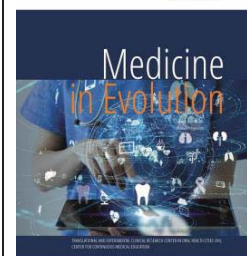


Legal Considerations on Physician Liability in the Context of the Covid-19 Pandemic



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Abstract

Background/Objectives: The liability of medical staff for malpractice in the context generated by the Covid-19 pandemic is a topical issue both for those who work in the medical system and for legal practitioners. **Methods:** In order to carry out this observational-prospective study, a questionnaire was drawn up consisting of 10 closed questions with a yes or no answer, which had the role of analyzing the opinion of doctors regarding the incidence of malpractice allegations during the COVID-19 pandemic. After completing the completion period, the questionnaires were centralized and analyzed statistically. **Results:** The majority of doctors considered that the emergence of the pandemic favored an increased level of stress and anxiety among the specialized staff working in health facilities, a fact that inevitably led to the appearance of complaints from patients, as a result of various professional errors what were committed and which resulted in the prejudice of their rights, especially the right to health. **Conclusions:** The central conclusion of this study focuses on the future development of a legislation that should enjoy clarity and brevity, being unambiguous and adapted to various unexpected situations, as was the pandemic generated by the emergence of the SARS-CoV-2 virus.

Keywords: pandemic, doctor, patient, malpractice, medical malpractice, medical error, medical mistake

INTRODUCTION

The crisis brought about by the pandemic evolution of COVID-19 is a state of affairs which has had to be countered by vigorous measures adopted both at European Union level and at the level of each Member State in order to ensure the health protection of EU citizens. Some of these measures have had a direct impact on patients' rights and interests [1].

In a democratic society, it is necessary that in such situations, the application of punctual measures does not turn into abuse and does not lead to the violation of fundamental rights, under the guise of protecting superior interests, such as public health [2].

The period leading up to the declaration of COVID-19 as a pandemic did not seem to herald the adoption of any extraordinary measures that would affect or restrict patients' fundamental rights [3,4].

The issue of doctors' civil liability for malpractice in the context of the COVID19 pandemic has been debated in various specialized studies elaborated in Romania by legal specialists, analyzing this topic both from a practical and theoretical point of view [5,6].

There is a substantial difference between the concept of medical error and medical mistake, and the distinction between the two concepts is such as to exonerate or incriminate medical personnel accused of malpractice [7]. Medical error is a complicated course of a disease or symptomatology with a tragic end, such that no diligent doctor could have stopped its unfortunate course, whereas medical malpractice is characterized by the doctor's fault in the exercise of his profession, manifested either in the form of imprudence or negligence [8,9]. More precisely, medical negligence is an unintentional act on the part of the doctor, which causes harm to the patient and makes the professional liable, since in the same circumstances another doctor, more diligent but with the same professional training, would not have caused the harm [10]. Negligence, on the other hand, is a failure to act in a situation in which a diligent professional would have acted, and can be circumscribed to haste, superficiality or improper performance of the duties of the profession [11,12].

The doctor is responsible for medical mistakes, not errors, and haste and superficiality are a form of medical error [13].

What happens, however, in a crisis situation where haste becomes the central element and defines medical activity, while at the same time opening the floodgates to superficiality? Moreover, if quantity (treating as many infected patients as possible-superficial or not) prevails over quality (giving each patient thorough and thorough care), is medical staff who have harmed some patients to save many others justified or not? In other words, if the superficiality would have caused harm only to the patients most affected by COVID-19 (perhaps because of morbidities), but led to the saving of the other (significantly more numerous) patients, who in the absence of prompt treatment would have suffered worsening, can it still be considered malpractice? [14,15].

We appreciate that the answer to these questions is a very sensitive one, given the specificities of each individual situation. Overburdening medical staff, over a long period of time, in order to save as many patients as possible, with the risks associated with their superficial treatment, and moreover, with the risk of their own illness, is, if not an element that contributes to exonerating them from liability, a genuine cause of mitigation of civil liability [16].

