BALTIC JOURNAL OF LAW & POLITICS
A Journal of Vytautas Magnus University
VOLUME 14, NUMBER 1 (2021)
ISSN 2029-0454

Cit.: *Baltic Journal of Law & Politics* 14:1 (2021): 124-152
https://content.sciendo.com/view/journals/bjlp/bjlp-overview.xml
DOI: 10.2478/bjlp-2021-0006

THE PRICE OF MEDICAL NEGLIGENCE – SHOULD IT BE JUDGED BY THE CRIMINAL COURT IN THE CONTEXT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS?

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Received: April 13, 2021; reviews: 2; accepted: July 28, 2021.

ABSTRACT

The article deals with a recently relevant issue – whether a doctor who has made an error or was negligent during his or her professional activity that has resulted in injury or death should be prosecuted, whether this type of liability is not too strict, and whether it is proportionate and adequate to the specificities of the medical profession. From the point of view of criminal justice in Lithuania, this topic has not been investigated at all. The courts hear such criminal cases without any exceptions for doctors. However, in an international level, the judgments of the European Court of Human Rights or investigations in other states suggest that criminal liability is not always a binding legal consequence in such cases. After having analysed and summarised the case-law of the said court, by taking into account the insights of foreign authors, the danger of medical error and *ultima ratio* principle, the author raises the

idea that the current practice in civil medical negligence when doctors are prosecuted for simple negligence should be changed.

KEYWORDS

Medical negligence, gross medical negligence, medical error, criminal liability

INTRODUCTION

Recently there are more and more discussions in Lithuania, whether a doctor who has made an error during his or her professional activity that has resulted in injury or death should be prosecuted, whether this type of liability is not too strict, and whether it is proportionate and adequate to the specificities of the medical profession. Both the doctors and other persons have repeatedly raised this issue in the public space. The Doctor and Professor Vytautas Kasiulevičius who often speaks publicly on various issues noted that:

> The doctor seeks to save the patient by making one or another decision during the surgery or by prescribing a diagnostic or therapeutic procedure or medical treatment. Even if all actions are done properly, the result is far from always what we expect, thus I unequivocally assess the criminal liability of medical practitioners for medical errors negatively. Even the most qualified healthcare specialists and professionals with many years of experience in the treatment of patients and international practice, are not and cannot be absolutely sure that the prescribed treatment will not lead to complications for the patient. The complication and unintentional medical error are different phenomena with many common features. The courts of doctors can lead to a situation where doctors refuse to perform certain risky medical procedures due to fear of failure that could lead to trial.[1]

The association "Lithuanian Medical Movement" that unites many doctors has a similar position. The association applied to the relevant Lithuanian authorities for pre-trial investigations against doctors in order to change such practice.[2] Otherwise, the use of the criminal law is the strongest mechanism through which the state can hold an individual to account for actions that are contrary to the public interest. No person because of his or her professional status should be immune from the criminal law.[3]

The analysed topic is relevant not only due to the public discussions, but also because this topic has not been examined in detail in Lithuania from the aspect of criminal justice. Only one article can be found among the studies conducted that provides a sufficiently brief and summarised legal assessment of doctors' actions from the aspect of criminal liability.[4] Although Lithuanian researchers were reluctant to conduct more research in this area, foreign scholars from all over the world,

[1] See: https://www.delfi.lt/news/daily/law/gydytojas-kasiulevicius-medikui-nepavyko-isgelbeti-gyvybes-bet-ar-uz-tai-reikia-ji-teisti.d?id=84348385.
[2] See: https://sc.bns.lt/view/item/331545?fbclid=IwAR1iUUGxrNUFDCqZIPLpsbPA8Rug1P67pDU9DL21hsR7257R_oCCkXZRIbM.
[3] Fiona McDonald, "The criminalization of medical mistakes in Canada: a review," *Health Law Journal* 16 (2008).
[4] Iveta Vitkutė Zvezdinienė, Anna Pacian, and Jolanta Pacian, "Legal assessment of physicians malpractice in criminal law," *Applied Research at the Colleges of Lithuania* 1, No. 11 (2015).

