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Patient Rights and Responsibility of the Physician and Administration in The Light of The Decisions of The Council of Consultation in Turkish Law

Ali SERİNOĞLU[1,2]

[1] T.C. Ministry of Health, General Directorate of Management Services, Department of Law and Legislation, Ankara, Turkey
[2] T.C. Ministry of Health, General Directorate of Management Services, Department of Disciplinary Actions, Ankara, Turkey

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ABSTRACT

Human and health are at the center of medicine. The right to health, which concerns human health, is becoming more important day by day. The individual gets sick in countless ways throughout his life and applies to the health institution for treatment. The individual in the patient position in the health institution has certain basic rights. These rights are regulated as patient rights. Patient rights, which are relatively new compared to other rights in Turkey and around the world, are constantly evolving in this sense. In this study, it is aimed to examine and interpret the patient rights phenomenon in Turkey in the light of the decisions of the Council of State. In the research, the history of patient rights is mentioned and developments related to patient rights are included. How and in what way patient rights are included in Turkish law is also included. In addition, the violation of patient rights and the remedies arising from unlawful intervention were mentioned, and what should be the rights violation and remedies were evaluated with the decisions of the Council of State.

Keywords: Council of state decisions, health law, patient rights

ÖZ

Türk Hukukunda Danıştay Kararları Işığında Hasta Hakları ile Hekim ve İdarenin Sorumluluğu

Tıbbın merkezinde insan ve sağlığı yer almaktadır. İnsanın sağlığını ilgilendiren sağlık hakkı, gün geçtikçe daha önemli hâle gelmektedir. Birey yaşam süreci boyunca sayısız şekilde hastalanmakta ve tedavisi sağlık kurumuna başvurmaktadır. Sağlık kurumunda hasta pozisyonundaki bireyin belli temel hakları vardır. Bu haklar hasta hakları olarak düzenlenmiştir. Türkiye'de ve dünya genelinde diğer haklara oranla nispeten yeni olan hasta hakları bu anlamda sürekli olarak gelişim göstermektedir. Bu çalışmada Türkiye'deki hasta hakları olgusunun Danıştay kararları ışığında irdelenmesi ve yorumlanması hedeflenmiştir. Araştırmada hasta haklarının tarihçesine değinilmiş olup hasta hakları ile ilgili gelişmelere yer verilmiştir. Hasta haklarının Türk hukukunda nasıl ve ne şekilde yer aldığına da yer verilmiştir. Ayrıca hasta haklarının ihlali ile hukuka aykırı müdahaleden doğan hak arama yollarına değinilmiş ve hak ihlali ile hak arama yollarının neler olması gerektiği Danıştay kararları ile değerlendirilmiştir.

Anahtar Kelimeler: Danıştay kararları, sağlık hukuku, hasta hakları

Corresponding Address

Ali SERİNOĞLU

T.C. Ministry of Health, General Directorate of Management Services,
Department of Law and Legislation
ANKARA-TURKEY
e-mail: aliserinoglu@gmail.com

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INTRODUCTION

Overwhelming advancements in science and technology, increasing needs of the individual and public along with increasing population, renewed regulations, laws and international treaties entail various changes in health system and policies, just as in many other systems (1). The fundamental purpose of this change in Turkey and the

world is to strengthen the efficiency of the health system and protect basic human rights. Concordantly, patient rights, a subset of basic human rights, develop constantly. Patient right is considered a continuation of the science of medicine. Moreover, it has a vital role in determining the attitude and behavior of individuals in all fields of medicine (2).

Human and health are at the center of medicine. Therefore, all medical interventions and practices must be in compliance with the law since they are concerned with the right to live, the right to determine one's own future, and the right to ask for the protection of physical integrity. Nonetheless, there may be conditions and situations in which the judicial system falls behind for the interventions and practices to be performed as a result of the rapid advancements in science, technology and medicine, and by extension, new regulations and research are required in health law (3). In this study, the case of patient rights has been investigated in light of the decisions of Council of State in the Turkish law, and research results have been presented.

Constitutional Foundation of Patient Rights and Legislation of Patient Rights in Turkey

It is known that humans naturally have certain rights and freedoms. These rights are inviolable, inalienable, and indefeasible rights and freedoms. One of these rights is the right to health, which is considered a basic human right. The right to health means that all individuals can call for the public and the state to protect his/her health and seek medical care and receive treatment when needed and can benefit from all opportunities offered by the state and the public. Therefore, it is understood that there is a strong association between health and human right (4). The right to health was also addressed in the Universal Declaration of Human Rights (5) dated December 10, 1948.

In the Constitution, the right to health falls into positive status rights in accordance with the obligations of the state. In this respect, an individual has the right to demand health from the state (6). Furthermore, it would be appropriate to conclude that the right to health also has a negative dimension like negative status rights (6).

