Using the International Classification of Functioning, Disability and Health in assessing moral damages

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Abstract: Acts of medical malpractice attract civil liability of the medical staff or medical providers which through these deeds caused prejudices to patients. Civil liability of medical personnel implies taking cover of the prejudices caused by acts of malpractice. Where the conditions of civil liability are met this manifests as a rule, an obligation for compensation, the compensation for a prejudice caused by medical act. If the prejudice can be assessed in money, it is a patrimonial prejudice (material prejudices). If the prejudice is not likely to financial evaluation, it is a moral prejudice (moral injury). If material prejudices can be quantified, in a direct, objective way, based on experts’ reports, the financial compensation for moral injury issue remains a controversial one, due to subjectivity in the assessment of monetary damages for such injuries. In our analysis we aim to present a possible solution for the adoption of the International Classification of Functioning, Disability and Health as a tool for structuring and standardization of the assessment needed to cover compensation for prejudices caused by acts of medical malpractice. In an annex to this article, we enclosed an example of using the coding operation of the International Classification of Functioning, Disability and Health to assess the prejudice caused by a possible act of medical malpractice[1]. Developing and implementing a standardized system for assessing moral damages can contribute to change the stance of the insurance companies concerning the coverage for moral injury under the liability contracts for medical staff.

Key Words: prejudice, moral injury, medical malpractice

Civil liability of the medical staff

Principle of civil liability

Legal texts summarizes the principle of civil liability, as follows: "The person causing a damage to another individual, through an illicit deed, committed with guilt, has the obligation to repair it. The author is liable for the lightest damage fault "[2].

The New Civil Code does not aim to list and describe in concrete terms, possible illegal acts that are likely to attract civil liability, the task to ascertain the conditions necessary for meeting liability belongs to law enforcement practice.

In what concerns the medical field, there are specific legal texts, which define the conditions of civil liability.

Civil liability is only a possible component of the legal liability, along with criminal liability, disciplinary and administrative and other ways of exercise, depending on the specifics of the various branches of law. Civil liability can operate separately or together with any liability [3,4].

Our field of interest in this article is restricted only to civil liability. It can occur alone or be combined with one or more other forms of legal liability, mentioned before.
If the prejudice can be estimated in cash, it means is a real prejudice (material damages). If the prejudice cannot be evaluated in cash, it is a moral prejudice (moral damages/injury). Material damages are quantifiable, directly and objectively, based on expert reports.

The issue of financial compensation for moral damage is but one of the controversial issues, even in the law systems of states that have consistently upheld the payment of financial compensation for such damage.

In relation to the criteria for moral damages, the jurisprudence has decided that "no recourse to material evidence, as the sole judge in relation to the consequences on any plan, suffered by a civil party, must determine a certain global amount to compensate for what the civil party lacks as a result of the action committed by the defendant"[5].

To conclude, at present, there is no moral damage assessment scale. This reality has two direct consequences:

1. The impossibility of an objective assessment, by the courts, of the amount of moral damages sought by the civil party in order to repair their prejudice and
2. The reluctance of insurance companies to include compensation for moral damages in the liability insurance contracts of the medical staff.

The two consequences mentioned above have direct effects in legal practice and the company assurance strategy[6].

A system for the quantification of punitive damages would eliminate the hesitations and inconsistencies, as witnessed by the current practice of assessment and compensation of patrimonial prejudices, which relies on material evidence.

Therefore, our scientific approach will describe a tool used worldwide to measure health status and I will prove how this tool could be used by experts to quantify moral damages.

Moral damages are requested based on information about the health status deterioration, as well as from areas connective to health (such as education and labour). Our duty is to transform these information based on the functional status and subjective perceptions of a certain individual in standardised data. A possible mechanism that can be used for this purpose is The International Classification for Functioning, Disability and Health.

International Classification of Functioning, Disability and Health

Overview

The International Classification of Functioning, Disability and Health (ICF) was created by the World Health Organization (WHO) and endorsed by 191 countries [7].

Experts from 65 countries have been involved in this project, over a 7-year period. The field surveys they organized were aimed at certifying that this classification is applicable in various cultural spaces, regardless of age, sex or religion.

The ICF overall aim is to "provide a unified and standard language, as well as a general framework to describe health and other health-related states"[8].

The specific objectives are as follows:

- to provide a scientific basis for understanding and studying health and health-related states, outcomes and determinants;
- to establish a common language for describing health and health-related states in order to improve communication between different users, such as healthcare workers, researchers, policy makers and the general public, including people with disabilities;
- to permit comparisons of data across countries, health care disciplines and services over a specific period of time.
- to provide a systematic coding scheme for health information systems.

ICF covers all health aspects, as well as certain ancillary components relating to welfare – health and health-related domains [9]. ICF consists of two parts, each made of two components (see Table 1).