including Europe, paid more focus to the legal consequences of medical negligence. For instance, Italian scientists discuss the possibility for applying criminal liability only for gross medical negligence[5], while the scholars in India analyse the definition of medical negligence and the issue of proportional punishment for it very often[6]; the litigation for medical negligence has become an issue of worldwide concern, but the criminal prosecution of healthcare providers for medical negligence is not unique to Taiwan's jurisprudence.[7] Despite plenty researches in this area, the British scholars are still looking for the best way of physicians' responsibility for medical negligence by not evading the criticism to existing gross medical negligence system or supporting it: "there is no underlying reason why culpable gross negligence causing serious harm should not also be subject to criminal sanction"[8]. Other countries also paid close attention to this issue: in Germany, at least two researchers have written dissertations on this topic, where they analysed the similar problems as in the present article: Theresa Riegger[9] and Marc Stauch[10]; the researches in this area are relevant, popular and often performed in Slovenia[11] and Japan[12]. For example, in Canada, the issue of criminal medical negligence is analysed not only by lawyers[13], but, as in Lithuania, such cases are presented in public media.[14] However, most researches are limited to an analysis of the legal system and/or case law of a particular state or compering some states and leads to conclusions regarding the conditions and justification for prosecution of doctors.

In this study, the author seeks to provide a more comprehensive image of the issue in the context of the jurisprudence of the European Court of Human Rights (hereinafter – ECHR) and at the same time, to answer the question whether it is

[5] Polychronics Voultsos, Giovanna Ricci, Vittoradolfo Tambone, *et al*., "A proposal for limited criminal liability in high-accuracy endoscopic sinus surgery," *Acta Otorhinolaryngologica Italica* No. 37 (2017) // DOI 10.14639/0392-100X-1292.
[6] Suba Yoga and Ms. Dhivya, "Study on medical negligence and implications with special reference to consumer Protection Act," *International Journal of Pure and Applied Mathematics* Vol. 120, No. 5 (2018); MS Pandit and Shobha Pandit, "Medical negligence: Criminal prosecution of medical professionals, importance of medical evidence: Some guidelines for medical practitioners," *Symposium* 25 (2009).
[7] Huang Hui-Man, Sun Fan-Ko, and Lien Ya-Fen, "Nurse practitioners, medical negligence and crime: A case study," *Clinical Nursing Studies* Vol 3 No 4 (2015).
[8] Michelle Robson, Jon Maskill, and Warren Brookbanks, "Doctors Are Aggrieved— Should They Be? Gross Negligence Manslaughter and the Culpable Doctor," *The Journal of Criminal Law* 84(4) (2020) // DOI 10.1177/0022018320946498; Cath Crosby, "Gross Negligence Manslaughter Revisited: Time for a Change of Direction?" *The Journal of Criminal Law* 84(3) (2020) // DOI 10.1177/0022018320926468.
[9] Theresa Riegger, *Die historische Entwicklung der Arzthaftung*, Dissertation (Der Juristischen Fakultät der Universität Regensburg, 2007).
[10] Marc Stauch, *The Law of Medical Negligence in England and Germany. A Comparative Analysis* (Oxford: Hart Publishing, 2008).
[11] Miha Šepec, "Medical Error – Should it be a Criminal Offence?" *Medicine, Law & Society* Vol. 11, No .1 (2018) // DOI https://doi.org/10.18690/2463-7955.11.1.47-66; Maja Kos Ovčak and Ana Božič-Penko, "Dilemmas in Cases of Tort Law Relating to Liability for a Medical Error (Part 2)," *Odvetniška zbornica Slovenij*e 84(1) (2018).
[12] Norio Higuchi, "Should Medical Errors Be Judged by the Criminal Court?" *Japan Medical Association Journal* 55(2) (2012).
[13] Fiona McDonald, *supra* note 3.
[14] Wendy Glauser, "Should medical errors ever be considered criminal offences?" *CMAJ* 190 (2018): E518-E519 // DOI 10.1503/cmaj.109-5588.

possible to speak of adequate protection or violation of the human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) without criminal punishment for medical negligence. The study also reviews the experience and scientific insights of other states, including Lithuania, in this area and gives the study a significant relevance and novelty not only in Lithuania, but also in Europe or the world. Thus, *the aim of this study* is to analyse the validity of the application of criminal liability for medical negligence of doctors (or other medical staff) in the context of ECHR practice and to define criteria to distinguish between criminal and non-criminal liability. At the same time, this study can also serve as a scientific answer to the question raised by Lithuanian doctors regarding their potentially unreasonable and unjustified prosecution.

