LAWSUITS CONCERNING PROFESSIONAL RESPONSIBILITY AT THE CLINICAL HOSPITAL "SISTERS OF MERCY" ZAGREB, KROASIA

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Abstract: **In the Republic of Croatia there are no officially published statistical data about the number, reasons, procedures and results of lawsuits concerning the professional responsibility of hospitals, doctors and other medical staff. So far, in Croatia there are published data about the number of claims for damages or charges only for Clinical Hospital "Sisters of Mercy" in one research work made in 2007, but it was unpretentious research in comparison to this research work.**

When this work was done, The Clinical Hospital "Sisters of Mercy" was the fourth biggest hospital in Croatia, with approximately 900 beds and 2500 employees. After finishing this work, three smaller hospitals were integrated to our Hospital, due to process of reforming Croatian health system, and now our Hospital is the second biggest hospital in Croatia, with about 4,200 employees and about 1450 hospital beds. The folowing data does not incude data concerning three hospitals that were integrated to our Hospital in July 2010. The hospital annually provides ambulatory and diagnostic treatment for about 650 000 outpatients and treats about 42 000 inpatients. There are about 3200 deliveries annually in the maternity unit, and the surgical teams annually perform about 25 000 surgeries.The doctors working at the hospital cover almost all existing specializations. Because of the above reasons, the Clinical Hospital "Sisters of Mercy" is a showcase example for the statistics about lawsuits and settlements concerning professional responsibilities of doctors and other medical staff in Croatia. This paper is focusing on the statistics of such legal procedures in the Clinical Hospital "Sisters of Mercy" from January 1 1967 until present day.

According to the processed data there was an increase in the number of claims for damages in the mid-1990´s. The curve has constantly been rising with oscillations. Based on the obtained data, it is possible to conclude the approximate number of the above mentioned legal procedures in Croatia,

and to observe other tendencies in that area.

Key words: **Malpractice, lawsuits, statistical data.**

1. INTRODUCTION

The official statistical data on the quantity, causes, processing and outcome of lawsuits over the professional responsibility of hospitals, that is doctors and other medical staff, has not been published in the Republic of Croatia. The single exception is the data on the number of lawsuits and peaceful procedures for compensations in the Clinical Hospital "Sisters of Mercy" in one paper in 2007.

Clinical Hospital „Sisters of Mercy" is the fourth largest hospital in the Republic of Croatia, with about 900 hospital beds and approximately 2,500 employees. Annually approximately 650,000 patients receive outpatient and diagnostic treatment and approximately 42,000 patients are hospitalised. The Maternity Unit has about 3,200 deliveries per year and our surgical teams perform about 25,000 surgical procedures annually. Almost all the medical professions are represented in the hospital. Therefore, with some exceptions that will be elaborated in the continuation, we believe that Clinical Hospital "Sisters of Mercy" is a representative sample for statistical data processing on lawsuits and peaceful procedures originated from the professional responsibility of physicians and other medical staff in Croatia.

The subject of this paper is a statistical analysis of procedures due to the professional responsibilities of medical staff (doctors, nurses and other staff) in Clinical Hospital "Sisters of Mercy" since January 1, 1967 to present day and the estimates of potential number of lawsuits due to professional liability of medical staff at the national level. The analysis does not cover procedures that are conducted on the basis of other legal grounds.

2. INCREASED NUMBER OF LAWSUITS AND CLAIMS, THE CONDITION IN THE CLINICAL HOSPITAL "SISTERS OF MERCY"

For the purposes of this study we have analyzed all past and current litigations and peaceful procedures for compensations in the Clinical Hospital "Sisters of Mercy" since January 1, 1967, from which year is the oldest claim for malpractice in our archives, to May 15, 2010. A total of 132 cases were analysed, of which 69 are finalised by the court decision or settlement of the hospital or an insurance company with which the hospital is ensured, and 62 analysed cases are ongoing.

