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Health judicialization: a new concept to be feared in Morocco

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Abstract

This study aims to shed light on an imminent danger to the sacred relationship between physicians and their patients, represented by the increasing recourse to the courts to obtain satisfactory compensation for medical error, while compromise solutions could be found to satisfy the parties.

Methodologically, this work is the result of a critical review of judicial decisions, legal texts, and doctrinal references, and attempts to analyse them from a critical perspective. It also gives a great insight into the medical malpractice scheme and its consequences in the USA and France, compared to the current situation in Morocco.

To this end, a bibliographic research was carried out by consulting scientific works and official reports. Morocco is compared with other countries such as France and the USA. Our findings highlight the changing mindset of patients who have become more aware of their health rights, mainly due to media attention to the health sector and the influence of social media. Patients consider that medical errors are no longer the result of an inevitable fate, but the result of the doctor's negligence.

This study attempts to emphasize the urgent need to restore trust, approach exemplary ethical behaviour, honesty, and integrity in the sacred relationship between doctors and their patients. In the event of a conflict, institutions such as the National Medical Accident Compensation Office and the Reconciliation and Compensation Commission should be established for extrajudicial broadcasting, as is the case in France.

Key words: *judicialization, health, patients, physicians, mediation, reforms.*

القضاء الصحي: مفهوم جديد يجب الخوف منه في المغرب

ملخص

تهدف هذه الدراسة الى تسليط الضوء على خطر محدق يهدد العلاقة المقدسة بين الأطباء ومرضاهم والمتمثل في اللجوء المتزايد للمحاكم للحصول على تعويض مرضي جراء ارتكاب خطأ طبي في حين يمكن إيجاد حلول وسطية ترضي الأطراف.

من الناحية المنهجية، هذا العمل هو نتيجة مراجعة نقدية للقرارات القضائية والنصوص القانونية والمراجع الفقهية، ويحاول التحليل بمنظور نقدي. كما أنه يعطي نظرة كبيرة على مخطط سوء الممارسة الطبية ونتائجه في الولايات المتحدة الأمريكية وفرنسا مقارنة بالوضع الحالي في المغرب.

تحقيقا لهذه الغاية، تم إجراء بحث ببليوغرافي من خلال استشارة الأعمال العلمية والتقارير الرسمية. وبمقارنة المغرب مع دول أخرى مثل فرنسا والولايات المتحدة الأمريكية. تسلط النتائج التي توصلنا إليها الضوء على تغيير عقلية المرضى الذين أصبحوا أكثر وعيا بحقوقهم الصحية، ويرجع ذلك أساسا إلى اهتمام الاعلام بقطاع الصحة وتأثير وسائل التواصل الاجتماعي. ويعتبر المرضى أن الأخطاء الطبية لم تعد نتيجة قدر محتوم بل نتيجة لإهمال الطبيب.

تهدف هذه الدراسة إلى التأكيد على الحاجة الماسة إلى استعادة الثقة ونهج السلوك الأخلاقي المثالي والصدق والاستقامة في العلاقة المقدسة بين الأطباء ومرضاهم. وفي حالة النزاع، ينبغي إنشاء بعض المؤسسات مثل المكتب الوطني للتعويض عن الحوادث الطبية ولجنة المصالحة والتعويض للبث فيه خارج أطار القضاء كما هو الحال في فرنسا.

الكلمات المفتاحية: القضاء، الصحة، المرضى، الأطباء، الوساطة، الإصلاحات.

Introduction

The judicialization occurs when people resort more and more to judicial procedures to settle disputes that could be handled in a different way, such as mediation or amicable settlement. It is an effective way for people to claim their right to health, a legitimate exercise of citizenship (Vargas-Peláez, C. M., Rover, M. R. M., Leite, S. N., Rossi Buenaventura, F., & Farias, M. R., 2014). Health judicialization is mentioned when one part of the judicial trial is a health professional or a health establishment.

The concept of health judicialization has its origins in the USA, but it continues to spread in several countries on different continents (Biehl, J., Socal, M. P., & Amon, J. J. 2016) including Brazil, France, the United Kingdom, etc. the concept of arising with the controversy of the prosecution of politicians for their bad actions and decisions before spreading to other sectors, including the health sector (Helmlinger, L., & Martin, D. 2004).

To oppose legal actions brought by patients or their families, health professionals resort for their part to the practices of defensive medicine, which is a kind of reaction based on asking for multiple examinations and tests for a performance diagnosis in order to avoid a fault that could lead to justice. When a health professional practices defensive medicine, he/she would prescribe additional and unnecessary tests and refer his/her patients to specialists. The practice of defensive medicine is carried out in an atmosphere of mutual distrust and suspicion; the doctor fears the fault so that the patient does not sue him/her and the patient watches for his commission of a fault even by omission (Wen, M., Li, L., Zhang, Y., Shao, J., Chen, Z., Wang, J. 2024).

The Office of Technology Assessment (OTA) defines defensive medicine as follows:

*Defensive medicine occurs when doctors order tests, procedures, or visits, or avoid high-risk patients or procedures, primarily (but not necessarily solely) to reduce their exposure to malpractice liability. When physicians do extra tests or procedures mainly to reduce malpractice liability, they are practicing positive defensive medicine. When they avoid certain patients or procedures, they are practicing negative defensive medicine (*US-Congress, Office of Technology Assessment, 1994).

