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THE MEDICAL CARE CONTRACT

-PhD thesis-

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CONTENTS

Key words: patient´s pre-contractual information, progressive contract formation, freely expressed and enlightened patient consent mandatory condition, contractual liability , criminal liability for impunity, observance of patient dignity, observance of professional independence of doctors without punitive pressure.

SUMMARY

This paper seeks to identify the contours of the medical contract concluded between the patient and the medical staff, underlining its training through its own mechanism. During the ten chapters I presented the stepwise training of the parties' agreement and the object of the contract, identifying the type of liability that can be undertaken. In parallel with the national legal provisions and the vision of the Romanian doctrine and jurisprudence, regarding the relationship between the doctor and the patient, I have also included some comparative law elements in the presentation, especially French and British common law.

In trying to qualify the doctor- patient relation, necessary to be able to establish with greater precision the applicable legal norm, in the first chapter the analysis is centered on identifying the characters of this relation. By pointing it to the patient's agreement to be subject to the methods of prevention, diagnosis, treatment proposed by the physician, I appreciated the agreement between the doctor and the patient as a consensual contract, sui generis, intuitu personae, essentially civil, cumulativ, imperfect sinalagmatic, onerous, adherent and with immediate execution. In relation to these benchmarks, in the presence of the free, conscious and unconscious will of the patient, we can recognize the contours of an independent civil contract, which is formed through its own mechanism, and whose specific elements fold over the general characters of a true unnamed contract.

In the second and third chapters I surprised the existence of several stages necessary for the formation of the medical contract between the doctor and the patient. The vast process of medical care involves going through several stages. The rule that, before being subjected to methods of prevention, diagnosis and treatment, the patient must be accepted by a physician, and then correctly, completely and comprehensively instructed, marks the birth of the will in progressive stages.

From the moment of beginning to *the endpoint* of the parties' consent, we identify a "pre-contractual phase" of the medical care contract . This phase consists of three stages: 1) patient's choice of physician; 2) patient acceptance by the physician; 3) patient information by

the physician. Talking about a consent governed by specific rules, which does not fully comply with the general rules on consent[1] the intermediate steps cannot be separated from one another since they do not have the legal force separately to produce legal effects independently of the central purpose of forming the medical contract. The concern for identifying the parties' consent stages is due to the specificity of each step, with distinct legal content and effects. By marking these moments, it will be easier to identify the responsible party in the event of injury, and the applicable sanction can be properly established.

Informing the patient by the doctor is a compulsory stage for expressing his / her consent regarding the medical act and implicitly for the birth of the medical contract; in the absence of adequate information of the patient, we cannot speak of a valid consent, so that for the medical interventions made in the absence of full agreement, medical liability will be governed by the legal provisions governing extra-contractual relations.

Regulated both at international and national level, the information obligation can be classified into the collective information obligation and the individual information obligation. The right to collective information, first affirmed at European level by the European Charter of Patients' Rights of 15 November 2002, was also regulated in national law with the entry into force of Law no. 46/2003 regarding patient's rights and Order no. 1410/2016 approving the Norms for the enforcement of Law no. 46/2003[2] . Under these legal provisions, the patient is granted the right to be informed about the available medical services as well as the way they can be used.

As regards the obligation to inform individually, according to art. 8 of the Law no. 46/2003 on patient's rights, the particular information regarding the prevention, diagnosis and treatment activity must be communicated to the patient by the medical personnel[3], chosen by him/her in a respectful, clear language, with the minimization of specialized terminology. An essential condition for obtaining the patient's agreement regarding the proposed medical activity is that the medical staff should ensure that the patient understands the communicated information, having the obligation to explain it. Although the provisions of art. 7 and art. 9 of the Law no. 46/2003 recognize the patient's right to refuse his / her information, the position expressed by the doctors is unanimous in the context in which the

[1] G. Genicot, *Droit médical et biomédical,* Ed. Larder, Bruxelles, 2010, p. 129-130.

