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Essay/Commentary

Medical Liability of the Psychiatrist

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A B S T R A C T

This article discusses some relevant issues on the legal implications of medical liability, focusing on the professional practice of medicine and based on the analysis of key aspects under the Colombian legislation. Some conflicting topics are considered with particular reference to related legal aspects. The responsibility of the psychiatrist and the various situations he/she is exposed to are discussed, in addition to some protective measures for an adequate doctor - patient relationship.

Responsabilidad médica del psiquiatra

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R E S U M E N

Este artículo de reflexión presenta aspectos relevantes de la figura jurídica de la responsabilidad médica enfocada a la práctica profesional, con base en el análisis de aspectos relevantes de la legislación colombiana. Se exponen algunos temas en conflicto y se enuncian aspectos jurídicos relacionados. Se discuten la responsabilidad del psiquiatra y las diversas situaciones a las que este se ve expuesto. También se discuten algunas medidas de protección para una adecuada relación médico-paciente.

Introduction

The number of medical liability claims has increased recently in Colombia as a result of the amendment to the health legislation introduced during the nineties. The 1991 Political Constitution guarantees Colombian citizens the unalienable right to social security, including the right to health care as a fundamental right. Later on, the amendment to the 100 Law in 1993 extended the coverage of health services in accordance

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with the constitutional ruling. While the 1936 Political Constitution enshrines public health as a public service, it was only in 1991 when health care became a fundamental right under the law. The State is obliged to control and oversee both the public and the private health care sector and that it has been organized and regulated to ensure an efficient service that ensures a diligent and responsible medical practice.

Hence, medical practice in Colombia, as well as in the U.S., is initially defensive and it is increasingly usual for physicians to be obliged to have civil liability coverage for their professional practice and being able to respond at all times to the risk of a lawsuit.

Medical Legal Demands in Colombia

There is currently broad legislation regarding public health services. For instance, Law 100 of 1993, includes over 100 regulatory decrees, making it practically impossible for the physician to learn them all; however, ignorance is no excuse for non-compliance, nor a valid defense argument against a medical legal claim.

Few studies have been published in Colombia on lawsuits against doctors. The study by Tamara *et al.* showed that the specialties more often involved in medical claims are gynecology and obstetrics, orthopedics, general surgery, ophthalmology, plastic surgery, ENT, neurosurgery and pediatrics.[1]

Psychiatry is not included in the list corresponding to the practice from 2006 to 2010 in Bogotá, as recorded by the National Institute of Legal Medicine and Forensic Sciences. However, this does not mean that no lawsuits have been filed against psychiatrists; for instance, the study by Jiménez et al.[2] on professionals who were members of the Special Fund for Solidary Support in case of Lawsuits (Fepasde) and were sued between 1999 and 2006. There were 12 cases of professionals sued for a total of 18 lawsuits, mostly disciplinary and ethical. The most frequent causes were presumptive anti-ethical behaviors and other reasons unrelated to patient care. Two additional cases of complications with antipsychotic therapies were identified, one case related to poor safety and one suicide.

The recently published study by Jena et al., in a population of 40,916 physicians facing malpractice lawsuits in the United States from 1991 to 2005, shows the frequency distribution in 25 specialties. Neurosurgeons, thorax surgeons and general surgeons are at the top of the list, followed by gynecologists, internists and further down, anesthesiologists; pediatricians and psychiatrists are at the end of the list. This same study claims that by 65 years of age, 75% of the physicians at low risk for being sued have faced at least one lawsuit, versus 99% of those at high risk.[3]

The Psychiatrist's Medical-legal Risk

In the practice of psychiatry, similar to other medical specialties, lawsuits are more often filed in cases in which the patient's life and integrity are at risk. Assessment of risk of self-aggression, hetero-aggression, flight and damage to the surrounding environment are at the top of the list for medical - legal risks for the psychiatrist. Other risks however can be lethal; for instance, physical and chemical restraint in a hospital environment,[4-6] prescribing in the absence of the appropriate indication, inappropriate dosage and treatment duration, misdiagnosis and inappropriate psychiatric drug therapy, in addition to medical error when prescribing psychiatric medication leading to relatively frequent adverse events that are usually preventable or, failing to identify, monitor and treat such adverse effects.

Another medical-legal risk that does not necessarily imply a clear risk to the life of the patient, but raises a difficult ethical dilemma has to do with professional secrecy in the psychiatrist - patient relationship and the dilemma between societal vs. individual wellbeing. Other situations may also be fatal, for instance when a patient indicates his/her desire to injure somebody else, or the difficult position of the doctor when faced with the obligation to report that the patient claimed to have committed a crime. Other types of ethical claims are doctor - patient sexual activity, usually within the framework of psychotherapy.

Other practices such as electroconvulsive therapy (ECT) and isolation of the psychiatric patient have been discussed in the media, particularly in the past, when ECT was administered in some institutions without the use of anesthetic drugs or relaxants.[7,8] An additional dilemma for the psychiatrist is the institutionalization of a mentally disturbed patient against his/her will. Law 1306 of 2009 however, provides the guidelines for the "Protection of the Mentally disabled and establishes the Legal Representation Scheme for the Emancipated Disabled". This certainly standardizes the protection of rights of this population group and gives guidelines to the psychiatrist.

The psychiatrist medical - legal risk, as in any other medical specialty, is in fact minimized with a proficient, safe and good quality practice that includes a thorough medical record. Needless to say that the medical record is key in any type of lawsuit and may be the best defense tool for the physician.