The following research methods are used in the study: systematic, generalization, comparative, analysis and synthesis, historical, grammatical, semantic, etc.

1. CRIMINAL LIABILITY FOR MEDICAL NEGLIGENCE IN LITHUANIAN CASE LAW AND CRIMINAL LAW THEORY

As regards the consequences of medical malpractice, three types of liability have been identified: the civil liability leading to the indemnification of the patients for their damages, the administrative liability leading to disciplinary or administrative penalties for the healthcare professional and the criminal liability which triggers criminal sanctions to the healthcare professionals in case of actions qualified as offences by the criminal law.[15]

In this study, the author will try to draw a line between criminal and civil liability by making some insights about the necessity of criminal liability in medical negligence cases.

This study does not cover intentional medical crimes against the health and life of patients or other values protected by criminal law. First, it is because there are almost no such criminal cases in Lithuania and other states; second, in such cases, the issue of the validity or delimitation of criminal liability from other types of liability does not normally arise.

According to the Lithuanian language dictionary, an error is an unconscious deviation from the rule or the truth.[16] Thus, the semantic meaning of this word directs us to careless and unintentional action, which means that a doctor‘s error in

[15] Jasna Murgel, "Medical negligence and liability of health professionals in the European Court of Human Rights case law," *Medicine, Law & Society* 13, No. 1 (2020).
[16] See Lithuanian language dictionary // https://www.lietuviuzodynas.lt/zodynas/Klaida.

treatment is often equated with his/her careless behaviour. On the level of Council of Europe, the medical negligence was described as a failure to act according to the required standard of care (a wrong diagnosis or treatment) or failure "to respect individual patient rights (failure to inform the patient properly concerning the risks related to the particular treatment)."[17] Some authors state that the concept of professional medical error does not only cover errors in diagnosis and prescribing and the implementation of therapies, but also procedural errors, technical errors in the process of treatment, errors in the organization, management of medical documentation, etc. The concept of treatment is extremely broad and covers all health measures aimed at improving the health status of the patient.[18]

The concepts of "medical negligence" and "medical error (error)" are used in the text of the article. Their meaning is very similar, but not the same. Both concepts can be found in the jurisprudence of ECHR and in the relevant researches; this is the reason why the author uses both concepts. In the author's opinion, medical negligence is a wider concept with more general nature and includes the medical error. It means that medical error could be one of the ways to occur for medical negligence, but not the only one (for instance, incompetence or failure to perform duties could not be admitted as error, but could be a simple negligence). However, both concepts can be related to doctors' criminal liability or the basis on initiating a criminal investigation.

Thus, when analysing the medical errors of doctors, we can basically talk only about negligent criminal offenses, the qualification of which depends on their consequences. The Criminal Code of the Republic of Lithuania[19] (hereinafter – CC) provides for liability for negligent homicide (Article 132 of CC), negligent severe health impairment (Article 137 of CC) and negligent non-severe health impairment (Article 139 of CC). The criminal legal assessment of doctors' actions is not fundamentally different from the assessment of an unlawful act of any other person in the context of criminal law. At the same time and depending on the circumstances, the actions of the guilty doctors may be additionally qualified as a negligent crime against the public service and the public interest (Article 229 of CC). In such cases, the doctors or other medical staff are not excluded by any legislation; there are no exceptions for them. In other words, both the doctor and the person of any other profession, for instance, police officer[20], will be held liable for their negligence in the common procedure if all objective and subjective elements of a negligent crime are

[17] Herman Nys, "Report on medical liability in Council of Europe Member States," European Committee on Legal Co-Operation (2005).
[18] Maja Kos Ovčak and Ana Božič-Penko, *supra* note 11.
[19] *Criminal Code of the Republic of Lithuania*, Official Gazette (2000, No. 89-2741).
[20] There are many examples in the practice of Lithuanian courts of the conviction of police officers when other persons die due to their careless use of a firearm.

identified. The negligence manifests itself through a person's mental relationship to the act and the consequences, thus, the issues often arise in determining the doctor‘s negligent fault.