Each of the above-mentioned components can be described in both positive and negative terms. Each component consists of various domains. In these domains, categories are used as classification units. An individual’s health and health-related states can be described by choosing the category code or codes, to which qualifiers are then added. Qualifiers consist of numerical codes that specify the extent and magnitude of the functioning or disability from the respective category or the extent to which an environmental factor facilitates or hinders functioning.

In order to understand the classification complexity and its usefulness in assessing moral
damages generated by a medical malpractice claim, I shall describe in detail how this is organized, then give examples of practical applicability.

We shall now list the definitions used for each component, the applicable qualifiers and the major chapters they represent

**Part 1. Functioning and disability**

- Body functions, structures and impairments.

  ICF uses the following definitions:

  Body functions are the physiological functions of the body systems (psychological functions included).

  Body structures are the body anatomic parts, such as organs, limbs and their components.

  Impairments are problems in body functions or structures, such as significant deviation or loss.

  Impairments can be temporary or permanent; progressive, regressive or static; intermittent or continuous. Deviation from the population norm may be slight or severe and can fluctuate over time.

  Deviation characteristics are coded with qualifiers.

  Qualifiers used in assessing body functions.

  The following generic qualifiers shall be used to assess body functions, with the negative scale used to indicate the extent or magnitude of impairment:

  $\text{xxx.0 NO problem (none, absent, negligible...)}$ 0-4%  
  $\text{till xxx.4 COMPLETE problem (total, ...)}$ 96-100%

  Where xxx stands for the chapter number and detailed subchapter number, respectively.


  Three qualifiers are used to assess body structures.

  The first qualifier is the one described above.

  The second qualifier indicates the nature of the changes occurring in the respective body structure: form 0 (no change in structure) till 6 (qualitative changes in structure, including accumulation of fluid).

  The third qualifier (suggested) indicates the location: 0 - more than one region, 1 – right, 2 – left, 3 – both sides, 4 – front, 5 – back, 6 – proximal, 7 – distal, 8 – not specified, 9 – not applicable.

  Body structures are coded with letter “s” and cover the following chapters: 1 - Structures of the nervous system, 2 - The eye, ear and related structures, 3 - Structures involved in voice and speech, 4 - Structures of the cardiovascular, immunological and respiratory systems, 5 - Structures related to the digestive, metabolic and endocrine systems, 6 - Structures related to the genitourinary and reproductive systems, 7 - Structures related to movement, 8 - Skin and related structures.

  Body functions and structures are classified in two different sections, designed for use in parallel. For example, “seeing functions” are structurally correlated in the form of “eye and related structures”.

- Activities and participation.

  Activities and participation are coded with two qualifiers: the performance qualifier, placed in the first position after the point in the coding system and the capacity qualifier, placed in the second position after the point.

  Activities and participation are coded with letter “d” and cover the following application chapters:


**Part 2. Contextual factors**

Environmental factors.

Definition: environmental factors make up the physical, social and attitudinal environment in which people live and conduct their lives.

First qualifier. There is a positive and a negative scale for the extent to which an
Environmental factors act as a barrier or a facilitator; the use of a point indicates a barrier and the plus sign indicates a facilitator, if it used 1 point, it means there is a barrier (from xxx.0 - No barrier till xxx.4 Complete barrier) and if it used the sign "plus", it is a facilitator (from xxx+0 - No facilitator till xxx.4 Complete facilitator).

The second qualifier is yet to be developed.

Environmental factors are coded with letter "e" and cover the following application chapters:
1. Products and technology – refers to the natural or human-made products or systems of products, equipment and technology in an individual’s immediate environment that are gathered, created, produced or manufactured.
2. Natural environment and human-made changes to the environment – refers to animate and inanimate elements of the natural or physical environment and components of that environment that have been modified by people, as well as characteristics of human populations within that environment.
3. Support and relationships – refers to people or animals that provide physical or emotional support, nurturing, protection, assistance and relationships to other persons in their home, place of work, school or play or in other aspects of their daily activities.
4. Attitudes – refers to attitudes that are the observable consequences of customs, practices, ideologies, values, norms, factual beliefs and religious beliefs.
5. Services, systems and policies.

Applying ICF in the settlement of medical malpractice claims.

As shown above, medical professionals’ liability represents the obligation to pay for the prejudice caused by a medical act.

The claimed damages are material and moral. Judiciary practice grants moral damages based on appraisals conducted by appointed experts. Moral damages are appraised subjectively by the judge, as there is no appraisal system in place.

The subjectivism of these appraisals poses several problems.

Firstly, judiciary practice relies on a poor scientific basis to define the disability, activity limitations and impairment concepts.

Meanwhile, the current evaluation system does not guarantee fair treatment of claimants.

Claimants with similar problems may get different compensations.

The method for setting the extent of the moral damages is at the judge’s discretion, which has at his/her disposal evidences coming from various fields (medical reports and other specialized reports) submitted by both the claimant and the defendant. There is no instrument or standard to guide this process, the major argument used to support this situation being the subjective evaluation power of the judge that ensures a proper evaluation of the individual circumstances.