The concept of patient rights is the right of an unhealthy individual to recuperate. Additionally, it is also the right of an individual, who cannot recuperate, in other words, who has a disease that cannot be treated, to minimize the discomfort, disturbance, and restrictions caused by the disease and be given the opportunity to have and lead a high-quality life as far as possible (4). In point e of Article 4 of By-Laws of Patient Rights, patient rights have been defined as follows: "The rights of individuals requiring healthcare services, which have been vested in them for just being humans and secured by the Constitution of Turkey, international treaties, statutes, and other legislation."

Fundamental Regulations Regarding Patient Rights

Fundamental regulations regarding patient rights are found in the Constitution and in national and international regulations. According to Article 2 of the Constitution, the Republic of Turkey is a social state based on the rule of law (7). The right to live with physical and mental health is among the social rights provided for by a social state based on the rule of law (8). There is an indirect relation between patient rights and Article 17 of the Constitution regulating individual rights. According to this article of the Constitution, all persons have the right to live and protect and develop their material and spiritual entity. Again, in the same Article, it is written that body integrity of persons cannot be touched as long as there is no medical obligation and be subjected to scientific and medical experiments without consent. Along with the 2010 amendment of the Constitution, the paragraph added to Article 20 can be evaluated as directly connected to patient rights. Accordingly, "All persons have the right to ask for the protection of their personal data. This right also involves persons to be informed about their personal data, have access to these data, demand correction or deletion of the data, and learn if these data are used in line with their purposes. Personal data can only be processed in accordance with the provisions laid down in the law or with express consent of the person. Basis and procedures regarding the protection of personal data are regulated by law."

Articles 30 and 40 of the Constitution securing the right to legal remedies and the right to action have essential importance for patient rights. With regard to Article 40 of the Constitution specifically indicating that "all persons whose Constitutional rights and liberties are violated have the right to demand to be provided the application to competent authorities without delay," and that the State has to indicate which legal remedies and authorities persons can apply to in their procedures," to Article 41 regarding public servants, and to Article 125 forming the basis of Administrative Law, the setbacks a person may experience during his/her healthcare service are considered as service failure/ neglect of duty. At this stage, the aggrieved party has the right to claim damages by applying to the administration or judiciary system.

When national legislation is considered, there are many regulations regarding patient rights. "By-Laws of Patient Rights" involving all legal regulations regarding patient rights entered into force on 01.08.1998 following its release in the Official Gazette of the Republic of Turkey No. 23420. Significant changes were made regarding patient rights with

the "By-Law for Amendments to be Made in the By-Law of Patient Rights" published in the Official Gazette numbered 28994 and dated 08.05.2014 (9). There can be found numerous international norms as well as national regulations regarding patient rights (10,11).

Fundamental Patient Rights and Lawful Medical Intervention

Article 6 of By-Laws of Patient Rights is related to the utilization of healthcare services. Institutions and organizations offering healthcare services and all healthcare personnel are obliged to act fairly and equally. In Articles 2, 18, and 3 of Medical Deontology Regulation, there is a provision stating that the physician or person running a private hospital is obliged to first aid in all kinds of emergency situations and cases. However, in respect to non-emergency cases, the physician does not have to make any agreement with the patient regarding medical examination and intervention.

Patients' "right to demand information" is regulated by Article 7 (12) of By-Laws of Patient Rights, "right to choose and change the healthcare institution and organization from where he/she would get healthcare service" is regulated by Article 8 (13), "right to choose, know and change the persons who will provide healthcare service" is regulated by Article 9 (14), "right to demand intervention suited to modern medical science" is regulated by Article 11 (15), and respect to personal life and right of privacy" is regulated by Article 21. Moreover, right to respect personal life has been regulated by "Administration Regulations for Bedded Healthcare Facilities". While Article 21 of By-Laws of Patient Rights regulates the right to respect personal life, Article 23 provides for the protection of patient's personal data.

Principally, each medical intervention is a violation against the material and even spiritual integrity of a person's body integrity. Therefore, receiving patient consent is important for the medical intervention to comply with the law. Thus, it is stated explicitly in Article 17 of the Constitution regulating the persons' right to integrity and to protect material and spiritual entity that "body integrity of persons cannot be touched except to the extent required by law and medical necessities, and persons cannot be subjected to scientific or medical experiments without consent."

By this provision of the Constitution, apart from any medical necessities and except to the extent required by law, consent is required for medical intervention. Articles 23 and 24 of the Turkish Civil Code are related to "the Retention of Personality". These articles have been regulated due to the fact that receiving consent of the person for interventions against body integrity and hence, personal rights is in compliance with the law (16). In point h of Article 4 of the By-Laws of Patient Rights, consent is expressed as "informed consent and acceptance of medical intervention with one's own free will" (17). This provision also sets forth two necessary conditions for a valid consent. Accordingly, the patient must give consent willingly and free from any outside pressure, coercion, and trick. Besides, the patient must be informed openly and apprehensibly on the possible outcomes and nature of the medical intervention in order to give consent.

