

## Discussion of physician's legal responsibility in suits for damages brought against cardiothoracic surgeons within the framework of Supreme Court decisions (Cardiothoracic surgery in Supreme Court precedents)

*Kalp ve damar cerrahlarına karşı açılan tazminat davalarında hekimin hukuki sorumluluğunun Yargıtay kararları çerçevesinde tartışılması (Yargıtay içtihatlarında kalp ve damar cerrahisi)*

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### ABSTRACT

In this review, we present the evaluations of Court of Appeals for 13<sup>th</sup> Civil Chamber concerning decisions made by local courts as a consequence of medical malpractices by cardiothoracic surgeons. This legal terminology and concepts, which seem to be rather distant to physicians ourselves, are valid at every stage while executing our profession. According to the Turkish Penal Code, not knowing about the law is not considered as an excuse and this concept is valid in laws of every civilized country. As in the examples given in the review, in daily physician and surgical practices, an ordinary medical intervention may turn into causes of which their suit may continue for years and result in damages. The main component in the concept of malpractice is the neglect and defect in the care and treatment standards. The patient physician relationship is an attorney agreement and during his/her treatment, the patient grants the physician the right to intervene with the integrity of his/her body. In all such cases of conflict, evaluations are being made within the frame of the current general laws due to the lack of legal regulations toward health legislation.

**Keywords:** Cardiothoracic surgery; Court of Appeals for 13<sup>th</sup> Civil Chamber; legal responsibility of physician; precedents.

As required by the principle of the state of law, the physicians also are responsible for their professional practices before the law. Physicians' being ignorant of the laws or sanctions

### ÖZ

Bu derlemede kalp ve damar cerrahlarının tıpta uygulama hataları sonucu yerel mahkemelerce verilen kararlara ilişkin Yargıtay 13. Hukuk Dairesinin değerlendirmeleri sunuldu. Biz hekimlere oldukça uzak görünen bu hukuk terminolojisi ve kavramları mesleğimizi icra ederken her aşamada geçerlidir. Türk Ceza Kanunu'na göre kanunu bilmemek mazeret sayılmamakta ve bu kavram her medeni ülkenin kanunlarında geçerli olmaktadır. Günlük hekimlik ve cerrahi uygulamalarında, derlemede verilen örneklerde olduğu gibi, sıradan bir tıbbi müdahale senelerce davası devam edebilecek ve tazminatla sonuçlanabilecek nedenlere dönüşebilmektedir. Malpraktis kavramında temel unsur, bakım ve tedavi standardında ihmal ve kusurdur. Hasta hekim arasındaki ilişki bir vekalet sözleşmesidir ve hasta tedavisi boyunca hekime vücut bütünlüğüne müdahale etme hakkı tanımıştır. Tüm bu uyumsuzluk durumlarında sağlık hukukuna yönelik kanun düzenlemeleri olmadığı için değerlendirmeler mevcut genel kanunlar çerçevesinde yapılmaktadır.

**Anahtar sözcükler:** Kalp ve damar cerrahisi; Yargıtay 13. Hukuk Dairesi; Hekimin hukuki sorumluluğu; içtihatlar.

regarding themselves does not free them from responsibility. Pursuant to article 44 of the Turkish Penal Code, being ignorant of the law may not be an excuse.<sup>[1]</sup>

*Received:* August 22, 2016 *Accepted:* March 30, 2017

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**Cite this article as:**

Türker FS, Türker G. Discussion of physician's legal responsibility in suits for damages brought against cardiothoracic surgeons within the framework of Supreme Court decisions (Cardiothoracic surgery in Supreme Court precedents). Turk Gogus Kalp Dama 2017;25(4):681-9.

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Malpractice is defined as the failure of a member of a profession to implement the profession with the knowledge and skill that should be implemented under all circumstances by an averagely prudent and respectable member of the profession in society, and consequently harming the person utilizing the service. Medical malpractice refers to misapplication of medicine, physicians' misapplications or improper practices in medicine. Therefore, practices performed in contravention of the requirements of medical science and profession may be named as medical malpractice. Medical malpractice is the medical manifestation of wrongful performance, which is a sub-branch of failure to perform properly. Negligence constitutes the predominant theory in suits for damages arising from medical malpractice. In order for damages to be awarded due to malpractice based on negligence, the plaintiff must prove the presence of the below elements;

1. Physician's obligation to the patient, which is generally based upon the presence of a physician-patient relationship,
2. An applicable care and/or treatment standard and its violation,
3. A recoverable damage,
4. Fault,
5. Relationship of causality between the violation of the care and treatment standard and the arising damage.<sup>[2]</sup>

A medical error may be defined as physician's harming his/her patient due to his/her conducts that do not comply with treatment or care standards resulting from imprudence, carelessness, inexperience in the profession or failure to obey the rules.<sup>[2]</sup>

Assuming that the relationship between the physician or the hospital and the patient is an agency contract, it may be stated that the patient cannot be imposed to prove the fault. For according to the article 112 of the Turkish Code of Obligations (TCO), the physician is obliged to compensate unless he/she proves that he/she cannot be charged (imposed, impeached) with the fault.

