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Corresponding author: *happy.end74@hotmail.com*

CRIMINAL LAW ASPECTS OF MEDICAL ISSUES OF DOCTORS AND PATIENTS

Jasmina Krštenić

Basic Public Prosecutor's Office in Lazarevac, happy.end74@hotmail.com

Jovan Bukovala

University of Belgrade - Faculty of Philosophy, jovan.bukovala@f.bg.ac.rs

Nikolaj Ivannikov

*University "Nikola Tesla" in Belgrade - Faculty of Business Studies and Law
nikolaj.ivannikov@fpp.edu.rs*

Abstract: *Medical law confronting criminal law brings new perspective of qualifications for patients who are suffering and trying to hurt others. Other perspective is focused on doctors' mistakes, unwilling usually. New era is seriously damaged by unconsciously dangerous virus. We must mention new disease and old danger called AIDS. People have these viruses and they do not protect themselves and do not protect others from themselves. Also, we are focused on doctors overwhelmed with numerous patients, with stress and hurry, and their mistakes with serious and less serious consequences. Nobody wants to make mistakes; somebody wants to hurt others willingly. Criminal procedural law must detect the right perpetrator and strengthen special and general prevention with the appropriate criminal sanctions. There are lot legal and medical dilemmas, and this article will try to describe, explain, and give unassuming solution with stress on future similar problems and necessity of legal remedies.*

Keywords: *criminal law, medical law, doctors, patients*

1. INTRODUCTION

Law and medicine could be intricately connected in situation when the process of healing is not conducted by the rule of medicine. Why is that happening is ques-

tion for criminal law, unfortunately. Lives of patients, their health are crucial objects of medical protection. Medical law is separate law branch, and it is about medical activities. This law sphere has appeared last few decades, but its importance is so significant.

The focus is the relations of doctor and patient. The significance of the word “patient” talks enough about desirable behaviour. A patient must be patient and wait for medical help. Also, a doctor must be professional and ethical to give right help. That is description of an ideal situation, but unfortunately, the life is not perfect.

We will focus on problematic situation from the criminal and medical aspect. We will describe questionable situations, legally described as a criminal offence. We regard doctors like heroes, and we want to strongly believe in that.

We must make difference between negligence and intention. There is a huge difference between these two issues.

The negligence is failure to take proper care, in our case, to take a proper care over patient’s health condition.

If we want to be more precise than we will quote the Cambridge English Dictionary: “Negligence is failure to give enough care or attention to someone or something that you are responsible for.” (Cambridge English Dictionary)

This definition clearly shows that it is all about “enough care”. A doctor can give some sort of care, but problem occurs if that care is not enough to preserve the health and life of a patient. That issue is very debatable in the frame of medical and criminal law. We are considering this issue in Serbian and international borders. There are some differences, but the intention is the same.

We will start from the main principle of The Serbian Criminal Code: No Punishment without Guilt - Article 2 defines that punishment and caution may be imposed only on an offender who is guilty of the committed criminal offence.¹

Criminal offence is by the Article 14: (1) A criminal offence is an offence set forth by the law as criminal offence, which is unlawful and committed with guilty mind/*mens rea*. (2) There is no criminal offence without an unlawful act or culpability, notwithstanding the existence of all essential elements of a criminal offence stipulated by law.

Patients ask for medical help and doctors give them the most suitable medical help according to the highest scientific standards.

¹ Criminal Code, Article 2 (Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005) with added amendments from 31 August and 29 December 2009 and 24 December 2012

Unfortunately, there is always untypical situations, patients with complicated health problems. Also, there is sometimes a doctor who is surprised with the medical condition of the patient. In that interaction could be brought a problem. When that problem gets criminal law aspect, medical law must “call” criminal law for help.

2. CRIMINAL OFFENCES AGAINST THE HEALTH ACCORDING TO SERBIAN CRIMINAL CODE

Serbian Criminal Code defines in the Chapter 23 offences against human health. There are 14 criminal offences in this chapter, but now we will focus on offences which doctor could commit.

In spite of that, we will explain very, unfortunately, current criminal offence which could commit everyone in this specific times of global pandemic.

