EDITORIAL

Return to Basics: the Cases of Informed Consent and Lost Chances of Living

In the last twenty years, medical technology has ‘run’ so much faster than the law, that lawyers and lawmakers found themselves unable to follow up with science; they have taken a position not much different from that of the spectators of Formula, being in absolutely no position to compete, but, simultaneously, in a great danger of getting hurt themselves.

How can one get ‘hurt’ because of these developments? Inability to catch up with scientific developments, when lawyers are, though, in great need of an enforceable rule, is, of course, a direct injury, an injury of the legal profession generally; this injury, to say the least, exposes lawyers (once again) to the accusation of a clear and great distance from reality. Clients do not care for reasons, but only for results: that a contract for surrogate motherhood, entered into with the full consent of the parties, may or may not, later on, be declared invalid, is an instance where the law necessarily fails, at least as to its supposed quality of certainty and predictability. Another way of getting profoundly hurt is to forget what medical law is really about; insisting so much on research of these limited topics may even cause the grave mistake of thinking that a medical lawyer does not need a solid theoretical foundation and deep knowledge of classic medical law, seeing this law as outdated.

Not that an absolute creed in pure and abstract theory will save us. All these years, we have been watching endless debates of lawyers, philosophers, doctors, nurses and people from many other relevant professions as to when a patient is dead, which should be the procedure of removing organs for transplants, is a consented abortion of a two weeks fetus a homicide, is a life-saving blood transfusion upon an incompetent Jehovah’s witness equal to rape, are all operations by an alcoholic surgeon who did not disclose his disease to the patients equal to assaults and batteries, is the care of an incompetent patient in imminent danger of dying legitimate because of an implied contract between the caretaker and the patient, is a severe mistake by the doctor a breach of contract, a tort or both? And besides the distance from reality of at least some of these favorite themes, there is also another major
source of concern: in all the conferences where the experts are called to offer their precious opinion, the lack of the important party of the panel, the patient, the person, the individual, means that the one voice we need to listen to is just not there. Even if we know that we cannot find one person to claim to be a representative of society, exactly as we know that the ‘reasonable person’—standard for model conduct in negligence is a fiction, we can do better than nothing at all. At least in the common law world, which refuses to try anyone without a jury, this steady omission is clearly not correct.

All the theories of the world, I am afraid, cannot help us much, in solving specific problems in the hospitals or in doctor’s surgeries. Last week, a three-year-old child was operated at the Children’s Hospital of Hagia Sofia of Athens. The doctors just took the child from the mother, saying only ‘we will do what is appropriate’; they did not allow her in the surgery, and afterwards, while she was congratulating her three-year-old for being so brave in there without her, one of the doctors complained: ‘What are you talking about? The kid was screaming all the time, for Christ’s sake!’ And I will always remember my fellow, at the Harvard Center for Ethics and the Professions, a physician-ethicist, who secretly announced us during one of the seminars, that never mind all the doctrine of autonomy and respect for patients’ rights; when it came down to telling the parents their child had leukemia, every member of the doctor’s team looked at one another and discussed (in fact, argued upon) the one and most important thing: who amongst them will tell the parents the truth, and how. And then he added: ‘we never talked about Plato in there’.

My fellow made us laugh in the seminar, and he laughed, somewhat guilty himself too; he did admit how far reality is from a thousand books on ethics. As such, this comment does not claim any reward of originality. I am using it, though, as a lead to another remark that medical law has to return, at least in part, to basics. Again, not that the law has to stop attempting to keep pace with the evolutions of medical science; I have already described some of the dangers of this route. But the dust of this exhausting race has to settle down and cease to blind us and hide the main problems of everyday situations of the doctor/patient relationship.

We have, to resist the temptations of modernity, up to a certain point, temptations, which force us to choose as a conference’s theme ‘genetic personal data and confidentiality’ over, for example, ‘informed consent’, because the first topic is so much more ‘a la mode’. After all, we are not haute couture designers, discussing latest styles and even they, as far as I know, live from the classic styles they sell, and not of the modern ones. Indeed, in this very journal you are reading from – which is, allow me to say, an excellent journal – in the last three years, nine articles were published on something in connection with ‘genetic’; only one had to do with informed consent, only