Also, article 17/II of the Constitution indicates that one's rights on his physical integrity and health are among the fundamental rights and decrees that the physical integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; he shall not be subject to scientific or medical experiments without his consent. In addition to this regulation in the Constitution, article 49 of the TCO provides protection by means of compensation against pecuniary and non-pecuniary damages arising from acts aimed at one's physical integrity. For this reason, any actions proceeded against an individual's physical integrity are conducts that are impossible to approve even if they do not cause significant damage and therefore, it is mandatory that the individual is protected against such actions.<sup>[3]</sup>

**Case I-** This case involves a suit for pecuniary and non-pecuniary damages brought by a patient who underwent a secundum type atrial septal defect (ASD) operation at a private hospital after which his/her complaints were not relieved and an interatrial septum re-flow was detected during evaluation. The suit was reversed by the Supreme Court in favor of the defendants.

The plaintiff claimed that holes were detected in two places in his/her heart as a result of a control and examination upon his/her complaints of tightness in the heart and arrhythmia; he/she was operated on by two heart surgeons on 26 December 2005 at a private hospital; he/she was informed that the operation was very successful and the treatment for the holes in his/her heart was performed flawlessly; he/she was discharged on 31 December 2005; but his/her pain increased even more and discomfort continued, such that it prevented him/her from performing even the simplest movements in his/her normal life while affecting his/her family life and causing problems with his/her spouse; when he/she applied to the private hospital where he/she was operated on for a control visit three months after the operation, the doctor in charge examined him/her with ultrasound and said that the operation was very successful and the treatment occurred as well; yet he/she stated that he/she felt discomfort but the private hospital where he/she was operated on did not pay regard to his/her such statements and 15 days after the final control examination, he/she visited the local state hospital for an examination; as a result of the analyses performed there, he/she was referred to a specialized state hospital in Istanbul; as a result of the examination performed at this hospital on 17 April 2006, he/she was informed that the holes in his/her were not closed and treatment did not occur; this time, he/she visited the local state hospital for an examination and was referred to a research hospital located in another province; and as a result of the examination performed at this hospital on 02 May 2006, it was detected that the holes in his/her heart were open; thus he/she claimed and filed a suit for a decision to be made for the collection of 1,000.00 TL pecuniary and 100,000.00 TL non-pecuniary damages from the defendants jointly and severally (alternately), reserving any of his/her surplus rights.

The court decided on the dismissal of the suits for pecuniary and non-pecuniary damages brought against one of the defendant heart surgeons due to waiver; partial acceptance of the suit for pecuniary damages brought against the other defendants and the collection of the 1,000.00 TL of 8,399.48 TL as of the suit date of 21 February 2008 and the 7,399.48 TL as of the rectification date of 23 December 2010 severally from the defendants private hospital and the other defendant heart surgeon, including legal interest, to be given to the plaintiff; dismissal of the claim for surplus; partial acceptance of the suit for non-pecuniary damages brought against the other defendants and the collection of the 35,000.00 TL as of the

suit date severally from the defendants private hospital and the other defendant heart surgeon, including legal interest, to be given to the plaintiff; and dismissal of the claim for surplus; the judgement was appealed by the defendants private hospital and the defendant surgeon.

In this case, the suit is related to a claim for pecuniary and non-pecuniary damages arising from the responsibility of the physician and the private hospital undertaking the diagnosis and treatment service. The suit grounds on a case of violation of the duty of care arising from the defendant physician's agency contract. The Forensic Medicine Institution (FMI) report was not found to be sufficient to render a judgement due to its failure to explain adequately the manner the incident occurred. Therefore, a decision was made indicating that the duty of the court is to submit (deliver, give over) the file to a committee of experts consisting of expert cardiovascular surgeons to be selected from departments of universities; assess as a whole the defendants' legal positions and responsibilities along with the evidence available in the file; and make a decision in accordance with the result attained by means of a report to be obtained that is eligible for the audit of any party, court and Supreme Court and that demonstrates whether or not any negligence or fault exists requiring the defendants' responsibility in the incident according to medical demands and rules, and explains the causes thereof.

