

## In the face of surgical malpractice, ethical or legal transcendence?

*Ante la mala praxis quirúrgica, ¿trascendencia ética o legal?*

José Ignacio Guzmán Mejía\*

### Key words:

*Lex artis,*  
malpractice,  
transcendence,  
ethics,  
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### Palabras clave:

*Lex artis,*  
mala praxis,  
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profesional.

### ABSTRACT

The medical act is defined as the set of actions that the user of health services receives with the purpose of restoring his or her health (Article 32 of the General Health Law). When the obligations of means and/or safety for the patient are not met and medical error can be proven, we say that there is medical malpractice. In Medicine we point out the existence of malpractice to indicate a mismanagement by action or omission when administering a medicine or performing a procedure that causes damage to the body or health of the human person, whether partial or total, limited in time or permanent, resulting from an act of imprudence, negligence, incompetence or recklessness. It is necessary to clarify that due to the biological variability of the patient and in spite of having acted in accordance with the medical *Lex artis*, the expected result is not always obtained or the patient's expectations are not met. This poses various problems for the right to be resolved in relation to how to ensure equity in the results of the medical act in the face of the fracture of the doctor-patient relationship resulting from dissatisfaction with the failure to obtain the expected results. That is why any medical act—especially in the presence of mala praxis—has important ethical, deontological and legal consequences for the medical professional.

### RESUMEN

*El acto médico se define como el conjunto de acciones que recibe el usuario de los servicios de salud con el propósito de restaurar su salud (Art. 32 Ley General de Salud) cuando no se cumplen con las obligaciones de medios y/o de seguridad para el enfermo y se puede demostrar el error médico, decimos que existe mala práctica médica, en Medicina señalamos la existencia de mala praxis para indicar una mala gestión por acción u omisión al administrar un medicamento o realizar un procedimiento que provoque un daño en el cuerpo o en la salud de la persona humana, sea parcial o total, limitada en el tiempo o permanente derivado de un actuar con imprudencia, negligencia, impericia o temeridad. Es necesario aclarar que debido a la variabilidad biológica del enfermo y a pesar de haber actuado en arreglo a la Lex artis médica, no siempre se obtiene el resultado esperado o no se cumplen con las expectativas del paciente. Esto plantea al derecho diversas problemáticas a resolver en relación a ¿cómo asegurar una equidad en los resultados del acto médico ante la fractura de la relación médico-paciente derivada de la insatisfacción por la no obtención de los resultados esperados? Es por ello que cualquier acto médico—especial en presencia de mala praxis— trae consecuencias importantes desde el punto de vista ético, deontológico y jurídico para el profesional de la medicina.*

*“When the scalpel is properly used,  
it produces miracles,  
and its misuse causes tragedies.”*

*Ochner Bull*

*“The more corrupt the state is,  
the more laws it has.”*

*Cornelius Tacitus  
Consul and Governor  
of the Roman Empire*

### INTRODUCTION

Good medical practice is regulated by two main types of factors: internal or inherent to the healthcare provider (knowledge, values, ethics, deontology, morals), and external, regulated by the society to which he belongs (laws, codes, regulations, standards, clinical practice guidelines, management protocols). Thus, when the physician performs a medical action incorrectly, he is committing an act of negligence (lack of compliance with a standard of care), inexperience (doing what he does not

\* General Surgeon.  
Member of the CMPCCG  
Legal Committee.

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know how to do), imprudence (doing more than should be done, without thought, caution or foresight) or constructive malice. Causing harm to an individual's health (not only physical but also emotional and social) leads implicitly to serious repercussions or consequences, imposed by the physician's inner self (moral, ethical) or by society's regulatory mechanisms (civil, criminal, administrative or labor laws). We will briefly analyze what medical malpractice is and its consequences when there is an associated professional responsibility.

### **What does the legislation in force state?**

Article 51 of the General Health Law<sup>1</sup> states that "...Users will have the right to obtain timely and ideal quality healthcare services and to receive ethically responsible professional care, as well as respectful and dignified treatment from health care professionals, technicians, and assistants...".

Article 2615 of the Civil Code for the Federal District<sup>2</sup> states in that "...The person who provides professional services is only responsible for the persons he serves in terms of negligence, inexperience or constructive malice...". This is why the contractual relationship when providing healthcare service is a contract of means but not of results. The Regulatory Law of Article 5 of the Constitution<sup>3</sup> states in Article 33 that the healthcare professional is under the obligation to put all of his scientific knowledge and technical resources at the service of his client, as well as to perform the work agreed upon.

