



Original communication

## Current aspects of penal surgical liability in Greece

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### ABSTRACT

The surgeon may face in every day practice issues that may render him liable. The legal liability usually emerges due to the negligence exhibited during the preoperative, the operative and the postoperative stage. The surgeon, as any doctor, isn't liable for the result, but he is responsible for the correct diagnosis and therapeutic treatment, always according to the principles of the Medical science and to the possibilities available to him in every specific case (facilities and time). The continuous education about the issues of his speciality, the adaptation of scientifically approved techniques, the correct monitoring of the patient, both preoperatively and postoperatively, and finally the good communication with the patient are necessary for the proper practice of Medicine; but also constitute the "shield" of the surgeon against any possible legal conflict.

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### 1. Introduction

Every doctor in Greece takes by tradition the Hippocratic Oath when graduating by the Medical School: "I swear by Apollo Physician, and by Asclepius, and by Hygeia, and by Panacea and by all gods and goddesses, making them witnesses, to fulfil, according to my ability and judgement". It is reasonable to understand that each doctor can only practice medicine to the full extent of his abilities and of his judgement. The Greek Ministry of Health & Welfare (MOHAW) proposed to every concerned institution and medical association, a plan for a revised Code of Conduct of the Medical Profession and of Medical Deontology. This code is Law 3418, as voted by the Hellenic parliament. In this code it is stated that: "the medical profession is bided by absolute respect for the human dignity and the human life; and it's addressed to all humans without discrimination of gender, religion, nationality, social status or political beliefs".<sup>1</sup>

Greek doctors are bided by a number of provisions whose violation makes them liable to penal, civil and disciplinary

sanctions. Especially, surgeons are more vulnerable due to the intrusive treatment they follow and the high expectations patients have from them. Medico-legal aspects in surgery includes issues of informed consent, standard of care and malpractice during the preoperative, operative and postoperative stage, treatment of complications, treatment in case of emergency. In the following paragraphs, the current status and legislation in Greece are discussed, with special consideration on the matters concerning the penal liability of the Greek surgeon.

### 2. Definition of penal liability

According to the Greek Penal Code (PC), article 14: "crime is an unfair action which is attached to its perpetrator and is punishable by the law. In the articles of the penal laws, the term action includes even omissions". According to the article 15 of the PC the non-deterrence of a specific result is punishable, in the same way as the infliction of the same result by action, if the perpetrator has special legal duty to deter it.

By the means of the penal liability the public disgrace is expressed towards the actions of an individual. The penal liability in Greece is divided into two subcategories, the penal liability by intent and the penal liability by negligence. Especially in the case of physicians, the interest is focused on the penal liability by negligence.

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### 3. Definition of negligence

According to the article 28 of the Greek PC “whoever due to lack of attention that he should and could have paid according to the circumstances, didn’t foresee the punishable result which his action caused or had foreseen it as possible but didn’t believe it would actually happen, is acting in the content of negligence”.

The punishable result may be bodily harm or manslaughter. Bodily harm by negligence (involuntary), may bear imprisonment up to three years. In case of a completely mild bodily harm the punishment may be prison term or fine (article 314 of the PC). Manslaughter by negligence is punishable with a prison term of three months up to several years (article 302 of the PC). In order to be clear on the definition of manslaughter, generally it is considered to be the term for the killing of a human being, in a manner less culpable than murder. For medical professionals, it is considered by Greek legislators that whenever they commit a manslaughter, this is done not by intent, thus characterizing it as an involuntary manslaughter, which actually explains shorter imprisonment than in cases of murder.

In the relevant Greek Jurisprudence it is stated that: “to found the crime of manslaughter by negligence, it’s required to ascertain that the perpetrator didn’t pay the attention required according to common sense, the same attention any wise man should pay in those particular circumstances; according to the principles, the habits, the common sense and the experience, and that himself, according to his personal skills, knowledge and abilities, could foresee and avoid the punishable result, which must be causally related to the action or the omission of the perpetrator”.

The above mentioned apply for every citizen or professional owning a duty to another person. More specifically, for the doctors, it is stated that: “no negligence can be valid, even if the patient died, in case that in diagnostic level there has been given the proper attention, and if a valid scientific view has been adopted”.<sup>2–7</sup>

Subsequently medical negligence legally, is the condition which bears the following characteristics:

1. duty of care
2. breach of the duty (failing to exercise a reasonable standard of care)
3. resulting damage to the patient
4. causal connection between the breach and the harmful consequence<sup>8</sup>

### 4. Judge’s perspective

A doctor is usually sued for bodily harm (or manslaughter) by negligence after a complaint by the damaged (or his relatives in case of death). The prosecutor never closes the case without trial, mainly due to the serious nature of the accusations involved.