[2] Order No. 1410/2016 published in M. Of. no. 1009 of 15.12.2016 repeals the Order no. 386/2004 approving the Implementing Rules of the Law No. 46/2003 on Patient Rights

[3] According to art. 653 par. (1) let. a) of Law no. 95/2006, title XV (title XVI, after republishing of Law No. 95/2006), medical personnel means the doctor, the dentist, the pharmacist, the nurse and the midwife who provides medical services.

agreement on methods of diagnosis and treatment prevention must come directly from to the patient.

According to art. 8 of the Methodological Norms for the application of Title XVI of Law no. 95/2006[4], the written agreement of the patient who consented to the medical act must include a brief description of the information provided to him/her by the medical staff. In order to make clear the provided information, the document recording the patient's consent should contain all the information provided by art. 660 par. (3) of the Law no. 95/2006, Title XVI. Even if they are written in an abridged manner, the information provided to the patient should not miss the diagnosis, the nature and purpose of the treatment, the risks and consequences of the proposed treatment, and the viable alternatives to treatment, along with their risks.

We also appreciate that by Order no. 1411 of 12 December 2016 amending and supplementing the Order of the Minister of Public Health no. 482/2007 (regarding the approval of the Methodological Norms for the application of the title XVI "Civil liability of the medical personnel and of the medical and sanitary and pharmaceutical products and services provider" of the Law 95/2006) partially regulate the issue of correct information of the patients. These legal provisions aim at achieving a unitary patient information regime by introducing in Annex no. 1 of an informed consent form. This form contains several headings in which the patient will mark what type of information was provided to him.

By this legal provision, at art. 8 par. (7) the obligation to complete the written consent form of the patient, presented in Annex no. 1 by all physicians regardless of their specialty or the medical unit in which they operate is included. We emphasize in this respect that there is no distinction between the need to comply with the model form of a certain category of doctors, so we appreciate that as long as the law does not distinguish, both physicians in public hospitals and those in private health care establishments must seek the written agreement of the patient, informing him/her in advance of all the elements provided by art. 660 par. (3) of the Law no. 95/2006, identified in the form set out in Annex no. 1.

In Chapter III, particular attention is paid to the content and extent of information communicated to patients, emphasizing how medical risks should be addressed. Thus, according to art. 660 par. (3) of the Law no. No 95/2006, Title XVI, the information communicated by the medical staff shall include : the diagnosis, the nature and purpose of the treatment, the risks and consequences of the proposed treatment, as well as

[4] Approved by the Order of the Minister of Public Health no. 482/2007, modified and completed by Order no. 1411 of December 12, 2016.

viable alternatives to treatment, together with their risks. Also, the physician is required to tell the patient even the prognosis of the disease without applying the proposed treatment . The concept of risk gets size and becomes variable in relation to the idea of injury and the severity of the damage. In medical matters the serious risk is caused by the occurrence of major consequences, as well as both patrimonial and non-patrimonial major damages.

The need to establish the severity of the risk is useful in identifying the limits of the obligation to provide information about the proposed investigations or treatment. In order to identify these issues, the analysis of the severity of the damage will be achieved by aggregating the objective perspective with the subjective perspective. in the doctrine of our country[5], based on the qualitative dimension, respectively the severity of the consequences and the quantitative dimension consisting of the frequency of statistically undesirable consequences, it was considered that "qualitative risks" are those that must be communicated to the patient before making a decision on the proposed intervention. Qualified risks exceptional circumstances are considered to exceed the obligation to provide information in other specialties than plastic surgery.

Qualifying a "serious" risk is a high level of relativity. Motivated by the multitude of factors that can influence a specific intervention, including age, body specificities, identification of serious risks is made in concrete. Another important element to be considered when qualifying risks is the evolution of medical science at that time. Under this aspect, it is important to underline that, according to medical science data, a risk may "retrograde"[6], respectively, the risk potential can be put in another light according to the latest findings in the medical field.