Article 9 of the Regulations of the General Health Law on the Provision of Medical Care Services<sup>4</sup> states that "...medical care must be provided in agreement with the scientific and ethical principles that guide medical practice...".

From an administrative point of view, the physician working for an institution is also a public servant, and his obligations are stated in article 8 of the Federal Law on Administrative Responsibilities of Public Servants.<sup>5</sup> From another perspective, a physician is also subject to the ethical values of his profession, whereby ethics is considered the part of philosophy that addresses morality and the obligations of man,

as well as the set of rules governing human behavior.<sup>6</sup>

In medicine, within the patient-physician relationship, there are at least four fundamental ethical values that the physician is morally and socially bound to respect, i.e.: Beneficence (to direct his practice towards the patient's benefit), Nonmaleficence (to avoid harming the patient), Autonomy (to respect the patient's or his legal representative's decisions, meaning therapeutic freedom) and Justice (to equitably provide healthcare without discrimination).<sup>7,8</sup>

One must consider that, if all professions based on a contractual agreement between individuals have a professional secret, the professional secret is particularly relevant in medicine. Under the premise of respect for his freedom and dignity as a person, the patient has a right to confidentiality, to the protection of his personal information, intimacy, and respect for his autonomy.<sup>9,10</sup> Thus, in the medical action these rights must be respected, rights that in recent times are not only based on ethics but protected by the Law. Article 36 of the Regulatory Law of Article 5 of the Constitution states that "...Every professional shall be strictly bound to keep the secrecy of all matters entrusted to him by his clients, except for those established by the corresponding laws...".<sup>3</sup>

Malpractice is the term used to refer to professional liability regarding the acts performed without due care. In medicine, "malpractice"<sup>6</sup> is a term used to indicate inappropriate management "by action or omission" in the prescription of drugs or due to the improper manipulation of the patient's body (during surgery, resulting in the possibility of making physicians liable for the problems that could have ensued).

In its conceptual definition, medical malpractice (*malpraxis* in Latin) in health care shall exist when injury is inflicted to the body or health of a human being, be it partial or total, limited in time or permanent, as a consequence of reckless action or omission, negligence or inexperience during a healthcare procedure, or due to non-observance of regulations or duties while under the physician's charge, deviating from health regulations currently in force.

Some factors predisposing to an increased risk of malpractice have been identified, such

as lack of coordinated work or teamwork, non-observance of regulations, complexity of procedures, experience, workloads, schedule, season of the year, poor communication, and ethics. However, the age of physicians is not related to an increase in malpractice.<sup>11</sup>

The law states that it is fair for the healthcare facility or medical support service to be jointly liable for the injuries caused to the patient arising from negligent, reckless or unskilled activities of healthcare professionals, technicians or assistants who perform the medical procedure or treatment acting within a dependency relation, but the healthcare facility is solely responsible for injuries arising from not having provided the means that would have prevented these events from occurring, provided that the provision of such means is inherent to the nature of the service offered.<sup>12</sup>

It follows from the above observation that, when faced with a medical action in which malpractice is demonstrated, there will be consequences for the person or persons responsible for such conduct.

Article 1910 of the Federal Civil Code<sup>13</sup> states that "...any person who, acting unlawfully or against public morals, causes harm to another has the obligation to repair such harm...". Likewise, Article 1923 of the same Code states literally that "...master craftsmen are responsible for the damages caused by their workers in the execution of the work entrusted to them...". Thus, it follows that, in the event of malpractice, the healthcare professional will be obligated to repair the damage "... (loss or impairment of patrimony resulting from a breach in obligation), including moral damage (that suffered by a person's feelings, affections, beliefs, decorum, honor, reputation, private life, configuration and physical aspects)..." caused to the patient by his negligent, reckless or unskilled actions. It is worth noting that, should malpractice be demonstrated, the healthcare professional shall also be obligated to repair the harm, pay for damages (profit loss or deprivation of any legal gain that would have been obtained had the obligation been fulfilled), and even compensation to the patient, court costs, and expenses.