Considering the concrete incident, it is indisputable that the plaintiff patient was operated on by the defendant physician at the hospital owned by the defendant company for the closure of the holes in the heart. According to the report of the Third Specialization Board of FMI, the 4x2 cm sized ASD depicted in the secundum ASD repair operation of the plaintiff patient that was performed at the private hospital on 26 December 2005 4x2 cm should have been closed with patch instead of primary suture and the actions of the defendant surgeon did not conform with rules of medicine.<sup>[4]</sup>

However, the mentioned report has not explained sufficiently if the holes were closed as a result of the current operation, if new holes were formed, or if the current holes persisted due to the improper performance of the operation. Therefore, the Supreme Court decided in favor of the defendants indicating that the FMI report was not sufficient to render a judgement.

A brief summary of this case would be that a patient underwent secundum type ASD operation at a private hospital after which his/her complaints were not relieved and subsequent evaluation showed atrial septum re-flow. Then, the patient brought a suit against both of the defendant heart surgeons for pecuniary and non-pecuniary damages. Based on the FMI report, the local court acknowledged that the surgeons failed to perform the duty of care sufficiently pursuant to the agency contract drawn with the patient. Thereupon, it judged for the surgeons,

in other words, the agents, to pay damages. However, the defendants used their rights to appeal and their objection was assessed by the 13<sup>th</sup> Civil Chamber of the Supreme Court that reversed the decision made by the local court in favor of the plaintiff due to the insufficiency of the forensic medicine report submitted to and based on by the local court which judged that closure of the secundum ASD with primary suture instead of patch was a fault. The Supreme Court indicated that the FMI report was not sufficient to show if the ASD opened due to primary closure or if there was any other remaining residual flow and thus reversed the decision of the local court on grounds that a committee of experts consisting of expert cardiovascular surgeons to be selected from departments of universities should assess this file to prepare a new report.

**Cases 2 and 3-** These two cases involve the reversal of the decision made by the local court regarding the same suit in favor of the plaintiff.

The plaintiff claimed that he/she underwent a bypass operation at a private hospital on 13 November 2000; his/her pain did not subside, upon which he/she applied to the defendant physicians who performed the operation and was informed that blood coagulation occurred which was a natural process after the operation; however, when he/she visited another physician, it was detected that a gauze bandage was forgotten in his/her heart during the operation; the gauze bandage was removed with an operation performed at a state hospital; and suffered pecuniary and non-pecuniary damages during the treatment period since he/she served as the president and manager of five companies thus he/she claimed a decision to be made for the collection of 50,000.00 TL pecuniary and 50,000.00 TL non-pecuniary damages as yet from the defendants severally, reserving any of his/her surplus rights. The conflict involves whether or not the defendant physicians who performed the operation had any fault during or after the operation.

Epicrisis reports available in the file indicate that in the concrete incident, the plaintiff was operated on by the defendant physicians at the private hospital on 14 November 2000; the plaintiff applied to the state hospital when his/her pain did not subside, was hospitalized with a "diagnosis of lung abscess", and performed abscess drainage; and the radiopaque material used to mark the gauze bandage forgotten in the body during the bypass operation was removed with foreign body removal operation. There was no conflict regarding these issues. The conflict involves whether or not the defendant physicians were faulty in forgetting the radiopaque material used to mark the gauze bandage in the patient's body during the bypass operation. The FMI report dated 31 October 2005 states that forgetting gauze bandages is characterized as a medical error in forensic medicine applications; however, the material removed at the state hospital's cardiovascular surgery was not a gauze bandage but a radiopaque material

used to mark the gauze bandage; indeed, the fact that the number of gauze bandages was correct at the counts performed during the operation confirmed this situation; marking with radiopaque material is a method applied to eliminate the risk of forgetting gauze bandages; however, leaving the radiopaque material behind is a fault related to the preparation of the gauze bandage; the physicians who performed the operation exercised maximal attention and care; therefore, they cannot be attributed any fault; and if it is acknowledged that the gauze bandage was prepared at the defendant administration, the defendant administration would be faulty in the occurrence of the left lung abscess and the corresponding procedures; while the report dated 13 December 2004 of the Specialization Board of FMI obtained during the prosecution office investigation explains that the material with radiopaque quality may have remained in the pleural cavity when the physician was removing the gauze bandage; in the supplied X-rays, the radiopaque material was located laterally to the left lung lower lobe field and despite being associated with the operation, this localization was outside the operative field and may not have been noticed by the physician; thus, no fault was present that could be imposed on the physician.<sup>[4]</sup>

