

MEDICAL NEGLIGENCE IN THE REPUBLIC OF SERBIA

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In the area of protection and improvement of human health, it is of particular importance to provide legal, effective, correct, professional and timely medical assistance; performing other healthcare activities, or providing medical assistance or care. In this way, a significant social function is achieved, as well as the protection of the proclaimed right by the Constitution on the inviolability of the physical and psychological integrity of man (human health). However, due to the physician's or other medical activity, it is possible that the health of the person according to which the corresponding activity is undertaken is deteriorating. In the case of serious mistreatment of physician's or another medical profession, or a gross violation of the rules of the profession, resulting in a more serious consequence of the health of people, then all modern legislation provides for criminal responsibility and punish-ability for a particular criminal offense - inadequate medical assistance. A similar situation exists in the Republic of Serbia. In this paper, this crime is analyzed from the aspect of the concept, characteristics, features, forms of expression and other grounds for determining criminal responsibility and punishment of its perpetrator.

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Introduction

People's healthcare, along with life protection and bodily integrity, represents a social function which every country has performed since the early ages until this day. This is manifested in numerous crimes from which these personal and social values are protected, since the first written legal codes (e.g. Dušan's code) (1). Naturally, not only that the care was incomplete, inefficient, unevenly distributed, but also had minor or greater differences in incriminations of violating or imperiling these social values, depending on characteristics and type of a state organization.

Starting from France's bourgeois revolution, the protection of these social values has gained significance, considering the declared human rights and freedoms. Naturally, among basic, fundamental, universal, natural and general human rights, there is the right to live, the right of inviolability of the

physical and mental (psychological) integrity, and the right of an individual to be healthy. The protection of these human rights was proclaimed as a part of universal (UN) and regional (CoE) international documents and constitutions of states as the highest legal acts (2).

All positive obligations in Criminal law in this specific area regulate various forms and aspects of manifestations of the crimes against all of these human and social rights, as well as against people's health. The situation in Serbia is similar. Serbia acknowledged the first crimes against the general welfare just in 1929 altogether with the Declaration of the Criminal law of the Kingdom of Yugoslavia. All future criminal law acts: Criminal law of the Federal People's Republic of Yugoslavia from 1959, just as the Criminal law of the Socialist Republic of Serbia (as well as the laws of other socialist republics and socialist autonomous provinces) from 1977, acknowledged crimes against people's wellbeing (3). It is the same nowadays in the Republic of Serbia, where starting from January 1st, 2006 the Criminal law has been in use. This law in chapter 23 predicts more felonies against people's welfare (known as the Crimes against Human Life and Health).

The Protection of People's Health in the Criminal Law

The Criminal law has been in use since January 1st, 2006 in the Republic of Serbia. It predicts more criminal acts in chapter 23 "Criminal Acts against People's Health" which, as the object of pro-

tection, has people's welfare (4). Namely, these are the crimes against not only the people's wellbeing but also the right to protect one's health, which is guaranteed in article 68 of the Republic of Serbia's Constitution. The crimes against general health had been earlier systematized (according to the law from 1977) into a unique group of acts together with "ecological" acts against the environment (5). Health is the psychophysical state of a human being, including all organs and body parts functioning harmoniously and processes, which enables one to lead a normal life and labor (6).

As opposed to health there is illness, the psychophysical state, which is created under the effect of germs, bacteria and viruses on the human body and which leads to a dysfunction in the built and function of particular organs, tissues or the whole body as a whole unit, because of which a normal life and labor are weakened or interrupted. Among illnesses, the most dangerous of all are infectious diseases, characterized by spreading fast among great number of people in large areas, causing severe and permanent consequences, and, finally, death (7).

Therefore, the object of protection from crimes is welfare. However, the object is determined in different ways, depending on the type of the felony, and so it appears as: a) the health of a subjectively unspecified number of people affected by the transmission of infectious diseases; b) the health of a specific individual affected by impetuous medical assistance (8).