The aim of medical research is different from that of medical interventions. E point of Article 5 of By-Laws of Patient Rights is as follows: "A person cannot be subjected to medical research without his/her consent and the approval of the Ministry." As can be seen, medical research does not only require the patient's consent but also the approval of the Ministry of Health. It is forbidden to perform medical research on minors and persons with mental incapacity when there is no advantage for them.

Regaining health depends on the medical intervention to be suitable for its purpose, sufficient, and efficient, and obtaining a positive outcome from the medical intervention depends on the fact that the physician or healthcare personnel exercises due diligence. In Article 14 of By-Laws of Patient Rights, there is a provision stating that "the personnel exercises due diligence as required by the general condition of the patient. Even when it is not possible to save the life of or keep healthy the patient, it is mandatory to try to decrease or soothe the pain."

International documents also note that persons have the right to demand the relief of pain in circumstances when it is not possible to keep the patient healthy or alive. Paragraph 10 of Article 5 of "A Declaration on the Promotion of Patients' Rights in Europe" (Amsterdam, 1994) states that the patient possesses the right to demand relief of pain in circumstances when it is not possible to keep the patient healthy or alive. The article in question also indicated that "in light of recent information, patients have the right to be relieved from their suffering (18)." In point b of Article 10 of the "Declaration of Patients' Rights in Bali (1995)", it is stated that in light of recent information, patients have the right to be relieved from their suffering.

In Article 5 referred to as "Physicians' Duties and Obligations" of the Code of Ethics of Physicians of the Turkish Medical Association, "the primary duty of the physician is to protect human life and health by trying to prevent diseases and recuperating the patients by employing scientific facts. Primary obligation of the physician is to regard human honor during the employment of his/her profession. In order to carry out these responsibilities, the physician closely follows all advancements." Since a physician serves as a "proxy", "he/she

is required to perform his/her duty for the "client" (patient) well."

Moral rights of the patients include the right to receive moral support, to receive tenderness, and to have patient accompanist. Articles 37, 38, 39, and 40 of the By-Laws of Patient Rights include respectively the following: providing security, executing religious obligations and utilizing religious services, the right to demand for respect to humane values and being visited, and the right to have an accompanist in the hospital.

When any patient requires medical intervention, this intervention needs to be given in compliance with the law. The conditions sought in an intervention to be legally compliant are patient consent, informed consent given by the patient, indication (medical necessity) for the intervention, and medical intervention is performed by a physician in line with medical rules and diligence obligations.

Malpractice, in the World Medical Association (WMA), is defined as the physician's inability to give standard and up-to-date treatment, lack of medical skill or harm that occurs due to lack of treatment (19). Moreover, medical error and error in practice can be defined as malpractice of medical intervention, professional error, negligence or lack of diligence (20). With respect to this, WMA announced "Malpractice in Medicine" in 1992. The scope of the legal responsibility of the physician following wrong medical intervention was defined in the announcement as "the fact that the physician fails to give the standard treatment to the patient, lack of skill, or harm that arises from the fact that the patient has been left untreated" (21-23).

As can be understood from the above-mentioned statements, not executing a specific medical standard during treatment is what lies beneath the responsibility arising from medical neglect and fault. Within this context, according to Article 13 of Medical Deontology Regulation, the physician is obliged to establish a diagnosis on the patient as regards the procedures necessitated by the medical science. It is forbidden for the physician to diagnose and treat a patient with contradictory medical rules and norms. In medical standards, it is necessary for the physician to pay maximum attention and diligence required by conditions of the time and country (21).

Violation of Patient Rights and the Means to Legal Remedies Arising from Unlawful Medical Intervention

The right to legal remedies and the right to petition fall into Articles 36 and 74 of the 1982 Constitution, respectively. The citizens can file a complaint or motion in any matter involving themselves of the public. Article 42 of By-Laws of Patient Rights also indicates that "the patient or patient's legal guardians or relatives have the right to appeal, file a complaint and action in the event of patient rights violation." In this article, it has been specified that the patients or legal guardians and relatives of the patients have the right to appeal, file a complaint and action in accordance with the legislation in effect in the event of a violation of patient rights or harm as a result of medical intervention and the actions of the healthcare personnel. In this circumstance, the patient or legal guardians or relatives of the patient can claim pecuniary and non-pecuniary damages using their rights in the legislation from the physician or the administrator of the healthcare institution. The source of the compensation, in other words, the legal basis of this damage will vary on the healthcare institution the patient received treatment at. Likewise, a patient treated in public hospitals can claim damages by filing full remedy action against the administration in administrative justice if harmed due to not having acted in compliance with patient law. However, private law will come to the fore in terms of patients damaged during healthcare service in private healthcare institutions or by physicians working without being affiliated to an institution.