A brief summary of this case would be that the plaintiff, that is to say, the patient, underwent a coronary bypass operation at a private hospital but his/her pain did not subside in the postoperative period, after which the appearance at left thorax was interpreted in favor of hematoma during the evaluation. However, during an evaluation performed at a state hospital, this appearance was detected to conform with an abscess which was drained possibly through left thoracotomy and from inside was removed a blue radiopaque tape with barium sulfate that is used to mark the sponges. The FMI report concluded that forgetting gauze bandages inside patients is an error; however, since this piece was the radiopaque material used to mark sponges; not the physicians but the administration, in other words, the hospital may be held responsible in the preparation of the sponge. Also, the report of the Specialization Board of FMI obtained during the prosecution office investigation concluded that the radiopaque material was located laterally to left lung lower lobe which was outside the operative field but associated with the operation; therefore, the physician may not have noticed it, thus the physician is not faulty and consequently the suit was dismissed. The 13<sup>th</sup> Civil Chamber of the Supreme Court reversed the decision judging that forgetting foreign materials inside the body during operations is an error and the decision stating that the physicians are not faulty based on these reports indicates that the judgment was given through deficient examination, which is against procedures and laws. The Supreme Court decided that patient's operation and signboard documents, all X-rays, and epicrisis and forensic medicine reports pertaining to both of his/her operations shall be delivered to a committee of three experts consisting of faculty members

with academic career to obtain a report that is eligible for the audit of any party, court and Supreme Court, that demonstrates whether or not any fault exists that may be imposed on the defendant physicians related to forgetting inside the patient's body the radiopaque material used to mark the gauze bandage, and that explains the causes thereof to detect if the defendant physicians are faulty according to the principles and grounds and deliver a judgement based on the result.

In the third case, the same plaintiff appealed claiming from the local court to reverse the decision they had made against him/her.

The report dated 03 November 2008 prepared by the faculty-member committee of experts and obtained upon the reversal decision of the 13<sup>th</sup> Civil Chamber of the Supreme Court indicates that "...The radiopaque marker that should never detach from the gauze bandage, of which its possible detachment was not foreseen scientifically since no such incident occurred before," detached from the gauze bandage due to an unknown cause (production error or any other unforeseen cause) and caused this complication; there is no fault that may be imposed on the defendant physicians; as may be seen in the literature, such markers with barium sulfate are left inside patients due to a great number of medical causes; therefore, not only the radiopaque marker but also and even predominately, some factors pertaining to the patient (allergy, rejection of the foreign body by the organism etc.) are effective in the development of this problem.<sup>[4]</sup>

Despite the committee of experts report, the 13<sup>th</sup> Civil Chamber of the Supreme Court found that it was faulty to forget inside the plaintiff patient the radiopaque material that should never have detached from the gauze bandage during his/her operation and reversed the decision in favor of the plaintiff stating that the case should be reinvestigated.

Case 4- The plaintiffs claimed that the patient who was their daughter and sister underwent a heart operation at the defendant hospital in the year 1998; her two heart valves were replaced; patient visited the defendant hospital for routine control on 10 April 2003 and was told that her international normalized ratio (INR) was 4.04 and informed by the defendant specialized physician that she should continue the same-dose medication; no information was provided regarding the condition of the patient; the patient continued the treatment as told; however, after three days, she developed fever, headache and nape pain, speech disorder, and unconscious behavior and was brought immediately to the emergency service of the hospital; at the emergency service, she was examined by a non-defendant specialized physician; patient's INR value was not measured; contrary to what was said before, she was advised to decrease the dose of the medication and was discharged on the condition that she should be brought again unless her condition did not change;

patient's condition deteriorated; she was brought to the hospital again, told that she was administered the wrong treatment method, and hospitalized; she suffered cerebral bleeding on the same day; her condition did not change for three days as a result of the hospital's lack of interest; she lapsed into a vegetative state; was transferred to another private hospital and died here; thus the plaintiffs claimed a decision to be made for the collection of a total of 55,000.00 TL non-pecuniary (20,000.00 TL each for mother and father, 7,500.00 TL for siblings) and 1,000.00 TL pecuniary damages due to defendants' lack of professional care, neglects, and failure to perform the requirements of their duty.

The defendants stated that neither the hospital nor the other defendant physicians had any neglect or fault; and the patient was brought to the hospital 10 days later despite all suggestions to bring her one day after at the latest; thus the defendants requested the dismissal of the suit claiming that the plaintiffs were faulty. The court decided to dismiss the case and the plaintiffs appealed the judgment.