Of course, we are talking about criminal offence Transmitting Contagious Disease defined by the Article 249: Whoever fails to act pursuant to regulations, decisions or orders for suppression or prevention of contagious disease and thereby a contagious disease is transmitted, shall be punished by imprisonment up to three years.²

Each state described its own rules, regulations, decisions, orders for suppression and prevention this destroyable unique virus. These rules and regulations influence on, conditionally speaking, regular patient who has health problems long before this global pandemic state.

Also, equally important is criminal offence defined by Article 248: Failure to Act Pursuit Health Regulations During Epidemic - This criminal offence commits whoever during an epidemic of a dangerous contagious disease fails to act pursuant to regulations, decisions or orders setting forth measures for suppression or prevention thereof, and shall be punished by fine or imprisonment up to one year.³

2 Criminal Code, Article 249 (Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005) with added amendments from 31 August and 29 December 2009 and 24 December 2012

3 Criminal Code, Article 248 (Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005) with added amendments from 31 August and 29 December 2009 and 24 December 2012

3. CRIMINAL OFFENCES WHICH COULD BE COMMITTED ONLY BY A DOCTOR

The common opinion and fact which should be an axiom is that doctor heals and could only help to person in health need. There is unbreakable bound between a doctor and a patient. It is all about trust and belief.

Doctor must provide medical service and use adequate means and suitable treatment, if doctor in professionally work does not behave according to those medical standards we have questionable situation according to criminal law.

4. MEDICAL MALPRACTICE

Criminal offence Medical Malpractice is defined in Article 251. This offence commits (by paragraph 1) A doctor who in providing medical services uses an evidently inadequate means or an evidently unsuitable treatment or fails to observe appropriate hygiene standards or evidently proceeds unconscientiously and thereby causes deterioration of a person's health, shall be punished by imprisonment of three months to three years.

By the paragraph (2) The penalty specified in paragraph 1 of this Article shall be imposed to other medical staff who in rendering medical assistance or care or performing other medical activity proceeds in an obviously unconscientious manner thereby causing deterioration of a person's medical condition, and by paragraph (3) if the offence specified in paragraphs 1 and 2 of this Article are committed from negligence, the offender shall be punished by fine or imprisonment up to one year.

If we want to prove doctor's intention or negligence, we must collect evidence which will have strong evidence potential to persuade court of doctor's guilt for causing deterioration of a person's health.

5. FAILURE TO PROVIDE MEDICAL ASSISTANCE

Criminal offence Failure to Provide Medical Assistance is stipulated in Article 253. This offence commits: (1) A doctor who contrary to his duty refuses to render medical assistance to a person in need of such assistance, and whose life is in immediate and present danger or is in danger of onset of grave bodily harm or serious deterioration of health, shall be punished by fine or imprisonment up to two years.

This is the most harmless action of doctor. A doctor contrary to his duty refuses to render medical assistance to a patient who needs medical assistance, patient's life is in immediate and present danger. Question of further medical expertise is to describe and explain what a doctor should do, what he did or did not do and what were the consequences on patient's health and medical condition. (Stojanović, 2020)

In paragraph (2) If due to the offence specified in paragraph 1 of this Article, the person to whom medical assistance was not provided sustains grave bodily harm or serious deterioration of health, the offender shall be punished by imprisonment of six months to five years.

In paragraph (3) If the offence specified in paragraph 1 of this Article results in death of the person to whom medical assistance was not provided, the offender shall be punished by imprisonment of one to eight years.

6. GRAVE OFFENCES AGAINST HEALTH

Article 259 stipulated Grave Offences against Health. (1) If due to offences specified in Articles 249, 251 paragraphs 1 and 2, 252, 254, 255 paragraph 1, 256 paragraphs 1 and 2, 257 paragraph 1 and 258 paragraph 1 hereof, a person sustains grievous bodily harm or serious health impairment, the offender shall be punished by imprisonment of one to eight years.

Paragraph (2): If the offences specified in Articles 249, 251 paragraphs 1 and 2, 252, 254, 255 paragraph 1, 256 paragraphs 1 and 2, 257 paragraph 1 and 258 paragraph 1 hereof result in death of one or more persons, the offender shall be punished by imprisonment of two to twelve years.