Exceptional risks are known in practice and doctrine as a *therapeutical* ones. This potential risk, which by itself is virtual, is not subject to the obligation to inform. Being related to the "unpredictable risk", the *therapeutic* one is an uncertain event that is not known if it will be achieved. This exceptional risk is related to the risk that occurs in the event of an accident, both by its unpredictable character and by the unpredictability. The unpredictability of the accident can be due either to the limits of scientific knowledge or to the particularities of each patient[7] .

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[5] E. Florian, Discussions on Civil Liability of Medical Staff for Failure to Obey the Patient's Informed Consent, in Law no. 9/2008, p. 35.

[6] Ibidem

[7] I. Turcu, Health Law. The common front of the physician and jurist, Ed. Wolters Kluwer, Bucharest, 2010, p. 199.

Another topic widely discussed in the third chapter is that of special subjects, creditors of the obligation to inform. If we look at the doctor as a parent and the patient as a creditor, special attention should be paid to minors and people with psychic illness, considering, on the one hand, the presumption of discernment, and on the other hand, the uncertainty of the existence of a discernment that is valid even if it is lacking. Although in our country there is no practice in this respect, the Belgian, German, Spanish and English law systems recognize the autonomy of the will of the minors actually involved in the medical decision. In the case of persons who suffer from mental illness but who, while having the discernment, have difficulty in assessing the implications of the medical decision, the information will be made in the presence of a legal or conventional representative. If the judgment of the persons suffering from mental illness is abolished (according to a decision of the psychiatric forensic expertise commission), only the guardian will be informed and the consent to the therapeutic program will be obtained only from him/her.

Whereas, regardless of the responsibility for the maladministration, the doctor's liability for the non-fulfilment of the information obligation is assumed; in Chapter IV we have analyzed this responsibility in the pre-contractual phase on the realm of the contract's extraordinary responsibility. The conditions to be met for the engagement of this responsibility fully complies with those governed by the common law in the case of tort liability under Art. 1349 of the NCC.

The damage caused by the non-fulfilment of the information obligation or the inappropriate fulfilment of the obligation is not closely related to the information that the patient is entitled to receive. The link that concerns the injury relates to the healing or survival chances the patient had before expressing the consent for the medical act in relation to which the information was made. Therefore, in the event of non-fulfilment or non-compliance with the obligation to inform, the damage suffered by the patient is the result of the loss of the chance of gaining an advantage over other treatment methods or of avoiding damage by another choice which he could make the correctly and fully informed patient.

The difficulty in proving the causality condition originally led the French courts to use presumptions as evidence. Subsequently, the judicial review courts have pointed out that the need for the judge to determine in concrete terms the fulfilment of the condition of the causation report. In our country, the courts are still reluctant to acknowledge the damage consisting in the loss of a chance as damages indemnifiable, excluding at the same time any lost chance as indemnifying damage.

As far as the condition of the doctor's fault is concerned, it does not need to be proved, because we accept the qualification of the obligation to inform as a result obligation, the main consequence is precisely the assumption of the debtor's fault. Thus, in order to prove the culpability of the doctor, it is sufficient merely to prove the failure or inadequate fulfilment of the obligation of information.

In order to assess the damage consisting in the loss of an opportunity, the provisions of Art. 1385 par. (4) of NCC will apply. The amount of the repair will be calculated in proportion to the real probability determined in relation to the circumstances and the concrete situation of the victim. With regard to injury consisting in the loss of a chance suffered by the patient, we underline that the remedy will not cover the bodily harm caused to the victim by the medical act as a result of the avoidable risk. From the amount of this damage, the court will have to assess to what extent the risk could be avoided or a more advantageous choice could have been made for the patient, granting compensation in relation to that identified probability according to the circumstances of the case and the patient's condition.

