



A BROAD OVERVIEW OF MEDICAL MALPRACTICE LIABILITY POLICY IN TURKEY

Veli Durmuş*

* *Ph.D. Healthcare Administration, Marmara University, Turkey.*
e-mail: velidurmus@hotmail.com

Abstract: The importance of health law has grown over the years at international and national level. An important element of health law is the use of law to promote good and effective health. Health law concerned with a number of issues which have arisen from health care services, both civil, political, cultural economic and social rights. Thus, health law shares conceptual terrain with the fields of health policy. The impact of internationalization health care on health-policy making will cause legalization of rules in the health law field. Health policy may impact on the health outcomes such as health service costs, patient physician relationships, and quality of health services received. This study examines structural and regulatory standpoints that shape Turkish health law policy. In order to mention that, it has been assessed government structure of health care, health insurance policy besides regulatory framework e.g. medical liability systems and medical malpractice under civil law and criminal law. Based on the qualitative and quantitative scientific evidence on the effects of Turkey health policy, it has been discussed key lessons and implications for policy-makers to resolve difficult health law policy problems in future.

Key Words: Health policy, Health law, Health care, Turkey health system, Medical liability.

Introduction

Health outcomes are problematic in Turkey. Infant Mortality Rate (IMR) is an important indicator of the health of a nation because it is associated with a variety of factors such as maternal health, quality and access to medical care, socio-economic conditions, and public health practices (McDorman and Mathews, 2014). IMR is still the highest rate in Turkey among OECD countries (10.1 per 1000 live births in 2010). Scholars have attributed this alarming number to socio-economic conditions, low levels of education among females, and the prevalence of infectious diseases (Tatar et al., 2011)). Turkey has average life expectancies below the OECD average of 80.2 years (Ministry of Health,2014; OECD Health Statistics, 2014).

Despite the fact that public statistics on medical error are not available, medical error is estimated to be high while the costs associated with medical error remain low. According to a study of 240 nurses in the Konya province in Turkey, medical error was observed among 6.2% of their patients (Ozata and Altunkan, 2010). According to another study of 997 medical malpractice cases reported to the Higher Health Council between 1993 and 1998, fifty-nine percent of those cases resulted in death (Gündoğmuş et al., 2005). However, the Turkish Supreme Court only heard 120 criminal, tort and administrative cases between 1973 and 2007 (Savaş, 2013). Thus, many very serious medical malpractice claims are not being asserted.

In order to understand how beneficial for medical malpractice liability and health law regulations, it is important to look beyond what has been done in the health care area and to learn from the current situation in health law. Therefore, firstly, this study provides some information about governmental, legal, health care and insurance based on descriptive data to better understand the medical liability for Turkey. Then, it draw's out topics for medical malpractice under civil and criminal law, no-fault liability, hospital liability, informed consent, proof issues, conciliation and mediation in health law. Finally, it concludes by presenting the key lessons and future priorities those policy-makers and law-makers should be taking into account.

Governmental Structure

In order to better understand the issue of law and health policy, it is important to identify some key legal principles that underlie both public health and healthcare law in Turkey. Health law legislation consists of the constitution, laws, decrees and regulations, and documents of international status. Article 56 of the Turkish Constitution secures the positive status of the right to health care, which allows individuals to demand health care service and allows the state to full its obligations to ensure the health of its citizens. Under these obligations, the government must take the necessary precautions, establish the required institutions and authorities, and regulate the institutions and authorities. To direct the states, numerous legislative texts exist to establish a standard for the provision, regulation, and control of health care. These texts outline the provisions and financing of health care services both by the public and private sectors, as well as sanctions imposed should health care institutions or their employees violate the text (Sert et al., 2011).

Turkey's healthcare payment system is mostly government based and then self-pay, private sector payments. There is also a complex reimbursement system. Reimbursement decisions for human medical products and pharmaceuticals are made by the Reimbursement Commission comprising members from the Social Security Insurance (SSI), the Ministry of Health and the Ministry of Finance. Health services are financed through a social security scheme covering the majority of the population, the General Health Insurance Scheme financed through payments by employers, employees and government contributions (Tatar et al., 2011). Turkey has a national health care delivery system derived from a mix of government budget allocations, general taxation, fees paid by insurance companies, and individual out-of-pockets payments.

Health Care Structure

Health care in Turkey is traditionally dominated by a centralized state system run by the National Ministry of Health. The Ministry of Health is responsible for the delivery of health services, from preventative care to hospital amenities, development of policy and overseeing regulatory and statutory functions. It also supervises private medical facilities, pricing regulation and the provision of health personnel within the sector. A private sector with private practitioners (28 466 physicians in 2013) and hospitals, and a public sector operated through public hospitals with publicly employed physicians (105 309 physicians in 2013) (Ministry of Health, 2013). Funding for this system is derived from a mix of government budget allocations, general taxation, fees paid by insurance companies, and individual out-of-pocket payments (Tatar et al., 2011). While the balance of the freedom of private enterprise and state intervention initially drove this system, state intervention has expanded based on the national belief that optimum health development can be achieved through increased state intervention.

Turkish healthcare system was characterized by its highly complex and fragmented provision and financing systems as well as inequalities in access to healthcare (Tatar et al., 2011). In the year 2003, Turkey started Health Transition Program (HTP) to develop easily accessible, high-quality, efficient, and effective healthcare services for the population, which was also for the sake of pairing its healthcare system with the health regulations of the European Union (EU) and OECD countries (Ali Jadoo et al., 2014).

Insurance Structure

In Turkey, social health insurance is a key element of social health protection and an integral means of achieving universal and affordable coverage by coordinating pluralistic health financing mechanisms. Social health insurance is thus seen as a necessary element in achieving both social health protection and social security (Scheil, 2013). The health care system is financed by the government through general tax monies (41%), insured contributions through taxes, insurance premiums (31%), and out of pocket payments (28%), and employers, if applicable (Kısa and Younis, 2006).