This situation is essentially due to the awareness of individual rights by patients and the creation of several ways of compensation, whether judicial or extrajudicial, as well as the legal and jurisdictional recognition of patients' rights in terms of informed consent and prior information have encouraged them to turn to justice to obtain compensation for the damage (Drucker, J., & Faessel-Kahn, M. 2004). The mediatisation played, as well, its role in the propagation of the notion and the increase of the level of the consciousness of citizens in front of sporadic cases which were taking their magnitude among them, before the judicial actions intensified becoming a current topic, and any judicial decision, in particular that of the Court of cassation in Morocco, and the court of cassation and the Council of State in France, relating to health professionals finds its impact in the minds of the members of society, the jurists and the health professionals (Helmlinger, L., & Martin, D. 2004).

It is obvious that the legal text is stable; its stability can last for years or even decades, while the medical art is always evolving; we see daily new products and new medical devices that are becoming more and more essential in the various techniques carried out in the context of diagnosis, treatment, surgery, etc. Between the stagnation of the text and one, and the evolution of the other, there is a whole injustice that affects the parties to the trial.

Methodology

Methodologically, a review of judicial decisions in both Morocco and France has been conducted, along with consultation of relevant legal texts and doctrinal attitudes. This work attempts to analyse to interpret with a critical perspective. The USA status was used as a witness to the consequences of

the health judicialization. Moreover, some countries like Sweden and New-Zealand were cited as successful ones after reforming medical liability.

Discussion

I- Health judicialization: a new concept to be feared

The health sector cannot be excluded from the scope of legal rules; the judge intervenes whenever it is discovered that these rules are violated. Pr. Rousset. G has made a distinction between the notion of judicialization, which means the increase in the number of judicial summonses and convictions against health professionals, and juridicization, which means the multitude of legal rules applicable to the health system (Rousset, G. 2009).

A- Judicialization of medical activity in France

The profession of medicine is subject to predetermined legal and ethical rules governing its practice, and the doctor is responsible for the decisions he makes and the acts he performs. And each time he commits a fault that causes damage, the victim patient goes to the judiciary to assert his right to compensation for the damage suffered and sometimes even to punish him criminally if he is guilty of criminal misconduct.

The notion of health judicialization has been accentuated in particular by the notoriety of certain thorny high-level judicial decisions, such as the famous Mercier judgment of May 20, 1936, of the French court of cassation, which recognized the contractual nature of the doctor-patient relationship.

The first judgement in France that highlighted the **question of the necessity of obtaining the informed consent of the patient before any surgical intervention, failing which, the physician violated this obligation to respect the dignity of the human person, he committed an infringement on the rights of the patient, a breach of his medical duties (French Supreme Court (FSC), Teyssier judgment, 1942)**. (Bergoignan-Esper. C & Sargos. P. 2010).

Another judgment also had its major effect in amplifying the concept of immediate recourse to justice to obtain monetary compensation; this is the Budgie judgment, which infuriated the insurance companies, who decided in 2002 to opt out of medical civil liability. On November 17, 2000, the FSC **retained the doctor's civil liability for a prenatal misdiagnosis that prevented the mother from choosing an abortive method; she was not properly informed, subsequently giving birth to a disabled child** (FSC, November 2000) (Mascret, D. 2015).

On the side of the Council of State, the Bianchi judgment recognized the responsibility without fault in favour of the patient victim of therapeutic hazard, the judgment stipulates that:

Considering, however, that when a medical procedure necessary for the diagnosis or treatment of the patient presents a risk whose existence is known but whose realization is exceptional and whose no reason allows to think that the patient is particularly exposed to it, the responsibility of the public hospital service is engaged if the execution of this act is the direct cause of damages unrelated to the initial state of the patient as with the foreseeable evolution of this state, and presenting a character of extreme gravity (French Council of State, 1993).

The socialization of the damages resulting from the therapeutic hazard, by the inclusion of national solidarity through the ONIAM (*National Office for Medical Accident Compensation)*, in the field of compensation for damaged patients, has proven the social dimensions that a state of law holds, and it has reduced the consequences of deprivation of compensation for its harm.

However, these decisions and many others have given rise to a plethora of decisions that involve the responsibility of health professionals and which manifest an inclination towards compensating the victim, or even manifest a certain sacralization of the patient (Rousset, G. 2009).

This judicialization had a deleterious impact on medical practice, and it built a certain distrust in the doctor-patient relationship, based, in the past, on absolute trust and total submission to the opinions of doctors. It also had an impact on the economy through the increase in health costs by resorting to

the practice of defensive medicine and the crisis caused in the field of insurance on medical civil liability.

Morocco is not immune to this phenomenon; although the official figures are not published, the crisis began to arise in silence.

B- Judicialization of medical activity in Morocco

The issue of the judicialization of the health sector in Morocco is still in an embryonic state since the number of appeals against health professionals does not reflect the lived reality of offenses committed within public or private health institutions. And by analogy with the criminological theory of the dark number or rather the dark figure of crime which is a term used to describe the gap existing between real offenses and those declared by the police (Doorewaard, C. 2014), we can say that the offense in the field of health reflects this theory because it is underestimated, and there are no official statistics by the competent Moroccan authorities.

Faced with this deficit in official statistical data and this deficiency in the reports objectifying the subject, it is essential to create an observatory of medical accidents (Helmlinger, L., & Martin, D. 2004) that can highlight the volume and the rate of faults committed by health professionals and allow to have a global vision of the claims helping to schematize a general policy able to reduce the risks, mitigate the suffering and reduce the costs.