In the light of the above and in the context of COVID-19, it is questionable to what extent the excessive workload, coupled with the lack of knowledge of the supporting physicians and the inability to seek a second medical opinion or to receive confirmation of the diagnosis and treatment of infected patients will lead to the liability of the attending medical staff [17].

The concept of the supporting doctor is another important element in analyzing whether medical personnel fulfill the conditions for tort liability. At the time of the pandemic, any medical personnel could be delegated/ seconded to provide medical care in other support health facilities for the diagnosis and treatment of infected patients suffering from COVID-19. In these circumstances, a number of questions arise, including the question of the limits of the liability of support physicians for medical malpractice, given that they are not infectious disease specialists or pulmonary specialists [18,19].

At present, there are no special liability exemption rules in relation to the COVID-19 pandemic that derogate from the common law rule contained in the Civil Code. At least at first sight it would seem that there is no basis for derogation from the Civil Code. If the medical personnel could have realized that they were committing a wrongful act by treating infected patients, since they were not specialized in this and as such their action harmed the patients, they would be obliged to compensate for the damage caused. The mere fact that he was acting on the orders of his superior/undertaking an activity permitted by law will not exempt him from liability [20].

Certainly, opinions will be issued both in the sense that the doctor should not be held accountable in the context of carrying out his work in good faith, in crisis conditions, and in the opposite sense, namely blaming the medical staff for any mistakes and/or medical errors committed. The ambiguity of the regulation will benefit the party that is able to explain clearly and coherently the factual situation and, consequently, the legal reality of the situation and the legal reality that is being analyzed.

Aim and objectives

The main aim of this research study is to analyze physicians' opinion on the incidence of malpractice allegations during the COVID-19 pandemic. We wished to analyze the extent to which physicians were confronted during the pandemic period with accusations from patients, who complained of improper performance of medical acts and harm to their rights and interests. Moreover, we aimed to assess physicians' views on the extent to which the COVID-19 pandemic has favored the increase in malpractice allegations among patients. We want to analyze whether they believe that the high workload and stress generated by the COVID-19 pandemic has influenced the way they provide medical care, exposing them to the risk of making mistakes in the provision of specialized care, such that patients have seen their rights and interests harmed and jeopardized.

MATERIALS AND METHODS

For the realization of this study we chose as material and method an anonymous questionnaire consisting of 10 closed yes or no questions addressed to physicians on the topic of medical malpractice in the context of the COVID-19 pandemic.

Before starting to fill in the questionnaire, the doctors were asked to agree to their involvement in the study and were informed about the purpose and role of the study. The study participants were also provided with all the information they needed so that they were aware of the role and purpose of the study. The questionnaires completed by the physicians were anonymous and they were not required to state their first and last names when completing them. The group of physicians included in the study consisted of 50 people, working in different health units in Timis County. Physicians' participation in the study was free of charge and they had the right to withdraw at any time. The withdrawal of physicians from the study was voluntary, without them being manipulated or influenced in any way. The questionnaires were completed in a combined mode, distributed both in letter and electronically through various social networks.

The first question in the questionnaire addressed to the doctors aims to analyze their opinion on the increase in the number of malpractice cases during the pandemic due to the very high workload of doctors who worked in the Covid wards during that period. We wanted to analyze the extent to which the heavy workload and stress to which medical staff were subjected during the pandemic period favored the commission of various mistakes in practice, which caused a series of harms to patients, so that the latter had to turn to the competent judicial bodies to defend their rights and interests that were harmed.

The second question in the questionnaire aims to analyze the incidence of medical malpractice in medical practice during the pandemic period, in order to observe to what extent the participants involved in the study are aware or not aware of whether or not some of their colleagues have been accused by patients and called to court to be held legally accountable for the harm caused. The aim was to assess the extent to which malpractice claims have increased during the pandemic period or, on the contrary, whether there is an increase in malpractice claims influenced by the emergence of the new virus.