Social health insurance provides coverage for most medical needs in Turkey. These needs include primary health care services, in-patient and out-patient care, emergency care, maternity services, physiotherapy and other curative therapies, dental services, prescription medicines, ambulance services, medical laboratory tests and analysis, organ tissue and stem cell transplantation services, assisted reproductive services for pregnancy, etc (Turkish Social Insurance and General Health Insurance Code, 2006). Most of this coverage is paid for directly by the social health insurance. The patients are free to choose their doctors, including specialists without prior consultation of a general practitioner (Regulation of The Patient Rights of Turkey, 1998; Turkish Medical Deontology Statue, 1960). The patient has the freedom to select a doctor or hospital even if the hospital is not a party to an agreement with the social health insurance, referred to as a private health care institution. In this case, patients must pay the healthcare provider directly, but are still eligible for at least a partial reimbursement from their social health insurance in some instances (Regulation of Health Care Implementation in Turkey, 2013).

While social health insurance already covers all costs of treatment, approximately four percent of all Turkish people still opt to purchase some form of private health insurance (Turkey Insurance Association Annual Report, 2013). Private insurance premiums are based on the extent of coverage and the patient's general state of health, gender and age at entry. Moreover, the insured can add certain benefits to their health care through private insurance, such as a single room or reduction of patient expenses, like excess costs of a doctor. A typical policy would cover a combination such items as additional hospital expenses, outpatient, in-patient, dental treatment expenses, and medical laboratory tests and analysis beyond those covered by social health insurance.

The private health insurance market is well developed in Turkey, with many residents paying for private cover as well as contributing to the state insurance system in order to guarantee access to the best quality health services available, and to cover any extra unexpected costs or treatment not usually covered by the state. While the cost of treatment is much lower than in the United States, the expat patient can still face considerable expense when using private facilities, especially if there are complications. It is also worth noting that the EU health card, which allows the holder to access free medical treatment in European countries, is not valid in Turkey.

All practicing doctors are statutorily required to carry medical malpractice liability insurance, regardless of whether they work in public or private health care institutions. However, the Turkish government pays for half of all premium costs for practicing physicians who work in public health care institutions. The exact cost of an insurance policy is dependent on the area of expertise (such as plastic and aesthetic surgery, emergency medical, surgical oncology, heart surgery, brain surgery, anesthetist, gynecologists, neonatologist, etc.) and professional status (such as general practitioner verses a specialist). Physicians' premiums are gradually affected by their history of adverse events and experience (Statutory Regulation of Mandatory Insurance for Medical Malpractice Claims, 2010). The maximum coverage is one billion-eight hundred thousand Turkish Liras (approximately \$620 689), however, indemnity amount

for medical malpractice damages is paid to patients or patient's family by insurance companies about 2,5 million Turkish Liras (approximately \$862 068) in 2016.

Regulatory Framework

This chapter outlines the practice of regulation and the main legislative arrangements upon which the health care system and health law are based. First, it is necessary to summarize employment of physicians under managed care in order to understand liability of physicians in regulatory framework in Turkey.

Professional qualifications process to become a licensed physician in Turkey is simple. After entire medical training in six years, physicians who seek to practice in private health care institutions or agencies are required to become members of the medical chamber in their province,¹ while physicians who seek to practice in public health care institutions may voluntarily join (Act of the Turkish Medical Chamber, article 7). The medical chambers of each province collectively make up the Turkish Medical Association (Türk Tabipler Birliđi) and the Turkish Dentists Chamber (Türk Diř Hekimleri Birliđi). The Turkish Medical Association (TMA) provides membership to nearly of the country's physicians and is entirely funded by private, non-government contributions, which is especially important in Turkey given that a majority of health care and health organizations are funded directly from the government. Turkish Medical Chamber (TMC) also may issue a broad range of discipline, ranging from written reprimands to injunctions or temporary bans on practice. Thus, the quality of care and level of expertise for Turkish physicians appears to be primarily controlled by formal regulation rather than competition.

Medical Malpractice Under Civil Law

Medical malpractice is defined as an act or omission by a physician during the course of a patient's treatment that deviates from acceptable norms in the medical community and causes an avoidable injury to the patient (Bal, 2009). Medical malpractice liability in Turkey rests almost entirely within the fault-based civil tort liability system and civil contract law, with very specific and discreet areas of criminal liability and strict liability. Under civil tort liability, an injured plaintiff has both the burden of persuasion and production and may only recover if the health care provider was negligent. A prima facie case for negligence requires that the plaintiff prove by a preponderance of the evidence that (I) the health care provider had a legal duty to provide care or treatment to the patient; (II) he or she breached this duty by a failure to adhere to the standards of the profession; (III) a causal relationship between such breach of duty and injury to the patient; and (IV) the existence of actual damages that flow from the health care provider's alleged breach (Bal, 2009). The patient who wants to sue a physician or a hospital has to prove the loss (the deterioration of the health status of the patient), the causation between this loss and a fault, and the fault (Turkish Obligation Code, Art 50).

¹ According to Turkish Medical Association, 80 percent of all doctors are active member to Turkish Medical Chamber in Turkey. See Turkish Medical Association official web-site (2016) <http://www.ttb.org.tr/index.php/bilgi.html>

Duty requires a showing of the existence of a provider-patient relationship sufficient to trigger a legal obligation to exercise reasonable care in the treatment of that patient (Hyman and Silver, 2013). Most treatments arise from a consensual relationship between physicians and patient, which create an implied duty. Alternatively, a duty can also arise out of a contractual agreement between the parties or by operation of law or statute (Ansay, 2011).

A breach is a provider's deviation from the standard of reasonable care. The standard of reasonable care is measured by the learning and skill expected of an average member of the medical profession in good standing, acting in the same or similar circumstances (Hyman and Silver, 2013; Ansay, 2011). This standard is essentially a quality determination, so it is ever evolving as technology and academia advances and heavily depends on the locality, availability of facilities, and specialization or general practice at the time of the treatment.