Motivated by the fact that the information obligation is viewed from a different point of view in the British common law system, compared to the French and Romanian law system, in the fifth chapter the comparative analysis refers to the orientation adopted by the British doctrine and jurisprudence.

Chapter VI marks the stage of forming the medical care contract, with the general and special conditions required for the formation of this convention.

Thus, in addition to the exercise capacity required to be a shareholder in the patient's consent, the doctor must have graduated from an accredited medical faculty and to be qualified in one of the specialties prescribed by law. In order to be able to validly consent, the patient must be at least 18 years of age. In the case of minors who do not have full exercise capacity, the necessary consent to perform the medical act is obtained from their parents or their legal representatives. In the absence thereof, if there is no medical emergency, the medical staff may request the authorization of the medical act by the guardianship authority. In addition to age-related conditions, the patient, both the minor and the major one, must also have the mental capacity to make decisions. In this regard, it is important for the doctor not only to check the age of the patient but also to understand the nature and effects of the medical treatment.

In order for the encounter between the "offer" of the doctor, the proposed treatment and the patient's acceptance of that treatment to produce legal effects, the patient's consent must be consistent with his real will, to be freely expressed and seriously. However,

the principle of contractual freedom enshrined in Art. 1169 of the NCC[8] and the immediate consequence thereof, namely the binding force of the contract, appears to be in a different form than that provided by the New Civil Code. Thus, given that the doctor cannot refuse to provide medical care to a patient in a state of medical emergency[9], and the position expressed by the patient is not taken into account if it presents danger to self or public health[10], it is obvious that we are not in the presence of absolute contractual freedom.

Also, even in relation to the binding force of the contract, there is a significant deviation from the basic principle. In the relationship between physician and patient, the principle of binding contract force is not equally applicable to both parties. According to art. 653 par. (3) of the Law no. 95/2006, the doctor answers in the case of non-fulfilment of the obligation to provide compulsory medical care, the patient being entitled to continuous medical care until his state of health or healing. Contrary to the physician's obligation, for which the law provides for an express sanction in case of non-compliance, the patients are entitled, according to art. 13 of the Law no. 46/2003, to withdraw their consent at any time, and the physician is bound by this decision of the patient.

An exception is the situation in which, by withdrawing consent, the patient puts his life at risk, in which case the physician will intervene contrary to the position expressed by him/her to save the patient's life after having previously tried to persuade him/her of the adverse consequences of the decision.

From the perspective of the subject of the doctor-patient relationship, being in the presence of a sinalagmatic and commutative contract at the same time, each of the parties to the contract assumes mutual obligations. Thus, by his/her consent, the patient assumes the obligation to put his or her body at the disposal of the physician, and the latter undertakes to intervene on the patient's body with those methods of prevention, diagnosis and treatment in relation to which the patient was informed and agreed. In addition to the primary duty of care, in order to respect the patient's rights, four important obligations can be identified: the obligation to inform the patient, security duty, confidentiality obligation and the obligation to keep his/her file available to the patient.

The legal nature of the case, as provided by art. 1236 par. (2) and paragraph (3) of the NCC, presupposes that it complies with both the laws in force and public order and good morals. Also, in the presence of a serious cause, consent is acquired by legal force, generating

[8] Article 1169 of the NCC states: "The parties are free to conclude any contracts and determine their content within the limits imposed by law, public order and good morals."
[9] Art. 663 para. (3) of the Law no. 95/2006, as last amended, republished in M. Of. 283 of 27 April 2015.
[10] Article 25 (2) of Law no. 46/2003.

rights and obligations to the parties that outwardly intend to legally bind. When analyzing the licit nature of the case in the meantime, it is necessary to analyze as a matter of priority the specific cause of the legal act[11], all the more that according to art. 21 of the Code of Medical Deontology of the Romanian College of Physicians, "the doctor must be a model of professional and ethical behaviour".

