



THE DEFINITION OF LEGAL RELATIONSHIP BETWEEN A PATIENT AND PHYSICIAN

Tuğçe ORAL*

* Intern Lawyer. LL.M. (Heidelberg)

ABSTRACT

In this article, the types of legal relationship between the patient and physician were analyzed. First of all, the approaches of the treatment contract is a type of sui generis contract, service contract and mandate contract were handled. Moreover the details of that approaches, decisions of courts and criticisms against these opinions were also given. Furthermore, the situations, where the treatment contract constitutes a contract for work, the cases that the physician behaves as an agency without authorization, and the behaviors of physician which are also tort, were discussed.

Keywords: *treatment contract, relationship between physician and patient, agency without authorization, tort, medical law.*

INTRODUCTION

The legal relationship between a patient and physician is firstly a contractual relationship.

The contract between the patient and physician will be formed with the acceptance of the physician on the issue of medical treatment in addition to the application of the patient to physician. This contractual relationship will form the basis of patients' and physicians' rights, requests and obligations.^[1] The cure and therapy that will be applied to the patient will constitute the subject of the contract. Thus, the physician assumes the obligation of giving medical treatments attending caring and giving information to the patient about his or her condition.^[2]

There are many different opinions about identifying the category of contract of treatment. The opinions about definition of legal relationship between a patient and physician can be categorized under these titles:

1. THE OPINION THAT TREATMENT CONTRACT IS A TYPE OF SUI GENERIS CONTRACT

According to some jurists, the treatment contract has a type of sui generis contract. Moreover, it can not be explained with other contract types which are in Code of Obligations. Because, although the treatment contract encumbers two parts with debts, contrary to the patients' debt, physicians' debt can not be categorized as "good", and consequences of physicians any malpractice can be "paid" with the life of other part. In other words, the types of debts are different.

2. THE OPINION THAT TREATMENT CONTRACT IS A SERVICE CONTRACT

According to some jurists, treatment contract is a service contract. German law system was predicated on this opinion.^[3] Likewise treatment contract is also a service contract according to Austrian law system.^[4] According to the approach of "treatment contract is a service contract", the relationship between patient and physician is the fulfillment of a service as a performance and the parts undertake some liabilities with the contract under this aspect. The performance that was undertaken by the physician with the contract is the treatment of the patient. If the

[1] DEUTSCH, Erwin; SPICKHOFF, Andreas, *Medizinrecht*, 6. Auflage, Berlin, Heidelberg, 2008, p.55

[2] BAYRAKTAR, Köksal, *Hekimin tedavi Nedeniyle Cezai Sorumluluğu*, İstanbul, 1972: p. 31

[3] KATZENMEIER, Christian, *Arzthaftung*, Tübingen, 2002, p. 99; WENZEL, Frank, *Handbuch des Fachanwalts Medizinrecht*, Köln, 2007, p. 232; HEIDELK, Stefanie, *Gesundheitsverletzung und Gesundheitsschaden*, Berlin, 2005, p. 22

[4] WENZEL, p. 1443

physician does not fulfill his performance according to the contract, the contract will be breached by the physician and the physician will be liable. Because of the service contract the performance of the patient will be to pay the wage which was fixed with the contract. The patient has an obligation to comply with physician's recommendations and treatments; moreover the patient has also an obligation not to have any objections. Otherwise the physician will not be liable.^[5]

Service contract was handled in Art. 313 and et seq. of Turkish Code of Obligations (818) with this definition:

"The service contract is a contract that the employee stipulates to perform a service in known or unknown time and the employer stipulates to give a payment to employee."

Service contract was also defined in Art. 393 and et seq. of Turkish Code of Obligations (6098) in this way:

"The service contract is a contract that the employee, who works as a dependent of employer, undertakes to perform a service in known or unknown time and the employer undertakes to give a payment to employee according to the time or service."