Also, there is a certain hiding of mistakes committed inside hospitals and clinics with the complicity of colleagues. Then there is the adoption of the concept of belief in fate, whether good or bad, and the damage caused is only a representation of the divine will to evaluate the patience, perseverance, and obedience of the slave who must in no case dispute or contradict, something that leads to silence with satisfaction without reacting in justice against the offender.

Moreover, the difficulty of the procedure in the labyrinths of the courts, with the need, on the part of the victim, to prove the commission of a fault by the health professional, often held to an obligation of means, dissuades him from desperately pursuing the judicial way. It is only recently that victim patients have started to head to the courts to subpoena health professionals for condemnation or compensation. Change certainly favoured the increase of the collective consciousness of human rights, fuelled in particular by social networks and the sharing of information in groups and statuses, e.g., Farah case of Larache (Moroccan City), which struck public opinion because Farah, the mother, and her foetus gave their last sigh because of negligence on the part of the night watch team.

This transformation of mentality correlatively generates an increase in judicial litigation, hence the need for evolution and the hardening of judicial and administrative jurisprudence. Evolution, which remains slow because of the fragility of the legal arsenal available in terms of the responsibility of health professionals for their faults, which is still governed by the general texts of the Moroccan DOC (Dahir of Obligations and Contracts) and the penal code. This is called the weakness of the juridicization of health.

However, some doctors carry out harmful behaviours to the reputation of the profession of medicine and health in general; they increase the aspects of health judicialization by harming their patients more by violating ethical and human rules. We will cite some aspects that give a taste of bitterness and which demonstrate the vileness and ignominy of its authors. Moreover, the legislator must intervene criminally in this context to deal with these abject behaviours:

- The fact that a doctor (e.g., a traumatologist) requires the purchase, at a higher price, of certain materials necessary for the surgical intervention of a named drugstore, just because he receives his share later, failing which, the patient will not benefit from his operation under the pretext that he trusts the equipment of this drugstore.
- The fact that a doctor requires the patient to do the biological examinations in a specific laboratory because he has received gifts and offers of family travel abroad for free.

- Still, the fact of prescribing a drug more expensive than another just to submit to the desires of the pharmacological laboratories, which also give him gifts and privileges to the detriment of the patient's pocket.
- The fact of referring or even imposing on the patient to be operated on at an expensive private clinic instead of a cheaper or free public hospital just to increase these personal figures.

We consider that these abuses are rather against morality and ethics; these actions are contrary to the spirit of Law 131-13 relating to the practice of medicine in Morocco, and the legislature must intervene with all its weight to punish the guilty and stifle a phenomenon that is beginning to proliferate in hospitals. Of course, Law 131-13 relating to the practice of medicine **prohibits doctors from practicing their profession as a commercial profession or exercising it under some kind of influence; their only motivations should be their science, knowledge, conscience, and professional ethics (Art. 2 Law 131-13 related to medicine).**

This phenomenon leads to many negative effects that could influence the sacred relationship between physicians and their patients, posing the tremendous question of its nature: Does the medical contract become a contract of consumption? Could it be faced with a crisis of medical liability insurance?

II- the alteration of the physician-patient relationship

The field of health had long enjoyed a certain divine sacredness to such an extent that each tribe had its healer to whom its members turn before each malaise or epidemic, whether it succeeds or fails, his act was so valued and overestimated, his decision was indisputable, because the notion of profit was discarded, and the notion of consumption of care was never present; it is only recently that the doctor-patient relationship was the subject of a legal framework in a contract similar to other acts of commerce and crafts. This attempt would only lead to an alteration of this relationship (Chen, J., Majercik, S., Bledsoe, J., Connor, K., Morris, B., Gardner, S., et al. 2015).

Is the doctor-patient relationship really a consumer relationship? (A) And the increase in judicial decisions in favour of patients by awarding them significant compensation does not embed this theory and does not create a crisis with the insurance companies, who no longer want to guarantee medical civil liability? (B).

A- Health: a consumption of care?

The change of mentalities in contemporary societies has increased the expectations of patients to such an extent that the failure in a medical or surgical intervention is not conceived as a therapeutic hazard or a fatality of fate, but rather as a failure to be taken care of by the healthcare team and that the patient, as a fee-payer, is entitled to a satisfactory result, namely the improvement of his state of health or even his recovery.

The substantive judges are accused of an inclination to grant the rights to the patients considered the weak party in the medical contract in order to protect them and to allow them compensation in compensation for their physical and moral damage. In addition, doctors have necessarily taken out insurance for their civil liability. Consequently, it is the insurance companies that will pay (Pischedda, G., Marinò, L., & Corsi, K., 2023).

