in the United States 76 839 claims were made in 2012 [22].

Conclusion

While the United States and some other countries have a judicial system that has not only the ability to punish the doctor and compensate the patient but also the possibility of causing psychological damages and the creation of a more defensive medicine with time; Scandinavian countries have an administrative system that is only able to compensate the patient without reprimanding the doctor. An ideal system would be a combination of both.

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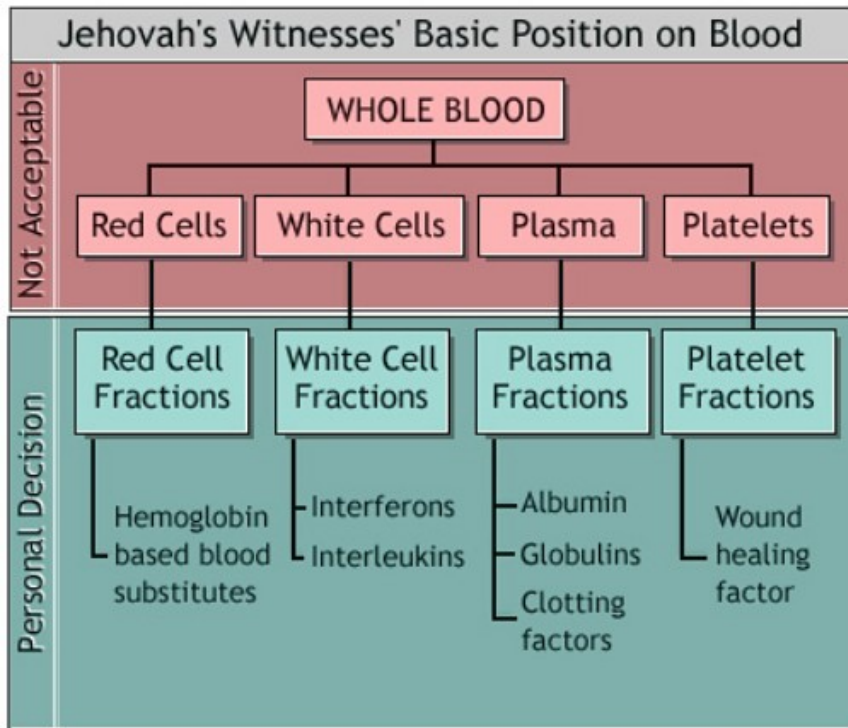
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Annex 1- Jehovah's witnesses' position on blood [5].



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Annex 2- Techniques that are considered acceptable by Jehovah's witnesses [7].

ACCEPTABLE ALTERNATIVES	
<p>Blood-oxygen monitoring devices</p> <ul style="list-style-type: none"> • Transcutaneous pulse oximeter • Pediatric ultra-microsampling equipment • Multiple tests per blood draw (batching) <p>Hematopoietic agents</p> <ul style="list-style-type: none"> • IV Iron (InFed, Ferricet, Venofer) • Folic Acid • Vitamin B-12 • Vitamin C • Granulocyte-colony stimulating factor (Neupogen) • Interleukin-11 (Neumega) • Recombinant stem-cell factor (Stemgen) <p>Operative and anesthetic techniques</p> <ul style="list-style-type: none"> • Hypotensive anesthesia • Induced hypothermia • Mechanical occlusion of bleeding vessel <p>Hemostatic agents for bleeding/clotting Topical</p> <ul style="list-style-type: none"> • Avitene • Gelfoam • Oxygel • Surgicel <p>Injectable</p> <ul style="list-style-type: none"> • Desmopressin (DDAVP) • e-aminocaproic acid (Amicar) • Tranexamic acid (Cyklokapron) • Vasopressin (Pitressin) • Aprotinin (Trasylol) • Vincristine (Oncovin) • Conjugated estrogens • Vitamin K (Phylonadione) • Recombinant Factor VIIa (NiaStase) • Recombinant Factor IX (BeneFIX) 	<p>Volume expanders: Crystalloids</p> <ul style="list-style-type: none"> • Ringer's lactate • Normal and hypertonic saline <p>Volume expanders: Colloids</p> <ul style="list-style-type: none"> • Dextran • Gelatin • Hetastarch (Hespan, Hextend) • Pentastarch <p>Oxygen therapy</p> <ul style="list-style-type: none"> • Hyperbaric oxygen therapy • Perfluorocarbon solutions (Oxygent) <p>Surgical devices and techniques</p> <ul style="list-style-type: none"> • Electrocautery • Ligasure vessel sealing system • Laser surgery • Argon beam coagulator • Gamma knife radiosurgery • Microwave coagulating scalpel • Endoscope • Arterial embolization • Cryosurgery • Ultrasonic scalpel
PERSONAL DECISIONS	
<p>Medical products and therapy</p> <ul style="list-style-type: none"> • Albumin • Any drug buffered with albumin (e.g., Epogen/Procrit, Kogenate) • Immune globulins • Natural clotting factors • Cryoprecipitate • Plasma protein fractions (Plasmanate) • Tissue adhesives • Natural interferons • Hemoglobin-based blood substitutes • Platelet derived wound healing factors 	<p>Medical tests</p> <ul style="list-style-type: none"> • Red or white blood cell tagging <p>Surgical procedures</p> <ul style="list-style-type: none"> • Dialysis and heart-lung equipment • Intraoperative blood salvage (Cell Saver) without storage • Hemodilution (if blood is not stored) • Therapeutic apheresis

Based on a table created by Fountain Valley Regional Hospital and Medical Center.