However, according to our opinions, the treatment contract can not be classified as a service contract because of two reasons: First of all, in the service contract one of the parts should be employer, whereas the other part should be employee. But in treatment contract like the patient is not employer, the physician is also not employee. Forasmuch as the physician treats the patient not complying with patient's dictations and decisions, on the contrary according to his or her professional knowledge and experiences. Besides physician has a state that commands whether the patient stay in hospital, if so how many days he or she should stay, what he or she should eat, which medicals he or she should use, which motions he or she should do or not, according to his or her experiences or knowledge.

Second, one primary matter of service contract is the duration of the contract. Even if the physician can guess how many days the treatment will last, since the duration of treatment has a relationship with patient's body's qualities, the duration of the contract can not be set certainly.

3. THE OPINION THAT TREATMENT CONTRACT IS A MANDATE CONTRACT

According to this approach, the legal relationship between the patient and physician is a mandate contract. In the frame of mandate contract, patient will define physician as a mandatee and direct him or her under his or her assent. The physician will treat the patient using his professional knowledge and experiences.

The first criticism to this opinion is that although normally the mandatee has a mission of representing the client, in this relationship mandatee has a mission against the patient.

[5] SÜTLAŞ, Mustafa, Hasta ve Hasta Yakını Hakları, İstanbul, 2000, p. 52

According to the law of Switzerland, treatment contract is a mandate contract having one exception: contract with family practitioner.^[6] There are decisions of Federal Court of Switzerland in this way.^[7] Likewise treatment contract is classified as mandate contract by Turkish doctrine.^[8] Turkish Supreme Court of Appeals also accepted that treatment contract is a mandate contract.^[9] The examples of some other decisions of Turkish Supreme Court of Appeals are:

“According to Art. 386/2 of Code of Obligations, if the other types of contract for services can not be applied for the issue, mandate clauses will be used. In the instant case, the dispute between the parts can be defined as an action for compensation basing upon that the physicians, who work in the institute, behave against the obligation of physicians caring. Physician as a mandatee can not be always liable because he or she can not get what was aimed with treatment contract, on the other hand, he or she is liable if the physician does not behave in compliance with obligation of physicians caring. If the client has damages because of not compliance with obligation of physicians caring, mandatee will be liable.”^[10]

“The relationship between institute’s hospital and the patient is a type of mandate contract.

The claimant lodged a claim with expressing that he had had an operation of herniated disk, and for two days after from the operation he has not sensed anything since the respondent nurse gave an injection to him, which constitutes malpractice. According to Art. 386/2 of Code of Obligations, if the other types of contract for services can not be applied for the issue, mandate clauses will be used. Due to this clause that was placed in Code of Obligations, this case can be sued at ordinary courts, not at administrative courts.”^[11]

“The relationship between the parts is mandate contract. Physician as a mandatee can not be always liable because he or she can not get what was aimed with treatment

[6] WENZEL, p. 1493

[7] BGE 117 Ib 197; BGE 116 II 519

[8] ÖZCAN, Burcu G., ÖZEL, Çağlar, “Kişilik Hakları- Hasta Hakları Bağlamında Tıbbi Müdahale Sonucu Çıkan Hukuki İlişkide Aydınlatma Yükümlülüğü ve Aydınlatılmış Rızaya İlişkin Bazı Değerlendirmeler”, Hacettepe Sağlık İdaresi Dergisi, 2007, Sayı: 1, Cilt: 10, p. 63; ATICI SEVİNDİK, Ebru, Hekimlerin Mesleki Hatalarından Kaynaklanan Hukuksal ve Ceza Sorumlulukları, Yayınlanmamış Yüksek Lisans Tezi, Çukurova Üniversitesi Sağlık Bilimler Enstitüsü, Adana 2006, s. 6; OZANOĞLU, Hasan Seçkin, “Hekimlerin Hastalarını Aydınlatma Yükümlülüğü”, Ankara Üniversitesi Hukuk Fakültesi Dergisi, 2003, Cilt: 52, Sayı:3, p. 55; BAŞPINAR, Veysel, “Organ Naklinde Hekimin Aydınlatma Yükümü (Die Aufkärungspflicht Des Arztes Für Die Patienten Bei der Organtransplantation)”, <http://auhf.ankara.edu.tr/kitaplar/diger-eserler/veysel-baspinar>, p. 3.