The main difficulties of such cases lie within the proof of the accusations, but also within the proper correlation of them to the legislation in such way as to guide the judge to decide whether this is a case of malpractice or not.

It cannot be overstated enough that both in penal and civil cases, the burden of the proof lies with the plaintiff. There is rarely any dispute over whether the surgeon owed the patient a duty of care. The major problem is proof of breach of that duty. In case the plaintiff cannot prove the accusation mentioned in his lawsuit, then the case is dismissed and the presumption of innocence of the doctor is applied.

The negligence (in medical cases malpractice) in penal cases is divided into conscious (when the perpetrator has foreseen the punishable result but hoped to avoid it, nevertheless it occurred

due to lack of attention that he was obliged to pay) and unconscious (when the perpetrator didn’t foresee the result due to negligent behaviour-if he had paid attention he would have foreseen it).

A surgeon is considered to have been negligent if he acted in an unreasonable and inappropriate manner. The reasonable standard of care is determined under the particular circumstances of the case. However, because the judge has not the medical knowledge necessary to determine what conduct or omission would be considered as reasonable, he usually calls a doctor as an expert witness (most of the times, a forensic doctor).

### 5. Reasonable standard of care

A surgical action is by itself a physical damage, which however is acceptable because of the need to assure the health of the patient. There is a positive balance between the expected benefit and the damage, caused by the surgeon.

No doctor is expected to be perfect or infallible. The standard of competence which the patient is entitled to expect is that of an ordinary competent practitioner in the grade or speciality to which the doctor belongs. A surgeon is considered to have exhibited the expected skill if he kept the generally known and accepted rules of the medical science, he performed operation that he was familiar with and didn’t overestimated his capabilities, he provided full and comprehensive information to his patient about the suggested operation and its possible complications and finally, if he post-operatively offered his services. The surgeon is liable for the mis-judgement, negligence or ignorance of matters (that he should know) and if the above lead him to a mistake in the diagnosis, in the treatment or even in the operation. In other words the surgeon is liable if he didn’t act *lege artis*. In other words, there is no negligence, even if the patient died, when in both diagnostic and therapeutic level, the necessary thoroughness has been exhibited.<sup>2–7</sup>

### 6. Informed consent

According to the World Health Organization (WHO)<sup>9</sup>: “Patients have the right to be fully informed about their health status, including the medical facts about their condition; about the proposed medical procedures, together with the potential risks and benefits of each procedure; about alternatives to the proposed procedures, including the effect of non-treatment; and about the diagnosis, prognosis and progress of treatment”. The informed consent of the patients is a prerequisite for any medical intervention.

The necessity of medical confidentiality and of the informed consent is again stated in the Law 3418, concerning the Greek Code of Conduct of the Medical Profession and of Medical Deontology Code (articles 12–13).

In case the patient wishes to exclude himself from this information, he has the right to do so and furthermore to suggest another third person to take his place.<sup>1</sup>

Until now, it was a common practice for the Greek doctors and families of the patient to conceal the truth, especially in case of serious and incurable diseases. It seems that the particular mentality and cultural background of the Greek people lead the Ministry of Health and Welfare to suggest a special provision in the Code, in which it is stated that the Greek doctor may decide, in a very few exceptional situations, to inform a close relative, instead of the patient, if he believes that the information given may deteriorate his health status.<sup>1</sup>

Normally, the usual form of consent is the verbal one. However, nowadays there is an increasing tendency for lawsuits against many surgeons which forced many physicians in Greece to adopt the written form of consent.

The consent is clearly only valid insofar as it applies to the precise treatment in question and until such time as the patient express a change of mind. When a patient agrees to a particular operation, the surgeon is not justified to depart from instructions and perform a different one. The only time when surgeons are justified in proceeding without prior authorization is when it is necessary to do so to save the life or preserve the health of the patient and it is not possible to obtain that person's consent. A full discussion of the surgeon with the patient on any probable advance during the operation and assessment of the respective consent, preoperatively may prevent him from situations with ethical and legal implications.<sup>8</sup>

In case of unconscious patients brought in the emergency room and if there is not the time needed to access a consent by his relatives, the doctor is entitled to carry out any procedures necessary to preserve life. Otherwise, he may be accused of "omitting to rescue the patient from danger of life" (article 307 of the Greek PC).

