



MEDICINA DIFENSIVA E RESPONSABILITA' MEDICA

Antonio Palagiano



THE DEFENSIVE PRACTICE OF MEDICINE Myth or Reality

NATHAN HERSHEY

Serious concern about medical malpractice is evident and the interest in it is increasing. It is not only being discussed in the medical and legal journals, it has also made its way into the popular media. Among the titans of medicine upon whom millions of Americans focus their attention, even Dr. Marcus Welby has had to defend his performance in a malpractice action. Medical malpractice is good theater and none of the television series dealing with medical practice has failed to use it as a subject.

Practically every member of the public has been a recipient of medical service, at one time or another, and has been exposed to the risk of poor medical performance. However, to some, medical malpractice is of particular interest. Not only physicians and attorneys, but the insurance industry, hospital administrators, nurses and other health personnel who work closely with the physicians follow the subject, because in most malpractice actions the plaintiff sues his physician in addition to others concerned with his care.

The concern of the public and of those particularly involved with malpractice questions has stimulated governmental activity. In 1969 the Senate Subcommittee on Executive Reorganization, chaired by Senator Abraham Ribicoff, published a study report of more than one thousand pages.¹ It consists of

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The Law and the Nurse

The Patient Doesn't Always Win

If the defendant nurse or physician can show the plaintiff patient "brought it on himself," the defendant may well not be held liable for the patient's injury.

NATHAN HERSHEY

The usual defense in a negligence suit is denial of negligence, but other defenses may be raised. Two of these, assumption of the risk and contributory negligence, are of particular interest.

In the former the defendant asserts that the plaintiff, by his conduct, assumed the consequences of an injury occurring because of the fault or negligence of the defendant. The person who knows of a departure from the usual standard of care, but assumes the risk of injury from it, is not regarded as having suffered an injury for which the negligent party can be held liable.

Contributory negligence applies when acts or omissions amounting to negligence on the part of the injured party, together with the negligence of the defendant, constitute the proximate cause of the injury. A defendant who has been negligent along with the plaintiff cannot be held liable for the injury.¹

In a suit brought by a patient who suffered injury in a physician's of-

fice, the defendant physician denied negligence. In addition, he asserted that the patient had assumed the risk by declining assistance offered by a nurse employed by the physician.² (The patient died prior to the trial and the suit was maintained on behalf of her estate with the executrix of the estate as plaintiff.) At the time of the incident that led to the law suit, the patient was 81 years old and had been under the care of the physician for almost 20 years. Approximately a year before, the patient had been admitted to a sanatorium and subsequently discharged with the diagnosis of chronic brain syndrome with senile brain disease, arteriosclerosis, and pulmonary emphysema.

The plaintiff offered evidence to establish that the patient was infirm as well as elderly and that the physician was aware of her condition. It was claimed that she used a cane to help her walk toward the physician's office and was accompanied by the office nurse, who walked beside her after she was called from the waiting room where she had been sitting. The plaintiff asserted that the physician advised the nurse to help the patient undress and that, while the patient was in the dressing room without the nurse present, she fell over and suffered her injury. There was a further assertion that the patient had never in the past refused help in dressing or undressing and that she did not refuse assistance on this occasion. It was argued that the nurse was negligent in failing to provide the assistance. The physician would be liable for the

negligence of the nurse under the doctrine of *respondeat superior*.

Evidence was presented on behalf of the physician that, while the patient used a cane, she did not need physical assistance in walking, sitting, or rising. Furthermore, the physician claimed that he did not order or direct the nurse to help the patient undress. There was testimony that the nurse had offered to help the patient to remove the top part of her clothing in the dressing room, but that the patient told the nurse she was perfectly capable of undressing herself and demanded that the nurse leave her to undress alone. The nurse waited in an adjacent room with the door ajar until 10 minutes later when the patient called. The nurse entered the room and found the patient already disrobed down to her slip, sitting on the floor with her feet outstretched, facing the door.

There was evidence that on previous visits to the physician's office this patient had refused to let anyone dress or undress her and that she had been allowed to dress and undress herself. The physician had instructed his nurse not to insist on undressing any patient if the assistance was refused. It was also asserted that, during the time the patient was undressing, the nurse did not go about her other duties in the office, but remained near the dressing room.