[9] Yargıtay 13. HD E. 2005/3645, K. 2005/11796 T. 08.07.2005; Yargıtay 13. HD E. 2002/13959, K. 2003/2380 T. 06.03.2003; Yargıtay 13. HD E. 1994/8557, K. 1994/2138 04.03.1994; Yargıtay 9. HD E. 1991/8375, K. 1991/14336 T. 18.11.1991; Yargıtay 4. HD E. 1993/8557, K. 1994/2138 T. 4.3.1994; Yargıtay HGK E. 2001/4-595, K. 2001/643 T. 26.9.2001; Yargıtay 13. HD E.2000/8590, K.2000/9569 T. 06.11.2000

[10] Yargıtay HGK E. 2003/21-95 K. 2003/113 T. 26.02.2003

[11] Yargıtay 4. HD T. 26.05.2005 E. 2005/5837 K.2005/5679

contract, on the other hand, he or she is liable if the physician does not behave in compliance with obligation of physicians caring, and if he or she does not make any effort. The physician, who has a state as a mandatee, should behave in compliance with obligation of physicians caring and follow all technologic and scientific improvements."^[12]

"The legal relationship between the patient and physician, who works in a special hospital is a mandate contract.

According to Art. 386/2 of Code of Obligations, if the other types of contract for services can not be applied for the issue, mandate clauses will be used. There is a parallel relationship between the opinion of doctrine and practice of Turkish Supreme Court of Appeals that mandate contract clauses should be applied for cases, which has the parts of patient and special hospital"^[13]

4. THE TREATMENT CONTRACTS THAT ARE CONTRACTS FOR WORK

It was emphasized that instant case is a very important factor while identifying the type of contract.

In some cases the relationship between the patient and physician can constitute a contract for work. However these cases are very exceptional cases.

The first type of treatment contracts which constitutes a contract for work is aesthetic surgery. The Turkish Supreme Court of Appeals has some decisions on this issue:

"In case of aesthetic surgeries, if the physician gives a guarantee about the aesthetic view after the surgery, the relationship between these parties constitutes a contract for work.

Like in the mandate contract, in contract for work, the respondent physician should prove that he or she behaved in compliance with obligation of physicians caring and followed and applied all technologic and scientific improvements.

According to the instant case the parts agreed on the issue that nose of the patient would be shaped due to the agreed good view of nose. Thus, the physician gave a guarantee about the aesthetic view after the surgery. In other words, there is no doubt that this contract is a contract for work."^[14]

The other type of contract which constitutes a contract for work is the contracts between dentists and patients that have the subject of dental plates, prosthesis and dental restorations. There is a decision of Turkish Supreme Court of Appeals on this issue:

"...dental plates, prosthesis and dental restorations has a character of contract for work. In contract for work, dentist obliges to do something in relation, patient pay the

[12] 13. HD E. 2002/7925 K. 2002/10687 T. 15.10.2002

[13] Yargıtay HGK E.2002/13-1011 K.2002/1047 T. 11.12.2002

[14] 13.H D E.1993/131 K. 1993/2741 T. 05.04.1993

price. In the instant case, it should be determined whether the dental plate is fit to the patient or not.” [15]

Turkish Supreme Court of Appeals has one more decision which includes two situations:

“Dentist’s obligation of doing dental plate, or an aesthetic surgery that was done only with the reason of cosmetic constitute the subject of contract for work which was handled in the Art. 355 of Code Of Obligations.