The United States has experienced fluctuations in terms of care, which has become a market in the pure sense of the term, and then care is sold like any other commodity; as a result, the term "*care*" loses all its weight and its value. "*To treat a sick person*" is to relieve the pains of a weak, fragile creature and subject to a medical skill filled with humanity, humility, and honesty. During the 60s and 70s of the 20th Century, the "*Patient-centered Care*" movement appeared to counteract the previous orientation, "illness-oriented medicine," where medicine focused on the disease, the methods, and the means able to cure the patient. But through the "*Patient-centered Care*" movement, the patient developed his right to clarifying information, free consent, the expression of these choices, and his

needs before the health professional could intervene. However, patients are not informed or trained enough to enter negotiations with their doctors, and they do not have many preferences and options to haggle over their health in favour of the quality or price of care (Gusmano, M.K., Maschke, K.J., & Solomon, M. Z., 2019). Sometimes, excessive patient requests do not correspond to what health professionals believe to be certain and effective. If they act in accordance with their conviction, patients, ipso facto, in the case of harm that has occurred, go to court to sue them and assert their rights to punish them or obtain compensation (Park, S.-Y., Yun, G. W., Friedman, S., Hill, K., & Coppes, M. J., 2022).

As a result, traceability has become an essential tool to escape a judicial conviction in which the collection of informed consent from the patient after having informed him sufficiently is proven (Gusmano, M.K., Maschke, K.J., & Solomon, M. Z., 2019).

In Morocco, with the entry into force of legislative texts aimed at reforming the Moroccan health system and in particular the framework law 06-22 relating to the national health system and the accompanying laws (the laws 07-22, 08-22, 09-22, 10-22, 11-22) and the generalization of medical coverage, signs of commercialism are coming and care is rendered an act of consumption; clinics are starting to build branches ***(Akdital (group of clinics) is the typical example that extends its ramifications throughout the national territory), the alienation of public hospitals and public health centres to land developers (e.g. Sidi Said hospital in Meknes, Sanyet Rmel hospital in Tetouan, My Youssef Hospital in Rabat, etc.).***

This regal orientation of the state to concede the health of citizens to the private sector, under the pretext that citizens are covered by compulsory health insurance and have the right to be taken care of in the private sector, announces suspicions about the future of health in Morocco, the patient will then be seen as a simple consumer of care, and health will be worth the money, and the one who does not have money or not covered by health insurance will not be able to assert his constitutional right.

The idea of treating the health sector as an economic market, insofar as suppliers meet to provide quality health services at a lower price, and where the patient can make his/her choices comfortably. Moreover, this vision demonstrated its failure during the COVID-19 health crisis, where only the public sector was able to faithfully and sincerely take charge of the health of the population, and where the private sector withdrew to safeguard its financial interests.

Consequently, the medical contract will be stripped of its human and social feature, but rather it will be veiled of an economic and lucrative aspect insofar as the doctor-patient conflict arises intensely and fills the labyrinths of the courts where the patient watches for the doctor's fault and the doctor cares about committing a fault, it is a predator-prey model relationship (Antoci, A., Maccioni, A. F., Galeotti, M., & Russu, P. 2019). Health facilities will be a meadow for lawyers to grow their turnover.

B- the crisis of medical liability insurance:

Insurance is a technique for covering the risks of loss that may affect the property of a natural or legal person (fire, accident, theft, water damage, natural disaster) or resulting from the occurrence of a random event directly affecting the person himself (illness, disability, work accident, death). The civil liability insurance contract is one of the means, next to defensive medicine, used by doctors to protect themselves if their liability is incurred in the event of misconduct committed against a patient (Antoci, A., Maccioni, A. F., Galeotti, M., & Russu, P., 2019).

The issue of the insurance crisis is reflected in the increase in premiums paid by doctors for the benefit of insurance companies to cover their civil liability (Géraldine S, 2015, p. 286). And besides, the premiums are calculated according to the foreseeable losses in addition to the loading costs known as 'Loading charge', which means the additional costs imposed by the insurance company when the risk for the insured is higher than in ordinary circumstances (Karaca-Mandic, P., Abraham, J. M., & Phelps, C. E., 2011).

The medical liability insurance crisis in the USA is manifested by the increase in legal proceedings against health professionals for the mistakes they commit. Consequently, decisions in favour of compensating patients are increasingly on the rise, which leads to the deterioration of the assets of insurance companies, despite the increase in annual insurance premiums. Some doctors have preferred to settle in certain states where the annual insurance contribution is lower and lower (De Marcellis-Warin, N, 2003).

These experiences, in the USA or even in France, show that there are still enough problems relating to medical liability insurance that some researchers refer to two main causes: the first has to do with the great hopes held by patients in the recovery and success of certain surgical operations so technically, medically and legally complex; something that leads to the decrease in the offers of insurance companies on medical civil liability, there remain, then, the big companies which monopolize the insurance market and insure this type of risks (DUC J.M, 2008).

The second relates to the generosity of certain expert doctors in increasing the value of compensation for patients[3285]. Consequently, this leads to an increase in the insurance budget and also the bills for health services (Alaoui, B., 2018), in particular those related to anaesthesia, surgery, and obstetrics, which bring together almost 10% (Prudential Control and Resolution Authority, France, 2023) of doctors practicing in France. In view of these circumstances, the Senate social affairs committee has confirmed that the premiums paid by these specialties have increased by 59.6% (Procaccia, C, 2019).

In addition, the statements of the MACSF (Mutual insurance company of the French health corps) in 2006 gave birth to a new crisis because the amount of premiums has seen a massive increase for gynaecologists-obstetricians (27000euros) while the premiums are around 14000Euros on average in 2006, moreover, the increase proves inevitable in the future (Social affairs general inspection-finance general inspection, France, 2007).

