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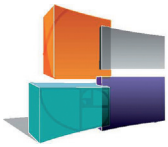

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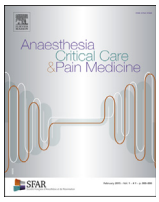

Review

The liability of the anaesthesiologist in ambulatory surgery

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ABSTRACT

With the development of ambulatory surgery, there may be questions about the legal risk of this procedure. Indeed, the discharge of the patient from the hospital on the same day as the medical treatment raises the problem of monitoring and supervising potential complications, with a substantial delay in medical care, and the anaesthesiologists can be confronted with new areas of liability. This article specifies the French statutory and legal framework of the ambulatory surgery, and shows how the responsibility of the anaesthesiologist can be involved during patient care at all steps. The analysis of judicial precedent shows that the legal risk for the anaesthesiologist also exists in outpatient surgery. Surgery and anaesthesia are medical procedures involving a relatively high risk of damage for the patient. The damage can be attributed to malpractice from one or several health care professionals or to a medical complication (abnormal damage not related to malpractice and independent of past medical history of the patient). In the light of the ongoing and significant development in ambulatory surgery, there may be questions about the legal risk of this procedure. Indeed, the discharge of the patient from the hospital on the same day as the medical treatment raises the problem of monitoring and supervising potential complications, with a substantial delay in medical care. If the patient suffers any damage, the surgeon, the anaesthesiologist and in some cases, the hospital will have to answer in courts: the surgeon for the surgical procedure, the anaesthesiologist for the medical care and the hospital as the liable institution. After having specified the statutory framework of ambulatory surgery, we will see how the responsibility of the anaesthesiologist can be involved during patient care at all steps.

1. The rules of medical liability

1.1. Civil liability (or administrative)

Medical practice is likely to cause various legal responsibilities for the health care professional. The specific activity of ambulatory surgery does not change the applied liability regulations.

In case of a damaging event that happened to the patient, the responsibility of the practitioner and/or of the hospital may be involved in order to compensate the patient. The regulation related to the liability of health care professionals and facilities is governed by article L. 1142-1 of the French public health code (CSP), resulting from the act of 4 March 2002 [1]: "Health care professionals [...] as well as any health care facility [...] are held liable for the harmful consequences of the acts of prevention, diagnosis or care particularly in cases of malpractice". This malpractice may be improper care, negligence or a deviation from the standard of care. Two cases must be distinguished: if the practitioner works as an employee in a hospital, the hospital will be held liable in courts: the administrative courts if the hospital is public funded, the civil courts if it is private funded. If the practitioner exercises as an independent contractor, he will be the one held liable in civil courts. In order to be granted any compensation for malpractice, there must be in most cases an injury to the patient, a medical error from a health care professional or facility and a causal link between the injury and the error. It is the compulsory insurance of the hospital or the practitioner's, which is financially responsible for compensation. If

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Table 1
The patient's clinical pathway in ambulatory surgery.

Preoperative assessment
Ambulatory validation
Risk/benefit ratio assessment
Anticipating side effects
Preparing the discharge after surgery
Peroperative stage
No specificity for ambulatory surgery
Discharge from PACU
Medical assessment
Signing the discharge slip
Postoperative follow-up protocol
Checking the discharge prescriptions
Patient's follow-up
The day-after phone call
Remote surgical consultation

no fault is found, the medical complication will be compensated by the national solidarity. It will be done if some conditions, in particular the seriousness of the damage, are met. Consequently the national office for compensating medical malpractice (ONIAM) will be financially responsible. The nosocomial infection is a putative error. However, in case of death or of particularly serious after-effects (Partial Permanent Disability higher than 25%), it is the ONIAM, which gives compensation regardless of the existence or non-existence of a civil liability under the act of March 4, 2002 as amended by the act of December 30, 2002 (article L 1142-1-1, 1° of the CSP)

The same rules apply to the amicable settlement procedures, now the most numerous, which are initiated in the Conciliation and Compensation Commission (CCI), the latter being also subject to the seriousness of the damage.