These criminal acts are naturally blanketed. In most cases, the act of implementation consists of acting against the regulations, in fact, violating law or by-law regulations, or orders given by competent state bodies which belong to the field of healthcare, which means that for knowing the content and characteristics of a structure responsible for these acts, it is essential first to determine the content of the law, other regulations and the extent of the competent state bodies (restrictions or orders) which are being violated (9). Moreover, felonies, as drug abuse, are systematized as well in this chapter, and are a part of the scope and structure of the crimes against health with approximately 90 % representing the actual violation of international documents, universal or regional, which regulate actions of preventing and undoing illegal activities related to production, processing and usage of narcotics and psychoactive substances (10).

These felonies result in endangering people's health or creating the danger of arrival, or spreading a disease or deteriorating other individual's health (11). That danger as a consequence appears in two forms: concrete and abstract danger. The concrete danger is real, direct; it can suddenly affect the life, bodily integrity and the health of an individual. This means that the possibility of violating these values is definite and yet there is no such doing. This type of danger is included in the form of a felony and it must be proved in the legal procedure. Abstract or general danger can occur in a particular action, thus endangering life, bodily integrity or health, but does not occur in some particular incidence. To carry out a legal process, it is considered that the consequence or the abstract danger compromising the protected

has been caused. This danger is not a part of a crime's form, therefore in a legal procedure, it does not necessarily have to be proved in a particular case. The solely existence of the abstract danger is enough to undertake the procedure because the moment the danger occurred it is considered to be a consequence of a felony (12).

However, some criminal activities in this chapter can result in a violation (creating a new illness, making the already existent condition deteriorate or a simple trauma) (13). Still, these are not held against unspecified individuals, but against a specific individual. Such felonies are: transmitting an infectious disease, negligent medical assistance and medicine preparation and distribution. If undertaking the procedure for the basic form of a crime in this chapter causes a violation, such as: a) severe physical trauma, b) actions taken to severely endanger health, c) death of one or multiple individuals, then, these actions are formed as a specific crime- serious crime against people's health.

Many of these crimes can be committed by anyone, but some of them can only be performed by certain individuals: a doctor of medicine or any other health officer (negligent medical assistance), a doctor of medicine (not providing medical care), an individual responsible for providing medicines (negligent behavior during making and distributing medicines), or an individual responsible for medical examination of livestock for slaughter (negligent examination of provisions).

In terms of fault, many of these crimes are premeditated, while others can be qualified as premeditated or not premeditated.

Among crimes against human welfare, there is a crime which by its significance, nature, characteristics, the perpetrator, the type and scope of the caused consequence is singled out, and it is the crime of Medical Negligence from article 251 in the Criminal law, although since 1951 until today it has been named as Patient's Medical Negligence. Anyway, this crime appeared for the first time in the Serbian law system in 1929 along with the declaration of the Criminal law of the Kingdom of Yugoslavia, which determined two unnamed types of this very crime, nature, and character, in regulations of articles 263 and 264 (14).

Medical negligence

The crime of Medical Negligence was put in the positive criminology in the Criminal law of Serbia in 2005 in chapter 23 under the name of Crimes against People's Welfare according to regulation in article 251. It is used to inculcate incompetent, immoral, illegal acts of doctors of medicine and other medical officers, by which there is a great deviation from the medical field, knowledge, and skill, and causing severe health issues in the sense of "deteriorating" the condition of an individual who is receiving certain medical assistance.

The crime itself consists of Medical Negligence, malpractice of medical care or assistance, by physicians or other health workers, which results in deterioration of one's health (15). The object of protection from this crime - Medical Negligence, the

malpractice of medical workers, or failing in other medical treatments, is individuals' welfare. Therefore, the type of an individual's medical condition is not of great importance.

In historical terms, this crime appears for the first time in domestic Criminal law together with the Criminal law of the Kingdom of Yugoslavia in 1929 (16). Reportedly, this law's chapter 23, "Crimes against the General Welfare" distinguishes two types of this crime. Since they are unnamed crimes, their nature, characteristics, and content are excluded from legal descriptions.