In the concrete incident, the result of the report of the First Specialization Board of FMI dated 17 October 2012 indicates that the patient, who was born in 1979 and underwent ASD closure and mitral valve replacement in 1998 when she was nine years old at a private foundation hospital, arrived at the defendant hospital on 10 April 2003; was examined and checked by a physician; reapplied to the hospital on 13 April 2003; the follow-up of the patient was performed by the defendant physician; the required examinations and follow-ups were performed; the patient left the hospital voluntarily; the patient reapplied to the hospital on 22 April 2003 and was tended by a specialized physician not involved in the suit; she was hospitalized; all medical procedures related to her treatment were performed; upon the deterioration of the patient's condition, she was referred to the intensive care unit of a private hospital on 25 April 2003 at the request of her relatives; she died here on 30 April 2003; patient's INR level that was detected when she first applied to the hospital was within normal treatment range; she was advised another INR check for after four days or one week; during the examination of the patient by the defendant physician, patient resisted the inspection and treatment due to her agitation; her blood could not be drawn; the family was advised to decrease the dose of medication; patient's neurological consultation was performed; however, due to the agitation, she was allowed to leave the hospital upon the request of the family before any administration could be performed; a prescription was issued and it was told that she should absolutely apply to the hospital if her fever recurs; the patient was brought to the hospital by the family after nine days; the procedures and actions of the defendant physicians complied with the rules of medicine; and that they could not be imposed any fault. The court based its judgment on the FMI report and dismissed the suit. On the other hand, the FMI report does not discuss

issues such as whether or not the treatment performed by the defendant physicians was sufficient and complied with the rules of medicine; whether or not the patient, who reapplied to the hospital on 13 April 2003 and had mechanical mitral valve, thus used the medication named Coumadin, required close (in-patient) follow-up due to her complaints; the fact that there was no signed statement showing that the plaintiffs took the patient out of the hospital willingly; and whether or not the patient was eligible to be taken out of the hospital; thus this report is far from providing detailed information and includes abstract statements. Also, the committee that issued the report did not include a brain surgeon, a neurosurgeon, or a hematology expert. A report issued by the chief of the cardiology clinic of a specialized state hospital as a result of the inspection performed upon the complaint of the plaintiffs considered that a patient under such conditions should have been followed-up as an in-patient; there is no signed document showing that the patient's relatives took her out of the hospital willingly; and therefore, the hospital is faulty.<sup>[4]</sup>

In this case, the patient was performed mechanical mitral valve replacement and followed-up at a private foundation hospital. During the patient's routine INR follow-up, she developed neurological symptoms and agitation. Agitation developed possibly due to the cause that created the neurological symptoms or the damage formed in the brain because of the extreme increase in the INR value and the relatives of the patient refused treatment and took the patient out of the hospital. Here, the 13<sup>th</sup> Civil Chamber of the Supreme Court's reversal of the decision in favor of the plaintiff was based on the failure to obtain a consent form from the relatives of the patient showing that they refused the treatment as mentioned in the expert report.

## DISCUSSION

In these four cases, the 13<sup>th</sup> Civil Chamber of the Supreme Court begins its decisions with the following comment: The suit, as is, relates to the responsibility of the physician and the private hospital; while it is the direct duty of the judge to characterize in terms of the law the cases that are based on in the suit and search out the statutory provisions to be executed (article 76 of the Administrative Judicial Procedure Act numbered 1086; article 33 of the Code of Civil Procedure numbered 6100). The suit grounds on a case of the defendant physicians' violating the duty of care arising from their agency contract (articles 502 and 506 of the TCO). The agent is not responsible for his/her failure to obtain the aimed result while performing his/her duty, but he/she is responsible for the failure to carry out carefully the activities and procedures to achieve this result. Article 506/3 of the TCO discusses the agent's duty of care with the regulation as follows: "the agent's responsibility arising from his/her duty of care is determined based on the behavior that should be exhibited by any prudent agent

undertaking work and services in a similar area". Pursuant to this regulation, the scope of the agent's responsibility and duty of care will be determined based on the behavior that should be exhibited by any prudent agent undertaking work and services in a similar area. In other words, the scope of responsibility is determined considering the type, difficulty, and required training and level of professional knowledge, namely the objective benchmark, for the work to be performed according to the contract provisions. Physicians are obliged to exercise not only professional attention and care, but also the attention and care that may be imposed on everyone according to their general life experience so that their patients do not get harmed. While performing medical work, the physician is obliged to fulfill certain professional restrictions, value the patient's condition, pay regard to and administer the rules of medical science, and conduct the treatment by taking all kinds of measures. In case of any minor hesitation, the physician is obligated to perform research to eliminate this hesitation and in the meantime, take preventive measures. While making a selection among various treatment methods, the physician should consider the characteristics of the patient and the disease, avoid any attitudes or behavior that may put the patient under risk, and prefer the safest way (See Tandoğan et al., *Borçlar Hukuk Özel Borç İlişkileri*, Ankara 1982, pg. 236). In fact, the client trusting the agent has the right to expect the agent (physician), who is a professional worker, to exercise care and attention. An agent who fails to execute care meticulously should be deemed to have failed to carry out the agency contract properly pursuant to article 506 of the TCO.