1.2. Criminal liability

In case of a criminal complaint, it is the existence of the offense committed by the practitioner, which is sued. The penalty, delivered by a magistrate's court, can be a fine (a personal one that cannot be covered by the insurance) and/or a prison sentence (usually deferred in the absence of any subsequent offense). The criminal suit can be done in parallel to the civil proceedings: if the victim of the offence is a private party. The plaintiff can also obtain redress from the insurance company for the damage caused.

1.3. Ordinal liability

Finally, in case of complaint before the French Medical Council, it is the respect of ethical obligations, which is examined. A conciliation attempt should be carried out by the departmental council. If this attempt does not succeed, the complaint must be forwarded to the disciplinary division, except for the physicians practicing in a public service. It is the departmental council which hands or not the practitioner over to the court. The sanctions range from a warning to the removal from the medical register.

This article deals exclusively with the civil liability of practitioners but also with the civil or administrative liability of the hospital (public or private) as regards the compensation of the damage related to a medical intervention performed in ambulatory. The criminal or ordinal liabilities are not taken into account.

2. Applicable regulations for ambulatory surgery

If the SFAR (French Society of Anesthesiology and Intensive Care) issued recommendations as early as 1990. The legal recognition of ambulatory surgery in France found its origin in the act of July 31, 1991 [2], and its implementing decrees of October 2, 1992: ambulatory surgery pertains to the hospitalization of less than 12 hours without overnight accommodation. Therefore, it includes the surgical interventions scheduled and performed in the technical conditions that absolutely require the security of an operating block under an appropriate anesthesia and followed by a postoperative surveillance in the recovery room allowing the patient's discharge on the same day of his admission without any potential risk. Unlike other countries, ambulatory surgery cannot be performed in a doctor's office then.

Since 2000, and particularly between 2010 and 2014 (10 texts), the drafting of regulations has been prolific and in favor of the development of ambulatory surgery [3]. The decree of the DGOS (the French General Directorate for Health Care), issued on December 27, 2010, specifies that "it is a question of paradigm shift [...] and of extending this medical care to all eligible outpatients and to the entire surgical practice". Consequently ambulatory surgery becomes the standard reference [4]. Shortly after, the decree of 20 August 2012 aimed at encouraging the development of alternatives to standard hospitalization by relaxing some technical requirements related to its management [5]. But eliminating the concept of specific patient pathway and care map by a medical staff assigned to the ambulatory care unit, the meaning of this text seems ambiguous and carries the risk of looking upon ambulatory surgery as a secondary activity. The DGOS has therefore sent a decree to the ARS (Regional Health Agencies) on November 22, 2012, by the combined request from the AFCA (the French Ambulatory Surgery Association) and from the SFAR, to clarify the specific aspects of the ambulatory and staff pathway. This circular letter recalls that "the decree keeps compulsory a devoted paramedic staff for ambulatory surgery" and "explicitly considers that ambulatory surgery units should have premises assigned to ambulatory surgery".

3. Risk management in ambulatory surgery

3.1. Preoperative assessment and guidelines

3.1.1. Pre-anaesthesia consultation (PAC)

For any scheduled surgery, the pre-anaesthesia consultation must take place several days before surgery, in accordance with article D. 6124-92 CSP issued from the decree of 5 December 1994 [6]. As there is a regulatory obligation, its oversight may constitute a clear case of negligence in criminal proceedings. In case of an emergency, this regulation is not enforced. As part of the ambulatory framework, the problem of iterative interventions performed in quick succession is raised. This comes with the problem of performing or not a new PAC for each surgery. It is possible to hold off, provided that it is for the same type of surgery within a month, in accordance with the opinion of the SFAR in 2001 and on a proposal from its Work/Life Committee [7]. This is only a general estimate and the anaesthesiologist who has examined the file may consider it useful to see the patient in consultation or to call him/her.

The other characteristic of the pre-anaesthesia consultation in ambulatory surgery is its importance to inform the patient and to prepare the clinical pathway (Table 1). As the ambulatory patient takes part in his/her preparation and postoperative recovery at home, the detailed information on all the stages contributes to the quality, safety and success of this care. The SFAR recommendations drafted in 2009 aim at informing on the preoperative fasting, the management of treatments, the obligation of an accompanying person for the discharge, the instructions related to the potential consequences and the rights of appeal in case of unforeseen events [8].