Condition of form is not a condition of contract validity, being only a means of proof. According to art. 1182 of the NCC, the contract is formed by the concurrent meeting of the will of the two parties, the written form being necessary only to prove the internal will expressed by the parties unequivocally.

Chapter VII includes two central themes of debate included in two sub-chapters. The first subchapter deals with the analysis of medical accountability from the point of view of the medical act as the primary responsibility of the medical staff as well as from the perspective of the relationship between the medical unit and the patient. The second subchapter focuses on the legal qualification of this responsibility in the Romanian law, the French and English comparative view of the law .

After a detailed analysis of the conditions necessary for the accountability of the physician we concluded for the purpose of applying the tort liability only in the absence of the valid consent expressed by the patient. Thus, in cases of urgency or when the patient is unconscious, and there is no free will, the liability will be committed on a non-contractual basis. Although the case law of our country considers that in relation to the injurious medical act, tort liability is the rule, not recognizing the existence of the contract that arose between the two protagonists, however, the orientation presented in this chapter is embraced by various Romanian doctrines who were concerned with the analysis doctor-patient special report.[12]

In the contexts in which in the previous chapters I analyzed the way of gradual training of the doctor-patient contract, claiming the existence of an agreement expressed by the parties with the purpose of producing legal effects, in Chapter VII, I concluded in the sense of contracting contractual liability as the primary form of liability for expressing informed patient consent. Thus, whenever we can speak of an agreement of will that has a valid relationship between physician and patient about the methods of diagnosis, prevention and

[11] I. Reghini, Ş. Diaconescu, P. Vasilescu, Introduction to Civil Law, Ed. Hamangiu, Bucharest, 2013, pp. 539-540.

[12] I. Turcu, op. cit., pp. 163-170; G.A. Say, Medical malpractice. Particularities of medical civil liability. Relevant internal case law. The Malpractice of Liberal Professions, revised edition, Ed. Universul Juridic, Bucharest 2016, p. 113.

treatment to which the patient is subjected, the liability that will be committed will be contractual. Although the relationship between physician and patient has many specific elements that differentiate them from the usual content of the obligations that arise in the case of appointed contracts, however, the autonomy of the will of the parties cannot be denied or marginalized in the current legislative context.

In Chapter VIII I approached the conditions of the criminal responsibility of the doctor, establishing that starting with the provisions of art. 15 of the New Criminal Code, the deed of the medical staff can incur criminal liability only if the act is provided by the criminal law is committed with guilt according to the situations regulated by art. 16 from the NCC, is unjustified and also imputable to the person who committed it. However, referring the facts of the medical staff to the essential features of the offense and also to the conditions of engaging in tort or contractual civil liability, emphasizes the exceptional nature of criminal liability. Thus, it could be concluded that the criminal liability of medical staff will only be withheld when the doctor infringes his obligations with respect to the patient in a very impervious and very serious manner. However, the patient injured or dissatisfied with the medical act is tempted to resort to criminal charges against the treating physician in order to cover the suffered prejudice, given the advantages for him/her of such a procedure. Thus, criminal prosecution bodies once charged with a criminal complaint are involved both in the identification of the evidence and in its administration, with minimal costs for the injured party but with fatal consequences for the physician .

In Chapter IX, I have reached the issue of bioethics in the relationship between physician and patient, underlining the conditions of engagement in disciplinary liability. Thus, starting from the Romanian legal doctrine and practice, unlike the tendency manifested in the French law system, the norms of medical deontology do not have the legal force necessary to be invoked as a lawful ground before the courts in the case of actions having as their object the engagement of civil or criminal liability . Sanctions for non-compliance with medical deontology rules are disciplinary, mainly targeting those violations that harm the honor and prestige of the medical profession.

In the Chapter X, I presented the current approach of the French and Belgian system of the medical contract issue in the context in which France was initially promoted contractual liability for the injurious medical act.