Out of 69 finalised lawsuits or peaceful settlements, in 29 cases the hospital or insurance company paid the compensation in the period of 41 years (first payment was in 1969), and in 40 cases the compensation was not awarded, i.e. paid. The inflow of claims and lawsuits in the specified period can be seen in the following chart.

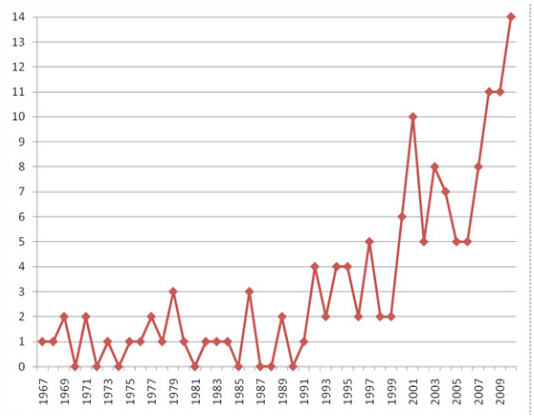

CHART No. 1 The inflow of lawsuits and claims in the period 1967-2010

According to the processed data, it is evident that a significant increase in the number of claims occurred since the mid 90s of the 20th century, while now the curve, with some oscillations, is going upwards substantially.

It should definitely be noted that this is not because the doctors performance in their professional activities has worsened, but the patients expect more from the medicine, often uncritically, and more easily decide to initiate proceedings against health care institutions in principle because of the trends in the protection of individual rights, the effects of associations for the protection of patients' rights and because of the media coverage of individual cases.

3. ESTIMATED INFLOW OF LAWSUITS AND CLAIMS IN THE REPUBLIC OF CROATIA IN THE PERIOD 2000-2010

Based on data presented in the above chart, it is possible to roughly estimate the number of these procedures in Croatia and to identify other trends related to this subject.

The basis for the calculation was:

- The data on the inflow of claims in the Clinical Hospital "Sisters of Mercy" in the period from January 1, 2000 to May 15, 2010;
- The data on the number of patients on hospital wards in the Clinical Hospital "Sisters of Mercy" in the period from January 1, 2000 to 2010; and
- Since the Clinical Hospital "Sisters of Mercy" is the hospital for acute illesses, the above data were related to the total number of patients treated in all hospitals for acute illesses in the Republic of Croatia in the period from January 1, 2000 to 2010.

By correlating the number of patients treated in Clinical Hospital "Sisters of Mercy" (346,971 patients) with the total number of patients in hospitals for acute illesses in Croatia (5,699,086 patients), we calculated that in the referenced period (2000-2010) Clinical Hospital "Sisters of Mercy" treated 6.1% patients of the total number of treated patients in Croatia.

Based on the share of 6.1%, the estimated inflow of lawsuits and claims and the number of active cases (pending disputes and peaceful procedures) were calculated at the natioal level.

Therefore, considering that in the reference period the Clinical Hospital

"Sisters of Mercy" received 82 lawsuits and claims based on malpractice, it is probable that in the same period, at the national level there would have been around 1344 lawsuits and claims filed.

Furthermore, given that in our Hospital there are currently 62 pending litigations or peaceful procedures due to compensation claims based on malpactice, it is probable that at thenational level there are currently around 1016 proceedings in progress, before the courts or within the hospitals themselves with regard to claims in peaceful procedures.

The disadvantage of the above stated estimation derive from the fact that the Clinical Hospital "Sisters of Mercy" is the University Hospital, which affects the structure of casuistry to a higher, more sophisticated methods of treatment, above-average education of physicians and above-average intensity of work, which is why Clinical Hospital "Sisters of Mercy" does not represent an average hospital for acute illnesses in the Republic of Croatia.

Another disadvantage arises from the fact that, given the fact that the data are mutually incomparable, the estimate did not take into account the patients, the potential plaintiffs, who were in the reference period treated in health care institutions, such as special hospitals, medical institutes, polyclinics, institutes of emergency medicine, health centres, private practices, sanatoriums, health care facilities and institutions for palliative care.