Paragraph (3): If the offences specified in Articles 251 paragraph 3, 255 paragraph 2, 256 paragraph 3, 257 paragraph 2 and 258 paragraph 2 hereof result in grievous bodily harm or serious health impairment of a person, the offender shall be punished by imprisonment up to three years.

Paragraph (4) defines If the offences specified in Articles 251 paragraph 3, 255 paragraph 2, 256 paragraph 3, 257 paragraph 2 and 258 paragraph 2 hereof result in death of a person, the offender shall be punished by imprisonment of one to eight years.

This legal solutions of Serbian legislator show the strong decision of the state to severe punishment of doctors in cases of negligence than other conditionally said "non medical" offenders. The medicine is exact science and patient has enormous

trust in doctor. At the other side, a doctor has strong professional and human obligation to help, to heal and to dedicate to each patient.

Is there any justification for doctor in hurry to be negligent? Does doctor have time, collegial help or adequate medicine and apparatus to give right medical help to each patient? These are deliberately rethorical questions. Answers are in innerspace made of doctors' capabilities and patients' expectations.

7. FOREIGN EXPERIENCES AND SOLUTIONS

The Balkans' countries are built on the same legal source and their criminal codes have similar legal solutions no matter if specific state is a member of the European Union or is still outside that organization.

We do not have enough space to show rich Balkans' legal treasure of criminal law solutions in the field of human, people's health. We have chosen several examples, good or not so good practice, reader will make conclusion.

8. THE BALKAN'S LEGISLATIVE SOLUTIONS

Croatian Criminal Code in the group of Criminal offences against the health of people stipulates criminal offence Medical Malpractice by Article 181⁴. This offence commits: (1) A doctor of medicine, doctor of dental medicine or other health care worker who in rendering health care services applies an obviously inadequate means or method of medical treatment or in some other way obviously fails to follow the rules of the health care profession or obviously acts carelessly, thereby causing the deterioration of an illness or the impairment of the health of another person shall be punished by imprisonment not exceeding one year.

We can notice that this crime could comitt not only a doctor of medicine, but also a doctor of dental medicine or other health care worker who in rendering health care services applies an obviously inadequate means or method of medical treatment.

By paragraph (2) If as a result of the criminal offence referred to in paragraph 1 of this Article another person suffers a serious bodily injury or the existing illness is considerably deteriorated, the perpetrator shall be punished by imprisonment not exceeding three years.

⁴ Criminal Code (Official Gazette of the Republic of Croatia Nos 125/11, 144/12, 56/15, 61/15, 101/17 and 118/18)

The punishment depends on the seriousness of injury of person in medical need. The more serious injury, the more severe punishment. This gradation we can see in next paragraphs.

By paragraph (3) If as a result of the criminal offence referred to in paragraph 1 of this Article another person suffers an particularly serious bodily injury or a person's pregnancy is terminated, the perpetrator shall be punished by imprisonment from six months and five years. By paragraph (4) If as a result of the criminal offence referred to in paragraph 1 of this Article one or more persons die, the perpetrator shall be punished by imprisonment from three to twelve years.

If crime is committed out of negligence, the punishment is not so severe.

By paragraph (5) If the criminal offence referred to in paragraph 1 of this Article is committed by negligence, the perpetrator shall be punished by imprisonment not exceeding six months.

By paragraph (6) If the criminal offence referred to in paragraph 2 of this Article is committed by negligence, the perpetrator shall be punished by imprisonment not exceeding one year.

By paragraph (7) If the criminal offence referred to in paragraph 3 of this Article is committed by negligence, the perpetrator shall be punished by imprisonment not exceeding three years and by paragraph (8) If the criminal offence referred to in paragraph 4 of this Article is committed by negligence, the perpetrator shall be punished by imprisonment from one to eight years.

It is very noticeable that Croatian legislator intended to give legal solutions only in one article.

Slovenian legal solution is classified in Chapter 20 of Crimes Against Human Health. Article 179⁵ stipulate special offence of negligent treatment.