Causation can be typically the most disputed issue in medical negligence and requires both factual and proximate causation. Because factual causation is a very low threshold and only requires a showing that but for the alleged negligent conduct (either an act or an omission on the part of the provider), the injury would not have occurred (Hyman and Silver, 2013) Proximate causation, sometimes referred to as legal causation, limits liability to only the harm sustained by the plaintiff that was foreseeable by the healthcare provider at the time (Ansay, 2011). Furthermore, Turkey legal system allows the plaintiff to still recover against a defendant even if other persons may have also been liable under the Doctrine of Joint and Several Liability (Turkish Obligations Code, Art 61).

Finally, the plaintiff must prove damages, or an actual injury. Compensatory damages serve to make the plaintiff whole or compensate the plaintiff for actual losses in Turkey.

The general elements for a negligence action must be proven in European land law countries such as Turkey. These elements are material elements (maddi unsurlar), moral elements (manevi unsurlar) and the unlawfulness of the act (hukuka aykırılık). Within this structure, the material elements comprise the following: act (fiil), result, casual link, perpetrator, victim, object of crime (suçun konusu). The moral elements refer to intention and negligence. Intent and negligence are not regarded as types of guilt, but as types of 'wrongful conduct'. According to this view, crime refers to a wrongful behavior violating a legally protected value (Onok, 2011).

All patients are deemed to have a contractual relationship with the physician. On the other hand, the contractual relationship is referred to as a medical treatment/service contract, mandate contract, or patient admittance agreement, or the hospital, referred to as a hospital admission contract in Turkey.² Once the relationship was established, the physician was under a legal obligation to provide medical treatment and was a fiduciary in this respect. In other

² In fact, the Turkish Court Of Cassation has qualified the legal nature of medical treatment contract as a 'mandate contract'. There are a lot of decisions regarding with that. Some of them are 15. HD, E: 1999/004007, K: 1999/003868 (03 Nov 1999,); 13 HD, E: 2000/008590, K: 2000/009569 (06 Nov 2000); 13 HD, E: 2014/30305, K: 2014/35473 (17 Feb 2014). In particular, in case of treatment in a private hospital or clinic, the contract is made between the patient and the hospital. The medical treatment contract concluded with a hospital or health institution is called 'hospital admittance agreement'.

words, the duty of care for which the physician owes to the patient is assessed according to the objective standards of medical practice.

Tort law is mainly based on liability for wrongful and faulty conduct in Turkey (Turkish Obligations Code, art 50). Torts include negligent act, such as medical malpractice. In this regard, the concept of the tort liability encompasses base of a claim for compensation, which is expressed by the Turkish Obligation Code of art 49 as “A person, who has acts against law and damage to another person, is obliged to compensate for a loss which he has caused”. In addition to the civil sanctions against the wrongful acts, certain wrongful acts may also be punished under the provisions of the Turkish Penal Code (Ansary, 2011).

In general, the contract of care was deemed to include the commitment of the practitioner to give his or her patient ‘conscientious and attentive care and, subject to exceptional circumstances, in line with what is known by science’ (Demir, 2008). In addition, the Patient Rights Regulation for Turkey expresses almost the same principle in terms of subjective rights of the patient: “Any person, who is patient, is entitled to receive the most appropriate care and to receive effectively treatment including preventive medicine services under the legal framework” (Article 6).

Adverse events are defined as unintended injuries or complications caused by healthcare management, rather than by the patient’s underlying disease, that lead to death, disability or prolonged hospital stays (Baker et al., 2004). To be clear, not all adverse events, nor even all preventable adverse events, qualify as instances of legal negligence (Flood and Thomas, 2013). In this context, they may in principle be redressed through criminal, contract, and tort law remedies. However, the criminal law plays a very minor role in addressing medical malpractice, primarily because of the substantive and procedural standards; it is mentioned by failing to take proper care or precaution instead of felonious injury and felonious homicide.

Before the addressing special ways to pursue claims based on medical malpractice in Turkey, it seems important to highlight just some of the most fundamental characteristics of Turkey civil procedure. Firstly, the Turkish adjudicatory system is non-adversarial. Judges are more actively involved during the trial, and the parties and their counsel are expected to submit their pleadings in writing rather than through oral statements when compared to common law system. According to the Turkish Civil Procedure Code, the judge does not has the authority to summon witnesses in addition to those requested by the parties (The Turkish Code of Civil Procedure, art 25). In civil litigation, the general principle is that the court is not required to investigate beyond the submissions of the parties (The Turkish Code of Civil Procedure, art 24-26). It is worth noting in this context that the hearing of witnesses is a form of discretionary evidence and thus the statements of witnesses do not bind judges. Furthermore, experts are typically appointed by the court, even though the parties may bring in further expert evidence (The Turkish Code of Civil Procedure, art 198 and 266).

Finally, under the Turkish Civil Procedure Code of Law, there is a principle that is the loser-pays which means that whatever side wins the case is eligible to claim costs from the opponent in proportion to percentage of success. This includes mandate fees, judgment taxes,

file expenses, witness and expertise fees. So, if the patient loses her case, she has to pay not only her own dues, but also some court fees. If she succeeds only in a part, the court effectively offsets costs of the court in proportion as the corresponding success of the defendant.

Medical Malpractice Under Criminal Law

This chapter identifies the outlines that tend to bring about criminal prosecutions for medical malpractice. Because the prosecution of physicians for medical malpractice occurs within a health law framework. So, it can be helpful to understand the legislation that underpins the allegations made in a medical liability case.

The vast majority of malpractice cases proceed as tort cases in Turkey. If the physician is to be found liable for a criminal medical negligence act, general elements of the crime must be proven. These elements are material elements (maddi unsurlar), moral elements (manevi unsurlar) and the unlawfulness of the act (hukuka aykırılık). Within this structure, the material elements comprise the following: act (fiil), result, casual link, perpetrator, victim, object of crime (suçun konusu). The moral elements refer to intention and negligence. Intent and negligence are not regarded as types of guilt, but as types of ‘wrongful conduct’. According to this view, crime refers to a wrongful behavior violating a legally protected value (Onok, 2011). In addition, criminal prosecutions of medical personnel for medical acts resulting in harm to patients are rare in Turkey³ According to Turkish criminal law, the regular list of crimes against bodily integrity also applies to the medical profession, including voluntary manslaughter,⁴ involuntary manslaughter,⁵ negligent⁶ and felonious bodily injury.⁷ In addition, negligent injury and felonious injury⁸ are only prosecuted upon the express request of the person or the patient. Likewise, list of medical crimes consists of some felonies such as voluntary manslaughter, involuntary manslaughter, negligent homicide, and reckless homicide.