However, we believe that this first mentioned deficiency is compensating by the other, so our estimation should be very close to the real situation.

4. THE STRUCTURE OF LAWSUITS AND CLAIMS IN THE CLINICAL HOSPITAL "SISTERS OF MERCY"

Below is a graphic overview of lawsuits and peaceful procedures for compensation of damages in the Clinical Hospital "Sisters of Mercy" according to the specialization of physicians. The cases in which it was the responsibility of nurses and the cases involving the responsibilities of other staff (support, technical staff) are isolated.

It should be noted that the number of lawsuits and peaceful procedures presented below is greater than the one in the previous chart because in some cases the same patients were treated by several doctors of different specializations (e.g. the fracture was recognized neither by the radiologist nor the surgeon). In such cases the same subject was counted twice.

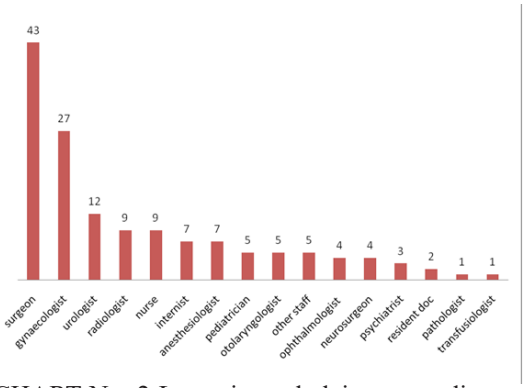

CHART No. 2 Lawsuits and claims according to the specialization of physicians and other staff

It is evident from the chart that the absolutely largest number of claims is related to surgeons (43 cases), followed by gynaecologists (27 cases), urologists (12 cases), radiologists and nurses (9 cases). 7 cases refer to internists and anaesthesiologists each and 5 to paediatricians, otolaringologist and other staff each. Ophthalmologists and neurosurgeons follow with 4 cases, psychiatrists with 3 cases, resident doctors with 2 cases and one case each due to the work of pathologists and transfusiologists. It is assumed this structure does not differ in other procedures conducted in Croatia, especially with regard to the available statistics of some other countries.

5. THE LAW ON OBLIGATIONS, January 1, 2006

According to Croatian compensational law, for errors in medicine, as in all other cases of liability for compensations, the physitian is personally liable only if he/she performs the activity individually.

If the physitian is employed in an institution or commercial enterprise, the employer is responsible for his/her actions and he/she is personally liable only if he/she committed the damage intentionally. This regulation is in force today, as it was regulated also by the Law on Obligations from 1978. If he/she had acted with gross negligence, the employer can, according to the Law on Labour, within six months from the date of payment of compensation, regress the amount from the doctor or other staff who had committed a mistake in his work.

In relation to the liability for compensation, the Law of 1978 followed the Austro-Hungarian General Civil Law, which had been applied in Croatia since the mid-nineteenth century to 1978. In relation to the nineteenth century Law of 1978, in the segment of the liability for compensation, enacted innovation in terms of change from the principle of proven culpability in the system of subjective responsibility to the principle of presumed culpability in the system of subjective responsibility. Under both laws, the system of objective responsibility was applied only exceptionally, in the case of dangerous substance with which the damage was performed, or in the case of dangerous activity.

The Law on Obligations, (Official Gazette, 2005) that came into force on January 1, 2006, did not substantially change the traditional regulations on the liability for compensation, but it brought many novelties related to non-material damage (Crnić, 2006.). Most of these changes have impact on the responsibility of health care institutions and physicians who independently carry out practices, and that impact will significantly reflect the amounts that will be paid on the basis of professional responsibility of health care institutions by the application of this Law. The new Law on Obligations applies to adverse events that occurred on January 1, 2006 and later,

and does not apply to events before that date (Article 1165.).