According to provisions of Article 16 of CC, the crime or misdemeanour shall be committed through criminally false assumption, if the person who committed the act had anticipated that his act or omission may cause the consequences provided for by this Code, but recklessly expected to avoid them (Article 16 (2) of CC) or through criminal negligence if the person who committed it had not anticipated that his act or omission might cause the consequences provided for by this Code, although the person could and ought to have anticipated such a result based the circumstances of the act and his personal traits (Article 16 (3) of CC). The careless deprivation of life through criminal negligence is when the perpetrator did not anticipate that his/her act could deprive the life of another person, although the person could and ought to have anticipated such a result based the circumstances of the act and his personal traits. In the case of criminal negligence, the perpetrator does not realize that the action endangers another person’s life. The foreseeability of consequences is an objective criterion of criminal negligence that determines the existence of a duty of care in the commission of the respective actions. Such duty may arise from law, official duties, profession, previous activity, life experience, etc. The ability to anticipate the consequences is a subjective criterion of criminal negligence that determines the real possibility for a person with a relevant duty to understand the danger of an action in a particular situation and to anticipate the loss of another person's life because of his or her action. It is decided after having assessed the personal characteristics of the perpetrator – experience, competence, education, health condition, etc. Such classic signs of negligence have been consistently described and developed in criminal law theory[21] and case law[22] for quite some time. However, none of these sources of law suggests that doctors should be subject to any exceptions, other rules or perhaps a specific modified form of negligence.

Such theory of criminal law is also reflected quite unequivocally in specific court judgments in criminal cases, where doctors who have committed relevant medical negligence are convicted. For example, the courts of all three instances convicted a surgeon M. Ž. for improperly performed surgical intervention. On 16 May 2013 from 12:30 to 14:05, the Urologist Surgeon performed a laparoscopic varicocelectomy to M. V. in private hospital because he damaged the blood vessel – left external hip vein. As a result, the developed acute internal bleeding caused the death of a patient at 19.15. Thus, the doctor deprived M. V. life through negligence, i.e., committed the

[21] Armanas Abramavičius and Andželika Vosyliūtė, "Qualification of negligent homicide in the practice of the Supreme Court of Lithuania," *Law review* 2 (18 (2018).
[22] *State v. K.K.*, Supreme Court of the Republic of Lithuania (2016, no. 2K-7-193-895/2016).

offence specified in Article 132 (1) of CC.[23] Although the defence lodged appeals and cassation appeals in the present case, none of them raised the question of the applicability or justification of criminal liability. Such position of the defence is quite logical, since it is difficult to raise a general question of the validity of criminal liability, where, as already mentioned, the doctors are not excluded under the current legal framework and they are punished. In this case, only the signs necessary to establish guilt, causal link or other criminal offense were disputed: the advocate did not agree that the courts had assessed the act of M. Ž. as done through negligence, but not an incident. However, in rejecting these arguments of the appeal, the court noted that the courts of lower instance had rightly found that M. Ž. damaged the vein during the surgery due to criminal negligence. According to the circumstances of the case, he was not prudent enough during the surgery to injure the hip vein adjacent to the surgical site and did not anticipate that it could cause any consequences - death of a person, however, according to his education, experience, and competence as a Urologist, he had and could have anticipate such consequences.[24] Thus, the cassation court did not engage in a broader discussion on the possibility of determining the characteristics of an incident in the present case (moreover, it did not comment on the criminal liability of doctors in general). The court briefly noted that the doctor's actions fully comply with the signs of negligent guilt - criminal negligence. According to the court, the doctor's position (objective criterion) obliged him, and his experience and competence (subjective criterion) made it possible to anticipate the consequences of such conduct.