Likewise, Article 35 of the Regulatory Law of Article 5 of the Constitution<sup>3</sup> states that:

"...should the arbitration award or the judicial resolution, whatever the case, be adverse for the healthcare professional, he will not have the right to charge fees and must, in addition, compensate the client for the damages or losses suffered...". From the point of view of criminal law, there are many consequences in the event malpractice in a medical activity is proven. Unlike civil law, dealing mainly with money (assets), at the criminal level the physician's liberty is at stake, since the act may be considered a criminal offense. A criminal offense is defined as the act or omission punishable by criminal laws, such as those put forth in article 18 of the Criminal Code for the Federal District, which states that the actions or omissions above can only be committed either with criminal intent or malice or else with negligence or imprudence. A person acts with criminal intent or malice if, being aware of the objective elements of the typical event under consideration, or foreseeing as possible the typical outcome, wishes to or accepts committing it. A person acts with negligence or imprudence if he produces the typical outcome he did not foresee when it was foreseeable, or else when he did foresee it but was confident that it would not happen, by failing to observe the standard of due care that was objectively necessary.

The crimes most frequently associated with surgical malpractice and for which physicians are subject to punishment are crimes against life, body integrity, and dignity, as well as crimes committed in professional practice, abandonment of a patient, denial and improper practice of medical service, which are typified in the Penal Code of the Federal District. The following will be discussed in order of seriousness, as well as their consequences:

### **Homicide**

He who deprives another of life will be subject to twenty years in prison (Article 123). An injury will be considered fatal when death is due to alterations caused by the injury to the involved organ or organs, one of its immediate consequences or any complication inevitably resulting from the same injury (Article 124).

He who deprives another of life, when that person has expressly, freely, repeatedly, and

seriously requested it; as long as it is based on humanitarian reasons, and when the victim is suffering from an incurable illness in its terminal stages, will be subject to prison for two to five years (Article 127).

### **Injuries**

He who causes injury or harm to the health of another will be subject to: six months to two years in prison if the injuries take more than fifteen days and less than sixty to heal; from two to three years and six months in prison, if the injuries take more than sixty days to heal. From two to five years in prison when injuries leave a permanent scar, particularly on the face. From three to five years in prison if a faculty or the normal functioning of an organ or a limb is impaired. From three to eight years in prison, if injuries cause the loss of any organic function, a limb, an organ or a faculty, or cause an incurable disease or an incorrigible deformity, and from three to eight years in prison when injuries are life-threatening (Article 130).

When injuries are serious, the penalty corresponding to simple injuries will be increased by two thirds (Article 134).

### **Failure to render aid or care**

He who abandons a person unable to take care for him/herself when responsible for such person will be subject to three weeks to three months in prison if no injury or damage occurs (Article 156).

### **Infection hazard**

He who, aware of carrying a serious disease in an infectious stage, knowingly endangers another's health by the risk of contagion, either through sexual relations or any other method of transmission, as long as the victim is unaware of such circumstance, will be subject to a prison sentence from three months to three years and a fine from fifty to three hundred days; if the disease is incurable, the prison sentence will go from three months to ten years, and the fine will go from five hundred to two thousand days. This offense will be prosecuted by complaint (Article 159).

### **Failure to submit a forensic medical report**

Six months to three years in prison will be imposed on the physician who, having provided medical attention to an injured person, does not immediately report to the relevant authority: the identity of the injured person; the place, status and circumstances in which he was found; the nature of the injuries he suffered and their possible causes; the medical care provided; and the precise place where the individual was left in charge of the authority (Article 301).

The same penalty will be applied to the physician who, having issued a certificate of care to an injured person, does not provide the relevant authority information on changes in the place where the injured person is being cared for, the report on any worsening that may have occurred and its causes, the corresponding medical record (lawyers, judges and District Attorney Investigators consider the medical record the same as the medical chart), the definitive certificate stating the injury healing time or its consequences, or the death certificate, given the case (Article 302).

### **Professional liability**

Professionals, artists, technicians and their assistants will be responsible for crimes committed in the exercise of their profession in the following terms and without prejudice to the provisions included in the rules of professional practice. In addition to the penalties set for consummated crimes, they will be subject to a suspension of one month to two years in the practice of their profession, or definitive in case of reiteration, and they will be obligated to repair harm caused by their own acts and those of their assistants, when the latter act in compliance with the instructions of the former (Article 322).

### **Denial of medical care**

One to four years in prison and one hundred to three hundred days of fine will be imposed, as well as suspension from practice for a time equal to the prison term, to the practicing physician who, in the presence of an injured

person or having been called upon to care for one, does not provide such care or requests help from the appropriate institution.

The physician who refuses to provide assistance to a patient who is at risk of dying or of developing more serious illness or injury, and due to the circumstances, is unable to turn to another physician or healthcare institution (Article 324).

#### **Abandonment of a patient**

The health care professional who has begun caring for an injured person and ceases to provide said care without immediately giving notice to the relevant authority, or does not comply with the obligations stated by the law on the matter, will be sanctioned with one to four years in prison and one hundred to three hundred days of fine (Art 325).