Due to necessity, other laws that are similar but that were not prepared for medical applications have been grounded on to assess complaints and suits in medical application errors. As is seen, although being ignorant of the law may not be an excuse, a separate training is required to comprehend the articles of laws. Two possibilities appear for what may be done in such situations that may be faced by the physician. First is constructing legal regulations specific to the responsibility arising from medical misapplications. The Law Draft for Responsibility Arising From the Application of Medical Services was submitted to the Presidency of the Grand National Assembly of Turkey on 24 July 2002 but not brought into force. A review of the details of this law draft shows that, as emphasized before, due to the advanced medical applications and technologies in the provided medical services, physicians are pressed to perform certain applications that they were unable to perform in the past, and, as a result of these applications that mostly include severe risks, complaints and suits involving medical misapplications have increased. Here, World Medical Association's Marbella Declaration of 1992 was referred to and attention was drawn to taking measures in the national laws to cover the damages of patients who sustained medical damage.<sup>[5]</sup> This declaration requires a decision

to be made on whether the patient's damage will be covered if the undesired result in treatment is not related to any error of the healthcare personnel and if it will be covered, which source will be used; indicates that it is the state's duty to provide insurance coverage for patients in such condition; and places importance on informing the public on the risks that new technologies have, training physicians on obtaining informed consent from patients for such treatments and surgeries, revealing the problems in medical applications, and working on developing legislations and methods for medical misapplications. When any damage occurs due to medical misapplication, if the person causing the damage works in the public sector, one may resort to judgement within the framework of the procedure mentioned in the fifth paragraph of article 129 of the Constitution and article 13 of the Code of Administrative Procedure numbered 2577 for the recovery of the damages incurred and suits for damages may only be brought against the administration. For the recovery of damages caused by the medical misapplications of healthcare personnel working outside the public sector, suits for damages may be brought in judicial justice within the framework of the general principles of TCO.<sup>[5]</sup> Legal experts' comment on this issue, which has a complex structure in terms of legal and medical aspects, is that such legislations and methods for medical misapplications should be prepared meticulously with support from expert persons and boards. This draft that was prepared in the year 2002 has become obsolete (when chances of discussing a law draft or bill are lost when the law draft or bill does not pass into law during the relevant legislative year) due to 2002 elections. Also, approaching patient-physician relationship as a commercial structure that is subject to market rules will not benefit the patients. It is criticized that the draft is dominated by an understanding that unfairly imposes physicians with all the responsibility related to healthcare services ignoring the fact that healthcare is a social right under the state's watch pursuant to the social state principle.<sup>[2]</sup>

Another solution is informing physicians working either in the private or public sector regarding their legal responsibility.

## **RESPONSIBILITY OF A PHYSICIAN WORKING AT A PRIVATE HOSPITAL**

### **General**

Private hospitals are private healthcare establishments -which are not part of the public management- that are subject to the permission of the Ministry of Health in order to be opened.<sup>[6]</sup> Operators of private healthcare establishments may be real persons or legal persons such as commercial companies, foundations, or societies.

Generally, a physician providing services at a hospital has a service contract with the hospital operator and therefore is a person working as part of the hospital staff.

On the other hand, sometimes it is possible for a physician from outside the hospital to undertake the treatment of a hospitalized patient. Today, such relationships exist commonly, particularly when it comes to operations.

Although the physician who is a part of the hospital's staff works according to the service contract, he/she is completely free in terms of performing the profession of medicine. The physician, while performing the medical services he/she provides at the hospital, is obliged to fulfill the requirements of medical science and it is not possible for the hospital management to give him/her any limiting instructions in this matter. The physician should act freely while choosing the treatment method, just like he/she does in establishing the diagnosis. The physician's obeying the instructions of the hospital does not free him/her from responsibility. However, this is important in terms of the internal relationship between the physician and the hospital.<sup>[6]</sup>

As of the moment of application, a special legal relationship is established between the hospital and the patient, who arrives at the private hospital for reasons such as receiving a diagnosis or treatment, or getting his/her health checked or protected. The contract between the private hospital and the patient is named "Admittance to Hospital Contract".

There are opinions in the Turkish law indicating that admittance to hospital contracts are combined contracts, while the dominant opinion is that they are mixed contracts that majorly incorporate the contract's proxy elements.<sup>[7,8]</sup>

Accommodating, feeding and providing other care services that arise from an admittance to hospital contract are responsibilities of the hospital operator. However, execution of the medical treatment is undertaken sometimes only by the hospital operator, sometimes by the hospital physician, and sometimes both by the hospital operator and the hospital physician depending on the characteristics of the concrete incident. Differentiating admittance to hospital contracts into two as full admittance to hospital contracts and separated admittance to hospital contracts will be appropriate.<sup>[9]</sup>