In another criminal case, one more surgeon was convicted of improperly performing his duties as a person treated as a civil servant, as a result of which natural persons suffered significant damage. He negligently deprived the life of another person in breach of special statutory rules of conduct, namely: he, as a Doctor Surgeon and a person treated as a civil servant, on 12.02.2015, before the patient's colon tumour removal surgery, failed to perform the repeated fibrocolonoscopy and tumour biopsy to clarify the diagnosis and location of the tumour. During the patient's colon tumour removal surgery and in breach of special statutory safety rules, he negligently damaged the patient's spleen during the surgery, which resulted in the removal of this internal organ after the development of splenic bleeding. During the spleen removal, he negligently removed the tissues of the patient's pancreas together with the spleen, thus damaging the patient's pancreas. It led to a development of acute pancreas inflammation resulting in death of the patient on 14.02.2015.[25] The court found that the accused did not anticipate

[23] *State v. M. Ž.*, Supreme Court of the Republic of Lithuania (2019, no. 2K-78-511/2019).
[24] *Ibid*.
[25] *State v. Ž. S.,* Kaunas district court (2020, no. 1-160-240/2020).

that his actions – the damage of the pancreas - could lead to the death of the patient, however, according to his education, experience and competence as a surgeon, he had and could have anticipate that his careless and inattentive behaviour and the damage of vital organ – the pancreas could lead to the death of a patient. The above circumstances constitute grounds for claiming that the accused committed the act through criminal negligence. In this case, the issue of the cause of patient's death was again addressed in this case – surgeon's actions in removing and damaging internal organs, anatomical features of the patient and unavoidable consequences of surgery (i.e., objective and subjective features of the crime), but not the possibility of not punishing the doctor in accordance with the procedure established by criminal law.

However, the doctors who have made a medical error are not always accused of a dangerous act involving a health impairment. In one case, an Obstetrician was convicted of misconduct and failure to take appropriate actions during childbirth, during which the new-born died, only according to Article 229 of CC, i.e., for the failure to perform official duties.[26]

Nevertheless, the author would like to point out that there are only few similar cases in Lithuania within the last 10-15 years. This fact may mean that the doctors do not make major errors, the victims do not apply to law enforcement authorities, or pre-trial investigations are not promising, refused to initiate or terminated. The number of criminal proceedings against the doctors in other states is not high too. Data from their examination of 192 cases for the period January 2007 to March 2018 identified twelve cases where healthcare professionals were charged with gross negligence manslaughter (ten of whom were doctors) – just 6% of the cases investigated. These figures need to be seen in the context of approximately 250,000 licensed doctors in the UK.[27] Although the number of such cases increases quite rapidly in some states: only 50 cases of medical prosecution were recorded during the period after the Second World War until 1999 in Japan, but there were 79 cases from 1999 to 2005.[28] According to other sources, the number of criminal cases related to gross medical negligence also increased significantly in the United Kingdom and Canada.[29]

However, even a small number of criminal cases does not mean that the examined issue is not important or relevant. On the contrary, it is a particularly sensitive issue for the state, society and the medical community. International

[26] *State v. S. M.*, Supreme Court of the Republic of Lithuania (2008, no. 2K-299/2008).
[27] Leslie Hamilton, "Independent review of gross negligence manslaughter and culpable homicide" (2019) // https://www.gmc-uk.org/-/media/documents/independent-review-of-gross-negligence-manslaughter-and-culpable-homicide---final-report_pd-78716610.pdf.
[28] Norio Higuchi, *supra* note 12.
[29] Fiona McDonald, *supra* note 3.

organizations (World Health Organization, World Bank) have been involved in the fight for patient safety against medical errors and, more broadly, the poor quality of medical services; the European Union developed and implemented long-term patient safety programmes (World Alliance for Patient Safety, 2002; World Health Organization, 2000; Council of Europe, 2008). The application of criminal liability to doctors has also led to a rapid increase in legal pressure on doctors. The response has been the emergence of defensive medicine.[30] Such commentators as Dr Jenny Vaughan in the UK, and Professor Alan Merry in New Zealand, argue that unfairly criminalisation in a profession where risks are ever present, that criminalisation prevents learning and may encourage a form of defensive medicine which is not in the interests of patients, doctors or the wider healthcare systems.[31] The defensive medicine has a completely negative impact on the health care system as a whole. Many other foreign authors emphasize the significant negative impact of criminal proceedings on doctors and the treatment process: although the criminal investigation and prosecution of doctors is extremely rare, the effect of just one case has been palpable and profound across the medical profession. Many doctors feel unfairly vulnerable to criminal and regulatory proceedings should they make a mistake which leads to a patient being harmed.[32]