The jury found in favor of the physician, and an appeal was taken on behalf of the plaintiff. The appellate court had to determine whether the appropriate standard of care was presented to the jury, against which the defendant's conduct was to be measured in deciding whether the

¹ Some states have adopted a comparative negligence doctrine. Under comparative negligence, recovery by a negligent party is not completely barred; recovery is diminished proportionately only, provided the contribution to the injury by the plaintiff's negligence is found to be less than that of the defendant's negligence.

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² *LEVETT v. Etkind*, 265 A. 2d 70 (1969).

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COMMISSIONE EUROPEA PER L'EFFICIENZA DELLA GIUSTIZIA

Consiglio d'Europa: Italia, il boom di avvocati fa crescere il contenzioso

di Marina Castellaneta (Guida al Diritto)

24 settembre 2012

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Documenti e Approfondimenti

Approfondimento del 24-09-2012 - Il rapporto della Cepej



La giustizia ai tempi della crisi. La Commissione europea per l'efficienza della giustizia del Consiglio d'Europa (Cepej) disegna il quadro del funzionamento della giustizia in 48 Stati (non ha partecipato il Liechtenstein). Dal rapporto 2012 divulgato il 20 settembre, che raccoglie i dati riferiti al 2008, si ricava un quadro completo dello stato della

giustizia in Europa. Con un ruolo di primo piano per l'analisi dei costi.

La spesa

L'Italia ha destinato 3.051.375.987 alle spese dei tribunali (senza considerare i costi degli uffici della procura e dell'assistenza giudiziaria). Questo vuol dire 70,9 euro per abitante (ossia lo 0,28% del Pil) a fronte dei 95,3 euro della Germania, dei 175,8 di San Marino. La Spagna spende 86,2 euro contro i 55 della Francia. Se si includono anche i costi per le procure e per l'assistenza giudiziaria la cifra arriva a 73 euro per abitante a fronte della media del 57,4 euro.

In totale, l'Italia ha aumentato del 3,4% la spesa per tribunali, procure e assistenza giudiziaria a fronte della media del 6%. Diminuzioni invece in Bosnia, Bulgaria, Finlandia, Ungheria, Lettonia e Lituania. La Grecia - si chiarisce - ha fornito dati relativi alle previsioni di spesa ma le somme non sono state poi attribuite.

I giudici

Per quanto riguarda gli attori del sistema giustizia, in Italia sono 6.654 (ossia 11 per 100.000 abitanti) i giudici togati, e 3.121 quelli non togati (5,1 per 100.000 abitanti). Rispetto al 2006 vi è stato un incremento molto limitato (0,05) a fronte della media europea dell'1,6%. In Russia si contano 32.313 giudici togati, in Germania 19.832, in Polonia 10.625, in Turchia 7.727 e in Francia 6.945. Una diminuzione drastica del

OGGI L'INFORMAZIONE GIURIDICA È DIGITALE



Le riviste digitali del Sole 24 ORE ti accompagnano ovunque con l'informazione più autorevole.