The first act is formulated in article 263. This crime is committed by a physician who, while treating some individual, without any intention harms the individuals' health or greatly deteriorates it. The act is determined by consequential damage, which means that in the process of performance, there is an occurrence of performing or not performing, which is a reason enough for causing a consequence: a) affecting health, b) greatly deteriorating one's condition. It is of major importance for the crime to be committed: a) by a specific individual- a physician and b) at the right time- while providing medical assistance. A perpetrator is a specific person- a medical doctor, and when it comes to the fault, negligence is necessary. This crime receives a cumulative punishment, incarceration and a fine of 30.000 dinars. A more serious form of this crime is punishable by incarceration for at least two years only if the procedure caused a severe consequence- death.

The other crime of this sort is formed in regulation of article 264. This act is committed by a physician who uses a treatment which has still not been used, or performs a surgery which has not been tried before, without a patient's consent or the patient's legal representative's consent if the patient is unconscious or still is not 16 years old, which causes the death of the patient. This crime, for which the implemented punishment is at least 5 years of imprisonment and definite restriction of fulfilling medical duties in time of 2 to 5 years, is consisted of: a) implementation, dually and alternatively distinguished as: 1) usage of new, unused or simply "evidently unsuitable treatment" and 2) performing a surgery which has not been done before, b) only a doctor can perform a treatment, c) treatment is given to a specific person- to a patient, so, in the field of performing medical duty, d) assistance is done in a particular way- unauthorized, without a patient's consent or the patient's legal representative's consent (when the patient is not able to give the consent because of mental or physical disabilities) and e) the consequence of the performance is death.

Then, this crime, under many names, is acknowledged by our after-war criminal law system, such as the Criminal law of The Federal People's Republic of Yugoslavia from 1951, article 203 under the name of Patient's Medical Negligence, and the Criminal law of the Socialist Republic of Serbia from 1977, article 126, under the name of Patient's Medical Negligence which had been in use until January 1st, 2006.

1. The Term and the Elements of a Crime

In the protection of people's health, it is of paramount importance to provide medical assistance or any kind of healthcare to patients. People who are authorized to provide this kind of help- physicians or medical workers, along with the appropriate professional skills, should behave responsibly according to the rules of medicine, medical skills, and knowledge. Because of this, there is the need for a strict criminal law to protect the health of patients (17). As a matter of fact, there are opinions in the legal theory that this is actually an occupational crime, or a crime of the negligence of work duty (article 361, Criminal law) (18).

The crime from article 251 in the Serbian Criminal law under the name of Medical Negligence has replaced the already existent crime from article 126 in the Criminal law of Serbia from 1977 which was called Patient's Medical Negligence (19). Apart from the change in the name, this crime kept its old content, characteristics, forms of occurrence and implemented punishments. As a matter of fact, even this term does not fully reflect its nature, character, and content. Namely, this act doesn't consist solely of violating the regulations of patient treatment by a medical examiner, but also of general illegal behavior of medical workers while performing any kind of a medical procedure. Hence, a more logical and more appropriate term of this act would be Negligent Behavior in the Field of Medicine (20).

Now, this crime consists of negligent medical assistance by a doctor of medicine, or negligent medical assistance, care or any other medical treatment by a medical worker, which results in deteriorating a condition of an individual (21, 22). A medical doctor who declines to assist a patient medically also behaves in a negligent way, but in this case, it is not this particular crime but crime from article 253 which is named Refusal of Medical Assistance (23).

As the object of a protection in this particular crime, there is the health of a specific individual which is protected from negligent medical assistance, or medical workers while giving medical assistance, care or any other medical treatment. Hereby, it is not necessarily important to know the type of medical condition. Also, it is not important to have the consent of a patient for some medical procedure. Such consent of the injured party does not exclude the unlawfulness of the person at fault, or their field.