The third question addressed to the doctors who agreed to participate in the survey aims to highlight the level of knowledge and information they have on the Romanian legislation governing the civil liability of medical staff and health facilities for malpractice.

The fourth question analyzes to what extent the physicians included in the sample of subjects participating in the study consider that during the pandemic the refusal of medical staff to treat and admit patients who did not present a medical emergency constitutes a violation of their rights to healthcare, discriminating against this category of patients. There have been countless cases of this kind, in which patients who did not present a symptomatology that required emergency medical intervention were sent home to treat themselves, without being hospitalized in health facilities. In this context, we considered it appropriate and of great interest to find out what the doctors' opinion is on this subject, which has caused a number of complaints among the population.

The fifth question in the questionnaire seeks to analyze to what extent during the pandemic period doctors turned to lawyers specializing in malpractice litigation as a result of being accused by patients of various medical malpractice.

Question number six examines an extremely sensitive issue that has been widely debated, including in various specialized studies prepared in the context of the pandemic in our country, namely the gaps and ambiguities in Romanian legislation that medical personnel had to deal with during the pandemic in terms of malpractice. In the light of the health crisis that has shocked the entire planet and that has set in extremely quickly, without anyone being prepared, not even the staff in the health units, we would like to analyze the opinion of doctors on the need to improve the Romanian legislation on malpractice, so that it is much clearer, unambiguous and adapted to the situations they encountered in practice during the COVID-19 pandemic.

The purpose of the seventh question included in the questionnaire is to analyze the level of knowledge of physicians about the Romanian legislation on malpractice, which regulates the possibility of exoneration from liability of health care facilities' staff for disclosing patients' professional secrecy when this disclosure is motivated by the defense and protection of a public interest. It is precisely because this hypothesis is applicable in the context of the COVID-19 pandemic that we want to see to what extent healthcare professionals are aware of its existence in the legislation.

Question number eight explores a highly debated topic in the media. We wanted to find out the opinion of the participants in this study on the role and involvement of state authorities during the pandemic in supporting medical staff in health facilities, so that the conditions for providing health care would be much safer for patients. We set out to analyze to what extent they consider that the Romanian authorities were involved and provided them

with all the conditions to ensure that the provision of medical care took place in safe conditions for both them and the patients, or on the contrary, things were not like this, with the risk of a series of situations arising that could lead to the commission of various errors in medical practice.

The penultimate question in the questionnaire analyzes the opinion of doctors on the necessity and usefulness of having psychologists in the health units where SARS-CoV-2 infected patients were treated, to whom the medical staff could turn to, given the extremely difficult period that the specialists in the field have been through, the excessive workload and stress that the work on the Covid wards has involved.

The last question in the questionnaire aims to analyze the level of knowledge of the resident doctors involved in the study regarding the Romanian legislation in the field of malpractice, which regulates the exemption of medical staff from liability for damages caused to patients as a result of insufficient provision of diagnostic and treatment equipment or contact with nosocomial infections during hospitalization.

RESULTS

The data collected from the participating physicians in the study were centralized and statistically analyzed, and are presented in the form of figures.

Question 1: Do you consider that the pandemic period has favored the increase of medical malpractice by staff working in health facilities on Covid wards due to the extremely high workload? 0-NU; 1-DA. The results showed that 40% of the physicians participating in the survey did not consider that the pandemic period has favored the increase in medical malpractice by staff working in health facilities on Covid wards due to the extremely high workload. In contrast, the majority of doctors, 60%, claim the opposite, believing that the pandemic has influenced the increase in malpractice (Figure 1).

