Review article

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MEDICO-LEGAL ASPECTS OF THE PHYSICIAN'S RESPONSIBILITY EXPERTISE

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Legal medicine, an independent scientific medical discipline, is crucial in studying and resolving numerous health, legal, and social issues that can harm health or destroy lives. The institution of medico-legal expertise intricately links this science with the field of law. Questions related to medical ethics and the professional, criminal, and civil liability of doctors and other medical personnel are prevalent in forensic medical expertise. The nature of the medical profession implies that healthcare workers perform activities according to the valid healthcare doctrine and the code of professional ethics, which presuppose the assumption of profound professional, ethical, criminal, and material responsibility for their actions. Part of the regulations for malpractice are implemented through the competencies of the health institutions where the health worker is employed, and the work is done through the competencies of the state or public powers transferred by the state to the chambers of health workers, which regulate the obligations and responsibilities in the actions of healthcare workers. In the broadest sense, doctors and medical staff can be held responsible if they break humanitarian principles, universal human rights, established and generally accepted scientific medical achievements and rules of the professional code at a given time (lat. *Vitium Artis*).

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Introduction

Medicine and law have a long comparative history whose flows are congruent with the rise of technological, cultural, and civilizational achievements. Forensic medicine, or legal medicine, is an independent scientific medical discipline that, using a specific methodology, studies and resolves numerous health, legal, and social issues related to harming or destroying people's lives. As a result, the establishment of medico-legal expertise inextricably links forensic medicine with legal science. The dynamic nature of modern life and the uncontrolled development of modern technologies and innovations in almost all spheres of life increasingly force current forensic medicine to incorporate the expertise of doctors and other medical personnel. This paper apostrophizes the basic medico-legal principles of expertise based on violations of the medical profession's rules and regulations.

The doctor-patient interconnection

The doctor-patient relationship involves a complex connection where both parties make collaborative decisions about medical requirements and health objectives through mutual respect, information exchange, and agreements (1). When a patient and a doctor establish mutual rights and obligations, the patient requests medical assistance and agrees to provide it. This specific relationship can potentially establish a contractual medical treatment relationship between the patient, the doctor, and the health institution where the doctor works. Although the doctor and the patient share the same goal of providing or receiving medical treatment, their obligations are not of equal quality, as the doctor's obligations are in the patient's best interest while the patient's duties are in their interests. The doctor's dominance over the patient, who entrusts him with his greatest wealth—life and health—conditions the relationship's asymmetry. Therefore, the patient is subordinate to the doctor, and the patient's trust in the doctor is the foundation of the doctor-patient relationship. That trust rests on humanity, the essence of which is the medical profession's

promise that its members will take care of each patient indefinitely, selflessly, and immeasurably, respecting the primary principle of health care, *primum nil nocere* (first of all, do not harm) (1, 2).

However, the doctor's professional knowledge, compassion for the patient, and commitment to viewing the patient as an active participant in the healing process rather than an object or recipient of medical care underpin this trust, making it impossible to order or establish through legal penalties. The patient's faith in the doctor and the expectation that the doctor will use all his attention and knowledge to choose the most effective and, therefore, the best, safest, harmless, and least unpleasant methods put the doctor in a typical relationship of supremacy over the patient. That is why medical ethics recognizes the patient's right to freely choose a doctor to whom he will entrust his health, as well as the doctor's capacity to freely make decisions in the patient's medical treatment, not unthinkingly following the instructions of some higher authorities or instances. Even though human actions and trust characterize the doctor-patient relationship, legal regulation of this specific liaison is necessary (2, 3).