In the contract for work, there is an obligation of formation a positive or negative conclusion. If the conclusion can not be formed in compliance with the contract, physician will be liable.

In the instant case, the patient wanted from the physician to delete the tattoo from his arm. According to the clauses of contract for work, it is not satisfactory that the physicians maximum effort to get the aim, physician must also get the aim. However, according to the photographs, the sign of operation on the arm of the patient replaced with tattoo. It can not be accepted according to the clauses of contract for work, especially art. 360 of Code of Obligations.”[16]

5. PHYSICIAN’S TREATMENT AS AN AGENCY WITHOUT AUTHORIZATION

In some cases physician can behave like an agency without authorization.

Since the ethic of medicine the physician must help in case of need in anywhere and any situation. However, in case of this emergency treatments, naturally patients do not have the possibility of applying for the physician. If there is no offer that comes from the patient, and if the physician treats to the patient, there is physician’s treatment as an agency without authorization.

The other situation that the physician can treat like an agency without authorization is the treatment that was started with the assent of patient or his or her family but can not be continued and lasted because of an emergency matter, where there is also an impossibility to get one more assent from the patient or his or her family for another and changed treatment. In these types of cases, the physician should take the initiative and treat to the patient.

6. THE PHYSICIAN’S TREATMENT WHICH CONSTITUTES A TORT

Tortious liability has its basis in codes and it can only exist if there is no contract between the parties. Since, the liability that has its basis in the contract is more special than the liability that has its basis in codes. According to the principle of

[15] 15. HD E. 1977/1167, K. 1977/2307 T.20.12.1977

[16] 15. HD E. 1999/4007, K.1999/3868 T. 03.11.1999

lex specialis derogat lex generalis, in the cases, where there are contractual obligations was determined between the parts, there can not be one type of liabilities that grow out of codes. In other words, the tortuous liability can only be if there is no contract between the parties.

There are five conditions of tortuous liability:

- An act of the physician
- This action should be inequitable
- Damage
- Negligence of duty of care
- Causal Link

a. Act

First of all, there should be an act for the formation of generally liability and specially the liability of a physician. The can be as doing or not doing something.

Treatment, which has an aim of experiment, made to a patient who is in coma^[17] or physician's non-treatment to the patient, although there is patient's application for the physician who has hypertension,

b. Illegality

For the liability, there should be an infringement of a rule, which is mandatory.

c. Damage

Damage can occur with the reduction or with the hinder of increase of somebody's asset due to a case^[18]

Under the general title of damage, material damage which has a meaning of damages about the person's assets and pain and immaterial damages that are in relationship with person's soul, are special titles. Material damages are damages on somebody's asset which does not occur according to the person's will. Immaterial damages occur in consequence of unlawful acts against person's personality.^[19]

There should be damage for patient's request for material or immaterial compensation from the physician. Since the subject of treatment is patient's body and his or her bodily integrity, this damage can occur as death, loss of an organ or suffering more than normal treatment.

The patient's material damages in consequence of treatment can be treatment expenses, loss of workforce, compensation for loss of support and other damages that came into being because of the death.

Patient's immaterial damages are the mental damages as a result of pain and suffering.

[17] ŞENOCAK, Zarife, Özel Hukukta Hekimin Sorumluluğu, Ankara, 1998, p. 12

[18] Yargıtay HGK E. 1968/403 K. 1968/76 T. 14.02.1968

[19] KILIÇOĞLU, Ahmet M., Borçlar Hukuku Genel Hükümler, Genişletilmiş 4. Baskı, Ankara, 2004, p. 209.

d. Fault (Negligence of duty of care)

1. Term of Fault

Fault is not behaving in proper way. Fault of the physician is violation of obligations that was undertaken with the treatment contract with intention or negligence.^[20]

2. Types of Fault

Fault has two special types in civil law: Intention and negligence. What determines the heaviness of the liability is the extent of fault.