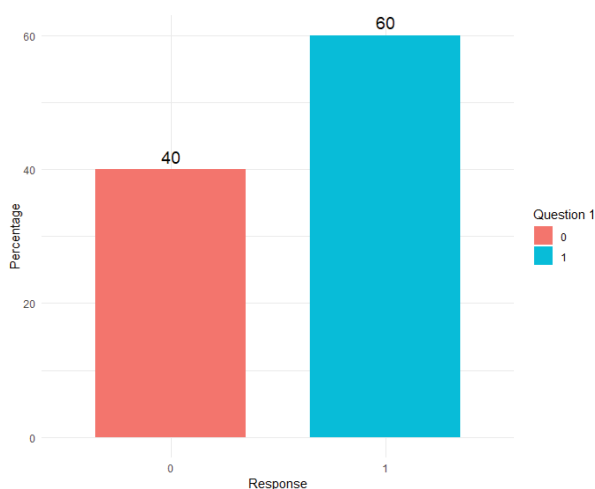


Figure 1. Statistical results for question 1

Question 2: Are you aware of any cases in which doctors working in Covid wards have been accused by patients of malpractice as a result of various errors in the provision of medical care? 0-NU; 1-DA. The results showed that 86% of the study participants have no knowledge about the existence of malpractice allegations during the pandemic period against physicians practicing on Covid wards. The remaining 14% of the survey participants stated that they are aware of the existence of certain situations in which their colleagues have been

accused by patients of committing certain professional errors in the provision of medical care (Figure 2).

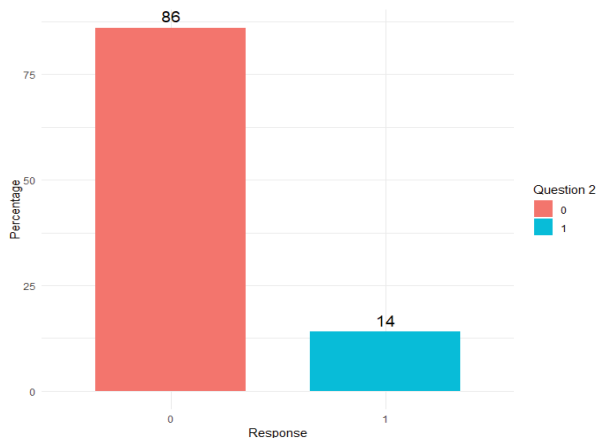


Figure 2. Statistical results for question 2

Question 3: Are you aware of the legislation in Romania regulating the civil liability of healthcare professionals and healthcare providers for professional errors committed in the course of the exercise of their profession? 0-NU; 1-DA. Regarding the third figure, 62% of the doctors who agreed to participate in the survey stated that they have no knowledge of the Romanian legislation that legally analyzes the institution of malpractice in the medical field. The opposite was true for 38% of those included in the survey, i.e. that they are aware of the Romanian legislation regulating the liability of medical staff for errors in specialty care, and that they are familiar with the content of these laws (Figure 3).

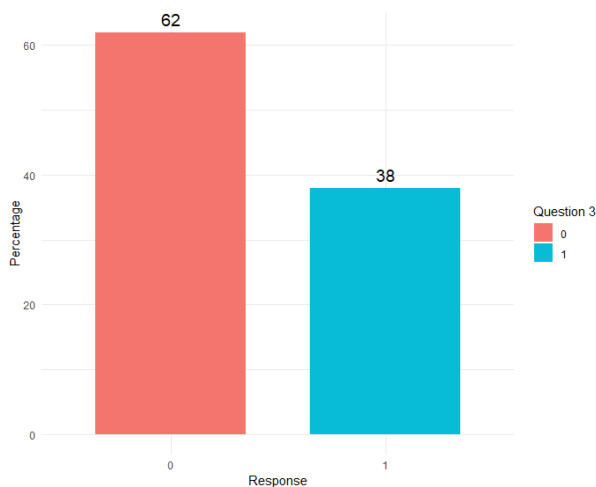


Figure 3. Statistical results for question 3

Question 4: Do you consider that during the pandemic the refusal of medical personnel to treat and admit patients who did not present a medical emergency constitutes a violation of their rights to healthcare, discriminating against this category of patients? 0-NU; 1-DA. The results revealed that only 14% of the respondents do not consider that during the pandemic the refusal of medical staff to treat and admit patients who did not present a medical emergency constitutes a violation of their healthcare rights, discriminating against this category of patients. Most of the doctors included in the survey expressed the opposite

opinion, namely an extremely high percentage, namely 86%, consider that in this situation patients are discriminated against, not being granted equal treatment in the medical act (Figure 4).