It should be noted that medical negligence may also amount to a criminal offense like unintentional manslaughter or involuntary harm to the integrity of the person under Turkish

³ Between in 1974 and 2007, the Turkey supreme courts (Criminal Chamber of The Supreme Court, and Supreme Court Penal Board made a decision about 29 medical malpractice cases which regarding Criminal Code in Turkey.

⁴ Turkish Criminal Code, Law no. 5237 of 12 Oct 2004 article. 81: ‘Any person who unlawfully kills a person is sentenced to life imprisonment.’ (In Turkish).

⁵ Turkish Criminal Code, Law no. 5237 of 12 Oct 2004 article 85. ‘(1) any person who causes death of a person by negligent conduct is punished with imprisonment from three years to six years. (2) if the act executed results with death or injury of more than one person, the offender is punished with imprisonment from two years to fifteen years.’ (In Turkish).

⁶ Turkish Criminal Code, Law no. 5237 of 12 Oct 2004 article 89, ‘(1) any person who gives corporal or spiritual injury to a person or cause deterioration of one’s health or consciousness by negligence, is sentenced to imprisonment from three months to one year or punitive fine.’ (In Turkish).

⁷ Turkish Criminal Code, Law no. 5237 of 12 Oct 2004 article 86, ‘(1) person intentionally giving harm or pain to another person or executes an act which may lead to deterioration of health or mental power of others, is sentenced to imprisonment from one year to three years.’ (In Turkish).

⁸ This special provision for felonious injury is available only the second paragraph of article 86 in Turkish Criminal law, (Türk Ceza Kanunu), Law no 5237 of 12 Oct 2004. (In Turkish).

Criminal Law. Physicians and health professionals may be confronted with criminal proceedings for acts committed in the exercise of their functions. It can be considered that if there is no serious deviation from the standard of care or if causation cannot be established, then there should be no prima facie criminal case that will satisfy due process under the criminal law (Dressler, 1995). However, successful criminal prosecutions for medical negligence have occurred in the absence of any clearly defined standard of care or established causation (Filkins, 2007).

Hospital Liability

Hospital liability is an ever expanding area of litigation that is drawing concern in both legal and medical framework. In order to understand more about hospital negligence and medical malpractice liability, this chapter identifies and describes basic elements of the hospital liability in Turkey.

Turkish law is similar in that the both the hospital and the physician may potentially be liable, but the grounds for liability are less restrictive and the procedure for recourse depends on whether the treatment was given at a public or private hospital. In a private hospital, private law applies and only the hospital and the patient are deemed to have entered into a ‘medical treatment agreement’ (not the physician); and thus, the patient may only sue the hospital under either a breach of contract or negligence cause of action (Özsunay, 2007). Thereafter, the hospital may recover damages from the physician if that physician was found to be negligent.⁹ The private hospital liability may be based on inadequate equipment, inadequate record-keeping, poor supervision of post op care, failure to protect patients from infection, failure to establish systems necessary for safe functioning, failure to prevent a patient from injuring themselves or other patients, failure to have a written protocol or internal regulations with respect to the treatment of a particular injury (Savaş, 2007) or lack of organization (Özsunay, 2007). In a public hospital, Administrative law applies and, regardless of who is responsible, the patient may only sue the National Health Ministry (a public institution).¹⁰ Once a claim is initiated, the National Health Ministry must investigate, is liable if either the hospital or the physician exhibited any wrongdoing, and may later recover from either or both the hospital and physician (Gürcan, 2011).

⁹ Yargıtay Hukuk Genel Kurulu (The Turkish Court Of Cassation) No: E.1986/13-640, K.1987/701 of 17 Sept 1987 (In Turkish).

¹⁰ Türkiye Cumhuriyeti Anayasası (Turkish Constitution) dated 7 Nov 1982, Art 125. The Turkish Constitution provides certain shields for civil servants in Articles 129 and 137 and also repeated in the state civil servants law no 657. Actions for damages arising from faults committed by civil servants in the exercise of their duties and may only be brought against the administration before administrative courts. Same principle is confirmed in Art 40 of the constitution as amended in 2001 (Law No.4709) which states as follows: ‘damages given to persons through unlawful treatment of holders of public office shall be compensated by the state. The state reserves the right to recourse to the official responsible’. (In Turkish).

Informed Consent

While both European (Sert et al., 2011) and Western civilizations (Vos, 2010; Alper, 2015) have placed heightened attention on the concept of informed consent since the turn of the twentieth century, their motivations are different. Western cultures have been primarily motivated by increased significance of patient autonomy – a belief that patient informed participation improves health outcomes and patient satisfaction in result (Örnek Büken and Arapkirlioğlu). Conversely, many European cultures, specifically Turkey, have been motivated by collective autonomy – a belief that a patient’s participation with respect to highly sensitive or high-risk treatments may actually harm the patient or negatively affect the health outcome, so the primary decision-maker should be the next of kin rather than the patient himself (benefiting the community). The Turkish model centers its practice of informed consent on what will provide optimal benefit to the community.