In the final conclusions of the eleventh chapter I highlighted the advantages of approaching the idea of a healthcare contract in the current national legislative and

jurisprudential context. In our legal system, I appreciate the utility being different from the French and English law systems .

Even if the current doctrine in our country[13], accompanied by the European-level orientation[14] asserts the existence of professional liability outside a contract, I consider that this approach creates confusion and arbitrariness in the judicial legal solutions, taking into account the current legislation in our country. The main reason lies in the lacuna provisions of Law no.95/2006. Thus, even if the circumstances in which the special subjects respond, without completing these provisions with those of the New Civil Code, there are no indications for the identification of the damage, the responsible persons, the culpability of the involved persons, as well as the legal premises for establishing the extent of the indemnities.

In support of the idea of a contract we call for the impossibility of denying the will to express legal effects. In the absence of the patient's illuminated agreement, except for medical emergencies, the doctor's intervention on the patient cannot take place. Furthermore, through the amendments to Law no. 95/2006, as well as through a crystallized orientation at European level through recent case law[15] it is noted that the patient's involvement in the medical decision is increased. In addition to providing the fullest information , in a perceptible language, special attention is paid to physician-patient collaboration in the sense of respecting the human dignity of the patient, who is entitled to make the decisions that directly concern him/her[16] .

Secondly, the regime of liability and medical malpractice is not regulated by Law no. 95/2006, it is necessary to corroborate these special legal provisions with those of common law in matters of liability. As even the supporters of professional accountability have expressed[17], if the specific legal regulations were more comprehensive, we believe that another would be the basis for discussion.

Thirdly, I consider it important to circumscribe the medical-patient relationship in a *sui generis* contract in order to fulfil the purpose of employing the responsibility of the medical staff or the healthcare provider in a balanced formula. The classification of medical

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[13] L.R. Boilă, Discussions on the legal nature of the civil liability of the doctor towards his patient, in Law no. 2/2011, pp. 81-118; L. Pop, I.-F. Popa, S.I. Vidu, Elementary Civil Law Treaty. Obligations - according to NCC, Ed. Universul Juridic, Bucharest, 2012, p. 549-556.

[14] Ch. Von Bar, *The Common European Law ofTorts,* Clarendon Press, Oxford, 2005, p. 316-319.

[15] in the case of Scotland Goorkani v. Tayside Health Board (1991), the doctor prescribed to a patient who only saw a functional eye a very powerful drug to strengthen the eye's eye. Without informing him correctly about the side effects that have led him to sterility, the doctor did not give the patient the chance to choose another medicine - in Ch. Von Bar, op. cit., p. 331.

[16] Ch. Von Bar, *op. cit.,* p. 330.

[17] L.R. Boilă, *op. cit.,* p. 117-118.

liability in the contract domain in the presence of the valid consent of the patient is an important guarantee for establishing the limits of the fault of the guilty physician. In this respect, judicial practice would more easily delimit the simple guilt, the unpredictable *(therapeutic*) event, the improbable fault that caused the major injury.

In this respect, I mention that, although there are no statistics developed by the competent institutions on the number of actions for the prosecution of the treating physician for the maladministration, one can notice the primordial tendency of the dissatisfied, injured patient to address first to the criminal investigation bodies. Besides the inherent moral pressure created on the treating physician, one can notice the procedural advantages of the patient. Thus, the criminal complaint is exempted from the payment of the stamp duty calculated in relation to the claimed damages. The procurement of the medical documents, or the entire medical file at the disposal of the doctor, is no longer an impediment, and the criminal investigations are carried out promptly. Also, other relevant evidence, including forensic expertise, is administered at least costly and without delay by criminal investigation bodies as well.

