Compensation of hospital-acquired infections in France

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Extent of the phenomenon

According to the last survey carried out by the Institut de veille sanitaire (InVS) in 2006, 4.97 % of patients treated in 2,337 health establishments (i.e. approximately 95 % of hospitalisation beds) suffer from one or even several hospital-acquired infections, i.e. 1 out of 20 patients. In comparison with 2001, this rate has decreased by 8 %.

Urinary infections (30.3 %) are the most frequent, followed by infectious pulmonary diseases (14.7 %) and surgical site infections (14.2 %). Skin and soft tissues (10.2 %) are then affected followed by the upper respiratory tract (6.4 %).

The three micro-organisms most commonly responsible for hospital-acquired infections in France are *Escherichia coli* (25 %), *Staphylococcus aureus* (19 %, including 52 % methicillin-resistant) and *Pseudomonas aeruginosa* (10 %).

At a worldwide scale, the WHO (2008) considers that 1.4 million persons suffer at any moment from a hospital acquired infection. The maximum prevalences are reported in the western Mediterranean region (11.8 %), in Southeast Asia (10.0 %) and in the Eastern Pacific region (9.0 %).
I. Definition of hospital-acquired infections

1. The hospital-acquired infection concept

- Absence of definition of the concept in the law no. 2002-303 of 04 March 2002 relating to patient's rights and the quality of the health system.

- In the absence of an epidemiological definition of the hospital-acquired infection concept, the use of this concept refers to its etymological meaning, in this case an event that can be directly attributed to a healthcare practice or treatment.
However, certain attempts of definition of hospital-acquired infection may be cited, in particular those provided for in:

- A circular of 1988 relating to the organisation of the monitoring and prevention of hospital-acquired infection, which defines hospital-acquired infections as: "any disease provoked by micro-organisms acquired in a health centre by a patient after his admission for hospitalisation or outpatient treatment".

- Circular DGS/DHO S/E no. 2000-645 of 29 December 2000 relating to the organisation of the fight against hospital-acquired infections in health centres, which highlights that hospital-acquired infections are infections acquired in a health centre and which were absent on admission of the patient.

- The report by the CTINILS (Comité Technique des Infections Nosocomiales et des Infections Liées aux Soins) (Technical Committee for hospital-acquired infections related to treatment) from May 2007 concerning the update of the definition of hospital-acquired infections presented the latter as "infections acquired in a health centre, irrespective of their mode of acquisition and not allowing to take into account infections acquired via a health process and for which very close prevention measures could have been implemented".

- Decree no. 2010-1408 of 12 November 2010 coding article R. 6111-6 of the public health code defines hospital-acquired infections as "infections associated with treatment acquired in a health centre".
2. The distinction between different hospital-acquired infections

A. Distinction between endogenous HAI and exogenous HAI

The interest of the distinction lies in the fact that for years, health centres could be exonerated from all liability in the case of endogenous hospital-acquired infections.

• **Distinction criterion: transmission mode**

- **Endogenous** hospital-acquired infections are those in which the patient infects him/herself with his/her own micro-organisms, following an invasive procedure and/or due to a specific weakness.

- **Exogenous** hospital-acquired infections are those due to a transmission from a patient to another via the hands/work instruments of the medical or paramedical personnel, or provoked by micro-organisms carried by the medical personnel or related to the contamination of the hospital environment (water/air/equipment/food).

- For compensation purposes, the courts ignore this distinction (Civ, 1ère, 4 April 2006, n° 04-17491) and CE, 10 oct. 2011, Centre hospitalier universitaire d’Angers, n°328500)

The French Cour de Cassation (highest appeal court) considers that even if the patient is a carrier of a micro-organisms, these were only revealed via the invasive procedures performed.

The French Council of State resisted until 2011 refusing to recognise a fault or negligence in the organisation of the operation of the hospital service when the patient presented and endogenous hospital-acquired infection (Council of State 27 September 2002).
B. Distinction between HAI and HCAI (healthcare associated infection)

The interest of the distinction lies in the possible compensation assumed: a healthcare-associated infection does not entitle the patient to compensation according to the specific provisions set out in the law of 04 March 2002.

- **Distinction criterion: scope of infection**

  - **Definition of HCAI:**

    The CTNILS defines HCAI as any infection occurring "during or further to the treatment (diagnostic, palliative, preventive or educational) of a patient, and which is not present or under incubation at the beginning of the treatment".