It must be noted that according to the Greek Penal Code (articles 362, 363, 364, 365, 371), the doctor bears penal responsibility in case of violation of the medical confidentiality bears penal liability. Furthermore any medical procedure carried out with prior informed consent of the patient (or his legal representative), is considered to be bodily harm, with the exceptions mentioned below.

### 7. Liability during the preoperative stage

The liability of the surgeon during the preoperative stage consists of the correct diagnosis and of the preparation of the patient for the operation. In order to establish negligence during the preoperative stage, one of the following conditions must exist:

1. error in the diagnosis
2. inadequate preoperative evaluation of the patient

More specifically it is absolutely necessary, in order for a patient to enter the operating theatre, to have an absolutely justified diagnosis which should be the indication for the operation. However, no doctor guarantees accuracy of diagnosis, and therefore cannot be considered negligent if an inaccurate diagnosis is made, unless it is shown that he did not exercise proper care in making it.<sup>8</sup> In the relevant Greek Jurisprudence, it is stated that the Greek doctor is not liable for error in the diagnosis, if the hospital does not provide him with the proper paraclinical tests and there is no way of reaching the correct diagnosis by means of clinical examination.<sup>10</sup>

Action in an acute emergency case when there is neither time, nor facilities may legitimately not be perfect as in a non-urgent situation. Doctors are not justified for not going on the appropriate course of action for reasons of legal defence.<sup>11</sup>

### 8. Liability during the operative stage

The duties of a general surgeon during an operation mainly consist of:

- lege artis performance of the operating procedure
- increased alertness for any probable or improbable complication during the operation, that he should confront immediately.

A surgeon is required to be as skilful and as diligent as possible during the various stages of an operating procedure. This is necessary not only for the benefit of the patient but because if such

diligence and competence is not exhibited, the surgeon can easily be prosecuted with medical negligence.

Furthermore a surgeon is required to be able to modify his original operating plan according to the situation of the patient during the operating procedure. If for example a tumour infiltrates more tissue than originally expected, a surgeon is required to attempt complete excision of the tumour, but without endangering the life of the patient.<sup>8</sup>

### 9. Liability during the postoperative stage

It is quite often that a surgeon is required to treat possible complications after the operation, complications that may lead the patient for a second time to the operating theatre. There is reasonable question whether the surgeon has responsibility for these complications both legally and ethically.

The surgeon bears the responsibility for the full recovery of the patient from the operation. The healing of the surgical wound as well as the fast recovery of the normal function of the human body constitutes the landmark goals of every post-operative treatment. The main duty of a surgeon is to prevent any complication, but also to be vigilant enough in order to detect any very early signs on the onset of the complications.<sup>11</sup>

This responsibility remains even if the complication has no immediate connection with the operation, for example in case of a patient dying of myocardial infarction after a cataract surgery in the eye. In this case the surgeon must provide first aid and immediately refer to a cardiologist.<sup>8</sup>

The surgeon has the duty to collaborate with other physicians and health professionals who are involved in the treatment of the patient. Doctors need to recognize their limitations and call for help as appropriate. The use of medical councils (meeting of various physicians to discuss the specific case of the patient in hand) is of grave significance.

Finally the surgeon has the obligation to provide instructions to the patient upon exit from the hospital but also to help him even out of the hospital, if necessary. In any case a good relationship between surgeon and patient is required in all cases even when the patient is at home.

### 10. Residency in surgery

It is quite often that young doctors, completing their specialization in surgery, are accused of malpractice. According to the Greek Jurisprudence, a resident may be considered to be negligent if:

1. he didn't refer to the senior doctor timely
2. he attempted to make a diagnosis that requires skills of a specialized physician
3. he didn't obey the instructions given by the senior doctor
4. he didn't offer the first aids, according to the skills and the knowledge described in the curriculum of the Schools of Medicine.

According the above jurisprudence, "the resident is not considered responsible for the patient when a senior doctor is present, except if the actions of the consultant violate in an obvious way the rules of the medical science as taught in the medical school".<sup>12</sup>

### 11. Conclusions

In the every day practice of Medicine, the surgeon may confront issues with legal consequences. The continuous information and training about his specialization, the adaptation of the scientifically approved techniques, the meticulous monitoring of the patient

both pre and post-operatively and above all the upkeep of good communication, based on trust and respect, are necessary for the proper medical practice but also constitute the “shield” of the surgeon against possible legal entanglements.

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