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Letter to Editor

Liability claims in Spain post-COVID-19: A predictable scenario

We would like to congratulate Parisi et al. [1] for their necessary global vision of malpractice litigation in COVID-19 and post-COVID-19 pandemic scenario.

We agree with the authors that many stakeholders do not appear to have fully understood what a global pandemic crisis means, and what efforts are being made to contain this emergency situation [1]. Our societies and healthcare systems were not ready for the COVID-19 pandemic and it has raised ethical and medico-legal problems, which included the equitable allocation of health resources, especially in relation to the prioritization of patients and the rationing of resources [2]. Accordingly, consensus documents have been designed, based on strictly medical criteria and fundamental ethical values [3], backed by clinical decision scores [4], with the aim of supporting healthcare professionals in making critical clinical decisions. These consensus documents have required periodical updating during the pandemic, to better face such an unknown disease.

All over the world, healthcare professionals (HP) worked extra hours and, no matter their specialization, many medical doctors and nurses were transferred to COVID-19 medical teams or COVID-19 dedicated Intensive Care Units. At least at the beginning of the pandemic, HP at the frontline risked their lives because of a widespread lack of personal protective equipment and testing facilities. In Spain, there have been especially traumatic situations in socio-health care centres that manage elderly patients with many comorbidities and fought against the pandemic in a catastrophic scenario, with lack of supplies. There has been a clear conflict between the doctors' duty to care for patients, and their rights to protect their own health and their families and loved ones [5,6]. Yet, exposure to infection is an inherent occupational risk for HP [6] and our Criminal Code penalizes HP who "fails to provide assistance" to a person in need, but workers should be guaranteed proper supplies to protect themselves. Until May 11, 2020, 40,921 cases of COVID-19 in HP (76% women) had been notified to the National Epidemiological Surveillance Network (RENAVE) in Spain, representing 24.1% of the total cases declared to RENAVE, with 53 HP deaths reported [7]. The 66% of these HP have had contact with people with respiratory infection as an epidemiological risk factor, and 71% have had close contact with probable or confirmed cases of COVID-19, which undoubtedly supports the professional origin of the contagion. Therefore, the General Council of Official Medical Associations of Spain has requested the development of the necessary legal measures in order to recognize the COVID-19 and its consequences on HP as a professional disease for legal purposes [8].

According to Spanish legal framework regarding to professional litigation claims, both HP and the public administration can be claimed.

Regarding claims against the HP, we strongly believe that during the COVID-19 pandemic catastrophic situation, HP have provided their services under unconventional situations and frequently inadequate occupational health conditions, performing procedures usually reserved for professionals with specific qualifications, and sometimes providing

assistance in facilities that are not considered healthcare centres [2]. We faced this exceptional situation with exceptional measures, such as the incorporation of residents in their last phase of specialization taking on staff duties, the return to activity of retired professionals or even the incorporation of medical students for non-care support tasks. In this sense, insurance companies have responded exceptionally well, incorporating under their coverage the activities carried out by these professionals [9]. By virtue of the foregoing, we believe that it is appropriate to remove HP from any medical professional liability claims involving acts related to care for COVID-19 infection, as long as it does not come to mistakes not related to the catastrophic situation.

Regarding claims against Public Administration, in March 14th, 2020, the Royal Decree 463/2020 [10] declared the State of Alarm in Spain to better manage the health crisis situation caused by COVID-19. As provided in article 1 of the Royal Decree, it was established in order to "face the situation of health emergency caused by the coronavirus COVID-19". It means that the Spanish government predicted an increase in the pressure on healthcare, a catastrophic scenario and its consequences. Therefore, we believe that there are three fundamental obstacles that can prevent these claims from thriving: 1) COVID-19 pandemic can be considered a case of force majeure (which paradigmatically entails the exemption from liability), 2) the unlawfulness of the damage, so the guilt must be proven by the injured party, what requires an individualization of each case and makes it even more difficult to prove the above, and 3) the difficulty to establish a causal relationship between the alleged deficits in the management of the crisis by the Public Administration and the specific damage caused.

It is well known that there are important differences in the laws and legal procedures that rule the way we deal with malpractice liability claims across countries. Therefore, the solutions applied with success in one country cannot be completely extrapolated to others. Nevertheless, the knowledge of the different country-to-country scenarios, through multiple legal approaches, can help us to get a comprehensive picture and to find the right strategy for each of our legal frameworks. We know that no single approach will provide the definitive solution to the problem. However, we will be satisfied if our paper contributes to improving the overall portrait.

Funding

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

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