  - **Distinction of HAI with respect to HCAI:**

    o "A hospital-acquired infection is an HCAI acquired in a health centre".
    o The HCAI includes the standard hospital-acquired infection, as well as infections acquired during treatments dispensed outside a health centre.
II. Compensation regime for damages due to hospital-acquired infections

- The compensation regime for damages due to hospital-acquired infections has undergone a noteworthy evolution with the law no. 2002-2003 of 04 March 2002 relating to patient rights and health system quality.

- The law was drafted in consultation with patient associations. Its principle advances are the following:

  • the legal concept of patient's rights;
  • a better representation of users within major health institutions and hospitals;
  • the right of patients to have access to all of their medical records;
  • a compensation of therapeutic risk, i.e. a medical accident without professional fault or negligence.
This law created the ONIAM which is in charge of compensating victims of medical accidents, under national solidarity, resulting from a “treatment risk” that fulfils the conditions set by this text.

Its compensation mission has been progressively enlarged to victims:

- of medical accidents resulting from emergency health measures, compulsory vaccinations or HIV contamination (law no. 2004-806 of 09 August 2004 relating to public health policy);

- prejudice resulting from contamination with hepatitis C virus (HCV) caused by a transfusion of blood products or an injections of blood-derived medicinal products;

- of Benfluorex.

The Oniam is also a one stop shop that examines compensation requests, but can also be party to litigation. The choice of proceedings is left to the discretion of the victims.
II. Compensation regime for damage due to hospital-acquired infections

- The provisions of the law of 4 March 2002 only apply to hospital-acquired infections resulting from prevention, diagnosis and care procedures performed after the 5 September 2001, date the law came into effect.

- Therefore, there are two compensation regimes depending on the date of the medical procedures that generated the hospital-acquired infections: that concerning hospital-acquired infections that were contracted following procedures performed before the 5 September 2001 (1), and that concerning hospital-acquired infections contracted following procedures performed after the 5 September 2001 (2).
1. The compensation of hospital-acquired infections contracted following medical procedures performed prior to the 5 September 2001

- The compensation rules are those developed by case-law based on the ordinary rules of liability law.

The French Cour de Cassation has confirmed the existence of a safety obligation which is an obligation to achieve a specific result (obligation de résultat) specifying in the decisions delivered in 1999 that: "the care hospitalisation contract agreed between a patient and a health centre imposes on the latter a safety obligation which is an obligation to achieve a specific result concerning hospital-acquired infections, from which it can only be released by providing evidence of an external cause". (Cass., civ. 1, 29 June 1999, n° 97-14254, n° 97-15818 and n° 97-21903)

**NB:** the compensation regime is, in this case, more severe for the victims of hospital-acquired infection, because even though case law had established a safety obligation which is an obligation to achieve a specific result for health centres, the latter could be exonerated from their liability by demonstrating an external cause, but also by simply demonstrating compliance with hygiene and asepsis rules.
2. The compensation of hospital-acquired infections contracted following medical procedures performed after the 5 September 2001

- **Compensation principle**

Article L 1142-1 I of the public health code provides that: *"the centres, departments and organisations mentioned above are responsible for any damage resulting from hospital-acquired infections, unless they provide evidence of an external cause".*

- Therefore, there is strict (no-fault) liability of the health centres with respect to hospital-acquired infections.

- However, strict (no fault) liability is excluded in the case of hospital-acquired infections contracted during a medical procedure performed in a medical practice. If applicable, the patient must prove the fault or negligence of the doctor to be compensated.

[**NB:** The 2002 law did not take up the case law solution of the Cour de Cassation in its 1999 decisions, retaining the automatic liability of the doctor].
Compensation regime

The compensation regime differs depending on the severity threshold fixed by the law of 2002 at 25%.

- Definition of the severity threshold: it is a threshold corresponding to the partial permanent disability of the victim of the damage caused by the hospital-acquired infection.

• If the severity threshold is less than 25%:

It is the standard compensation regime that applies. The victim will then be compensated by the insurance company of the party whose liability was established.

• If the severity threshold is greater than 25%:

- In principle, it is the ONIAM, a public organisation, that will compensate the victim irrespective of the existence of a civil liability or not.

- Special case: if the severity threshold is greater than 25% but there was an asepsis fault or negligence, the ONIAM can turn against the health centre for the reimbursement of the sums paid.
Evolution in the number of hospital-acquired infection matters treated by the ONIAM
Thank you