This criminal offence commits a medical professional that violates the practices and rules of the medical science and profession and whose conduct negligently causes a significant deterioration in health of a patient can be sentenced to imprisonment up to three years. If the patient dies, the sanction is imprisonment from one to eight years.

9. EUROPEAN STANDARDS

Republic of Serbia and all surrounding countries are members of the Council of Europe and have obligation to synchronize their legislative framework with Council of Europe standards.

Revised European Social Charter-Article 11-The right to the protection of health defines: With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: 1. To promote as far as possible the causes of ill-treatment; 2. To provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. To prevent as far as possible epidemic, endemic and other diseases as well as accidents.

The other international document, Convention on Human Rights and Biomedicine, better known as Oviedo Convention, in Article 28 defines Public Debate: Parties to this Convention shall see to it that the fundamental questions raised by the developments of biology and medicine are the subject of appropriate public discussion in the light, in particular, of relevant medical, social, economic, ethical and legal implications, and that their possible application is made the subject of appropriate consultation.

10. JUDICIARY PRACTICE

Investigation of crimes against health has its specific problems because the type of evidence for prosecuting this sort of crimes are consisted of judicial experts' opinion. Public impression is that colleague doctor will not be completely objective during medical analysis and by giving professional opinion for colleague who is confronted with possible criminal charge.

This prejudice we will legally treat like it deserves, like false public opinion. Professional expertise is very important part of collecting evidence. The proper interrogation of patient and witnesses are important, too.

From 1869 when legal definition of medical error appeared, judiciary practice are trying to conduct criminal investigations in cases of criminal offences against health which are committed by doctors. In 1869 a medical expert Rudolf Virchow defined medical error as an error that occurs in a deviation from generally accepted rules of medical profession because of insufficient care. (Kaufman, 1989)

Medicine has changed through centuries and doctors also changed, improved their medical knowledge. Patients also have changed. There are new disease, new infections, viruses. Court has changed its rules in the way of more professional expertise which could help in the field of collecting necessary evidence.

The most relevant and reasonable conclusion according to fast development of science is that the role of science in medicine has increased dramatically in recent decades. (Leahy, 1989)

11. INSTEAD OF CONCLUSION

Constant race and unique cooperation of criminal and medical law have to improve legal solutions in this legal area and to make more effective all criminal investigations and criminal procedures regarding criminal offences against people's health.

Special and general prevention must improve the work of doctors and to build stronger trust of patients in their medical helpers. There always be some sort of negligence because doctors are overwhelmed with number of patients, documentations to be filled in often during the medical exam of patient. Professional approach to each patient, intent to find right diagnose and to subscribe the best individualised medical therapy are too many demands for every doctor. Doctors are heroes, these days more than ever, but, unfortunately, they are not superheroes without possibility to make mistakes.

We can analyse current situation of health system in each country, to collect data and then to compare data and make statistics calculation, but we must never forget that a patient should not be a number. A patient is a human, but also, a doctor is human, human makes mistakes which are often inhuman.

Proper education of doctors during faculty education, during specialisation, supplying with modern hospitals, improved medicaments, adequate salary, are some of pre-conditions for better relations between a doctor and a patient. Regarding current situation, social, financial, medical, health conditions on global and national level, the conclusion is unique: we all must be patient...

REFERENCES

- [1] Cambridge English Dictionary (www.dictionary.cambridge.org)

- [2] Criminal Code (Official Gazette of the Republic of Croatia Nos 125/11, 144/12, 56/15, 61/15, 101/17 and 118/18)
- [3] Criminal Code, Article 2 (Official Gazette of RS, Nos. 85/2005, 88/2005, 107/2005) with added amendments from 31 August and 29 December 2009 and 24 December 2012
- [4] Criminal Code of the Republic of Slovenia adopted in 2008, last amended in 2017
- [5] Kaufman, A. „Moderne Medizin und Strafrecht, 1989
- [6] Leahy, R. E. Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines, 77 CAL. L. REV. 1483, 1487-88 (1989)
- [7] Stojanović, R (2020) . „Komentar Krivičnog zakonika“, deseto dopunjeno izdanje, Službeni glasnik, Beograd