The consequence of an act appears as a violation in terms of causing the deterioration of one's health condition, to whom medical care by a medical doctor was already delivered, or by any other medical worker while delivering medical treatment, care or any other medical treatment. Other individuals' health condition can deteriorate when a healthy individual gets ill or an already ill person's condition deteriorates, so, when the injured party gets into a condition which is not as good as it was before treatment or any other medical procedure (24).

The perpetrator of the first act can only be a medical doctor. That is a person with a medical or dental degree who works in medical and scientific institutions or has a private practice, as well as an intern. In legal theory, whether a medical doctor who is unemployed can be a perpetrator of this crime has been discussed (25, 26). There are two opinions as to the answer to the question. According to the first opinion, for the occurrence of the crime, it is necessary for a medical doctor to be in a medical institution at the time of the committing of the crime, therefore the patient is the injured party delivered to the doctor because of the needed medical assistance (27). The other opinion states that whether the medical doctor is unemployed or not, does not affect the existence and legal qualification of this crime because that does not represent the legal element of the act. The first opinion prevails as not suitable for the law, referring to this matter (28).

As the perpetrator of the second form of the act is another medical worker, apart from doctor, dentist, or pharmacist (29). This is a person who graduated from a medical or dental school: nurses, X-ray technicians, laboratory workers, health technicians, medical equipment technicians, midwives, and others.

In terms of fault in both of the forms premeditation is possible (usually eventual) or negligence.

Premeditation acts in any of the two forms is punishable by incarceration, 3 months to 3 years, and for unpremeditated acts, a fine or a year in prison.

2. Basic Crime forms

The crime of Medical Negligence from article 251, Criminal law, depending on the characteristics of the perpetrator and type, character and nature of the act, appears in two basic forms and they are: a) medical negligence by a physician and b) medical negligence, care negligence or any other medical treatments, by other medical worker (30).

The first basic form of this crime is a doctor who, while providing medical care, uses an unsuitable tool or evidently unsuitable treatment, or does not apply specific hygienic measures or completely behaves irresponsibly, by which the doctor deteriorates other person's health condition.

Judicial Practice: In dealing with medical assistance, the doctor acted negligently when he received the patient as an emergency officer as a duty officer, and failed to look at the first page of the health booklet, which indicated that she was allergic to certain medications, and ordered the nurse to her injection that contained the component of the medicine to which she was allergic and thus caused her health deterioration (31). Implementing consists of three alternatively chosen practices: a) using an evidently unsuitable instrument, or evidently unsuitable treatment, b) not applying hygienic measures and c) total medical negligence (32, 33).

For the existence of an act, it is important that these are committed by a doctor while providing medical care (34). Although different in content, all of these acts represent only forms of medical negligence, not following the rules and common pra-

ctice in the treatment of a patient (35). Delivering medical care relating to this incrimination should have a broader meaning. That means performing or not performing has to relate to the procedure of the treatment. The treatment is considered to be the measures directed to the determination of the existence, nature, type, and gravity of the disease, as well as measures which are used with the goal of alleviating or curing the existing disease. In legal theory, but in court practice as well, the question of whether vaccinating classifies as a crime, general examination (the monitoring of health) of residents, as well as in the case of surgeries for aesthetic reasons, unrelated to health, has remained unresolved (36).

Medical Negligence can be manifested in giving the wrong diagnosis, not using remedies properly, and giving the wrong treatment (37). The wrong diagnosis is a result of the negligent, reckless and incompetent examination, the omission of medical search and gathering findings, roentgen rays, analyses, etc. The right diagnosis influences the treatment and the process of it. The wrong diagnosis leads to the usage of the wrong remedies and treatment (38). Remedies are substances and devices which are taken into the organism or put on the body in order to diagnose the disease, or because of treatment or prevention. Medical treatment is a method and a type of medical assistance and a process of any kind of a disease which is scientifically confirmed and proved in practice. Remedies and treatments are connected to each other because there are specific treatments which require specific remedies and vice versa (39).