In conclusion, the evaluation of material, but especially moral damages is not based on a structured and rigorous process.

A possible solution in developing a system of moral damage assessment could be provided by ICF.

The potential of using ICF in moral damages evaluation.

Claims are paid to compensate for the sustained prejudice. Thus, the compensation should guarantee the reinstatement of the initial condition, in as much as possible. But the evaluation process is arbitrary, unstructured, unfair and litigious.

ICF could provide the working basis for clarifying and developing a structure to classify, evaluate and compensate prejudices caused by medical malpractice.

ICF classification was developed for coding various health or health-related states and not the actual disorder, as the International Statistical Classification of Diseases and Related Health Problems, 10th edition, revised (ICD-10) is used in this respect.

Currently, ICF uses have started to expand their coverage area to new therapeutic domains that include the evaluation of health status for patients suffering from stroke [10], multiple sclerosis [11,12], malignant diseases [13], musculoskeletal [14, 15,16] and rheumatologic [17, 18, 19] disorders.

Thus, ICF classifies the individual’s functioning in various health-related areas of life, as well as in functioning areas that impact general well-being and welfare.

The well-being state covers all areas of human existence, including physical, mental and social aspects that form what we can call “a good life”.

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In its evaluations, ICF applies a percentage scale to express the extent of the impairment (from 0-4% - no impairment; up to 96 - 100% - severe impairment). This scale can be linked to a material compensation plan, tailored for each ICF area. Thus, the claims volume can be quantified using a scientific instrument endorsed by 191 countries.

As an example of how this instrument works, we have coded in ICF terms a story about a possible medical malpractice case, featured in the media. The example described in Annex 1 demonstrates the capacity of this instrument to scientifically code any type of information related to the impairment of a person’s health state and well-being.

The use of ICF in quantifying moral damages also has limitations. The main constraint is the need to apply an evaluation instrument individually. Personal factors are not currently covered by this WHO classification.

Ethical issues related to ICF use.

Only experts familiar with this classification system should use ICF.

Just like any scientific instrument, ICF should not be misused. The ethical principles of autonomy, benefit and justice should be essential in the use of this instrument.

According to WHO “neither ICF, nor all information obtained from applying it shall be used to deny the customary rights of certain citizens or groups, or to limit in any way their rights to certain benefits”

Conclusions

Medical professionals’ liability means taking the responsibility for covering the prejudices caused by malpractice.

As stated before, if material damages can be quantified directly and objectively, based on reports drafted by experts, the issue of monetary compensation for moral damages remains controversial because of the subjectivism in assessing the monetary compensation for such prejudices.

ICF can be an extremely useful instrument in the effort to structure and standardize the evaluation of compensations that need to cover the prejudices caused by medical malpractice. This will also cause a change in the insurance companies’ attitude about including moral damages compensation through liability contracts for medical professionals.

A. A - A victim of the doctors' incompetence

A.A., aged 22, was diagnosed with systemic lupus erythematosus in 2002. She was admitted to several hospitals in the county of T. In 2002 she went to see a specialist at C. Hospital. This medical doctor prescribed her a much too strong treatment for her age and weight. She would take approximately 1,500 mg of Medrol tablets, 1,500 mg of Medrol perfusion and 1,000 mg of cyclophosphamide per month. The young girl was only 17 and weighted 45 kg at the time. She was never told that, during this treatment, she would lose calcium in the bones, nor was she prescribed any drugs to help her body cope.

A life filled with suffering

The treatment was so intense that she was unable to walk three months after. Following numerous tests, she found out she had severe cortisone osteoporosis and spine fractures. “No words can describe the terrible pain I went through. All my dreams were shattered because of that incorrect treatment. During all these years I have had other horrible experiences because certain medical doctors. Today, my life is filled with suffering”, tells Adelina. She has been wearing a spinal corset for several years now. She used to be a very active person, she used to run, swim, ride the bicycle every day and now she has to stay in a wheelchair almost all the time. She can walk, but she gets tired very quickly because of the five fractures she has now.

Surgery in Vienna

AA’s only chance of getting well is a spine surgery at a western clinic. However, the cost of the surgery is very high, about EUR 30,000. Gathering such a large amount of money is impossible for the girl’s family. A.A. appeals to the readers of asking them to help her. “I refuse to spend my whole life in a wheelchair and be dependant on my family for help. I no longer want to cry because of the pain. I beg you, help me make my dream come true. All I want is to get well so that I can go back to school. I want to graduate high school and why not, go to college.”

Photo:

“I refuse to spend my whole life in a wheelchair and be dependant on my family for help. I no longer want to cry because of the pain. All I want is to get well so that I can go back to school.”
References


Annex 1. A case featured in the media (Tajfasiuri, 28.08.2008 - 03.09.2008) and the relevant ICF coding