The liability of a freelancer physician can be based on a legal relationship with a different essence. This reason bearing the physician's legal liability may be noncompliance to the contract or be evaluated within the scope of negotiorum gestio or tortious act. When considered within the scope of tortious act, there should be four factors for a physician's compensation liability. Within this context, there first should be an act and this act should be tortious to law. This tortious act, then, should cause a damage, and the physician should be at fault for the damage to occur, and there should be a causal relation between the damage and the tortious act. If a treatment contract has been made between a patient and physician, and the physician has infracted the contract, then noncompliance provisions are applied. If there is no contract between the patient that was damaged and the physician, then provisions of tortious act should be applied. Tortious act liability has been determined as non-contractual liability to relieve the damage in cases where there is no contract. If there is no contractual relation between the patient and physician, then the source of the liability is comprised of negotiorum gestio or tortious act. Sometimes and especially in emergency situations, a physician may perform medical intervention without the patient's consent and a contract. In this context, this is considered a negotiorum gestio due to the fact that the physician performed a medical intervention without the patient's will. In cases with no proxy/ attorneyship, any work performed for someone is defined as negotiorum gestio (24,25). According to paragraph one of

Article 526 of the Turkish Law of Obligations (TLO), when a person acting negotiorum gestio (acting without authority) is doing the mandator's bidding, he/she should act in favor of and benefit of the mandator and in accordance with the mandator's supposed will. In other words, in a medical emergency, the physician has the liability to act with care (25). In the first paragraph of Article 527 of TLO, the liability of the physician will be evaluated in a lighter manner if "the agent has performed the act in order to eliminate the damage or risk of damage the mandator has faced". Medical intervention within the scope of negotiorum gestio will be done under emergency and difficult situations. When this is taken into consideration, the liability of the physician is extenuated since this emergency intervention is carried out under more unfavorable conditions when compared to an act performed within the scope of contractual relation (26). In accordance with paragraph two of Article 527 of TLO, if the agent has performed an act expressly or impliedly forbidden by the mandator, the agent is then liable from the damage caused by an unexpected situation. Thus, if the physician was aware that the patient had expressly or impliedly given representation regarding his/her treatment but still conducted the medical intervention, then the physician becomes liable of the events that arise, such as unwanted complications.

Again, it can be said that there are some legal liabilities due to good faith even before a contract has been made between the physician and patient. It is the force of rule of law that mandates respect to good faith and trust during meetings that occur before a contract has been made between the parties, and tortious acts are considered under the liabilities of the person that acts incongruously, and this liability is referred to as culpa in contrahendo liability, independent of whether a contract has been made or (24,27). Legal outcomes have been attached to the phases before a contract has been made between the parties. Within this scope, the parties need to provide correct information and show necessary care not to damage one another.

The characteristics of the legal relation between the patient and physician: Along with the fact that the medical contract between the freelancer physician and his/her patient is not one that is regulated by the Turkish Law of Obligations, definitions of the contract has been made in the doctrine. Medical contract has been defined as "a relationship between the freelancer physician and his/her patient or legal guardian and involves the liability of the physician to diagnose and treat accordingly within the framework of medical science and its practice" (20). Since diagnosis is made and treatment is performed by a physician, the characteristic of the contract to be made between the parties is referred to as contract of mandate (28). Duty of care of the agent that is valid in terms of contract of mandate is also valid in terms of the relation between the patient and physician. For instance, the care and attention that a dentist should employ is the care that should be employed by a dentist that works in his/her specialty (28).

In the event that a physician undertakes a specific outcome, the treatment contract, i.e., the medical contract will have the characteristics of contract of work. The Court of Appeals also recognizes that the relation between the parties has the characteristics of contract of work since the physician/dentist contracts tı realize a specific outcome in dental prosthesis or bridge applications, in implanting artificial eyes and legs or arms, and in aesthetic surgeries like rhinoplasty (29). The Court of Appeals also accepts that the contract between a patient and physician is contract of mandate (30). The Court of Appeals indicates that a medical contract is a contract of mandate except for aesthetic interventions (31). In the doctrine, it is indicated that the physician is responsible for showing the necessary care in reaching a solution rather than obtaining the result promised (26). The criterion of the responsibility that is rooted in the care liability of the agent is the actions that a prudent agent undertaking the job and business would achieve (25). The Court of Appeals has drawn attention to care liability in a decision (32).

Admitting a patient to hospital for treatment is a patient admittance contract, in the simplest terms, between the patient and hospital legal entity (33). A decision by the Court of Appeals reads as such: "In private hospitals, there is a contractual relationship between the hospital and patient, not the physician and the patient, as a rule. The contract between the private hospital and patient is not a typical contract regulated by the Code of Obligations. The contract between a patient or his/her legal guardian presenting to private hospital and the manager of the private hospital is referred to as Hospital Admission Contract thanks to which the manager undertakes to perform both medical and other routine acts (admission, meals, and etc.). There is no condition to conform to while establishing a hospital admission contract (B.K. m. 11/1); it is not possible to make this contract through implicit declaration of intent. In this manner, it is possible to make a contract under the name of hospital admission contract with a mixed structure and characteristic that includes more than one act."

Conditions of responsibility: If there is a contractual relationship between the physician and the patient, the physician is obliged to give necessary medical care and apply the most opportune treatment method by correctly diagnosing the patient's disease as suitable for the purpose of the med-

ical contract and act with paying attention to professional ethics and to the rules of law and medicine. The physician's wrongful act may involve not informing the patient or breach of loyalty and care (33).