For the occurrence of the crime, it is necessary that a medical doctor uses remedies or treatments which are evidently unsuitable, by which there is a great deviation from medical practice or medical rules violation (40, 41). Evidently unsuitable remedies are those which shouldn't be used for a certain disease or at least not in a great amount (dose) or not in a specific manner or process. Evidently unsuitable manner of treatment exists if an inapplicable treatment, not approved by medical practice and science, is used for a certain kind of a disease or is unnecessary and harmful. Not applying suitable hygienic measures is reflected in applying or not applying, by which a deviation from medical practice and rules is made, in terms of applying suitable hygienic measures whether these measures are violated completely, partly or are applied insufficiently and inconveniently. Negligent behavior, in general, includes various manners of performing or not performing, by which a deviation from obligational behavior in medical assistance is created.

Judicial practice: A nurse taking care of a sixteen-year-old patient failed to control the temperature of the water prior to therapy. As a consequence of overheated water, 40% of the surface of the patient's body was burnt causing health deterioration (42).

The other basic form of the crime is performed by a medical worker, who, while performing medical assistance, care or any other medical treatment, evidently behaves irresponsibly and causes deterioration of an individual's health condition (43). The very action is evidently irresponsible behavior of

a medical worker in the process of the medical assistance, care or any other health -related process (44). This kind of behavior consists of omissions, lack of performance or insufficient performance, inappropriate performance from the domain of medical assistance, care or other health - related process (45). For the existence of the act, it is necessary to encounter quite irresponsible behavior, which means a behavior which roughly, to great extent or longer duration, deviates from the rules of performing certain medical duties.

3. Serious Crime Forms

Serious crime forms of medical negligence from article 251 in the Criminal law of Serbia are specified in a separate regulation- article 259, named Serious Crimes against People's welfare (46). Severe punishments are implemented in this regulation of various crimes against people's health, depending on the form of the fault which a perpetrator used to commit the crime, and the scope and intensity of the caused consequences by negligence.

Severe crimes against people's welfare are qualified as grave manifestations of various crimes for which strict punishments implemented, because of the specially presented gravity and degree of danger, or degree of the perpetrator's fault. The following acts may become severe crimes against people: a) transmitting an infectious disease, b) negligent medical assistance, c) unlawful medical experiments and medication examination, d) medical quackery and pharmaceutical quackery, e) irresponsible behavior in producing and distributing medications, f) the production and distribution of harmful products and g) contamination of drinking water and provisions (46).

A serious consequence qualified as an occurrence, which is the result of an action of the basic negligence crimes, comes in two forms: a) serious physical trauma or serious health damage, and b) death of one or more individuals. The other occurrence that influences the gravity of these acts, qualified as the one with serious consequences, is a form of fault with which the act itself was done (it appears as not premeditated and premeditated) (47).

If we take a) the scope and intensity of a consequence as the result of negligence and b) the form of fault with which the basic crime is committed into consideration, there are four forms of serious crimes against people's health, and they are: 1) when the basic act is premeditated and the serious consequence is a serious physical trauma or health endangering of another individual, the punishment for this act is incarceration of 1 to 8 years, 2) when the basic act is done with premeditation and the consequence is death of one or more individuals, for this act the punishment is incarceration of 2 to 12 years, 3) when the basic act is done in pure neglect, but the consequence is a serious physical trauma or health endangering of another individual, the punishment is incarceration for up to three years and 4) when the basic crime is done in pure neglect and the severe consequence is the death of one or more individuals, the punishment for this act is incarceration of 1 to 8 years (48, 49).

Conclusion

Among the crimes against people's welfare (crimes against health,) there is a crime which by its significance, nature, characteristics, the perpetrator, the type and scope of the caused consequence is singled out, and it is the crime from article 251, the Criminal law of Serbia. Although since 1951 until today it has been named as Patient's Medical Negligence, nowadays it is called the crime of Medical Negligence, as it is known by this name some other modern Criminal laws (e.g. Bosnia and Herzegovina, Croatia and Macedonia).