After the promulgation of the law of March 4, 2002 known as the Kouchner law, even if it brought advantages for patients and the quality of health services, it aggravated the issue of insurance for specialized medical companies, because it insisted on the obligation of professional civil liability insurance, and added certain risks to the doctor's no-fault liability as in the case of nosocomial infections, something that pushed several insurance companies to withdraw from the market where only a few five large companies remain which monopolize the insurance activity in France by 95% (Martin, D. 2009).

And since the insurance companies refuse to insure the professional civil liability of health practitioners, the French legislator has given birth to the national office of prices and revenues whose mission is to exercise permanent surveillance on the evolution of prices and revenues and to judge whether this evolution is in the national interest, including the amount of the insurance premium, and in case of refusal on the part of the company, it exposes itself to multiple sanctions that can reach partial or total withdrawal of accreditation, or a warning or a blame or even the reduction of its competence in certain insurance operations (Géraldine. S, 2015, p.294).

Among the contributions of the law of March 4, 2002 relating to the rights of patients and the quality of the health system is the institutionalization of a compensation scheme based essentially on national solidarity and the conciliation procedure managed by the CRCI which aims to exclude certain health disputes from the judicial field, because this procedure is distinguished by its speed, its simplicity and its gratuitousness, as it pronounces its opinion on the compensation of the victim by

3285 In USA between 1994 and 2001, the paid compensations for victims have been increased by 174% with an amount achieved 1 Million dollars and the budget of liability has reached the number of 232 Billion dollars in 2002, which means 2.2% of the gross domestic product (GDP). In France, the budget of compensations affairs has reached 120000£ in 2002, whereas in 2007, it was doubled to achieve 256000£ in F years.

the insurer if the fault has been proven against the health professional, but if it concerns the risks relating to the therapeutic hazard (Bart, S., & Djadoun. W. 2021), it is the ONIAM that takes care of it within a maximum period of 4 months (Knetsch, J. 2019).

In this optic, the CRCI occupies many missions like promoting the resolution of conflicts between users and health professionals through conciliation, directly or by appointing a mediator. Moreover, allowing compensation by specifying the circumstances, the causes, the nature, and the extent of the damage in accordance with Article 1142-8 of the CSPF (French public health code). It will then be the insurer of the health professional, the health establishment, and/or the producer of a health product (in case of fault) or the national solidarity (in this case, the ONIAM in case of therapeutic hazard) who will propose compensation for the patient.

The national solidarity fund, in addition to its intervention in the compensation of damages due to the risks of medical or surgical intervention, it intervenes in the case of the absence of insurance at the attending physician (Meimon Nisenhom, C. 2024).

And to get out of the crisis, reform proposals are emerging strongly in some American states, such as New York through the adoption of a system of no-fault liability for medical damages, or also another suggestion to create agencies to receive, assess and judge medical malpractice claims instead of the courts, but with the maintenance of the principle of civil liability for proven misconduct.

It can be seen that the first proposal (no-fault liability and compensation for all victims of medical damage) is difficult to apply in such situation, because the objective is to reduce the excessive recourse to the courts to obtain high compensation to relieve doctors and their insurers, contrary to the second proposal which seemed reasonable given that the creation of special agencies for the treatment of medical disputes have several positive effects, namely; first, the reduction of the judicialization of the health sector, then, the promptness in the resolution of medical disputes and subsequently the prompt receipt of amounts of compensation, also, the crowding out of the congestion of the courts and the slowness of the judicial procedure.

III- The practices of defensive medicine

Complaints against health professionals are increasingly on the rise in Morocco, as in France, but it is a usual tradition in the United States. The increase in the phenomenon of the judicialization of the health sector weighs on its functioning because if we lost a physician or a nurse following criminal or disciplinary sanctions, the functioning of the health service would be fractured, and also, on its performance, because the spirit and morale by which the sanctioned health professional will work with is so diminished and a lamentable emotional situation affecting the quality of care(Adwok, J., & Kearns, E. H. (2013).

The impact of defensive medicine is manifest in several aspects, be it economic, social, ethical, and legal, but its magnitude in the USA is not the same in Morocco, because the phenomenon has begun there for a long time, and Morocco remains sheltered from traditional beliefs about fate and destiny (Patra, K.K., 2024). What about this reality?

A- Defensive medicine in the USA

Defensive medicine has been a phenomenon in the USA since the 60s, following certain studies carried out which showed that 91% of a sample of 1,500 doctors in 2012 (Amalberti, R. 2025) confessed to their practice of defensive medicine by requesting examinations and procedures more than necessary to protect themselves from legal proceedings (Bishop, T., Federman, A., & Keyhani, S. 2010).

However, the use of defensive medicine can expose patients to harmful risks due to the multiple examinations requested, such as exposure to X-rays from radiology that can lead to cancers, venous or arterial trauma that can lead to phlebitis through excessive biological examinations, frequent recourse to caesarean delivery instead of the low route, etc. (Antoci, A., Maccioni, A. F., Galeotti, M.,