European Judicial Systems

Edition 2006

Table 58. The number of lawyers with and without solicitors and trainees

Country	Q87 Number of lawyers practising	Number of practicing lawyers without solicitors nor trainees (Q88)	Number of lawyers without solicitors nor trainees per 100 000 inhabitants	Number of professional judges sitting in courts	Number of lawyers per judge
Albania	1 212	1 212	39,5	383	3,2
Andorra	108	108	140,5	22	4,9
Armenia	469	469	14,7	179	2,6
Austria	6 622	2 792	34,0	1 697	1,6
Azerbaijan	537	537	6,4	338	1,6
Belgium	14 876	14 876	142,4	2 500	6,0
Bosnia & Herzegovina	1 224	1 224	31,9	690	1,8
Bulgaria	11 452	11 452	147,6	n.r.	
Croatia	2 851	2 851	64,2	1 907	1,5
Cyprus	2 200*	2 200	319,0	96	22,9
Czech Republic	8 235	8 235	80,6	2 878	2,9
Denmark	4 635	4 635	85,9	368	12,6
Estonia	520	520	38,5	245	2,1
Finland	1 700	1 700	32,5	875	1,9
France	43 977	43 977	70,7	6 278	7,0
Georgia	1 000	1 000	22,0	406	2,5
Germany	126 799*	126 799	153,7	20 395	6,2
Greece	34 000	34 000	307,5	2 200	15,5
Hungary	9 500	9 500	94,1	2 757	3,4
Iceland	695	695	236,7	47	14,8
Ireland	9 273*	9 273	229,5	130	71,3
Italy	151 470	151 470	259,1	6 105	24,8
Latvia	800	800	34,5	384	2,1
Liechtenstein	113	113	326,6	17	6,6
Lithuania	1 282	1 282	37,4	693	1,8
Luxembourg	946	690	151,6	162	4,3
Malta	657*	657	163,2	35	18,8
Moldova	1 140	1 140	33,7	415	2,7
Monaco	27	27	89,9	18	1,5
Montenegro	462	462	74,5	242	1,9
Netherlands	13 111	13 111	80,5	2 004	6,5
Norway	5 772*	5 772	125,3	501	11,5
Poland	22 516	5 485	14,4	9 766	0,6
Portugal	22 418	22 418	212,9	1 754	12,8
Romania	16 000	16 000	73,8	4 030	4,0
Russian Federation	56 100	56 100	39,1	29 685	1,9
San Marino	87	87	293,2	16	5,4
Slovakia	4 100	4 100	75,9	1 208	3,4
Slovenia	1 040	1 040	52,1	780	1,3
Serbia	n.r.	n.r.		2 418	
Spain	111 313	111 313	259,3	4 201	26,5
Sweden	4 354	4 354	48,2	1 618	2,7
Turkey	52 195	52 195	73,4	5 304	9,8
Ukraine	n.r.	n.r.		6 999	
UK England & Wales	106 486*	106 486	200,7	1 305	81,6
UK Northern Ireland	552	552	32,3	62	8,9
UK Scotland	9 443*	9 443	185,9	227	41,6

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MEDICINA DIFENSIVA?**

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**MEDICINA DIFENSIVA:
NON E' SOLO UN PROBLEMA DI COSTI**

**L'AUMENTO DEL CONTENZIOSO
MEDICO-LEGALE CONDIZIONA IL
COMPORTAMENTO DEI MEDICI E
NON GARANTISCE
L'APPROPRIATEZZA TERAPEUTICA**

L'ERRORE NON DEVE SEMPRE COINCIDERE CON LA COLPA

E' INSITO NELLE PROCEDURE

E' INVOLONTARIO

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DISSERVIZI, ANOMALIE e DISFUNZIONI ORGANIZZATIVE

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NON VENGONO DENUNCIATI

**poiché il DG decide la CONFERMA DELL'INCARICO AL
DIRIGENTE MEDICO**

L 189/2012 (DECRETO BALDUZZI)

Art. 3

“L’esercente la professione sanitaria che nello svolgimento della propria attività si attiene a linee guida e buone pratiche accreditate dalla comunità scientifica non risponde penalmente per colpa lieve. In tali casi resta comunque fermo l’obbligo di cui all’art. 2043 del cpc. Il giudice, anche nella determinazione del risarcimento del danno, tiene debitamente conto della condotta di cui al primo periodo”

Art. 43 cpp

Il delitto:

è **DOLOSO** o secondo intenzione, quando l'evento dannoso o pericoloso, che è risultato dell'azione od omissione e da cui la legge fa dipendere l'esistenza del delitto, è dall'agente preveduto e voluto come conseguenza della propria azione od omissione;

è **PRETERINTENZIONALE**, o oltre l'intenzione, quando dall'azione od omissione deriva un evento dannoso o pericoloso più grave di quello voluto dall'agente;

è **COLPOSO**, o contro l'intenzione, quando l'evento, anche se preveduto, non è voluto dall'agente e si verifica a causa di negligenza o imprudenza o imperizia, ovvero per inosservanza di leggi, regolamenti, ordini o discipline.