In Turkey, informed consent is generally utilized as a recommended¹¹ precautionary mechanism to protect a physician from liability rather than a requirement that could form the basis for physician liability with the exception of surgical procedures (Hakeri, 2007).¹² Article 15 of the Regulation of Patients’ Rights enforced by the National Ministry of Health provides that a patient has the right to be informed of medical risk, possible complications, and alternatives for both treatment and post-treatment prescriptions, and may thereafter refuse the treatment. However, the requirements go a step further and require written consent (referred to as a contract for medical treatment) for all surgical procedures according to the Law on the Practice of Medicine and Related Arts (Tababet ve Şuabatı San’atlarının Tarzı İcrasına Dair Kanun based on the Article 70) and the Statute on the Practice and Control of Therapeutic Abortion and Sterilization Services (Rahim Tahliyesi ve Sterilizasyon Hizmetlerinin Yürütülmesi ve Denetlenmesine İlişkin Tüzük based on the Article 15). For these procedures, the physician must ensure to the best of his or her abilities that the patient reads, signs, and understands the information and a failure to do so will subject the doctor or hospital to liability for the patient’s damage even if the medical error was accidental in the course of proper and careful medical treatment (Özdemir, 2008). Thus, in most instances, the right to information is mandated in Turkey, but consent is not.

Despite the theoretical benefits of consent forms, the forms themselves have been the focal point for criticism in Turkey. First, most consent forms are very long and complex, incorporating unexplained medical terminology in poorly formatted forms with small font size and require very high reading comprehension levels (Sudore, 2015, Dantas, 2013). As a result, patients often do not understand the treatment or procedure in its entirety (Sert et al., 2011). In fact, the Institute of Medicine (IOM) articulated that, the readability levels of informed consent documents exceed the documented average reading levels of the majority of adults in the United States (Parnell, 2015). Second, language and cultural barriers may make

¹¹ The Turkish Court of Cassation encourages a clear preference for written consent of the Regulation Patients Rights (Hasta Hakları Yönetmeliği), Regulation no: 01 Agu 1998/23420, Art 25 (In Turkish).

¹² Consent allows the Turkish physician to avoid potential difficulties with medical malpractice defense, such as proof issues.

it difficult for some patients to understand and appreciate the risks or alternatives to treatment. Thus, valid informed consent necessarily hinges on both objective (what type of consent was obtained; when consent was obtained; to what extent the treatment was explained; and the minor or legal status of the patient) and subjective criteria (whether the patient understood and appreciated the risk).

Turkey makes exceptions to an informed consent requirement in exceptionally limited situations (Alper, 2015). In the event that a physician must proceed with treatment, but either does not have time to disclose the necessary information or the patient is unconscious (or under anesthesia), he or she must proceed in the best interest of the patient (Devettere, 2010, Ersoy et al., 2010). In these instances, the physician may intervene on the basis of presumed consent (Sert et al., 2011).

Proof Issues

The patient-plaintiff typically carries the burden of proof in an action for medical malpractice, and then once the patient-plaintiff establishes a prima facie case, the defendant need only attack at least one element of the claim in Turkey (Yalçınduran, 2007). The standard of proof required in civil cases is by a preponderance of the evidence, meaning more likely than not, while the standard of proof required in criminal cases is beyond a reasonable doubt. However, if either the Doctrines of Res Ipsa Loquitur or Negligence Per Se applies, the plaintiff initial proof burden is met and the burden shifts to the defendant to attack one of the elements the claim. Same procedures are available in Turkish law system.

As presumably in the all jurisdictions, The Turkish Code of Civil Procedure allocate the burden of proof to the plaintiff, who has to prove the facts supporting the case. In a medical malpractice case, the plaintiff must prove all of the individual elements of negligence (i.e. duty, breach, proximate cause, damages). In general, legal cases must be proved in accordance with several standards. The first is beyond a reasonable doubt which is standard that the state must meet if someone is to be found guilty in criminal case. The second one is clear and convincing evidence.

Mediation

The interest and utility of Alternative Dispute Resolution (ADR) methods in disputes among claimants has become increasingly popular in recent decades across the world due to overburdened courts, rising costs of litigation, and lengthy trial resolutions (Arikan, 2010).¹³

¹³ Traditional litigation overworked judges – according to the presidency of the supreme court of appeals, the judiciary had 1,4 million cases in 2013 plus over 500,000 cases pending from the prior year. See, national standards for court-connected mediation programs center for dispute settlement the institute of judicial administration, Retrieved 16 May 2016 <http://courtdadr.org/files/nationalstandardsadr.pdf> . See also ‘Mediation speeds up judicial process in Turkey’, Daily Sabah Newspaper (2015), Retrieved 20 March 2016 <http://www.dailysabah.com/nation/2015/02/23/mediation-speeds-up-judicial-process-in-turkey>. In Turkey, for the year 2009, application charge for the court is 7,30 Turkish Liras (TL) (approx. 4,8 USD, 1,5 TL= 1 USD.) Before civil magistrate courts, 15,60 TL (approx. 10,4 USD) in general civilcourts, and 23,90 TL (approx. 16 USD) before the Court Of Cassation (for the cases that may be brought before the court of cassation as firstinstance).

ADR encompasses various adjudication methods other than a formal trial proceeding, including negotiation, mediation, arbitration, and mixtures of these methods. Each method is generally quicker, less costly, involves an easier and less formal discovery process, and accordingly, is more flexible and responsive to the individual claimants and their respective needs. Additionally, less formal methods of adjudication are conducted outside of media attention and are usually accompanied by lengthy non-disclosure agreements, which make ADR more attractive to businesses (or health care organizations) given that their professional reputations are less likely to be negatively affected by the dispute. Thus, in the face of increased malpractice claims, sky-rocketing damage awards, and resulting increases in medical malpractice insurance cost, malpractice scholars have identified that traditional adjudication often fails to adequately suit the parties' needs (Sanbar, 2007) and that trial alternatives may provide better and effective opportunities to reach a resolution.

Mediation received traction later in recent history. In 2001, the International Arbitration Law was enacted to provide official procedures and principles for international commercial arbitration. Then in 2012, the Law on Mediation for Civil Disputes was enacted, which was aimed at defining the procedure and guiding principles for dispute resolutions under Civil Law, rather than solely international commercial arbitration. Aside from mediation, reconciliation, governed by Articles 253-255 of Criminal Procedure Law, has emerged as an alternative way to resolve criminal medical disputes, but the difference between mediation and conciliation is mostly procedural. Conciliation in criminal law is a free service in Turkey if the parties reach a compromise (Sanbar, 2007). Mediators' entitlement to fees is determined on the basis of a minimum fee tariff annually published by the Turkish Ministry of Justice unless determined otherwise by agreement between the parties and the mediator(s).