The doctor's ligation

The history of medicine has shown that the medical profession cannot ensure the fulfillment of the doctor's ethical duties towards the patient (1, 2). That is why the state authority has supported these duties by legalizing a limited number of ethical and professional responsibilities, transforming them into legal obligations governed by articles of the Criminal Code of the Republic of Serbia (CC) (4). It means that the legislation covers only the "ethical minimum", considering that it is neither necessary nor possible to legislate all of the doctor's moral, ethical, and professional obligations to the patient (1, 5). Violating rules and regulations in providing medical assistance and health services entails the responsibility, which can be individual or institutional, of one or more persons, the management of a health institution, or the entire organization of the health system or some of its units. A critical aspect of medical personnel's responsibility is consolidating their work while maintaining individual accountability. This implies that many medical workers typically participate in providing health services to the patient, with each individual solely responsible for actions within the scope of their professional work while respecting the principle of supervision (6). In the hierarchy of medical assistance, the doctor oversees subordinates, yet he bears sole responsibility for his actions. If it is about faulty equipment and devices, the responsibility falls on the management of the health institution (hospital, clinic) or the appropriate ministry (7). However, in such cases, in addition to the institutional responsibility, there is also the individual responsibility of health workers who knew unsafe working conditions but agreed to work in such situations, i.e., with defective or inadequate equipment, regarding the so-called shared responsibility. The doctor's obligations are to provide medical treatment and professional and timely information about the facts related to the patient's health in a way that is understandable to him, considering his age, education, and mental abilities, as well as obtaining consent for medical treatment (informed consent) (1, 5–8).

The patient must accurately declare information about his general health, habits, and symptoms of illness, follow the doctor's orders, and respect his person's dignity. The health institution's responsibilities include obtaining a work permit from the competent ministry and ensuring appropriate working conditions. The nature of the medical profession implies that health workers perform health activities according to the current health doctrine and the code of professional ethics, which presupposes the assumption of professional, ethical, criminal, and material responsibility for their actions. In this way, part of the regulations for work failure is implemented through the competencies of the health institutions where the health worker is employed and partly through the competencies of the state (court) or public powers transferred by the state to the chambers of health workers, which regulate obligations and responsibilities in their regulations (7, 8).

From a broad perspective, we can hold the medical staff accountable for violations of 1) humanitarian principles (universal human rights), 2) non-observance or violation of established and generally accepted scientific medical achievements and rules of the profession at a particular time (lat. *Vitium Artis*), and 3) failure to act with due care (5, 9).

Human rights are universal rights that apply to all people in all situations. These moral rights, defined as universal rights based on the principles of "natural law", do not require codification within valid legal norms, making them supra-juridical or "above the law". The right to life is a universal human right and one of the most essential. Since health is the fundamental foundation of life, the right to life entails the right to treatment, thereby establishing a close relationship between the medical profession and universal human rights through health protection. According to domestic legislation, health protection is also a constitutional human right. The legal position of medicine significantly aligns with other universal individual human rights, particularly the right to self-determination and consent, the right to information, the right to privacy, and the protection of information. That includes the obligation to maintain medical secrets, equivalent to the responsibility to maintain official secrets, and the right to respect the person's dignity, encompassing the patient's religious and customary specifics. However, discrimination in

the broader social context may restrict certain individual rights, such as exemption from criminal offenses, to safeguard collective rights when society's general interest surpasses an individual's well-being. The disclosure of official secrets at the request of judicial authorities, the obligation to report serious infectious diseases, the number of patients handling food, the introduction of forced treatment, and mandatory hospitalization in cases where the wider community may endanger the patient's mental or physical health are typical examples of the narrowing of individual rights at the expense of collective rights (9).

The Law on Health Care and the Law on Patients' Rights of the Republic of Serbia also uphold universal human rights and values in patient health care (7). These include the right to access health care, the freedom to choose a doctor, the right to privacy and confidentiality of information, the right to self-determination and consent, the right to observe medical documentation, the right to privacy of data, the special rights of patients undergoing medical examinations, and the right to compensation. The public's right to information is also defined as respecting collective rights (expert instructions on preserving one's health based on the dangers of spreading infectious diseases or major environmental incidents). The patient, as a claimant in a civil law court, obtains compensation for the damage suffered due to the violation of personal rights and universal human rights (7, 9).

Medical malpractice

Malpractice is defined as non-compliance with or violation of specific, established, and generally accepted medical profession and science standards. It refers to non-compliance with the rules of good practice (1, 10). The doctor must use the most excellent knowledge and skill in medical treatment (diagnosis and therapy) because this obligation primarily stems from medical ethics, deontology, and legal regulations. The "standard of care" (1) and the rules of scientifically based and widely accepted modern medical doctrine and practice determine the distinction between proper and incorrect practice in each case. It is not even possible to standardize due diligence. Therefore, we view each malpractice case within its unique circumstances and time frame. Different specialized knowledge, skills, and techniques also contribute to the variability of the standard of care, requiring the assessment to consider the complexity and risks of performed medical procedures, the patient's general state of health, and his characteristics such as co-morbidities, idiosyncrasies, and body anomalies. Acting contrary to the generally accepted rules of the profession results in a complex amount of damage to the patient's health, and these harmful consequences are the basis for determining the responsibility of doctors and other medical personnel (4, 7, 11).