& Russu, P. 2019). Consequently, the main concern of health professionals is not to provide appropriate care to their patients, but to guard against the judicial risk (Barbot, J., & Fillion, E., 2006).
Defensive medicine has a positive aspect and also a negative aspect (Sekhar, M.S., & Vyas, N., 2013). insofar as the so-called unnecessary complementary examinations seem necessary for doctors to prove to the judges that they were not negligent or reckless, it is also a tool to get rid of slanderous and plaintive patients who are waiting for the relevant opportunity to prosecute health professionals judicially (Cunningham, W., & Wilson, H. 2011), it is a kind of victimization of patients since the judges do not hesitate to pronounce irrational compensation in favour of the injured patients (Géraldine. S, 2015, p: 282).
The negative aspect of defensive medicine is represented by the increase in the cost of care, given the number of additional examinations requested. However, this additional cost does not stop at the financial overloads of the patient, but also the insurance companies and the funds of the social welfare organizations, which should reimburse their members for the examinations carried out. Consequently, defensive medicine increases the capacity of these funds, something that will necessarily affect the quality of care and the quality of reimbursements.
It is also a sign of the end of the doctor-patient relationship based essentially on trust and confidential submission to the chosen treatment (Cunningham, W., & Wilson, H., 2011). From now on, traceability is a preponderant element to demonstrate the acts performed and the treatments prescribed and/or administered, hence the preponderance of frequently updating the medical file as evidence indicating the guilt or innocence of the health professional in the event of a subsequent dispute (Gallard, P.-Y., 2014).
Given these data, surgeons resort, before any intervention, to having the patients or their families sign documents that prove their informed consent and that they have been sufficiently informed and that they assume all responsibility in the event of complications or adverse effects following the operation, including death. Failing which, he will be prosecuted judicially. This is what the French court of cassation retained when a urologist did not sufficiently inform his patient about the risks of erectile dysfunction and did not receive his consent to perform a prostate adenectomy (French Court of Cassation, civil, Civil Chamber 1, June 3, 2010, 09-13.591).
The phenomenon is not restricted to the USA, but also occurs in several countries. Studies in Italy (Catino, M. (2011) have shown that more than 80% of doctors practice defensive medicine due to the following reasons: first, the fear of compensation claims. Then, previous experience of a lawsuit. Also, the fear of the deterioration of the reputation built for years, and also the fear of disciplinary sanctions (Catino, M., & Celotti, S., 2009).
The receipt of a complaint by a health professional will absolutely hurt their person; they will need specialized psychological follow-up to overcome this unexpected shock, something that will affect the quality of the care provided. The emotional state of the health professional, his attitude towards his profession and his patients, and his ability to withstand the stress of medical practice in the fear of legal proceedings (Cunningham, W., & Dovey, S., 2000).
In this context, healthcare professionals in the USA live under heavy and unbearable pressure between the medical duty from an ethical point of view and the need to protect themselves against legal actions, especially for the riskiest specialties such as surgery, which is why they are calling for an immediate reform of medical liability for a more effective and efficient performance. This reform must focus on the methods of offering insurance and protection against legal actions in the event of damage caused while respecting the recognized standards of care (Kessler, D., & McClellan, M., 1996). What about Morocco?

B- Defensive medicine in Morocco: towards an American drift?

Congestion in the health sector is growing remarkably; widespread dissatisfaction among users of the public health service makes recourse to justice admissible and frequent for every fault committed and damage suffered. The sanitary matter is seen as a hearty meal for the press, in particular cases, in connection with medical malpractices causing infirmities, maternal-foetal mortality due to negligence. Arrests among health professionals are increasing remarkably. However, in comparison with Western countries, the situation in Morocco is not very worrying. Doctors do not often resort to defensive medicine procedures; they carry out their diagnosis comfortably without worrying about legal proceedings, and they request biological and radiological examinations just to carry out their diagnosis or in order to operate on a patient. They can grant a certificate of physical fitness out of complacency without even seeing the person concerned; they can inflate a forensic certificate under the pretext of helpfulness, kindness, and benevolence with an acquaintance. Nevertheless, the signing of informed consent by the patient or their family has become a usual practice.

Admittedly, studies are rare or non-existent on defensive medicine in Morocco, but the increase in legal actions against health professionals has introduced the idea of protecting against any possible legal action. Given that today, Moroccan citizens knew a certain awareness of their rights (e.g. the right of health) in particular through social networks, the flourishing on the laws and legal procedures in force, the renunciation of the idea of fate and inevitability after any harm caused to a patient (Kharbouchi, M., El Azzouzi, M., Bouchafra, M., Anouar, K., & Maatouk, S. E. (2024); it is now judged as medical malpractice that must be punished, the incentive of lawyers to sue health professionals for fruitful compensation, doctors see themselves on the trail of American and European doctors by prescribing examinations not for the treatment and recovery of their patients, but only, to protect themselves from possible legal actions by providing evidence to the judge that they have made the diagnosis and that they have prescribed the necessary treatment.

In this context, in a judgment of the CA of Kenitra, which confirmed the judgment of TPI, based on the conviction of the doctor, on his confession of having prescribed '*Astaph*' to the victim who took it during his life, and who was accused of having worsened his state of health due to the excessive allergy he caused. The doctor continued that he had not warned the deceased or her family about the adverse effects that could occur **(**Court of Appeal, Kenitra, Morocco, n° 10/2803, 2011**)**. The substantive judges qualified the present case as negligence requiring the doctor's conviction because he did not carry out the necessary examinations before the administration of the treatment.

The question that arises: how can a doctor know if a particular drug is tolerable or not for such a patient? It is up to the patient or his family who should contact the attending physician as soon as the adverse reactions appear following the taking of a specific medication, and if he did not react, his responsibility is then engaged. This judgment and many others create suspicions among health professionals in their relationship with their patients and encourage them to practice defensive medicine without thinking about the interests of the patient, nor the cost of care, nor the national economy (Chen, J., Majercik, S., Bledsoe, J., Connor, K., Morris, B., Gardner, S. et al. (2015) This judgment was the subject of a partial cassation for lack of grounds in application of Article 365/8 of the CPCM (Moroccan criminal procedure code).