According to the Turkish Justice Ministry's Department of Mediation, 4661 civil disputes (4 healthcare law disputes of them) have referred to mediators since 2013 (when the first mediation law came into force) with a 96% success rate.¹⁴ However, the most likely cases to be mediated are employment, dispute involving land ownership, and other non-violent disputes, and just four mediation data are available for medical malpractice cases.¹⁵ Thus, given that such high success rates have been realized in other civil disputes and so many potential medical malpractice disputes are never litigated, a medical malpractice model that focuses more on mediation-based resolution may best suit the injured plaintiffs.

¹⁴ Sonucuna göre arabuluculuk istatistikleri (Mediation Statistics), Türkiye Cumhuriyeti Adalet Bakanlığı Arabuluculuk Daire Başkanlığı (Head of Mediation Department in Turkish Republic Ministry of Justice). Retrieved 18 November 2016

http://www.adb.adalet.gov.tr/sayfalar/istatistikler/uygulamalar/adb_uygulamalari/images/sonuc.pdf (In Turkish).
¹⁵ 'Mediation Speeds Up Judicial Process In Turkey', Daily Sabah Newspaper (23 Feb 2015). <http://www.dailysabah.com/nation/2015/02/23/mediation-speeds-up-judicial-process-in-turkey>. See also Sonucuna göre arabuluculuk istatistikleri (Mediation Statistics), Türkiye Cumhuriyeti Adalet Bakanlığı Arabuluculuk Daire Başkanlığı (Head of Mediation Department in Turkish Republic Ministry of Justice). Retrieved 18 November 2016, http://www.adb.adalet.gov.tr/sayfalar/istatistikler/uygulamalar/adb_uygulamalari/images/sonuc.pdf (In Turkish).

In conclusion, mediation has become the forum of choice for parties seeking resolution of healthcare disputes in many countries. On the other hand, mediation in healthcare field does not sufficiently reach the desired level although Turkish Mediation Code allows for many areas within health care field including medical malpractice cases.

Healthcare Affairs Under Consumer Protection Code

A new Consumer Protection Code (CPC) was enacted on May 28, 2014 in Turkey, replacing the nineteen-year-old Consumer Protection Code of 1995. The principal aim of this code is to recognize the vulnerability of common citizens in consumer transactions.

After enacted CPC, Consumer's Court started using the concepts of a consumer and a service provider as defined in the CPC to resolve conflicts which regarding compensation cases between patients and physician who practicing in private hospital. This application creates an almost tangible tension among the medical associations which rejecting the possibility of having the medical profession considered as a consumer-oriented relationship.

The first problematic issue that arises is whether the practice of medicine – or in other words, the physician patient relationship – can be viewed as a consumer or commercial relationship according to the CPC (Petek, 2014). To understand that, it is necessary to analyze the legal definitions under CPC of “consumer”, “provider”, and “services”. Article 3/k of the CPC defines a consumer as “Any person or legal entities, who acting without any commercial or professional purposes.” A provider is defined by Article 3/I as “Any person, public legal entities or legal entities who provide services to consumers with commercial or professional purposes.”

With an interpretation of the spirit of the law, and literal concepts included therein, it can be concluded that the patient, a user of medical services, is the consumer for which a service is provided (a consultation, an intervention and any other type of medical procedure in general), and that the healthcare professional is the provider who develops his professional activity, and is paid for it, in situations listed in the aforementioned Article 3/k and 3/I.

Under the terms and for the purposes of the CPC, it can be said that the patient is considered a consumer of services, regardless of whether it is a simple consultation or a complex medical treatment in private hospitals. As a result, the physician-patient relationship, which based on confidence gains a new dimension under the CPC. Although beforehand the Turkish Court of Cassation made a decision that patient-physician cases arising from medical disputes did not associate with Consumer's Court, it has currently ruled that this type of cases are related to Consumer's Court (Petek, 2014).

Materials and methods

Regulations and laws related to medical malpractice liability in Turkey were examined to draw the legal framework of medical liability as a descriptive. The primary and secondary sources of material selection were used through the use of the law libraries and the internet as

well as journals and periodicals to gather information for this study. This health law research is conducted under the doctrinal method which is not empirical in view of the fact that analysis of statistical data or qualitative methodology.

Results

Healthcare law system in Turkey demonstrates that the physician's malpractice is regulated on the basis of the general principles of the civil, penal, and in some cases administrative responsibilities. Turkey suffers from a different type of medical liability problems such as patient rights, efficient use of health care resources. Those are caused by the related problems in not only quality of health care but also organizational and financial structure.

The majority of the population in Turkey is insured under statutory health insurance, the premiums for which are mainly based on the insured individual's income level.

In Turkey legal doctrines, vicarious or indirect liability may ensure to protection for the acts of employees and latter's right to indemnity from the employee. In addition, this protection for the employed practitioner may be regarded as the efficient channeling of the liability onto the person.

Conclusion

It is important to underline that the malpractice mediation has the possibility of creating a more constructive dialogue between the parties. Hence, malpractice mediation should be designed to encourage settlement of claims as soon as the parties have enough information to evaluate the case.

It is hard to say that medical malpractice mediation plays very significant and effective role in healthcare disputes of Turkey. Some contributing factors for that are the new mediation law for civil disputes comes into force in 2013, both physicians and lawyers do not embrace readily the regulations of mediation law and the patients seek to file medical malpractice claims to the court instead of settlement. However; no remarkable and official mediation data is available for medical malpractice cases. Cases are not systematically reported to the public but the media may report on a particular story.

Alternative dispute resolution method is practically quicker, less costly, more flexible and responsive to the individual claimants and their respective needs. Hence, it can play a significant role for medical malpractice disputes. Although, the Turkish Mediation Law on Civil Disputes dated 2012 was enacted in Turkey, it was aimed at defining the procedure and guiding principles for dispute resolutions under civil law, officially malpractice dispute resolution records have not officially been recorded yet. Clearly, mediation law for civil disputes in Turkey is quite new regulation; if policy-makers really want to apply the regulation for malpractice disputes, they should take into consideration for importance of recording data.