Throughout human history, specific legal mechanisms have called for doctors to take responsibility for transgressions during professional activities. We should view medical personnel's duties through the lens of social and legal obligations. Moral obligations and principles mirror social obligations, reflecting the time's prevailing social circumstances and conditions. Favorable legal regulations adjust legal obligations and their violation results in legal and judicial repercussions. A doctor's professional work includes pre-assumed and accepted responsibilities. Therefore, we should analyze the doctor-patient relationship within the framework of social (ethical and deontological or disciplinary) and legal (criminal and civil) responsibilities.

The Serbian Laws on Health Care, Patients' Rights, Health Insurance, Health Documentation and Records, Medicines and Medical Devices, Chambers of Health Workers, and the Code of Medical Ethics regulate the social responsibility of doctors and medical personnel (3, 7, 12). A doctor's ethical responsibility stems from violating the ethical and moral principles of medical ethics based on the Hippocratic Oath, which has survived for centuries and remains the basic ethical norm for all health workers. Medical deontology is a particular scientific discipline that studies health workers' professional duties and rights (1, 2). Medical personnel's moral and professional obligations, stemming from a duty violation in their workplace or harm to a chamber member's reputation, typically lead to disciplinary action. The Court of Honor of the Medical Chamber of Serbia can impose one of the following disciplinary measures: a public warning and a fine for a period of one to six months (for minor offenses), as well as a temporary ban on independent work in the performance of specific tasks in the health sector and a temporary ban on independent work in the performance of health activities (for severe offenses). These measures can last up to six months, one year, and, in exceptional cases, up to five years (12).

Legal (court) responsibility arises from the professional actions of doctors and medical staff (in the broadest sense, from applying medicine). When broader social interests protect the patient's interest, this type of responsibility can be criminal, and it can also be civil when the patient seeks compensation for damages caused by the doctor's negligence. Criminal responsibility entails violating specific laws outlined in the CC (4).

Criminal protection is only necessary for severe endangerment or impairment of people's health (5). It refers to cases where there are elements of a criminal offense in the professional work of health workers. For an action by a doctor or member of the medical staff to meet the criteria for a criminal offense, it must meet three criteria: 1) it must be illegal, as no criminal offense exists without an unlawful act or culpability; 2) it must pose a social danger; and 3) it must result in an adverse consequence. During the criminal act, the

perpetrator must be sane, act, and know explicitly or implicitly that his actions were prohibited. If the law expressly provides for negligence, the perpetrator is also guilty. A criminal offense is committed negligently if the perpetrator is aware that his action could commit a criminal offense. However, he carelessly assumed that the offense would not occur or that he would be able to prevent it. Alternatively, he was unaware that he could commit the offense despite the circumstances and personal characteristics that obliged him to be aware of this possibility. Furthermore, by taking voluntary action, he aimed to achieve a different outcome than the one that occurred. That was due to his imprudent belief that the consequences would not happen or that he could prevent unwanted consequences (conscious negligence). However, given the circumstances surrounding the act and his traits, he had a duty to be aware of this possibility (unconscious negligence) (4, 5).

Essential evidence in criminal proceedings includes: 1) an obligation that confirms that the patient has been accepted for medical treatment by a health institution or a doctor of private or state practice, which establishes a "contractual" relationship that lasts until the end of the treatment or until the termination of the contract by a patient or a doctor, which can be the basis for initiating a criminal or civil process if it was carried out by a medical institution or a doctor of private or state practice without the patient's will or without ensuring his further treatment in another institution with the provision of all previous medical documentation; 2) that there is a somatic and psychic impairment of the patient's health, which is considered to be a consequence of failure in treatment in terms of action or inaction; 3) bringing into causation, i.e., cause-and-effect unintended consequences (damage to the patient's health) with an omission in the course of treatment, which, as a rule, is carried out through medico-legal expertise. The cause-and-effect relationship, as well as other evidence for determining the liability of a doctor or other healthcare worker in criminal law, must be "beyond reasonable doubt", and this assessment belongs to the court. The state appears as the bearer of damage due to the civilizational achievement that the punishment inflicted for impairing an individual's health belongs to the organized society, not the individuals. Criminal sanctions aim to stifle actions that violate or jeopardize the values protected by criminal laws, safeguarding societal interests and judgments. This process reinforces specific moral and fundamental social values by isolating the offender from society and promoting rehabilitation to curb crime within society. By defining criminal offenses against people's health as a particular good, the legislator sought to protect the physical integrity of the patient and emphasize the role and responsibility of all participants in the treatment process, given that performing health care is a risky and responsible profession that requires a high degree of caution and special attention (1, 4–6).