It is therefore not so important that there are few cases where doctors are prosecuted for professional misconduct. It is much more significant to analyse whether those few (for example, in Lithuania) or a dozen (in larger European states) cases per year should remain by stating that doctors must be prosecuted for medical negligence in certain cases, regardless of the legal consequences involved. In addition to the occurrence of defensive medicine, there are many other consequences from criminalising a negligent doctor. A negligent doctor may face professional disciplinary proceedings, limits imposed on his/her ability to practice, a cessation of any hope of professional advancement and crucially a professional reputation that is irreparably tarnished. Classifying negligent conduct as criminal, however, threatens a doctor with a personal reputation that is irreparably tarnished.[33] It may therefore

[30] The defensive medicine means the promotion of doctor-patient opposition; attenuation or complete disappearance of therapeutic effects associated with the traditional relationship of mutual trust; the attenuation of traditional ethics of selfless service to patient well-being; the reorientation of the doctor to safeguard his own interests but not the interests of the patient; the transformation of treatment standards into an object of struggle between the doctor and patient; the dominance of formalistic requirements in doctor's practice; promotion of corruption in the health care system (Liutauras Labanauskas, Viktoras Justickis, and Aistė Sivakovaitė, "Feasibility of law. The current medical liability increase trend," *Social Sciences Studies* 4(8) (2010)).

[31] Leslie Hamilton, *supra* note 27.

[32] In any event, statistics are of no comfort to the individual who is facing the reality of criminal investigation. One doctor who had been the subject of an investigation shared their diary entries from the time: "I am now crying inconsolably and quite frankly feel like walking under the nearest bus. I seem to spend every waking hour on the phone. I felt like I was being hunted in a game in which I didn't know the rules – not having control or an understanding is the worst part" (Leslie Hamilton, *supra* note 27).

[33] Michelle Robson, Jon Maskill, and Warren Brookbanks, *supra* note 8.

be questioned whether the absolute or partial immunity of doctors from criminal liability should be ensured.

The examined issue is raised not only in Lithuania – the criminal liability of doctors for medical negligence is quite widely addressed in other states. Often these issues of medical liability do not end within the jurisdiction of national courts. The victims from different states apply to the ECHR and support their claims by the violation of the Convention. Therefore, in the author's opinion, it is important to provide a broader analysis of the issue in the context of the case law of the ECHR and try to answer the question of the necessity of criminal liability of the doctors based on this analysis.

2. CRIMINAL LIABILITY FOR MEDICAL NEGLIGENCE IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Unlike the Lithuanian courts, the ECHR deals more frequently with cases related to the criminal or civil liability of doctors, the delimitation of these liabilities and the obligation of the state to apply specific legal measures in case of medical negligence. It can be noticed that the issue of insufficiency of civil liability and intentions of the victims to apply criminal liability is relevant in very different countries, since the applicants are usually from entire Europe or other states. Thus, in the jurisprudence of the ECHR, we can look for an answer to the question – whether the doctor who has made an error in his or her professional activity or were negligent and caused harm to the patient's health or life must be held criminally liable.

The main Article of Convention that is mentioned and used in criminal proceedings against doctors and protects person‘s life is Article 2 of the Convention. According to the Article 2, everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.[34] Pursuant to Article 2, the State agents are obliged to refrain from acts or omissions of a life-threatening nature, or which place the health of individuals at grave risk. The states also have positive obligations under Article 2 to protect the health of individuals in particular circumstances. An issue may thus arise under Article 2 where it is shown that the authorities of a Contracting State have put an individual’s life at risk through the denial of health care, they have undertaken to make available to the population in general.

[34] *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 1, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16*, Council of Europe, ETS (1950, 5).