The physician may actualize the wrongful act intentionally or due to neglect. The presence of the physician's error is enough to hold the physician responsible in accordance with both tortious act responsibility and noncompliance to contract (TBK. m. 49/f.1; TBK. m. 112,113,97).

"Causal relation" refers to the relation between the damage that occurs as a result of the wrongful act and the causal link between the wrongful act. In a legal relationship, it would be groundless to talk about a legal responsibility if there is no causal relation between the wrongful act and damage. Therefore, the last condition to hold the physician responsible for the damage that occurs by neglecting the treatment contract is that there must be a causal relation between a bad medical practice and the damage caused by it (22). If there is no causal relation, the physician's responsibility is naturally ruled out. The reasons for not establishing a causal relation are force majeure, third party fault, and patient fault. If pecuniary and non-pecuniary damages that arise due to wrong medical practice are proven, the physician will have the responsibility to compensate damages.

The responsibility of the administration and full remedy action: As it is frequently emphasized in the decisions of the Council of State, the administration is, as a rule, liable at retrieving losses originating from the public services it provides (35). Public service is the activities performed to meet the needs of the public by public servants or by private entities under tight control of the public servants (36). Public service, in the decisions of the Council of State, is defined as follows: "constant and regular activities provided by the state or other public legal entity or under their surveillance to provide for public welfare and interest and meet general and common needs" (37).

As it is emphasized in judicial case law, healthcare services are different from other public services. Since healthcare services are aimed at protecting and improving human health, they cannot be postponed, and they are, are at the same time, described as risk-carrying services. They carry risks especially in treatment services. They have a primary attribution since they are directly related to the right to live. In the decisions of the Council of State, healthcare services are characterized as semi-public services as such: "As it is emphasized in the case law of the Council of State, healthcare services is one of the semi-public governmental activities that are also offered by the private sector" (38).

One of the principal service areas of the state is semi-public services. However, the state offers a part of these services to the public through private hospitals. Thus, a part of the services is carried out by the state and the other part by the private sector. This is in itself a semi-public activity (39).

Principles of the responsibility of the administration resultant of public service: In order to speak of the responsibility of the administration, there should be a service the administration is obliged to perform. The responsibility of the administration based upon Constitutional foundations is the liability to compensate the damages that arise from the activities and procedures of the administration. There is a Council of State decision indicating that healthcare service is an activity the administration is liable to perform (40).

In the last paragraph of Article 40 of the Constitution related to the protection of fundamental rights and freedoms, it is indicated that "The damage a person faces due to unfair treatment of city officials is compensated by the State. The State reserves the right of recourse to the official in charge." In the last paragraph of Article 125 of the Constitution, it is specified that "The administration is liable at paying the damages that occur due to their own activities and procedures." There is a provision in Article 129/5 of the Constitution stating that "action for damages resulting from the errors of city officials while using their authority can only be filed against the administration itself provided that it is recourse to themselves and in accordance with the conditions set forth in the law." As it is described in these provisions, a patient damaged from the healthcare services he/she has received from public healthcare institutions can file a full remedy action against the administration. If the administration loses the action, the damages will be compensated by the administration. However, the physician at fault in the damage will also be under recourse.

Healthcare services provided in public hospitals is a governmental activity. Therefore, there cannot be relations that arise from a medical contract between any patient applying to state hospital and the physician, from a hospital admission contract and a responsibility relationship resulting from wrongful act. Since the primary purpose of a public hospital is public welfare, if the patient is damaged due to the activity carried out by the public hospital, action can be filed within the norms of administrative law against the state or public legal entity (19).

Service failure and its profiles

"Service failure" indicates an error that occurs during the implementation of a public service by the authorities of the government. Service failure takes place if the service provid-

ed by the government is handled badly, is delayed or is not handled at all. Independent of the persons, irregularities in the establishment, organization or operation of the service are in question in service failure (41).

The Council of State has changed its case law related to "severe service failure" that it looks for the responsibility of the administration in full remedy actions filed for treatment services regarding healthcare services. In its decision (42), the Council of State states that treatment services have a different characteristic than other healthcare services, and the administration can only be held responsible in the event of severe service failure since treatment services have high risk. The associated decision is as follows: "within the scope of healthcare services, treatment services carry the highest risk, and apart from the mistakes that can be accepted natural in diagnosis and treatment, clear and distinct faults related to the fact that treatment has not been compatible with medical necessities require compensation responsibility of the administration." In our opinion, service failure concept adopted by the Council of State is only just since the Council of State should decide upon the compensation responsibility of the administration by investigating whether the physician obeyed medical rules and standards and there is service fault or not in full remedy actions filed with the claim that the healthcare service has been conducted faulty.

In order for the compensation responsibility of the administration to occur, service failure can be in the form of failure to form, organize and operate a healthcare service or in the form of medical malpractice.

