



# NEGLIGENCE AND CIVIL LIABILITY IN THE MEDICAL PROFESSION - PART I

Liability in the medical profession arises when the patient is not treated according to acceptable standard of care. It is a well-known fact that the medical professional is not duty bound to give specific results. The medical professional is however obliged to carry out the treatment to the best of his capabilities. The principal aim of this article is to analyse what constitutes negligence and when liability arises. Besides considering the defences that can be raised in a law suit for medical malpractice, this article will also make reference to the opinions and decisions of Maltese courts.

## A. DUTY OF CARE AND CONTRACTUAL DUTIES IN THE FIELD OF MEDICAL LAW

The nature of the relationship between doctors and patients is determined largely by practice of the profession and is shaped by a strong commitment towards long-standing principles of medical ethics. The law plays a significant role in providing a structure within which the doctor-patient relationship is conducted. Legal rules set out a minimum standard of professional behaviour. Ideal standards of practice are left to the profession itself to define. The law only comes into play in case of dispute where, the patient or his successors claim that such minimum standards have not been attained.

## B. CONTRACTUAL AND TORTIOUS RESPONSIBILITY UNDER MALTESE LAW

### B.I. CONTRACT OR TORT?

The doctor-patient relationship may be based either upon a contract between the parties, upon an undertaking to perform or on both. Given this dual source of doctor-patient relationship, a question arises, that is whether tort or contract law governs the rights and liabilities of the parties.

In the Maltese legal scenario, for a person to incur responsibility, there must have been a breach of a contractual obligation which can be raised tacitly or implicitly, or else a breach of an obligation imposed by law.

The doctor is required to follow the applicable standard of care not only when he impliedly agrees to do so, but also in view of the fact that the medical professional is obliged to do so by law. Even though an aggrieved party can choose whether to sue the alleged offender on the basis of a breach of contract or on the basis of a breach of a duty imposed upon him by law, there has been a general trend that whenever there is an allegation that a medical professional has failed to exercise the mandatory degree of care, tort law rather than contract law provides the basis for the claim. This notwithstanding, regardless of whether the physician-patient relationship is based on a contract or not, the duty of care is the same.





[WHEN JUDGING ON NEGLIGENCE AND CIVIL LIABILITY] THE COURT MUST RELY ON OTHER MEMBERS OF THE [MEDICAL] PROFESSION...

## B.II. MAIN DIFFERENCES BETWEEN CONTRACTUAL AND TORTIOUS RESPONSIBILITY

Primarily, whereas the person breaching a contractual obligation specifically provided for in a contract binding the parties would incur contractual responsibility, any person violating an obligation imposed by the law would incur tortious responsibility. This notwithstanding, the result remains the same, namely that of being held responsible for the violation of a contractual or a legal obligation.

Another important distinction between contractual and tortious responsibility lies in the effects such breach has on the person found responsible. In contractual responsibility the person whose rights have been breached may invoke the primary effect of the obligation, in other words compel the other party to perform the obligation that he had undertaken. The aggrieved party may on the other hand sue the defaulting party for damages arising out of breach of contract. In tortious responsibility the only remedy available to the injured party is suing the offender for the recovery of damages caused by the tortious act.

In furtherance, the Civil Code (Chapter 16 of the Laws of Malta) provides that an action for damages arising out of non-performance of a contractual obligation is time-barred by the lapse of 5 years. An action for damages arising out of tort is time-barred by a lapse of 2 years.

## C. ELEMENTS OF NEGLIGENCE

A claim of breach of contract or of a breach of a duty imposed by law based on negligence can be successful, if the patient proves to the satisfaction of the court the three main elements of negligence, that is that:

- i. the physician had a duty of care in that particular situation
- ii. the physician failed to discharge the standard of care required by that duty and
- iii. he has suffered damages in consequence of a breach of that duty.

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## C.I DUTY OF CARE

This refers to the fact that the doctor has a duty to provide the patient with care in accordance with an accepted standard.

## C.II BREACH OF DUTY

### C.ii.a Standard of Care

Article 1132(1) of the Civil Code (Chapter 16 of the Laws of Malta) provides that:

*"... the degree of diligence to be exercised in the performance of any obligation, whether the object thereof is the benefit of only one of the parties, or of both, is, in all cases, that of a **bonus paterfamilias** as provided in section 1032." emphasis added*

Article 1032, establishes that:

*"A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a **bonus paterfamilias**." emphasis added*

These provisions establish that the standard of care required in contract and tort law is that of the diligence of a bonus paterfamilias. In the medical profession this has been tied to the responsibility of a reasonable man exercising and professing to have that special skill.

This doctrine has been taken a step forward to include the notion of accepted practice in the medical profession as one which is highly specialised and therefore the court must rely on other members of the profession and their behaviour in given circumstances to be able to compare and judge the treatment given. As will be described in further detail in the next article, the notion of accepted practice is fundamental as the courts must endeavour to avoid curtailing the development of medical science and in fact one can observe an effort to strike a balance between the progress of medical science and the protection of patients. ❌

(to be continued ...)



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