It is commonly believed that the cost of litigation as an important deterrent to the bringing of acts for damages with respect to medical injuries (Oliphant, 2013). Although there is not official record about success rate of medical malpractice litigations in Turkey, it is widely accepted that the success rate for medical malpractice cases is relatively low compared to other personal injury cases even if it is generally considered that medical malpractice case filings have gradually increased recently. There are number of reasons for low success rate of malpractice cases, some of which are that it is hard to submit for evidence of medical malpractice. Because judge presumes physician should not intentionally make a medical mistake on a patient. Also, it is deemed that patients do not intend to file against physicians as a cultural factor. The socio-economic conditions and ignorance of law about the patient's rights can be other factors not to take legal actions against doctors in performing their duty to take care of the patients in Turkey.

Turkey finances health care services from multiple sources. Social health insurance contributions take the lead, followed by government sources because it is a social government based country. It has also recently accomplished remarkable improvements in terms of health status, particularly in the provision and the financing of health care services. On the other hand, it is difficult to determine objective and subjective measures of quality and outcomes. It also seems that poor access to health care for urban population in Turkey.

Turkish Medical Association (TMA) stands at the forefront of public debate on health care issues and has effectively influenced both the Ministry of Health and Social Security Institution, yet it continues to experience considerable government adversity. Most notably, TMA began to monitor the quality and quantity of medical training and offer both publications and continuing medical education in areas of specialty (such as sports or occupational medicine), and manage an interactive site to answer the publics' questions on public issues (such as clean water resources, communicable diseases, and critical reviews of health reform proposals). In early 1994, TMA developed an ethics committee (ECTMA) that investigated and published documents to guide medical doctors with ethical issues (Arda, 200). Unfortunately, the Ministry of Health feared weakened government control of regulation in light of TMA's actions and has ignored TMA's requests to increase the standard for medical specialists, even going so far as to destroy documents.¹⁶

In the very nature of the profession, physicians are vulnerable to liability under civil and criminal law in Turkey. However; the consumer law enables patients to obtain a quicker recovery of damages than traditional tort law, as the action under a civil lawsuit is lengthy and time consuming.

Turkey has embarked on a radical process whereby all essential aspects of the health care system have been questioned and changes made. However, It has a very complex health care system with multiple providers and funding sources. Because of this complexity, considerable improvements on health care law regulations may still be a major challenge for both policy-makers and law-makers in the coming decades.

¹⁶ UEMS and Turkish Medical Association, (TTB-UDEK, 2016).

Information about treatment must be given early enough so that the patient can thoroughly consider the pros and cons of the treatment, which enables the patient to decide on the basis of abundant background knowledge whether the patient wants to go ahead with the planned treatment or not.

References

- Ali Jadoo, S.A., Aljunid, S.M., Sulku, S.N. and Nur, A.M. (2014) Turkish Health System Reform From The People's Perspective: A Cross Sectional Study. *BMC Health Services Research*.
- Alper, J. (2015) Informed Consent and Health Literacy: Workshop Summary, Roundtable on Health Literacy, Board on Population Health and public Health Practice, Washington D.C.: The National Academies Press, pp. 6-12.
- Ansary, T. (2011) Law of Obligations In:T Ansary and D Wallace Jr. (eds) *Introduction to Turkish Law*, 6th edn Kluwer Law International, pp.170.
- Arda, B. (2000) Evaluation of Research Ethics Committees In Turkey, *Journal of Medical Ethics*, 26(1): 459-60.
- Arikan, A.S. (2010) Cost and fee allocations in civil procedure in Turkey, International Academy of Comparative Law, 18th. World congress Washington DC.
- Baker, G.R., Norton, P.G., Flintoft, V., Blais, R., Brown, A. and Cox, J. (2004) The Canadian Adverse Event Study: The Incidence of Adverse Events Among Hospital Patients In Canada, *Canadian Medical Association Journal*, 170(11) :1678-1686.
- Bal, B.S. (2009) An Introduction To Medical Malpractice In The United States, *Clinical Orthopedics' and Related Research* 467(1): 339-340.
- Dantas, E. (2013) A Bridge Over Troubled Waters: The Development of Medical Malpractice Litigation in Brazil in K Oliphant and RW Wright (eds) *Medical Malpractice and Compensation in Global Perspective*, De Gruyter Publishing, pp.39.
- Dauer, E.A. (2012) The Future of ADR, *Pepperdine Dispute Resolution Law Journal*, 1(1) :3-9.
- Demir, M. (2008) The Liability Of Physicians Arising From Contract (Hekimin Sözleşmeden Doğan Sorumluluğu), *Ankara University Law Faculty Journal*, 57(3): 225-252 (In Turkish).
- Devettere, R.J. (2010) Practical Decision Making In Health Care Ethics Cases and Concepts, 3d edn, Georgetown University Press, pp.8
- Dressler, J. (1995) *Understanding Criminal Law*, (2d edn).
- Ersoy, N., Şenses Özcan, M. and Aydın Er, R. (2010) Acil Tıp'ta Aydınlatılmış Onam (Informed Consent In Emergency Medicine) *Turkish Journal Trauma and Emergency Surgery* 16(1): 1-8.
- Filkins, J.A. (2007) Criminalization of Medical Negligence, In: *Legal Medicine*, 7th edn, pp. 507-508.
- Flood, C.M. and Thomas, B. (2013) Canadian Medical Malpractice Law In 2011: Missing the Mark On Patient Safety In: K Oliphant and RW Wrights (eds) *Medical Malpractice and Compensation In Global Perspective*, De Gruyter Publishing.
- Gündoğmuş, Ü.N., Erdoğan, M.S., Şehiraltı, M. and Kurtas, O. (2005) A Descriptive Study of Medical Malpractice Cases in Turkey, *Annals of Saudi Medicine* 25(5): 404-8.
- Gürcan, S. (2011) Administrative Law In: T Ansary and D Wallace Jr. (eds) *Introduction to Turkish Law*, 6th edn, Kluwer law International, pp. 78.
- Hakeri, H. (2007) *Tıp Hukuku (Medical Law)*, Seçkin Publishing, pp.141 (In Turkish).