Service failure due to medical malpractice

The conditions needed for an intervention to be a legal one are as follows: it should be carried out by a capable healthcare personnel, it should be in accordance with medical standards, it should have been performed when indicated, and informed consent must have been received (43). No matter how knowledgeable and experienced the physician is, there is the possibility of damaging the patient unintentionally during the medical intervention since it is risky as emphasized in the decisions of the Council of State. This damage sometimes occurs as a result of the neglect and mistake of the persons and institutions accepted as medical practitioners. It also sometimes occurs due to the risky nature of medicine. Medical malpractice stems from the fact that standard medical procedure has not been implemented and the patient has not received the proper treatment method because of lack of knowledge and experience. The responsibility that arises in this respect will be a responsibility based upon error (44).

In a decision of the Council of State (45); "Medical Malpractice is defined in Article 13 of Code of Ethics of Turkish Medical Association. All kinds of physician intervention that do not involve the care necessitated by medical standards and experience are accepted as malpractice. In other words, malpractice can be defined as nonconformity to standard treatment during the diagnosis and treatment of a patient, lack of knowledge and experience, and not implementing the proper treatment on the patient. Responsibility arising from malpractice is general responsibility based on error. The criterion in respect to the legal responsibility of the physician is the standard of an experienced specialist. The physician must be at a point where he/she can foresee harm in the health of a patient due to the normal progression of events objectively and to the personal experience, personal talent, professional knowledge, and to the quality and degree of his/her education subjectively. Here, we face the liability of care. Negligence of liability of care of the physician centers upon three areas. The first one is the diagnosis, indication, choice of medical precaution, implementation of the precaution, treatment or care after surgical intervention. The second one involves informing the patient and receiving anamnesis. The third one is the quality and sufficient number of personnel and cooperation between physicians (consultation) in clinical organization. It is possible to consider error in these three areas as fault in implementation (fault in treatment), fault in informing the patient, and organizational fault. These three faults are referred to as "Medical Malpractice". In order to mention the responsibility of the administration resulting from medical malpractice, the medical intervention should be not compatible with the law, should contradict the conditions of the law, and there should be negligence during diagnosis, treatment, and the period after treatment.

Breach of the conditions of medical intervention

The healthcare personnel with authority to medically intervene has been described in the Mode of Execution of Medicine and Medical Sciences no.1219. In addition, individuals that can perform a medical intervention in case of emergencies have been determined by the Regulation on the Emergency Medical Interventions that Non-medical Personnel are Authorized to Do in the Absence of Medical Personnel. Nonetheless, students receiving education in health sciences have the authority to medically intervene under the supervision of authorities for gaining experience (43). If the medical personnel that performs the medical intervention is not competent in the related field, such a case constitutes breach of the conditions of medical intervention. In this context, there will be medical malpractice, and application can be made to the administration.

As a rule, all medical interventions must be based upon a medical obligation. The principle of medical obligation must be sought in every stage of medical intervention, which has also been specified in the decisions of Council of State (46). In another decision of the Council of State, the provision of "the patient who presented to …Maternity Center delivered her baby with C-section due to medical indication (47)." states the condition of indication in terms of compliance with the law. Another condition so that medical intervention is in compliance with the law is that the intervention is in accordance with the standards of medical science. The concept of medical science represents "the generally recognized and accepted rules of the medical science, in other words, the generally recognized code of practice implemented on an ongoing basis by the authorized healthcare personnel on similar or precedent cases" (48). Another factor in medical intervention is to receive consent from the patient by fulfilling the liability of informing the patient. Informing patients include the sharing of the following matters: type of intervention, reasons for that particular intervention, the quality, content, side effects, risks, possible outcomes, success rates, and benefits fo the intervention, the course of the disease if the intervention is rejected by the patient, and alternative methods (49).

In a decision of the Council of State on an action filed due to becoming disabled because of an injection, the Council of State did not find illegality for the rejection of pecuniary damages by evaluating drop foot as a complication but decided for non-pecuniary damages that it should be investigated whether informed consent had been received from the patient or not since the patient should have been informed on the risks of the procedure prior to the implementation of the procedure and if not, such a case might have had the patient develop a sense of grief and concern related to the proper operation of healthcare services (50). In another decision. The Council of State approved the decision of the administrative court affirming non-pecuniary damages to be compensated to the parents of a baby who was born with defect since the parents had not been informed of the condition of the baby, having no arms from the elbow below on the right and the left, prior to its birth, which had been seen on pregnancy USG and been neglected by the physician, and thus they had experienced severe psychological and spiritual trauma, which are all indicative of service fault of the administration (51).

Diagnosis and treatment failure

In order or establish a correct diagnosis, the healthcare personnel must have acted in line with medical standard and conducted full research with great care. If misdiagnosis occurred even though test results and medical records were completely observed, it is indicated that there can be no responsibility due to misdiagnosis. However, if research was not conducted properly or findings were evaluated incorrectly, if a more experienced colleague was not consulted, if patient history was not received fully, and if past diagnoses were not considered, then faulty medical intervention will be in question, and the administration will be held responsible. In the decisions regarding failure in diagnosis of the Council of State, it has been accepted that performing an operation without proper research and diagnosis constitutes service failure and the responsibility of the administration must be sought (52,53).