#### **Physician's responsibility in full admittance to hospital contract**

In this type of contract, the hospital operator has undertaken all obligations related to hospital care including medical treatment as well as accommodation and feeding, etc. The hospital fulfills these obligations together with its employees (physicians and other healthcare personnel). Here, the issue that should be indicated is that the physician who will perform the treatment is chosen by the hospital. However, depending on the explicit intent of parties, a physician operating outside the hospital may also undertake the execution of the medical treatment. For this reason, full admittance to hospital contracts are divided into two as full admittance to hospital contract without

physician contract and full admittance to hospital contract with physician contract.<sup>[9]</sup>

#### **Full admittance to hospital contract without physician contract**

According to the rules of private hospital management, no contractual relationship may be established between the physician and the patient. In such situations, a service contract exists between the physician and the hospital operator. The physician who works as part of the staff of the private hospital is the execution assistant of the hospital operator (TCO, article 116).<sup>[10]</sup>

In this type of contract, a contractual relationship has been established between the patient and the hospital. The patient claims the obligations arising from the contract from the hospital operator.

A patient who suffers damage due to a physician's conduct violating any obligation may bring a suit against the hospital operator due to the damaging conduct of the execution assistant pursuant to article 116 of the TCO.<sup>[11]</sup> If the damaging conduct of the physician is an unlawful act, it is also possible for the patient to bring a suit against the hospital operator based on article 66 of the TCO. Due to the lack of a contractual relationship between the patient and the physician, the physician may be held responsible for provisions of wrongful act pursuant to article 49 of the TCO and its continuation.

Despite the lack of a contract between the physician and the patient, the physician should exhibit the required attention and care during the treatment procedure. The physician shall always be indebted to the hospital operator due to any of his/her fault in the obligation of care or attention.

#### **Full admittance to hospital contract with physician contract**

In addition to the full admittance to hospital contract concluded between the patient and the private hospital operator, a separate treatment contract may be concluded between the physician working at the private hospital and the patient. In such situations, besides the hospital operator, the physician as well has a contractual and joint responsibility for the treatment (article 511/II of the TCO). Due to the contract, the physician is under obligation of treatment to the patient and responsible for any damage he/she causes according to the contract (article 112 of the TCO) and wrongful act (article 49 et al. of the TCO) provisions. A physician who utilizes an assistant during treatment is also responsible for any faulty acts of the hospital personnel he/she utilizes as an execution assistant pursuant to article 116 of the TCO.

The decision of the Supreme Court Assembly of Civil Chambers dated 23 June 2004 and numbered 2004/13-291 E. 2004/370 K. states that "the operative team leader physician was faulty in the occurrence of the incident at a

rate of 4/8 since he/she failed to timely notice and repair the artery that was damaged during the operation, while the remaining fault rate of 4/8 was characterized as bad fortune. It is clear that in addition to the physician, the hospital owned by the other defendant company that acts in the capacity of a work provider and operator is also jointly and severally responsible for the incident. For the private hospital operator, besides its primary requirement to act as a prudent trader, has to exhibit loyalty and care so that the patient, and, in special circumstances, patient's relatives do not suffer any damage since the service the private hospital operator provides involves public healthcare services relating closely to the right to live. Such care should be exhibited maximally particularly in terms of the selection and inspection of the physician and the other auxiliary personnel, whilst not forgetting the same principle in the preparation of the other conditions", and therefore emphasizes the joint responsibility of the hospital operator together with the physician to the patient.

#### **Physician's responsibility in separated admittance to hospital contract**

When there is a separated admittance to hospital contract, the patient becomes a party in two separate contracts. In such contracts, the hospital operator is obligated to provide only the hospital services within the scope of the admittance to hospital contract, while the treatment is under the responsibility of the physician who has a treatment contract with the patient.<sup>[11]</sup> An example for the establishment of such a contract may be a free-lance physician hospitalizing his/her patient based on the contract he/she formed with the hospital operator. In this case, the patient does not have the right to bring a suit against the hospital operator due to any faulty act of the physician, since the responsibility of the hospital is limited to hospital care. Thus, the physician is not the execution assistant of the hospital, instead, he/she is the executer of his/her obligation.<sup>[6,9]</sup>

## **RESPONSIBILITY OF A PHYSICIAN WORKING AT A PUBLIC HOSPITAL**

### **General**

Public hospitals are non-profit healthcare establishments founded and operated by the state or some other public legal entity aiming to provide healthcare services for public benefit.<sup>[6]</sup>

Since employees such as physicians, anesthesiologist assistants, nurses, and orderlies who play an active role in providing healthcare services to citizens at public hospitals have public personnel status, the service they perform is an administrative activity in terms of administrative law. In essence, the offering of healthcare services at public hospitals for public benefit involves two parties. These are the public establishment providing public services and the patient who is the recipient of public healthcare services.<sup>[12]</sup>

Only a public relationship is established between the public establishment and the patient who applies to a state hospital to receive treatment and healthcare services. Besides this public relationship, the patient has no contractual relationship with physicians or other personnel working at the establishment.