For determining a fault as an intention, the person should know the consequences of his or her behavior and just the same he or she should behave in this way knowing and wanting that consequence. On the other hand, for determining a fault as negligence the person should not behave in compliance with obligation of caring that hinder the consequence which the person normally does not want that will be occurred.

The faults of physician can occur as a result of paramedical faults on law, fault of treatment and fault of diagnosis. If the physician proves that he or she behaves in compliance with the obligation of physicians caring during the duration of determining the diagnosis and interpreting the analysis, he or she will be exonerated from the liability. After the diagnosis, the physician should apply the treatment which is minimum risky and maximum successful. If the patient behave in compliance with the obligations that was accepted by the science and practice of medicine while he or she apply the treatment, even the treatment results unsuccessfully, the physician will not be liable.^[21]

According to the Federal Court of Switzerland, as a general rule, the physician should be responsible from all faults, during the performance of his or her duty, as he or she is a mandate. However, if it is accepted that the physician will be liable because of all of his or her faults, the profession of physician can become impracticable. The judge should remember that the science has no definite measures and the physician can be mistaken anyhow, while determining whether there is fault or not.^[22]

The criterion, while determining, whether there is negligence, is the analysis of treatment of any other physician would apply, who has the same conditions.

There are some decisions of Turkish Supreme Court of Appeals on this issue:

“In the instant case, the physician who is a ENT specialist, could not find and take the part of injector which was broken during the operation. And this part of injector

[20] ŞENOCAK, Zarife, Özel Hukukta Hekimin Sorumluluğu, Ankara, 1998, p.11

[21] SEVİNDİK, p. 53

[22] BELGESAY, p. 90

was found and taken by another physician. However, that physician violated his or her obligation of physicians caring and he or she has gross fault.”^[23]

“It can not be said that the problems can not be foreseen for the patient with epilepsy, having fallen into coma and been left without care in a long time period.”^[24]

“A professional person who has his or her specialism on an profession or art, knows that he or she will be liable if he or she does not know an issue that he or she must know or pass over the precautions which was accepted by the doctrine of a science and hinder the damages. However this person can not be responsible because of behaving not in compliance with some rules of science that are discussed and generally not accepted. Even the operation that was done by the physician was not in hoped way, if the physician operated the patient in compliance with the rules of medicine, the physician would not be responsible as he or she did not have any fault in the instant case.”^[25]

e. Causal Link

If the damage has a causal link with and occured as a result of the faulty and unlawful actions of the physician, the physician will be liable.

[23] Yargıtay 13. HD E. 2000/8590, K.2000/9569 T. 06.11.2000

[24] Yargıtay 4. HD E. 1987/2594 K.1987/3201 T. 27.04.1987

[25] Yargıtay 13. HD E.1974/2637 1974/2492 T. 14.10.1974

CONCLUSION

In this study, legal relationship between the patient and physician were handled and explained why it constitutes or not a sui generis contract, service contract, mandate contract, contract for work, or tort, and the cases when the physician behaves as an agency without authorization. All of these opinions and cases were analyzed in detailed way and determined in which law system they are applied.

Although there are some criticisms against this opinion, the best type of contract that can be in compliance with the nature of the treatment contract is the mandate contract, which was also accepted in Law and decisions of High Courts of Turkey and Switzerland. According to this type of contract, the physician, who has a state as a mandatee, should behave in compliance with obligation of physicians caring, follow all technologic and scientific improvements and make maximum effort to make the best treatment.

Moreover, aesthetic surgeries and the contract between dentists and patients that have the subject of dental plates, prosthesis and dental restorations are contracts for work. According to the clauses of contract for work, it is not satisfactory that physicians maximum effort to get the aim, physician must get the aim. From this point they are different from mandate contracts.

As it was emphasized before, determining which contract clauses should be used for the present way is very important to understand the obligations and rights of the parts.

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