#### **Improper practice of medicine**

Two to six years in prison and a fine of two hundred to four hundred days will be imposed on the physician who: performs unnecessary surgery, simulates the practice of a surgical intervention or, without authorization from the patient or the person who—in the event of patient inability or disability—can legally grant it, except in emergency situations, performs surgery that, due to its nature, endangers the patient's life or causes the loss of a limb or compromises the integrity of a vital function (Article 326).

#### **Unlicensed practice of medicine**

He who fraudulently claims to be a professional while lacking a medical degree or who publicly offers or provides his services without due authorization under the applicable legislation will be imposed a prison term from two to six years and a fine from two hundred to five hundred days (Article 323).

#### **Dispensing harmful or inappropriate medicine**

The physician or nurse who provides medication that is clearly inappropriate and damaging the

patient's health will be imposed a prison term from six months to three years, a fine from fifty to three hundred days, and suspension from the practice of his profession or trade for a period equal to that of the imposed penalty (Article 328).

#### **Arbitrary demand for payment**

Two to three years in prison, a fine of twenty-five to one hundred days and a three-month to two-year suspension from professional practice shall be imposed on directors, managers, administrators or employees of any facility where medical care is provided who: prevent a patient's discharge alleging debts of any kind, prevent the discharge of a newborn, or delay or deny handing over a corpse, except when an order from the relevant authority is required (Article 327).

From an administrative point of view, legal consequences are closely related to sanctions imposed for an administrative offense, which are stated in Article 13 of the Federal Law of Administrative Responsibilities of Public Servants<sup>5</sup> and range from a private or public warning or suspension from the job, position or commission for a period of no less than three days and no more than one year, to dismissal from office, economic penalty and temporary debarment from employment, positions or commissions in public service. When no injury or harm is done and no benefit or profit are obtained, three months to one year of debarment will be imposed, but if benefit or profit are involved, or if harm or injury is done, debarment will go from one to ten years, if the amount of the former do not exceed two hundred times the minimum wage currently in force in the Federal District, and from ten to twenty years if it exceeds such limit; this time can also be applied in case of serious offenses by public servants, besides dismissal from office.

Regarding the ethical consequences of malpractice, it is worth noting that the fundamental principle of ethics is to establish a set of moral standards and values accepted by the community in order to regulate the relations among its members. Based on this premise, medical ethics analyzes critically and makes it possible to put forward and improve values and

standards that may be rationally accepted by communities with different positive morals so that they may have a harmonious, peaceful and even cooperative coexistence. Ethical standards differ from legal standards in the way they must be followed (i.e., ethical standards in a rational and autonomous way, whereas legal standards are imposed in a heteronomous way) as well as in how their violation is sanctioned.

In medical practice, there are a series of ethical principles that must be observed, such as the principles of beneficence, equity, autonomy, confidentiality, respect for dignity, solidarity, honesty and justice. Among these, only the principles of beneficence, respect for autonomy and confidentiality have transcended to the legal level, with specific sanctions for their non-observance, some of which have already been discussed in previous paragraphs. The rest pertain to the physician who, based on his values, self-imposes the corresponding sanctions, manifested as feelings of guilt, lack of inner peace, the desire to compensate for the harm inflicted, and the purpose to improve and engage in further training.

These criteria imposed from discernment focus on three fundamental ethical models: the utilitarian approach, in which good relates to efficiency, profitability, and effectiveness; the deontological approach, in which good is reflected in the act itself in terms of duty of care, rights and justice; and finally, the virtue-based approach, in which good is centered on the individual and the vocation, and is attained by acquiring virtue. Happiness and balance between these three models represent the ideal of medical action.

Regarding ethical problems, the question is: which is the good that is sought and who is the beneficiary of that particular good?

Sometimes during the medical act, two ethical principles conflict and the physician alone lacks the capacity or the authority to solve it. A possible solution hinged on the creation of hospital ethics committees that have become a regular forum in which the responsibility of decision-making is shared through the participation of a larger number of persons. The functions of these committees include the confirmation of diagnoses, the review of established treatment, decision-making in

cases of non-competent patients, advice for the development of institutional ethical standards, the creation of a consulting body for the making of ethical decisions (both clinical and in research) within the hospital, and the provision of ethics education programs for the institution's staff. In our country, in December 1999, the Ministry of Health Office of Regulation and Health Promotion published the guidelines for the organization and functioning of teaching, research, training and ethics committees in Mexico.