The Convention does not guarantee a right to health-care or a right to be healthy. Otherwise, the obligations the Contracting States assumed under the Convention are of a negative and of a positive kind. Under the negative obligation, the Contracting State must not interfere with the health of an individual unless there is Convention-compliant justification for so doing. The Contracting State may also be required to take measures to safeguard the health of an individual under the so-called positive obligations.[35]

2.1. THE ANALYSIS OF THE DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Indeed, the Article 2 and its interpretation by itself does not provide an answer whether we are obliged to apply criminal sanctions for medical negligence. That is why we should analyse the decisions of ECHR where such issue was raised more deeply. By invoking the methods of analysis, systematization and generalization, the author reviewed the databases of ECHR decisions from past until present (when this issue became the object of ECHR), selected the relevant ECHR decisions that examined the issue of medical negligence cases and raised the question of necessity of the criminal liability for medical negligence. Besides, the author uses the same methodology and reviewed relevant and related scientific researches of mostly foreign authors that analysed the decisions of ECHR or criminal liability for medical negligence. The most significant case law of ECHR is presented according to the results of such review.

One of the recent cases, where ECHR gave some interpretations of Article 2 concerned medical negligence, was the case of *Mardosai v. Lithuania*. The applicants complained according to the Article 2 of the Convention regarding the effectiveness of the criminal investigation into the alleged medical negligence which had led to their new-born daughter's death. On 15 May 2009, the first applicant, who was nine months pregnant and already past her due date, was admitted to the obstetrics and gynaecology ward of Jurbarkas Hospital. In the morning of 20 May 2009, she was given medication in order to induce labour, but the medication was subsequently discontinued and she was given sedatives. In the late afternoon, her waters broke. The doctors noticed that the heartbeat of the foetus was weak and decided to perform a Caesarean section. Following the surgery, the first applicant gave birth to a daughter. The new-born baby was in a serious condition, so she was taken to a hospital in Kaunas for intensive care. On 22 May 2009, the baby died. On 22 June

[35] *Health-related issues in the case-law of the European Court of Human Rights*, Thematic Report, Council of Europe/European Court of Human Rights (2015) // https://www.echr.coe.int/Documents/Research_report_health.pdf.

2009, the applicants asked the Jurbarkas district prosecutor (hereinafter - "the prosecutor") to initiate a pre-trial investigation regarding the medical negligence of Jurbarkas Hospital which had led to their new-born daughter's death. The pre-trial investigation was initiated on the same day. On 28 February 2014, V. K., the gynaecologist, was served with a notice that, under Article 229 of the Criminal Code, she was suspected of having failed to perform her official duties. On 14 July 2014, the Jurbarkas District Court dismissed the case on the basis that it was time-barred. The same decision was validated after Appeal and Supreme Instance Courts revision. The courts dismissed the applicants' appeals.

Besides, the applicants instituted civil proceedings against Jurbarkas Hospital by claiming compensation in respect of pecuniary and non-pecuniary damage caused by inadequate medical services provided to the first applicant and their new-born daughter. The court considered that the doctors' actions had not been premeditated or grossly negligent, so the applicants' claim in respect of non-pecuniary damage was granted in part, and they were awarded a total of LTL 80,000 (approximately EUR 23,170) under that.

The applicants complained that the criminal investigation regarding the alleged medical negligence which had led to their new-born daughter's death had been lengthy and ineffective. They relied on the procedural limb of Article 2 of the Convention. The Court reiterated that, although the Convention does not guarantee a right to have criminal proceedings instituted against third parties, the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to criminal law. The Court admitted there were several periods of inactivity, which together amounted to about one year and six months of inactivity imputable to the authorities. The Court also noted that for the rest of the time the investigation was conducted very slowly and the investigative measures were sparse. Despite that, if the infringement of the right to life is not caused intentionally, the procedural obligation imposed by Article 2 does not necessarily require the provision of a criminal law remedy in every case. In the specific sphere of medical negligence, the obligation may also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained. Accordingly, the Court is of the view that in the present case the criminal proceedings could not be regarded as effective for the purpose of Article 2 of the Convention. However, the Court observes there is no dispute that the death of the applicants' daughter was not intentional. In cases concerning medical negligence, the procedural obligation under Article 2 of the Convention does not

necessarily require criminal liability, and civil liability may be sufficient. That is why there was no violation of Article 2 of the Convention under its procedural limb.[36]

So, the Court admitted that the whole criminal process was too long, but accordingly it decided regarding the sufficiency of civil liability. It means that criminal proceedings in medical negligence cases could be initiated and investigated, but the lack of such investigation or issues with the quality of it does not mean the violation of Article 2 of the Convention.