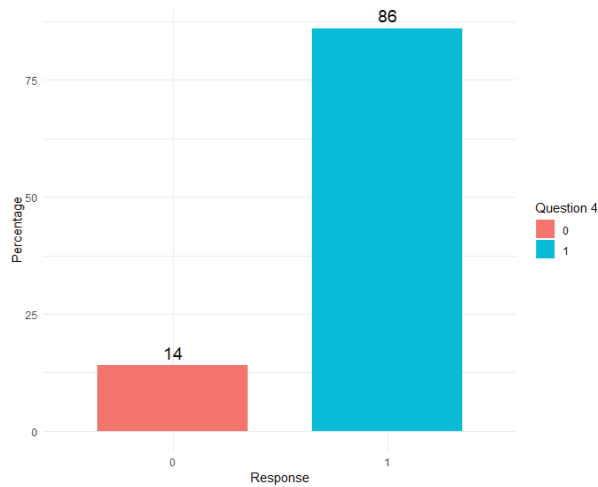


Figure 4. Statistical results for question 4

Question 5: During the pandemic period, did you use lawyers specializing in malpractice litigation because patients accused you of certain malpractice related to the provision of medical care? 0-NU; 1-DA. According to the results obtained, 42% of the physicians stated that they did not need to turn to lawyers during the pandemic to defend themselves in malpractice litigation, since their patients did not allege that they had committed any errors in the performance of medical acts. In contrast, 58% of survey participants reported the opposite, that they had to be represented in court by malpractice lawyers following complaints from patients during the pandemic (Figure 5).

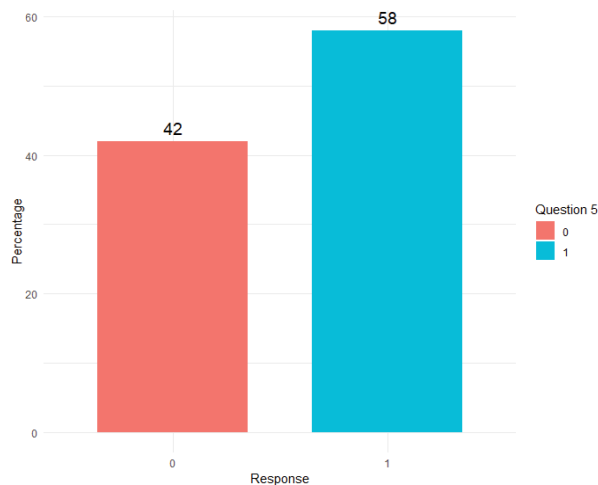


Figure 5. Statistical results for question 5

Question 6: Do you consider that the legislation in Romania regulating the liability of medical personnel for malpractice is deficient and needs to be improved and adjusted in view of the health crisis caused by the emergence of the pandemic? 0-NU; 1-DA. A small percentage of doctors, i.e. 20%, do not consider that the Romanian legislation regulating the liability of medical personnel for malpractice is deficient and claim that it does not need to be

improved and adjusted in relation to the health crisis caused by the emergence of the pandemic. On the contrary, most of them, namely 80%, stated the contrary, being dissatisfied with the way in which the malpractice legislation is enacted, requiring some changes to respond to the concrete needs caused by the emergence of the pandemic (Figure 6).