By the adoption of the new Law on Obligations, the objective concept of nonmaterial damage has been accepted (Article 1046), such as violations of the personal rights (among other things: the right to life, physical and mental health), therefore the very violation of personal rights already presents nonmaterial damage (Crnić, 2005.), and the intensity and duration of physical and mental pains and fears are only the criteria for determining the amount of damages. According to previous subjective concept of nonmaterial damage it was necessary for physical or mental pain or fear to occure. The new concept allows patients easier proving and easier realisation of some forms of compensation of damage which has so far been difficult or impossible to achieve, so that the increase in the scope of the damages can be predicted. For example, according to the old regulations, a patient in a coma cannot realise the compensation for the fear and pains, because in reality he/she does not feel them, while according to the new regulations, he/she may, because of infringement of personal rights, achieve compensation for his/her troubles, although he/she is not aware of them. In this sense, case law has not yet been established, but it's just a matter of time. The Constitution of the Republic of Croatia guarantees the inviolability of personality, respects and guarantees the legal protection of personal and family life, dignity, reputation and honor, but admits both personal and political freedoms and rights, by which it recognizes not only the right to the integrity of personality, but recognizes to everyone the right to life, to freedom, the inviolability of the home, the secrecy of correspondence, the safety and secrecy of personal data, freedom of thought, freedom of religion, freedom of association, of public assembly, political activity, etc. The Constitution provides that everyone, not just the state, must comply with those rights. These personal goods are the objects of personal rights in the Croatian legal system (Gavella, 2000.). The new Law on Obligations states personal rights by example, so it is possible to determine personal rights which the Law does not specify.

Furthermore, the new Law on Obligations widenes the circle of persons who are entitled to compensation of damage in the event of death or severe disability to the grandparents, grandchildren and the unborn child (Article 1101.). Until January 1, 2006 this right could have been achieved only by marital or extramarital partner, child, parents and, in case of death, the brothers and sisters.

According to the new Law on Obligations compensation based on the liability for damage becomes payable from the date of submission of a written request or complaint (Article 1103), which means that interest on the nonmaterial damage are viable from the first day and not from the date of sentencing by the court,

as it was the case until December 31, 2005. This means that it is no longer reasonable to conduct for years a litigation for which there is a good chance that it will be lost. The attention should be directed to the fact that, regarding this provision, there is a question of the limitation of the same claim. Namely, the grammatical interpretation of the stated stipulation allows that the compensation becomes mature on the date of filing the written request despite having already performed the limitation for the realization of claims by court order. In connection with this problem there are different interpretations and jurisprudence has not yet been developed because five years have not passed since of the entry into force of the new Law (January 1, 2006), which is the period for objective limitation period.

In addition to the above, until the adoption of the new Law on Obligations, if the patient died during the dispute, i.e. before the finality of judgments, demands for the compensation of nonmaterial damages stopped when the injured party died (unless it was a final judgement), so that his/hers successors could not inherit a nonmaterial damage amount. From January 1, 2006 nonmaterial damage claims can be inherited even if if the case was not finally judged. It is enough that the injured party filed a written request or complaint (Article 1105).

6. CASE LAW

The case law in Croatia adopted a system of subjective responsibility in which the culpability of the injurer (institution, doctor) is predicted. Thus the burden of proof is shifted to the injurer, because he/she has to prove that he/she had acted as he/she should (lege artis), i.e. that the damage occurred without his/her fault. In the world, in legal theory and in case law, the attitude prevails according to which the patient must demonstrate doctor's error (Klarić, 2003.).

However, there is an increased number of demands in the world and in the Republic of Croatia (Crnić, 2009.) to introduce the system of objective liability for compensations when it comes to health care institutions or a physician. It is a system of responsibility which is far stricter than the system of subjective responsibility that is still consistently applied by our case law.(Klarić, 2003.) Hereafter we are presenting some cases finaly judged in the system of subjective responsibility: Supreme Court of the Republic of Croatia, Rev 39/06, February 14, 2006,; Zagreb County Court, Gž-6459/0022, January 9, 2001,; Supreme Court of the Republic of Croatia, Rev.491/1992, September 24, 2002; Zagreb County Court, Gžn-211/05, March 31, 2006; Zagreb Municipality Court, PN-3064/84, June 6, 1989; Supreme Court of the Republic of Croatia, Rev.-540/03, December 17, 2003, etc.