- Hyman, C.S. (2011) Mediation and Medical Malpractice: Why Plaintiffs, Hospital and Physicians Should Be at the Table, *Dispute Resolution Journal*, 66(3) :32-37.
- Hyman, D.A. and Silver, C.M. (2013) How Does the U.S. Do It? In: K.Oliphant and R.W.Wright (eds) *Medical Malpractice and Compensation in Global Perspective* De Gruyter Publishing, p. 477-82.
- Kısa, A. and Younis, M.Z. (2006) Financing Health Care For The Poor In Turkey: Is A Temporary Solution Becoming A Permanent Scheme? *Public Health Report*, 121(1): 764-5.
- McDorman, M.F. and Mathews, T.J. (2014) International Comparisons of Infant Mortality and Related Factors: the United States and Europe 2010 *National Vital Statistics Reports* 63 :2-3.
- Ministry of Health, Republic of Turkey, Health Statistics Yearbook 2013 (2014) pp.12.
- Moore, C.W. (2014) *The Mediation Process: Practical Strategies For Resolving Conflict*, 4th edn, Jossey-Bass Publishing.
- OECD Health Statistics (2014) How Does The United States Compare? Retrieved 11 June, 2016, <http://www.oecd.org/unitedstates/briefing-note-united-states-2014.pdf>.
- Oliphant, K. (2013) Medical Malpractice And Compensation: Comparative Observations In: K Oliphant and RW Wright (eds) *Medical Malpractice and Compensation in Global Perspective*, De Gruyter Publishing.
- Ozata, M. and Altunkan, H. (2010) Frequency of Medical Errors In Hospitals, Determination of Medical Error Types And Medical Errors: Konya Sample, *Journal of Medical Research* (8)1: 100.
- Önok, R.M. (2011) Criminal Law In:T Ansay and D Wallace Jr. (eds) *Introduction to Turkish Law*, 6th edn Kluwer Law Internationa, pp. 186.
- Örnek Büken, N. and Arapkirlioğlu, K. (2010) Bioethics Committees and Examining Consent Within the Patient-Physician Relationship in Turkey, *Medicine and Law*, 29(1): 403-10.
- Özdemir, H. (2008) Teşhis ve Tedavi Sözleşmesinde Hekimin Aydınlatma Yükümlülüğü (Consent Obligation Of Physician's In Medical Treatment Contracts), *Erzincan University Law Journal*, 12(1): 347-366.
- Özsunay, E. (2007) Medical Liability and Liability of Health Institutions in Turkish Law, *European Journal of Law*, 14(4): 355-367.
- Parnell, T.A. (2015) *Health Literacy In Nursing: Providing Person-Centered Care*, Springer Publishing, pp.37.
- Petek, H. (2014) Tıbbi Müdahalelerden Kaynaklanan Uyuşmazlıklarda Tüketicinin Korunması Hakkında Kanun'un Uygulanması [Implementation of Consumer's Defense Code On Medical Disputes Arising From Medical Intervenes], *Dokuz Eylül Uni. L.J.* 15(1): 969-972. (In Turkish).
- Regulation of Health Care Implementation in Turkey, Official Gazette No.28597 of 24 Mar 2013, Art 1 (In Turkish).
- Regulation of The Patient Rights of Turkey, Official Gazette no.23420 of 01 Agu 1998, Art 9, (In Turkish).
- Sanbar, S.S. (2007) Alternative Dispute Resolution of Claims In: *The Medical Malpractice Survival Handbook*, American College of Legal Medicine, 7th edn, Elsevier Publishing.
- Savaş, H. (2007) Özel Hastanelerin ve Doktorların Tıbbi Faaliyetlerinden Doğan Hukuki Sorumlulukların İrdelenmesi (Medical Liability Arising From Private Hospital and Physicians'), *Journal of Istanbul Bar Association*, 81(1): 1001-25 (In Turkish).
- Savaş, H. (2013) *Yargıya Yansıyan Tıbbi Müdahale Hataları, Tıbbi Malpraktis Davalarının Seyri ve Sonuçları -Medical Malpractice Claims In the Judiciary and Court Decisions-* (3d edn).
- Scheil, A. (2013) Health Protection: More Than Financial Protection In: AS Preker and OP Schellekens (eds) *Scaling Up Affordable Health Insurance: Staying The Course*, Washington DC: World Bank Publishing.

- Sert, G., Güven, T. and Görkey, Ş. (2011) *Medical Law in Turkey* Wolters Kluwer Publishing.
- Statutory Regulation of Mandatory Insurance for Medical Malpractice Claims, Turkish Official Gazette no 27648 of 21 July 2010, Art 3 (In Turkish).
- Sudore, R. (2015) The Importance of the Informed Consent Conversation In Addition to the Form In: *Informed Consent and Health Literacy: Workshop Summary, Roundtable on the Health Literacy*, Board on Population Health and Public Health Practice, Institute of Medicine of the National Academie, pp. 54.
- Tatar, M., Mollahaliloglu, S., Sahin, B. and Aydin, S. (2011) Turkey: Health System Review Health System in Transition (13) :10.
- Turkey Insurance Association 2013 Annual Report, (2013) (In Turkish).
- Turkish Medical Deontology Statue, Official Gazette no.10436 of 19 Feb1960, Art 5 (In Turkish).
- Turkish Social Insurance and General Health Insurance Code, Law no. 5510 of 31 May 31 2006, Art 64 (In Turkish).
- Vos, D. (2010), Informed Consent, Patient Autonomy and Causation: Competing Perspectives the United States, Ireland And Germany, *Trinity Law Review*, 13(1): 147.
- Yalçınduran, T. (2007) *Vekalet Sözleşmesinde Ücret (Charges in the Mandate Contract)*, Legal Publishing, pp.77.