Domestic legislation

According to domestic legislation, doctors and health workers can be criminally liable for the following criminal acts: OFFENCES AGAINST LIFE: Mercy Killing, Illegal Termination of Pregnancy; CRIMINAL OFFENCES AGAINST FREEDOMS AND RIGHTS OF MAN AND CITIZEN: Unauthorized Disclosure of Secret; OFFENCES AGAINST HUMAN HEALTH: Failure to Act Under Health Regulations during Epidemic, Transmitting Contagious Disease, Transmitting HIV Infection, Medical Malpractice, Illegal Conducting of Medical Experiments and Testing of Drugs, Failure to Provide Medical Assistance, Quackery, Malpractice in Preparing and Issuing Medicaments, Grave Offences against Health; CRIMINAL OFFENCES AGAINST THE JUDICIARY: Failure to Report a Criminal Offence or Offender, Perjury—False testimony. The most common criminal acts that have been the subject of medico-legal expertise in domestic judicial practice are medical malpractice (negligent provision of medical assistance) and failure to provide medical assistance (4, 5).

According to Article 251 of the CC, medical malpractice is defined as an action by a doctor or other medical staff during the provision of medical services in which they use inadequate means or unsuitable treatment, fail to observe appropriate hygiene standards, or proceed unconscionably leading to the deterioration of a person's health or medical condition (1, 5, 13). A specific criminal offense can also result from negligence. From the perspective of medico-legal theory and practice, it is important to note that the negative outcome of a medical procedure does not necessarily indicate the doctor's or health worker's undeniable responsibility. Specifically, the unpredictable and unexpected constitutional characteristics of the patient or equipment malfunctions beyond the medical staff's control often lead to health consequences during medical assistance. In such cases, one cannot question the individual's criminal responsibility. On the other hand, individuals bear legal responsibility for harmful consequences that are uncommon and preventable under specific circumstances, like leaving instruments or bandages in body cavities. Additionally, if a doctor or other medical staff member makes a mistake and allows the damage to worsen, it could be considered a premeditated and grave offense against health. The standard of due care and the circumstances in which the critical event occurred determine whether there are elements of malpractice, omission, or negligent action by a doctor or other medical staff. That is the primary goal of medico-legal expertise. The standard of due care implies the attention of a competent expert in providing medical care. Determining the standard of due care involves evaluating how well a doctor or other medical staff adheres to the rules of acceptable clinical practice,

comparing their actions to those of another doctor under similar circumstances, and considering the perpetrator's knowledge and skills in the given context. Many legal systems apply the standard of due care to a conscientious and reasonable doctor of the same specialization under similar conditions, a standard of excellent medical practice that the medical profession has accepted. When providing medical services, the doctor must adhere to and master new treatment methods, with the standard set based on scientific knowledge at the time. In our country, doctors must act with the special attention of a qualified expert, which implies increased attention according to the profession's rules and customs. When a doctor does not act with the care of a qualified expert, it is "ordinary carelessness" (lat. *Culpa Levis*). If he does not act like an average doctor, it is "grave carelessness" (lat. *Culpa Lata*), which entails more significant responsibility (1).