Anyway, this crime appeared for the first time in the Serbian law system in 1929 along with the declaration of the Criminal law of the Kingdom of Yugoslavia, which determined two unnamed types of this very crime, nature and character, in regulations of articles 263 (when a medical doctor while giving medical assistance harms other individual's health or deteriorates the already existent disease) and 264 (when a medical doctor uses unsuitable treatment or performs surgery without a patient's consent which leads to the patient's death).

Then, this crime, under many names, is acknowledged by our after-war Criminal law system, such as the Criminal law of Federal People's Republic of Yugoslavia in 1951, article 203 under the name of Medical Negligence, and the Criminal law of the Socialist Republic of Serbia 1977, article 126 under the name of Patient's Medical Negligence which had been in use until January 1st, 2006.

The crime from article 251 in the Serbian Criminal law under the name of Medical Negligence (which is under the same name in the laws of Republika Srpska, Montenegro, and Slovenia) has replaced the already existent crime from article 126 in the Criminal law of Serbia from 1977. This act does not consist solely of violating the regulations of the patient treatment by a medical examiner (medical doctor or dentist), but also of general illegal behavior of medical workers while performing any kind of a medical procedure. Hence, a more logical and more appropriate term of this act would be Negligent Behavior in the Field of Medicine.

Now, this crime consists of negligent medical assistance by a doctor of medicine, or negligent medical assistance, care or any other medical treatment, by a medical worker, which results in deteriorating a condition of an individual. A physician who declines to assist a patient medically also behaves in a negligent way, but in this case it is not this particular crime but crime from article 253 which is named Refusal of Medical Assistance.

The object of protection related to this crime is health or the right of an individual to be healthy which is guaranteed in article 68 in the Constitution of the Republic of Serbia, of medical negligence by medical doctors, or medical workers failing to provide medical assistance, care or other medical treatment. Hereby, the type of condition of some individual is not of great importance. The existence of a patient's consent for a certain medical treatment is not necessary, either. The crime Medical Negligence

is formulated in the Criminal law of Serbia in 2005 in chapter 23, called "Crimes against People's Welfare" according to regulation in article 251. It incriminates incompetent, irresponsible, illegal behavior of doctors and other medical workers, by which there is a great deviation from the rules of medicine, skills and knowledge and creation of harmful consequences

related to health in the sense of deterioration of the condition of an individual who is treated medically.

The crime itself consists of medical negligence by a medical doctor or malpractice of medical care or assistance, or some other medical treatment by other health workers, which results in the deterioration of one's health.

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NESAVESNO PRUŽANJE LEKARSKE POMOĆI U REPUBLICI SRBIJI

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U oblasti zaštite i unapređenja zdravlja ljudi od posebnog su značaja zakonito, efikasno, pravilno, stručno i blagovremeno pružanje lekarske pomoći, vršenje druge zdravstvene delatnosti, odnosno pružanje medicinske pomoći ili nege. Na taj način, ostvaruje se značajna društvena funkcija, kao i zaštita Ustavom proklamovanog prava na nepovredivost fizičkog i psihičkog integriteta čoveka (zdravlja ljudi). No, moguće je da usled preduzete lekarske ili druge medicinske delatnosti nastupi pogoršanje zdravlja lica prema kome je odgovarajuća delatnost preduzeta. Ako se radi o teškim povredama lekarske ili druge zdravstvene profesije, odnosno o grubom kršenju pravila struke, usled čega nastupi teža posledica po zdravlje drugog ili drugih lica, tada sva savremena zakonodavstva predviđaju krivičnu odgovornost i kažnjivost za posebno krivično delo – nesavesno pružanje lekarske pomoći. Slična je situacija i u Republici Srbiji. U radu se ovo krivično delo analizira sa aspekta pojma, karakteristika, obležja, oblika ispoljavanja i drugih osnova za utvrđivanje krivične odgovornosti, i analizira se kažnjavanje njegovog počinioca.

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Ključne reči: *zdravlje, zaštita, nesavesnost, krivično delo, odgovornost*

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