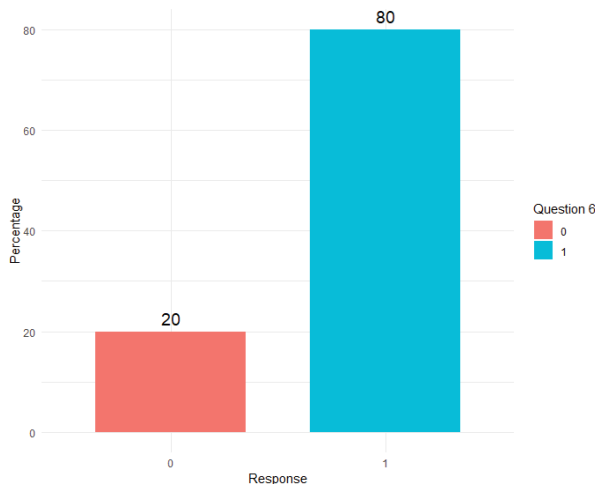


Figure 6. Statistical results for question 6

Question 7: Are you aware that under Romanian law, medical personnel are exempt from liability for disclosing patients' professional secrecy if such disclosure is prompted by the defense and protection of a public interest? 0-NU; 1-DA. The results showed that 62% of the physicians are not aware of the fact that according to the Romanian legislation, medical staff is exempted from liability for disclosing patients' professional secrecy if this disclosure is motivated by the defense and protection of a public interest, while 38% of them have knowledge on this subject (Figure 7).

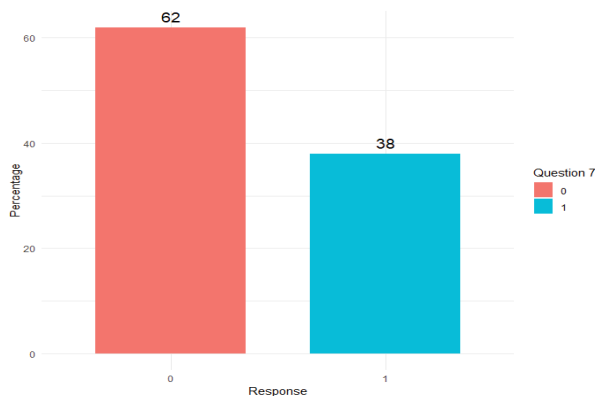


Figure 7. Statistical results for question 7

Question 8: Do you think that during the pandemic the state authorities could have cooperated and supported the medical staff in health facilities much more, so that the conditions of health care could have been much safer for patients? 0-NU; 1-DA. The results showed that 88% of the doctors involved in the study believe that during the pandemic the state authorities could have cooperated and supported the medical staff in health facilities much more so that the conditions of health care would have been much safer for patients, while 12% of the participants said the opposite (Figure 8).

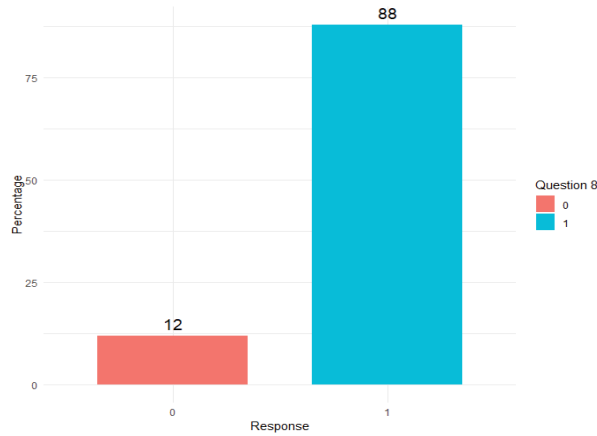


Figure 8. Statistical results for question 8

Question 9: Do you consider that during the pandemic it was necessary for medical staff in health facilities to be counseled by psychologists, given the stress they were under due to the extremely high workload and the medical severity of some cases? 0-NO; 1-DA. Only 8% of the respondents do not consider that during the pandemic it was necessary for medical staff in health facilities to be counseled by psychologists, given the stress they were under due to the extremely high workload and the medical seriousness of some cases, and the remaining 92% say that this measure is extremely beneficial (Figure 9).