In another decision of the Council of State, acquiring infection in the hospital due to improper care and attention has been accepted as treatment failure (54). Again, leaving a foreign object in the body during surgery is another treatment failure (55). The authorized health personnel also has the following liabilities after treatment: recommendation, warning, control, monitoring, and protection (43). The Council of State considers insufficient follow-up as breach of liability after treatment (56). Again, there is a decision of the Council of State regarding lack of care in fighting the complication that has occurred after treatment (57).

Service failure resulting from the organization of healthcare services

Organization of healthcare services indicates the employment of healthcare personnel in sufficient quantity and quality to offer necessary treatment to patients, being in possession of all necessary medical equipment, that hospital buildings have all the necessary medical hardware, taking all necessary measures for hospital care and hygiene (obeying hygiene rules, maintenance of the elevators and buildings, warning signs and lightning, taking measures for occupational safety, not leaving the floors wet, and etc.), and the supervision of healthcare institutions (43). The Council of State has accepted failure resulting from the organization of healthcare services as service failure (58).

Actual damage and concordant causal relation of the administration

In order for the administration to have a responsibility, there should be first an act of the administration. In other words, the administration must have an activity or procedure involved in the damage that has occurred, and the responsible must be the administration. The responsibility of the administration can be in the form of actual operation or a negligence act (59). In the decision of the Council of State, it has been stated that "apart from a damage, this damage must have arisen from an activity or operation of the admin-

istration itself in order to speak of legal responsibility of the administration, in other words, causality must be formed between the damage and administrative activity. If there is no causality between the damage and administrative activity, it expresses that the damage has not arisen due to an administrative activity" (60).

Duty failure-personal failure

It has been regulated that due to the failure of state officials, action can be filed against the administration. What is indicated here is that action cannot be filed against the state official but against the administration. If a relation can be formed between the damage that has occurred and the duty of the state official, it can be said that there is public loss. In a case at the Court of Disputes, it has been established that if persons benefiting from a service is damaged due to the failure of the healthcare workers, then, persons damaged can file actions against the administration (healthcare institution) (61).

The duties and activities performed by the state official must be separated from those related to state duties and those not. If the damage has occurred due to an activity of the state official other than his/her state duties, an action can be filed in civil justice since a relation between the damage and official duty of the state official cannot be formed. If the damage has occurred due to the activity of the state official under his/her duties, then the administration rather than the public official is responsible. The amount paid by the administration due to action for damages will be recoursed from the state official at the rate of his/her failure in the damage (62,63).

Lately, the Court of Appeals and the Council of State have indicated that it is necessary to file suits in administrative justice for the actions and activities within the service or related to the service of the healthcare personnel that constitute a crime, ill-intentioned behavior and in the event and presence of severe failures and not in civil justice since these failures are considered as service failures within the scope of the supervision and surveillance of the administration (64,65).

Strict liability of the administration

With the development of the principle of social state, it has now started to be accepted that the responsibility of the administration does not only cover the responsibility based on failure, but also strict liability, as well. Strict liability constitutes exception in the responsibility of the administration. Strict liability means that even though there is no failure or fault of the administration in the formation of the event that has damaged the patient, the administration is still responsible for the damage if there is concordant causal relation between the action of the administration and damage.

It is accepted that the responsibility of the administration depending on medical mistakes related to healthcare services provided for persons is not, in essence, responsibility of fault. Nonetheless, it is accepted to apply strict liability rather than gross fault in the compensation for damages in which causal relation can be formed in risky areas (care for mentally ill patients, nuclear medicine, and etc.) where even though all measures have been taken and all necessities of medicine have been fulfilled. Even though risks at a certain rate cannot be avoided in healthcare services, there can be exceptional or extraordinary risky circumstances. Most particularly, there can be cases where the principle of risk can be applied such as innovative drugs or treatment methods, nuclear medicine applications, brain surgeries, the care and protection of mentally-ill patients, infection of diseases through blood products, the use of dangerous medical devices, and protective healthcare services even though the administration has taken all kinds of measures and acted in accordance with medical standards. In such cases, it is necessary to act within the framework of strict liability of the administration (66). In the doctrine, the principle of equality is mentioned against the principle of risk, which is the basis for strict liability and public burdens (67).

The Council of State is of the opinion that strict liability cannot be accepted due to high risk in healthcare. The provision states that "the acceptance of the legal responsibility of the administration due to high-risk healthcare services is only possible if a clear fault or failure is detected in the operation of the service (68). The Council of State considers that if there is not fault to be directed at the administration in damages resulting from healthcare services, then strict liability cannot be enforced. Such a case is also supported by a decision of the Council of State (69).