The decision about which system will be applied lies in the court. The court as

sesses whether the concrete case is related to dangerous matter or dangerous activity, and if such a case is determined, the system objective responsibility will be applied.

There are a number of lower court judgments rendered in the system of objective responsibility, however, subsequent filtering of these judgments in the higher courts regularly determines that health care institution should be judged according to the system of subjective responsibility (eg.,the Zagreb County Court Gžn-982/07, from October 2, 2007).

As far as we know, so far only three final judgments in disputes due to medical errors have been adjudged in the system of objective responsibility. Both disputes were concluded at the expense of the defendant. In one case, the court judged in the system of objective responsibility deciding that a tooth extraction is a dangerous activity (Zrilić, 2005.), and the second time the court concluded that difficult childbirth is a dangerous activity, and it also judged in the system of objective responsibility. (Crnić, 2004)

In the third case Municipal and County courts (Municipal Court in Split, Gž-1213/04, January 20, 2005.) have concluded that the therapy using galvanic currents which caused the patient burns of the third degree, is a dangerous activity, and was judged in the system of the objective responsibility. That standpoint was acknowledged by the Constitutional Court of The Republic of Croatia (U-III-1062/2005).

In the system of objective responsibility it is far more difficult (almost impossible) for the health care institution to win the dispute than in the system of subjective responsibility. Proponents of the introduction of the system of objective responsibility seem to ignore sociological integrity of the possible consequences of increasing responsibilities of doctors or health care institutions, from more defensive treatment methods (still lege artis, but wit less chances of being cured) to the point that some doctors avoid certain risky specializations or sub-specialisations, which until recently were reserved for top students and doctors (neurosurgery, obstetrics, perintology). The problem of the lack of gynecologists-obstetricians and neurosurgeons has already emerged in the U.S.A., and insurers avoid to ensure certain high-risk specialist professions. (Bošković, 2007. and Mihalić, 2006.) In the Clinical Hospital "Sisters of Mercy" the decrease in the interest of young physitians for so called "risky" specialisations has also been noted in the last few years.

7. CONCLUSION

Not engaging in the issue of avoiding "risky" specialization of physicians present in the world, including Croatia, and not opening the problem of defensive medicine because these very current topics are not the subject of this paper, the

data presented above give sufficient reason for concern to health care institutions and doctors in private practice.

If we take into account the outlined legislative changes in force for more than four years, which certainly do not support health care institutions and doctors in private practice, and if we add the obvious increased rate in the number of lawsuits and claims in medicine, the Croatian Health will be in a very unenviable financial position because of professional liability in a few years. Disputes that were initiated due to adverse events after January 1, 2006 are not yet finalized, and will result not only with significantly higher absolute number of indemnities but also with higher amounts of indemnities and interests than is the case presently, when lawsuits for adverse events which occurred before January 1, 2006 are due for payment.

Therefore, on the one hand professional liability insurance requirements impose itself as a conditio sine qua non, on the other hand it is not sufficient to emphasize the importance of insurance in a situation where a significant financial impact on health care institutions due to professional liability can be anticipated, especially in circumstances where a large number of health care institutions in the Croatia are not insured for professional liability at all, or have provided with a completely inadequate insurance policies, where low amount of coverage per individual event is common place.

The system of malpractice insurance functions throughout the world with some differences depending on individual legal systems. Insurance provides security to health care institutions and patients.

Changes in public opinion and changes in regulations in recent years have influenced the fact that health care institutions increasingly reflect and plan business policies relating to issues of professional responsibility.

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