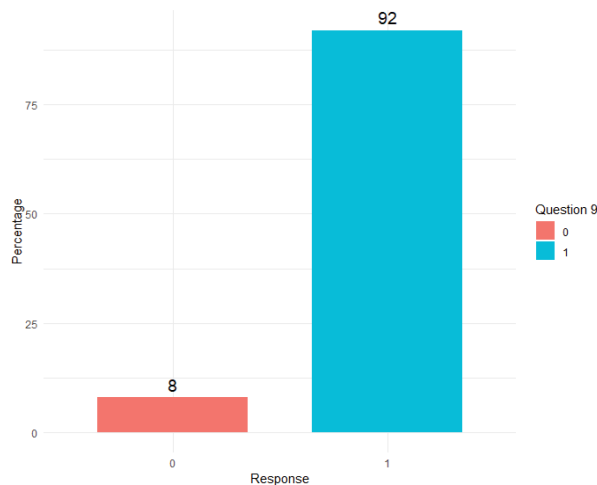


Figure 9. Statistical results for question 9

Question 10: Are you aware that medical staff were exempt from liability if, during the pandemic, harm to patients was caused by inadequate diagnostic and treatment equipment in health facilities or nosocomial infections? 0-NU; 1-DA. Interpretation of the results showed that 26% of the doctors involved in the study were not aware of the fact that medical staff were exempted from liability if during the pandemic period the harm caused to patients was caused by insufficient diagnostic and treatment equipment in health facilities or nosocomial infections, but a rather high percentage, 74%, were aware of this issue (Figure 10).

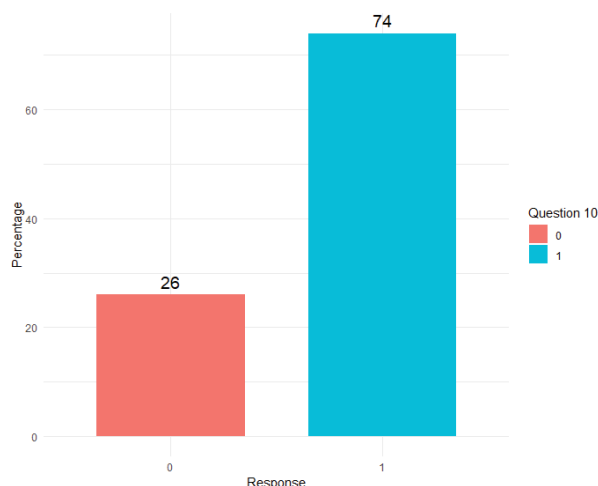


Figure 10. Statistical results for question 10

DISCUSSIONS

The number of accusations of medical malpractice increased during the pandemic, as medical personnel were subjected to extremely high stress and an increased workload, which led to the favoring of committing various professional errors during the medical act. We believe that improving the degree of knowledge regarding the legislation in the medical field will help doctors to know how to correctly manage the situations they face in medical practice in the relationship with patients, thus avoiding the appearance of malpractice accusations [21].

Another extremely important aspect that we believe needs to be pointed out and emphasized is that the interdisciplinary collaboration between the medical staff who worked in the Covid wards and psychologists is extremely beneficial, because unfortunately the pandemic period has overwhelmed everyone, especially those involved in treating patients, generating for the latter a state of continuous stress and anxiety.

CONCLUSIONS

In conclusion, what is essential in malpractice cases are the factual situation, the careful analysis of all the elements likely to lead to a clear legal conclusion, since any nuance of the factual reality and the identification of its subtleties will significantly contribute to the shaping of a substantiated legal reality right in law. The medical personnel liability legislation, as it is currently corroborated with the one adopted during the pandemic, represents a trap into which it is easy to fall – under the appearance of general provisions, the vagueness, the gap and the equivocation are hidden. Although we could argue that they benefit legal professionals, who have thus opened the way to the interpretation and therefore the manipulation of the rules in favor of the interests they defend, we appreciate that they prejudice the parties to a dispute.

Conflicts of Interest

The authors declare no conflict of interest.

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