Full remedy action: With full remedy action, compensation of the damages inflicted upon persons or fulfilling a breached right in terms of administrative law is desired. In the doctrine, full remedy action expresses compensation of the damages inflicted upon persons or fulfilling a breached right in terms of administrative law is desired (70,71). According to another definition, "full remedy actions are administrative suits filed by persons whose personal rights have been breached due to administrative procedures and actions, and the administration is convicted to compensate the damages or give the right back by bringing forward the responsibility under Public Law rules." (72). Full remedy actions are oriented at compensating the damaged personal right.

The Council of State has specified that full remedy actions are defined as actions for damages that are filed against the administration by those who have been damaged due to the

activities of the administration and indicated that the procedure or action that may cause damage and its legal consequences will be detected by the court in full remedy actions (73), and that whether there is an administrative fault or not will be determined by investigating the event and damage that has occurred and if there is no service failure, it will investigate whether strict liability would be applied or not and decide upon whether compensation will be paid or not (74).

Full remedy action is a suit filed by persons whose personal rights have been breached as a result of the medical intervention of the physicians while receiving healthcare service (83). Such an explanation means that persons damaged due to medical intervention can compensate the damage by filing full remedy action against the administration (76).

Conditions of full remedy action

According to Article 2/b of Code of Administrative Procedure (CoAP), full remedy action can be filed by those whose personal rights have been directly damaged by administrative actions or procedures. Therefore, a personal right must have been damaged in a full remedy action. According to a decision by the Council of State (77), since medical malpractice in healthcare services is considered under administrative actions, those damaged due to medical malpractice will have to file a full remedy action against the administration. However, it should be noted that even though most full remedy actions of healthcare services are comprised of administrative actions (medical interventions, etc.), sometimes, they are comprised of administrative procedures (faulty health report, etc.).

Excess of administrative agent is to file action without applying to the administration before filing the action (78). In full remedy actions filed due to damages that arise from administrative actions and activities, the individuals must receive a preliminary decision from the administration before filing for full remedy action. According to Article 13 of CoAP, it is mandatory for the individuals to receive a preliminary decision from the administration before filing for full remedy action. Even though it seems that learning about the action is sufficient for the start of the process, since the administrative action and the damage due to this action fall onto different dates, the date the damage has been learnt must be predicated upon (67). Thus, the Council of State also agrees (79). The Council of State has expressed that the time for application to the administration must start on the date the damage has been learnt, or otherwise, the freedom to legal remedies will be limited (80). In another decision, the Council of State has clarified that the damage caused by death that has occurred as a result of medical intervention has been learnt at time of death (81).

In any case, application to administration must take place within five years of the activity/action. This time is calculated as the date of the activity not the date the person finds out the damage has occurred (75). According to this decision, the causal relation between the medical intervention of the physician and the damage that occur must be taken into consideration. According to a decision of the Council of State, it is stated that "...it has been determined in the article that the time for application to administration can start as of the date the person finds out about the damage inflicted upon him/her due to the administrative action. It should be accepted that taking into account the date the damage has not occurred or has not even been learnt will lead to the shortening of time to file for action or not being able to use the right to action. Therefore, it would be more righteous to predicate the date when it is learnt that the damage has been caused by the action in question (82).

When persons apply to the administration before filing for full remedy action to compensate the damages caused by healthcare services and receive partial or full rejection, they can file for full remedy action within 60 days following the notification of the decision. If the administration does not respond within 60 days, the application will be implicitly accepted as rejected, and an action can be filed as of the date this period has ended (CoAP, article 13/1). The Council of State has decisions indicating that the time for filing for action starts as of the response given by the administration (83). The administration may have responded to the person claiming damages after 60 days, but article 13 of CoAP has not regulated anything regarding whether time to file for action will start again or not. However, in the doctrine, it is accepted that time to file for action will start again if the administration responds after 60 days (67). General time for filing action is 60 days in the Council of State and administrative courts and 30 days in tax courts unless otherwise stated in private laws (COAP, article 7/1). In the doctrine, it is mostly accepted that the time for filing for action in administrative jurisdiction is the latest term (78). The Council of State also agrees (84).

The Ministry of Health will be in the position of defendant in full remedy actions filed to compensate damages resulting from the activities carried out in divisions delegated to the Ministry of Health and in university hospitals, it is the University Rectorate.

Conditions related to the basis of the full remedy action resulting from healthcare services (the behavior and fault of healthcare providers, damage due to direct violation of personal rights of healthcare respondents, and the damage is the result of healthcare providers) are accepted as the pres-

ence of causal relation (85). According to the case laws of the Council of State, "Enjoining the administration with damages is only possible in the presence of distinct and clear pecuniary damages. If pecuniary damages have not become clear and distinct yet, the administration cannot be held liable to compensate the damages (86). Moreover, the subject of recourse of administration to the public servant has been regulated in Articles 40/3 and 129/5 of the Constitution and Article 13 of Public Servants Law. It is only possible to recourse administration to the public servant if there is personal failure. It is not possible to recourse administration to public servant in the event of a service failure.

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