In the USA, the use of caesarean operations is increasing especially in places where there are excessive complaints, because vaginal delivery presents multiple risks, in particular the risk of postpartum haemorrhage, tearing of the vaginal wall and the perineum, maternal-foetal infections, etc. (Sentilhes, L., Schmitz, T., Azria, E., Gallot, D., Ducarme, G., Korb, D. et al. (2020) and to save themselves, American doctors resort to the easy and certain method for them, namely caesarean section, despite the risk it presents to the woman, namely the persistence of the abdominal scar and the risk of a subsequent sudden tearing of the scar on the abdomen uterus. In Morocco, in a judicial

decision, the doctor was prosecuted for not opting for caesarean section and choosing the vaginal delivery even though the foetus was overweight.

The lack of constructive communication between doctors and their patients increases the distrust between them. Sometimes doctors consider that their decisions are indisputable or that they know the best interests of their patients better, something that makes patients resort to justice every time a prejudice takes place. In addition, health professionals find that the legislative deficit in the supervision of medical and paramedical professions causes an underestimation and trivialization of health professions, which gives patients and their agents the audacity to sue them in front of any complication or adverse effect.

This is mainly due to the inclusion of medical liability in the same framework as common law liability, without taking into account the particularities and complexities of the health professions. Many countries (Sweden, Finland, New Zealand, etc.) have renounced the classic civil or criminal liability of health professionals to adopt medical liability based on the theory of the inevitability of damage; that is, if the complication or adverse effect was preventable by having the possibility of proceeding otherwise, the patient would be entitled to compensation, failing which he would be deprived of any compensation, and the decision of the health professional is medically justified and does not lead to any legal proceedings.

The health professional is shocked and deeply hurt to be prosecuted and condemned as a crook, a thief, or a murderer. The criminal law criminalizes the criminal intention of the guilty person, but the doctor does not intervene with harmful intention to patients; the fault committed is only an unintentional one that any human being can commit within the framework of the fallibility of the human species (Mauroy, B., 2021). This is the case of a traumatologist who found himself among a gang of human traffickers when his fault was to have examined patients without billing, that is, free consultations, which was interpreted as a privation of the state from important revenues.

From this, it is necessary to include in the current health reform in Morocco, the reform of medical liability and the safeguarding of the relationship of trust between the health professional and their patient, without which the health benefits will be biased. The comfort of the doctor is essential for an advantageous performance, and the patient's trust in their doctor is a preponderant foundation for the success of the therapeutic process. Negligence and imprudence must indeed be punished, but there must be a special procedure for compensating the patient under the aegis of a conciliation commission as an appropriate alternative mechanism to judicial action.

IV- Recommendations for reducing defensive medicine practices:

The current situation of medical liability which is based on the theory of fault requires an absolute reform to restore the sacred relationship between the health professional and his patient (A) in a framework of mutual trust and where apparent negligence is the only punishable, and the harms caused by incidents inherent in the therapeutic hazard are subject to the theory of inevitability like the Swedish health system, and where institutions assume responsibility for compensating victims and protecting their health professionals (B). These measures are essential to avoid reaching the American drift in terms of judicialization and defensive medicine.

A- A reform of the medical liability system

The medical liability system in the USA contributes negatively to the increase in healthcare costs through the recourse of doctors to the practice of defensive medicine (US-Congress, Office of T. assessment. (1994). And several voices have called for the reform of the foundations of medical liability based on the following points:

-It is necessary to exclude medical liability for unintentional faults when the causality is undetermined to reduce the reasons for the practice of defensive medicine.

-Also, it is necessary to adopt an institutional responsibility in the cases of unintentional faults, i.e., that the health establishment assumes responsibility for the pecuniary or judicial consequences instead of the health professional (Jacobson, P. (2004).

-Also, it is necessary to establish an awareness-raising debate on the limits of medical technology in achieving the desired objective; this is a task that must be carried out not only individually by doctors with their patients, but also academically and institutionally through the organization of local, national and/ or international conferences where the stakeholders actively participate (doctors, lawyers, magistrates, politicians, civil society, etc.) to highlight concepts, bring points of view closer, clarify medico-legal approaches in order to overcome ambiguities and misunderstandings and also to enlighten the imagination of politicians with legislative and executive power and magistrates with judicial power, who are often laymen in medical matters, of the particularity of the health professions with a view to developing a modern legal arsenal capable of immunizing health professionals from futile legal proceedings and also capable of safeguarding the right of patients-victims of medical malpractice to compensation and why not punish doctors who commit apparent unforgivable negligence (Zarei, E., Yousefi, I., Shiranirad, S et al, 2024).

Among the proposed solutions to combat the practices of defensive medicine, we find the use of management protocols (PEC), trees or decision-making schemes (AD), and guidelines to be followed (CAT), which are pre-established by committees of specialists in which they explain the way to react to a specific case: hypertensive people, diabetics, tuberculosis patients, etc. For a tuberculosis patient, it is the search for BK in sputum, for a diabetic, it is the measurement of blood glucose, the glucosuria, as well as glycated haemoglobin, which makes it possible to assess their condition. These protocols aim to increase the adherence of health professionals to care protocols that will certainly reduce unnecessary and unfortunate procedures and rationalize the use of health products and resources (Demers, D., 1996).