#### **Legal responsibility between a physician working at a public hospital and the patient**

We had mentioned above that no contractual relationship may be formed between a physician working at a public hospital and the patient. The relationship between physicians and patients at public hospitals is a public relationship. In such relationship, the responsibility is based on the rules of public service faults. Therefore, the responsibility for recovery of damages for patients suffering any damage whilst receiving healthcare services from a public hospital should first be directed to the public legal entity at first degree.

As stated above, rules of responsibility mandate that any fault of public hospitals or healthcare personnel is considered a service fault; therefore, due to article 36/3 of the Public Service Law numbered 657 and article 40/2 of the Constitution, suits may not be brought directly against employees working at such hospitals since they are public servants; instead, pursuant to article 129/5 of the Constitution, a full remedy suit may only be brought against the relevant public establishment.<sup>[12-14]</sup>

Here, the criteria that distinguish types of fault including a service fault, duty fault or personal fault should be well-known.

Service fault occurs when any public service is never processed, is processed badly, or slowly. Such occurrences may develop due to public impossibilities, for instance, due to failure to provide the required tools or hardware because of budget insufficiency, extreme stampede or word load, or failure to cultivate experienced experts or personnel. A service fault is an anonymous fault; in other words, it is a fault that is not attributed to a certain person.<sup>[15]</sup> The administration is responsible for damages arising from service faults. Also, should the administration cover any damage for service faults, it cannot recover such damage from any personnel of the establishment.

A duty fault is different from a service fault. Their common feature is their arising only during the execution of the public service and in relation to the public service.<sup>[16]</sup> A duty fault is a fault committed by a civil servant while performing the public service due to reasons such as carelessness, recklessness, imprudence in the profession or art, or inexperience. For example; misdiagnosing a patient, furnishing medical attention during a misdiagnosis, or failure to inform the patient are duty faults committed during the execution of the medical duty. In damages arising from duty faults, the first addressee whom the patient should regard as responsible is the relevant



establishment, just as in service faults. However, in duty faults, the establishment has the right to recover damages from the personnel of the establishment who is known to have committed the fault.

Personal fault is sometimes mixed up with duty fault. Personal fault for a public personnel physician means damaging a patient with faulty conduct that is not related to the execution of the public duty. In such case, the legal characteristic of the relationship between the physician and the patient would be a wrongful act. For a personal fault to be characterized as such, the basic criterion is for the faulty act not to have any relevance to or any relationship with the execution of the public duty.<sup>[16]</sup> For example, during a medical intervention, a physician getting angry at the relatives of a patient due to their interference and punching a patient relative is the fault of the public hospital physician, in other words, a personal fault, since the said act has no relevance to the execution of the public duty.

In conclusion, a person has certain innate and unalterable rights, the foremost being the right to live and the right to health. As physicians, we must absolutely comply with these rights and know the personal rights. Being ignorant of the law is not considered an excuse. Due to our training and area of specialization, it does not seem possible for us to know all obligatory, civil or criminal codes. However, the requirement to know our legal responsibilities that would only fit into a few pages and how to act in current negative situations provides personal and professional benefits. As may be seen in the Supreme Court decisions, any deficiency or error in obeying the rules during the execution of the profession may cause suits that may result in severe compensation. Complaints involving errors in medical applications may turn into suits that are challenging to assess by legal experts due to the lack of laws pertaining to the area of medicine and rather challenging for physicians to comprehend. As physicians, an outcome that we briefly regard as a complication may cause a payment of high amounts of damages as a result of legal evaluations. My personal opinion for such suits to be defensible is, firstly, our requirement to be professionally well-trained and qualified physicians and surgeons who keep up with up-to-date scientific developments. For this, we need to develop an education program providing a certain standard that starts from the medical faculty, extends towards residency, and continues thereafter. While evaluating his/her patient and making a decision of intervention, the physician should include the patient in the treatment process and obtain patient's and patient relative's written informed consent under appropriate conditions and manner after enlightening the patient sufficiently.<sup>[17]</sup> Primarily the Turkish Medical Association, Chambers of Physicians, and Foundations of Expertise should take active role in legal applications in the medical field and in the preparation of laws and regulations. Particularly the Foundations of Expertise should play efficient role

in the determination of the criteria for specialized physician training, planning of numbers and distributions, preparation of diagnosis and treatment guidelines, and auditing of specialized physicians. Furthermore, these foundations should plan the procurement of legal services and also develop measures to defend their own members in case undesirable incidents such as malpractices are submitted to court.

#### **Declaration of conflicting interests**

The authors declared no conflicts of interest with respect to the authorship and/or publication of this article.

#### **Funding**

The authors received no financial support for the research and/or authorship of this article.

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