The disadvantages of this approach are obvious. Even if it is desirable to protect the rights of the vulnerable patient as a matter of priority , this directorial principle seems to be out of control at the expense of doctors. Thus, on the basis of the recent case law [18], medical staff are easily convicted of wrongdoing, forbidding their right to practice their profession and are obliged to pay exorbitant civil compensation for moral damages without the insurance companies with which they have contracted insurance contracts to be involved each time for the payment of such damages .[19]

Analyzing medical responsibility from the perspective of offense responsibility, even in the presence of valid patient consent, also creates legal uncertainty. Apart from the fact that the express provisions of art. 1350 par. (3) of the NCC, which provide for the parties to be unable to remove their contractual liability and to opt for another form of liability which is

[18] Court of Appeal Cluj, criminal decision no. 917 / A / 2015, in G.A. Say, op. cit., pp. 226-249.

[19] According to the current legal provisions (articles 667-678 of Law 95/2006), although medical staff and healthcare providers are required to take out professional indemnity insurance for their insurance business, this insurance is not compulsory according to art. 3 of the Law no. 136/1995. Under these circumstances, with optional insurance for the insurer, he will have the right, through the terms of the insurance contract, to pursue the selection of the risks and the clients with whom he contracts. Although Law no. 95/2006 (Article 672) allows the parties to negotiate the terms of the contract, the insurer submits adherence contracts to the medical staff or the healthcare provider, which the insured person chooses or does not accept. The disadvantage of these "pseudo-obligatory" assurances lies in the fact that, in order not to pay significant insurance premiums, most doctors or hospitals opt for the signing of professional insurance contracts which involve the payment of modest insurance premiums, but which do not cover also the indemnities for moral damage. - See O. Murariu, M.-F. Hare, General Exam on the Legal Issues Concerning Professional Liability Insurance for Doctors, in Law 4/2015, pp. 88-106.

more favourable to either party, there are no express legal provisions permitting the derogatory application of tort liability even in the case of a contract. Moreover, the conduct of medical personnel is not established by "law or the custom of the place"[20]. According to art. 666 in the Law no. 95/2006, the medical staff who provide health care or health care shall be obliged to apply the therapeutic standards established by the nationally approved guides of practice in the respective specialty or in the absence of the necessary standards recognized by the medical community of the respective specialty. In the circumstances in which medical practice guidelines, codes of medical deontology are not recognized under Law no. 24/2000 (on normative technical norms for the drafting of normative acts)[21] and the Constitution of Romania[22] (Article 61, Article 108) as normative acts with the power of law or for the organization of the enforcement of laws, they cannot be invoked as the sole legal basis for the qualification of compliance or non-compliance of the conduct of medical personnel.

Besides, the fault in the matter of offense liability can easily be confused with that in the field of criminal law, and there is no distinction between the simple fault specific to civil law and the guilt with or without provision in the field of criminal law, of the two forms of liability is hard to detect. Clear evidence in this respect is represented precisely by recent solutions in national judicial practice.

Thus, in order to protect and respect the rights of the patient, I support the need to qualify the relationship between physician and patient in the contractual realm, whenever the medical act is governed by the freely expressed consent of the parties. Through this approach, we sought to recognize the dignity of the patient who is effectively involved in making decisions about his / her life and health, while stressing the need to protect the professional independence of physicians and to encourage their entire activity in order to ensure the interests of the patient, wihout being intimidated and sanctioned

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[20] Art. 1349 para. (1) of the NCC, which regulates the conditions for the engagement of civil liability.

[21] Law no. 24/2000 regarding the normative technical norms for the drafting of normative acts, published in M. of. no. 260 of 21 April 2000, provides in Art. 81 paragraph (1) mentions the need for: "when preparing draft decisions, orders or provisions, their acts shall be considered as subordinate to the laws, decisions and ordinances of the Government and other acts of higher level."

[22] Art. 61 para. (1) of the Constitution of Romania establishes the Parliament as the only legislative authority of the country. Also, according to art. 108 of the Constitution of Romania, government decrees are issued for the organization of law enforcement, and government ordinances are issued under a special law of empowerment.