Several medical associations have established ethics codes for their members, with the purpose of making these ideals part of their everyday actions. All of them focus on the best clinical decisions, based on the scientific and humanistic principles of medical practice, such as respect for the profession, respect for colleagues and, undoubtedly, respect for the patient's rights. These codes are mandatory for members, and most were created in Europe and the United States.<sup>14-18</sup> In Mexico, CONAMED published a code of ethics in 2012,<sup>19</sup> stating the fundamental ethical principles that healthcare professionals should abide by.

Currently, the ethical principle that is accorded the most relevance is the informed consent. In fact, in most healthcare facilities, it is mandatory to have it in written form, according to the official Mexican standard on the medical record (*NOM 004-SSA3-2012, del expediente clínico*); its features are described in Paragraph 10.1. Compliance with this mandatory rule is intended to prove in writing that the principle of patient autonomy, or that of his/her legal representative, was respected by informing in plain and understandable language the characteristics of the patient's condition, its natural course, what are the risks and what would happen if no medical action was taken, the available treatment options given the situation, time and place, what are the risks and the expected benefits for each treatment option, which procedure the patient accepts after being informed, and the consent to address emergencies or unexpected findings during the procedure, taking into account the physician's prescribing freedom and expertise. The document should also include the signature of at least two witnesses and the possibility for

the patient to revoke it up until the beginning of the procedure in question. All of this has the aim of respecting the patient's principle of autonomy, from which the informed consent form stems.

### Analysis

Current medical practice is overregulated by the government in order to guarantee one of the legally protected intangible assets, i.e., the right to life and healthcare, which led to the constitutional principle of health protection for all citizens. Hence, medical work is subordinated to scientific principles, applicable technique, ethical principles, and health regulations. In his professional practice, the physician must act with erudition, update his knowledge, use scientific evidence and good communication strategies, and show profound respect for the patient's rights. He must also know his rights and the obligations imposed by the health regulations in force, all focused on the ethical principles of beneficence, non-maleficence, equity, autonomy, confidentiality, respect for dignity, solidarity, honesty, and justice.

Nevertheless, as a human being, the surgeon is only required to put all of his knowledge at the patient's service and fulfill his regular obligations in terms of means and safety; but he may be fallible. When these failures or mistakes in medical action are due to invincible errors and not caused by negligence, recklessness, inexperience or malice, they represent an inherent risk and will therefore not be subject to professional liability. If, on the contrary, medical care was inadequate, did not fulfill its obligations based on ordinary diagnostic means, care or safety or was not based on accepted scientific principles; if the physician did not prove having informed the patient or did not obtain the patient's consent in the absence of a real emergency; if the procedures performed were not indicated for the patient's condition; if unnecessary surgery was performed or a surgical procedure was simulated; if the patient was left unattended without justified reason or the authorities were not informed when required; in summary, if there are elements of inadequate practice in his activities that result in harm to the patient, the physician will be subject to the sanctions established by civil,

criminal, administrative and labor laws and will have to face the consequences.

Since medicine and surgery, as one of its branches, are immersed in society, ethical and deontological aspects that the physician should have respected will likewise bear consequences, albeit of a different nature, that the healthcare professional must also face as a result of his inappropriate actions.

### CONCLUSIONS

Medicine is a rigorous science but not an exact one; there is an area of uncertainty that the medical professional cannot overcome, despite acting by accepted scientific principles and with the appropriate technique. The patient may have expectations on the outcomes, but cannot demand them unless they are committed in writing.

The surgeon must log his actions in the patient's medical record, establishing that the medical care process was performed according to medical state-of-the-art (*Lex artis*), complying with the health regulations in force and the ethical principles that rule medical practice and surgery.

In case the physician commits medical malpractice and causes harm, such inadequate action will bear consequences—some of them very strict and severe—that he will have to face and answer to in accordance with the provisions in the laws regulating medical practice.

Although legal consequences are more implacable and inflexible, ethical consequences are not any less important.

The best way to avoid malpractice and its consequences is practicing assertive medicine,<sup>20</sup> based on sound, up-to-date and evidence-based knowledge, adopting strategies to establish good communication with the patient and his family, knowing and respecting the patient's rights and abiding by the obligations imposed by laws, while still upholding his rights as a physician.

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**Mailing address:**

**Dr. José Ignacio Guzmán Mejía**

**E-mail:** [jignacioguzmanm@yahoo.com.mx](mailto:jignacioguzmanm@yahoo.com.mx)