Certainly, these protocols are effective in medical disputes for misconduct in evidence insofar as the health professional could defend himself that he has carefully followed the pre-established therapeutic protocol and that he has performed the acts necessary for the patient (Mackey, T. K., & Liang, B. A., 2018). However, the imposition of guides and protocols on health professionals can undermine the competence and foresight of doctors and could also limit their autonomy in decision-making.

The standardization of care remains beneficial for doctors to avoid legal proceedings, so much so that they can follow the protocol to confirm the fulfilment of its tasks regardless of the result obtained for the patient, but we can never standardize the human body known for its complexity and the overlap of its components insofar as what is tolerable for one cannot be for the other.

B- The need to protect health professionals from spurious legal proceedings,

A primary aspect should be mentioned; the dissatisfaction of health professionals with the attitude of legal professionals, since the former are accustomed to the absolute truth through reliable scientific data, while the latter are only looking for a relative truth dependent on the evidence found (Demers, D., 1996).

The immediate recourse to justice by health professionals for a purpose creates a major disruption in several aspects:

- disruption of the functioning of the health service and sometimes the postponement of patients' appointments to a later date, which can harm their health,

-demoralization of the spirit of the health professional prosecuted regardless of the fate of the action (conviction or acquittal),

-loss of the desire to work sincerely and seriously, which affects the performance of the service,

-domination of a feeling of bitterness and disappointment from this unexpected and undeserved counterpart of a person who is supposed to be grateful,
-negative repercussions invading the family members of the health professional prosecuted slanderously (Healey, B. J., Kopen, D., & Smith, J., 2020).
- in addition, health professionals are convinced of the inability of magistrates to judge medical cases and everything pronounced against them is considered unfair because the magistrates do not know the complexity and the particularity of each human body, and that a treatment can be tolerated by a patient X, but cannot be tolerated by a patient Y, hazards and unexpected incidents can take place at any time. Of course, the magistrates resort to experts to enlighten them on certain technical points, but the latter answer their questions to the letter; the depth of the truth of things remains unknown to the judges and can only be discovered by putting themselves in the same situation.
Patients, faced with the multitude of harms caused, are dissatisfied with the health services provided, which leads them to file complaints against the health professional guilty of the damage for a possible sanction and to assert their right to compensation.
The remarkable increase in legal actions against health professionals is mainly due to the following reasons:
-First, the considerable increase in the level of awareness of the population who become more vigilant of any medical procedure, they find out in advance about the pathology, the procedures performed, and the treatment prescribed through their knowledge, if not by consulting websites that provide all the necessary information about a medical procedure or a medicine. Further, she asks questions on social networks. What is absurd and bizarre is that we believe everything except the health professionals. This unjustified caution watches for any medical malpractice causing damage to go to justice (Lorenc, T., Khouja, C., Harden, M., Fulbright, H., & Thomas, J., 2024).
-second, the influence of social networks and the media that broadcast any health incident, such as childbirth in front of hospital portals, disputes and violence that take place within services, especially emergencies and health centres, which stir up the animosity of the population towards health professionals,
-third, the evolution of medical technology has increased the scope of the expectations and forecasts of the sick to such an extent that any disease must be cured in one way or another, and any failure is the result of negligence or clumsiness (Khoury, L. (2014).
-fourth, the orientation of the legal profession to feed on such disputes, with facilities for payment of fees for patients, makes accessible the destination of injured patients to justice. In the USA, some lawyers send envoys to the doors of hospitals to offer their services to prejudiced patients (Dwyer, C. L., 2006).
These data certainly increase the proportion of the judicialization of the health sector and, consequently, the recourse of doctors to the practice of defensive medicine as a means of immunization against legal actions. This situation, according to foreign studies, causes between $650 and $850 billion to be lost each year on medically unnecessary treatments and tests just to avoid legal complaints (Catino, M., 2011).
It is necessary to protect health professionals from spurious legal actions that are aimed only at obtaining significant compensation. In the USA, it is necessary to present a certificate of merit certificate of merit) which shows that the damage is true and deserves legal action (Moye, J., & Bennett, P., 2020).
In this context, a promising legislative birth has just appeared, namely the alternative sentences of imprisonment through the law n ° 43-22 of August 27, 2024. It is a bright spot that could fulfill the two hard blades: punishing faulted physicians and permitting quick and fair compensation for patients.

Conclusion

To sum up, the medical civil liability has developed a lot because it has gone through several stages and complex experiments, but it has not found yet its principles and its fixed rudiments and researchers who are not convinced of legal texts in force, suggest a solution that proves to be more efficient and more effective to get out of this crisis, namely the gathering of risks in a pooling or a trimming of the heaviest claims would solve this delicate problem.

It is then necessary to intervene on the legal and institutional levels to restore the sacred relationship between physicians and patients and create bridges of reconciliation through an amicable settlement with the aim of avoiding the congestion of the courts and the slow and tiring judicial procedure.

By resorting to these reforms, HCWs could find their passion and enthusiasm to work serenely and to do their best for their patients without fear of being sued in front of court. Many countries have changed their medical liability scheme and obtained satisfactory results; they not only won their skilled frames by encouraging them to stay in their own country, but also, the satisfaction of the patients, which is the purpose of every respectful government.

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