Article 253 of the CC defines the criminal offense of failure to provide medical assistance (4). The offender can only be a doctor, not any other medical staff. This article mandates that a doctor must offer requested medical assistance to anyone in need. At the same time, that person must be in immediate danger of life or at risk of serious bodily injury or severe damage to health. It is disputed in legal practice whether a doctor practicing medicine or any other doctor can be considered an offender. In domestic jurisdictic practice, any doctor can be a potential offender (4, 5, 13). However, when doctors with a prescribed professional qualification work in a different, comparable, or entirely unrelated field, it is crucial to assess if they have fulfilled the requirement of acting "against their medical duty". While some interpretations suggest that the term "doctor" only refers to a medical professional who is currently practicing or has previously practiced medicine and is capable of providing such assistance rather than a recent medical school graduate who has never been professionally involved in medical practice, the judicial practice has demonstrated varying perspectives. Specifically, we can consider any individual with the appropriate professional qualification (doctor of medicine or doctor of dentistry) as a doctor, irrespective of their current or past involvement in medical practice. This opinion is based primarily on the view that during studies and with the acquisition of the title of doctor of medicine or doctor of dentistry, elementary skills for providing medical assistance are acquired, despite the lack of professional practice, especially bearing in mind that a large number of individuals from the broader social community, regardless of profession, are capable of providing at least "first aid". This position is supported by the fact that our criminal legislation stipulates for every individual, regardless of profession, a general duty to assist a person in immediate danger to life, which he is obliged to do within the limits of his capabilities but without danger to himself or others (Article 127, CC: Failure to assist) (4, 5). The criminal offense of failure to provide medical assistance involves the act of inaction, specifically the inability to assist. This refusal need not be explicit, as an intentional failure to provide medical assistance is sufficient. The passive subject of this criminal act, that is, the object of the act, is a person who needs medical help and who is in imminent danger of life, serious bodily injury, or severe health impairment. It implies that a person in immediate danger of death, serious bodily injury, or severe health impairment must require medical assistance to overcome these conditions. Individuals may not need medical assistance if they face immediate danger to their lives due to circumstances other than illness or injury. In such cases, criminal acts do not exist. It follows from the above that the doctor must provide the requested medical assistance at any place and at any time, directly or indirectly, to a person who needs this assistance in such a way that he will examine the patient, make a diagnosis, and provide medical assistance to eliminate harmful consequences. Health institutions must provide emergency medical assistance, particularly those with an organized emergency medicine service. Failure to provide medical assistance is always punishable, while the penalty depends on the outcome (monetary fine or imprisonment for six months to eight years) (13).

Until now, the forensic medical practice has demonstrated that doctors, primarily specialized in surgery and general or internal medicine and typically working in health institutions, frequently face prosecution for health-related crimes when they are not only outside their workplace but also lack essential medical equipment and medicines such as stethoscopes, blood pressure monitors, and drug injection accessories. As a result, instead of providing immediate medical help, they may prioritize transporting the patient to the first healthcare facility as quickly as possible. However, the legislator stipulates that a doctor of medicine, regardless of specialty, must provide medical assistance to a seriously endangered patient when the need arises, regardless of the location. This assistance can take various forms, including staying with the patient, positioning them, securing their airway, stopping bleeding, immobilizing them, initiating manual cardiac massage, and artificial respiration, all without leaving the patient for even a moment. The occurrence of a fatal outcome or severe and permanent health consequences, despite the implemented medical measures, excludes criminal responsibility because the doctor acted according to the ethical and doctrinal principles of the medical profession in emergency conditions. In contrast to criminal liability, civil liability for doctors and medical personnel includes compensation for the patient's damage from medical treatment.

The general regulations of compulsory law, the provisions of the Convention on Human Rights and Biomedicine, and the Law of Patients' Rights guarantee the patient's right to compensation for damages caused by medical intervention. Civil lawsuits realize the right to compensation for

damage when they meet the following criteria: 1) the offender's harmful actions, such as work neglect or actions that deviate from the standard of due care; 2) the illegality of the harmful action, establishing a causal connection between the harmful action and the damage it causes; and 3) the patient's consequences (13–15).

Civil (litigation) court proceedings aim to inflict material and non-material damage on an individual, institution, group of persons, or state institution itself (14, 15). Experts in economics and finance can easily determine and quantify material damage, while medico-legal expertise quantitatively and qualitatively determines the basis and types of non-material damages. Types of non-material damage include difficult-to-measure categories of suffered and future physical pain, primary and secondary fear, mental suffering due to a reduction in general life activity and life joys, and disfigurement (changes in aesthetic appearance). Even in cases where there is no criminal liability, the patient can seek compensation for damages through civil proceedings, as the standards of due diligence for criminal and civil liability differ. Doctors or other medical personnel should observe due care in their professional work, which reflects the main difference between criminal and civil liability (14, 15).