The case of the suicidal patient

The professional practice of medicine entails a risk for the patient. Particularly suicidal attempts and suicide are the most costly risks both economically and psychosocially, in addition to the number of years of life lost. These types of patients represent the most significant medical - legal risk for the psychiatrist and for the general practitioner or for any other medical discipline, particularly in the absence of an appropriate evaluation or treatment. Furthermore, this is the most frequent risk and the most usual claim against the attending staff, the psychiatrist and the health care institution.

The liability of the psychiatrist may be questioned if the suicidal attempt takes place in the hospital premises, a few days upon discharge, or in the case of out-patients with a moderate to high risk of suicide that have not been institutionalized. Inadequate suicidal evaluation or negligence in response to the risk is often argued.[9]

In Colombia there are no specific laws referring to professional liability as a crime, but lawsuits may be filed before criminal, civil, ethical, disciplinary and administrative authorities.

These cases have been classified as crimes of personal injuries or homicide. The civil law establishes the obligation to economically compensate for any damages. Law 23 of 1981 institutionalized the practice of the profession and established sanctions that may even impose a five-year suspension forbidding the physician to practice his/her profession. In other words, any doctor who receives this penalty must refrain for practicing medicine for the length of the conviction.

Regulations to be kept in mind

The medical practice and in particular the psychiatrist, must comply with all the applicable regulations; hence the physician should be acquainted with the text of the law: the Colombian Political Constitution of 1991, the current Criminal Code or Law 906 of 2006; the Code of Criminal Proceedings, the Civil Code and the Code of Children and Adolescents, as well as the corresponding jurisprudence (Verdicts of the State Council and Constitutional Court); additionally, the Code of Medical Ethics and its Regulation 3380 of 1981 (currently being at the legislative chambers following the proposal of a Bill for amendment). Likewise, Law 100 of 1993, the Educational - Health Care Framework Agreement of 1996, its corresponding rules and current regulations. Evidently, the physician must be acquainted with the internal regulations that govern universities, the hospital regulations and other specific rules, such as Resolution 2417 of 1992 of the Colombian Ministry of Health (which adopted the rights of the mentally disabled that are mandatory for every health care institution); legislation specific to certain illnesses, the regulations of the Ministry of Social Protection and of the Ministry of Health with regards to formulation of controlled drugs and the inclusion of patients in research projects, in addition to the most recent regulations on mental disability included in Law 1306 of 2009.

In summary, the doctor must be knowledgeable about the current legislation and must be part of his/her daily practice because of the constant medical-legal risks at stake.

As a whole, medical liability is determined on the basis of the means used and not on the basis of the outcomes; in other words, the doctor is not required to guarantee that the outcome of any intervention will be positive or beneficial for the health of the patient; nor will the doctor be measured in terms of the results, but rather in terms of his/her proficiency and diligence and the support given towards the betterment of the patient's condition. In sum, the evaluation is based on the means used and not the results.

Exceptionally, the medical practice could be evaluated on the basis of the results, such as in the case of cosmetic surgery when the patient wants to change his/her looks. In such case, the information provided by the physician must be comprehensive and clear, if possible in writing, and very detailed. Biases give rise to unrealistic expectations that may eventually lead to legal issues for the doctor. Informed consent is a must for the doctor-patient relationship and we must always respect the right of the patient to receive or reject the medical treatment offered, with the exceptions established under the current legislation.

A professional physician should always avoid any malpractice that may eventually trigger medical - legal claims. Hence, the doctor must be properly trained in his/her area of specialization, be cautious, and never neglect the patient; must foresee the potential results of the treatment administered and the procedures practiced; must act prudently and adopt the necessary precautions.[10] Never forget a comprehensive medical record in accordance with the current regulations, since this is the cornerstone for the defense of the physician in case of a lawsuit.

With regards to the liability of graduate students, they must practice under the supervision of a specialist and better still, under the supervision of a university professor.

Though generally speaking, Residents in Colombia do not receive any form of payment, they share their medical liability with the educational institution and with the hospital; consequently, the Resident's practice should be regulated and performed under adequate conditions for a quality care.

Some health care institutions opened to training of Residents frequently lack the adequate standards and structure and often the conditions are sub-optimal for any kind of medical practice or training. This situation affects both the patients and the training practitioner. Health care institutions must ensure both an adequate physical structure and organization to provide the right means and ensure positive outcomes.

Finally, it should be stressed that ignoring or neglecting the rules increase the risk of lawsuits for the physician. Patients are increasingly knowledgeable of their rights and are willing to file claims under the advice of competent lawyers.

Medical practice has undergone considerable transformation; the doctor's advice was taken in good faith and never questioned but now the physician is just a health care professional who sometimes is required show proof of his / her medical skills.

Conclusions

Several factors impact the liability of the physician; however, the best protection against any potential lawsuit is abiding by good medical practices.

Good medical practice goes beyond the skills to what is best for the patient, in addition to being knowledgeable about the current regulations and the use of the available tools, not only for appropriate patient care, but for a strong defense if the need arises.

Medical care always implies a medical - legal risk; consequently, every medical action must comply with the *lex artis* to limit the risk. According to Jiménez *et al.*, the medical record is extremely relevant as proof of sound medical practice and the informed consent should always be secured for any medical intervention in accordance with the *lex artis* and the ethical principles,[2] in addition to proficiency and confidence when carrying out a medical intervention.

Competing Interests

None declared.

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