Criminal liability, in particular, is only available for gross or obvious negligence. On the other hand, civil liability requires compensation for damages caused by smaller-scale negligence, also known as ordinary negligence. That is why civil proceedings (lawsuits) for damages caused by medical negligence are far greater than criminal proceedings (13–15).

The medical profession, through the institution of medico-legal expertise, determines what complies with the profession's rules and what does not. Healthcare workers determine the so-called objective criterion based on colleagues in the same profession and the medical procedure's unique circumstances. That means that greater danger and greater risk necessitate superior care, while the urgency of the medical procedure justifies a lower standard of care (5). Undertaking treatment without the patient's consent is illegal, as it goes against medical science and professional achievements. The legal validity of the patient's consent is critical, and the procedures must adhere to its standards. Doctors can only intervene in organs, organ systems, and body parts that they did not get informed consent for before but are necessary because of the patient's condition. For example, they might perform the indicated surgical intervention to stop a life-threatening blood vessel injury for hemostasis or to treat an undiagnosed or intraoperative perforation of the intestines. However, consent does not exclude the illegality of the doctor's actions if the consequences occur due to a medical error. If a procedure fails without the patient's consent, the healthcare worker bears full responsibility for any resulting damage, regardless of whether the procedure adheres to the professional's rules. The patient's entitlement to information about their health condition and their choice to accept or reject the doctor's proposal form the foundation of the Institute of Informed Consent (8).

Considering that the responsibility of the health care worker is one of the most critical assumptions of responsibility, medico-legal expertise plays a crucial role in determining the appropriate behavior of health care workers in providing medical care.

Conclusion

While mistakes are a common occurrence in human nature and across all professions, the medical profession bears a heightened level of responsibility due to the inherent discrepancies in patient trust in medical power, as well as the limitations of medical science, knowledge, and skills. The medical-legal expertise of the healthcare workers plays a crucial role in determining the failure of treatment, given that the judicial authorities receive the necessary information of a medical nature through the institution of expertise. The continuous education of doctors and other medical personnel is crucial for effectively preventing medical errors. Health workers, especially doctors, have the right to make mistakes, but not due to ignorance, negligence, or carelessness.

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SUDSKOMEDICINSKI ASPEKTI EKSPERTIZE LEKARSKE ODGOVORNOSTI

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Sudska medicina je samostalna naučna medicinska disciplina koja proučava i razrešava brojna zdravstvena, pravna i socijalna pitanja u vezi sa narušavanjem zdravlja ili uništenjem života ljudi. Kao takva, ova nauka je neraskidivo povezana sa pravnom naukom kroz instituciju sudskomedicinske ekspertize. Pitanja povezana sa medicinskom etikom, profesionalnom, krivičnom i građanskom odgovornošću lekara i drugog medicinskog osoblja predstavljaju veoma čest predmet sudskomedicinske ekspertize. Priroda medicinskog poziva podrazumeva da zdravstveni radnici obavljaju zdravstvenu delatnost u skladu sa važećom zdravstvenom doktrinom i kodeksom profesionalne etike, što unapred implicira i preuzimanje stručne, etičke, krivične i materijalne odgovornosti za učinjena dela. Jedan deo regulative za propuste u radu sprovodi se u okviru nadležnosti zdravstvenih ustanova u kojima je zdravstveni radnik zaposlen, a drugi u okviru nadležnosti države ili javnih ovlašćenja koja je država prenela na komore zdravstvenih radnika, koje svojim propisima regulišu obaveze i odgovornosti u postupanju zdravstvenih radnika. Ako se sve to posmatra iz najšire perspektive, zapaža se da odgovornost lekara i medicinskog osoblja može proisteći iz povrede humanitarnih principa i univerzalnih ljudskih prava, nepridržavanja utvrđenih i opšteprihvaćenih naučnih medicinskih dostignuća i pravila profesionalne struke u datom trenutku ili ogrešenja o njih (lat. *Vitium Artis*), kao i nepostupanja sa dužnom pažnjom.

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***Ključne reči**: lekarska greška, odgovornost lekara, sudska medicina, sudskomedicinska ekspertiza*