Moreover, in this case three judges issued partly dissenting opinion which emphasized the fact that the applicants had an effective remedy in civil proceedings (as they did not claim that these proceedings were unfair or ineffective) and thus can no longer claim to be victims of the alleged violation of Article 2. Accordingly, this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and should have been rejected in accordance with Article 35 §4.[37]

It is an interesting fact that ECHR similar position of such interpretation of Article 2 is maintained during the last 20 years and more. One of the first cases, where such issues was discussed, was *Calvelli and Ciglio v. Italy* and there it was the judgement of the Grand Chamber. In this case, the applicants alleged a violation of Articles 2 and 6 § 1 of the Convention on the ground that owing to procedural delays a time-bar had arisen making it impossible to prosecute the doctor responsible for the delivery of their child, who had died shortly (two days) after birth. The applicants' complaint was essentially that no criminal penalty was imposed on the doctor found liable for the death of their child in the criminal proceedings at first instance because of the operation of the time-bar. In the instant case, the Court noted that the criminal proceedings instituted against the doctor concerned became time-barred because of procedural shortcomings that led to delays, particularly during the police inquiry and judicial investigation. However, the applicants were also entitled to issue proceedings in the civil courts and they did it. The applicants entered into a settlement agreement with the doctor's and the clinic's insurers and voluntarily waived their right to pursue those proceedings. A judgment in the civil court could also have led to disciplinary action against the doctor. If the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal law remedy in each case. In the specific sphere of medical negligence, the obligation may, for instance, also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal

[36] *Mardosai v. Lithuania*, European Court of Human Rights, App. No. 42434/15 (2017).
[37] *Mardosai v. Lithuania*, European Court of Human Rights, App. No. 42434/15 (2017), Joint partly dissenting opinion of judges Yudkivska, Motoc and Ravarani.

courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged. The Court reiterated that "where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence, he or she is in principle no longer able to claim to be a victim". That conclusion makes it unnecessary for the Court to examine, in the special circumstances of the instant case, whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2. The Court therefore held that no violation of Article 2 of the Convention has been established in the instant case.[38]

The same motivation and interpretation of Article 2, *inter alia* medical negligence, were provided in another case of *Šilih v. Slovenia*, like in the case *Mardosai v. Lithuania* analysed above. In this case, the applicants complained that their son had died as a result of medical negligence and that their rights under Articles 2, 3, 6, 13 and 14 of the Convention had been violated by the inefficiency of the Slovenian judicial system in establishing responsibility for his death. Although the Court did not say that criminal liability must be assumed for medical negligence, but the Chamber considered that the way the civil proceedings had been handled (for example, the case had come before six different judges and was still pending after almost twelve years) could not be regarded as effective or, therefore, as satisfying the procedural requirements under Article 2. While the criminal proceedings took almost five years to be concluded with no charges being brought against the accused, it then took the civil court in the first-instance proceedings an additional five years to reach a verdict – these facts were enough to recognize the violation of procedural requirements under Article 2 and the Government's preliminary objection concerning the exhaustion of civil domestic remedies in respect of the procedural limb of this provision is dismissed.[39]

The Court also stated similar arguments in another subsequent judgement: the Convention should not be interpreted as guaranteeing a right to secure a conviction in criminal proceedings and indicated the probability to obtain a better result for the applicant, had the latter used civil proceedings to accuse a doctor in negligence.[40] The same or very similar statements about medical negligence and non-binding criminal liability for it were made in other judgements of ECHR: *Mastromatteo v. Italy*[41]; *Anna Todorova v. Bulgaria*[42]; *Cevrioğlu v. Turkey*[43]; *Lopes de Sousa*

[38] *Calvelli and Ciglio v. Italy*, European Court of Human Rights, App. No. 32967/96 (2002).
[39] *Šilih v. Slovenia*, European Court of Human Rights, App. No. 71463/01 (2009).
[40] *Vo v. France*, European Court of Human Rights, App. No. 53924/00 (2004).
[41] *Mastromatteo v. Italy*, European Court of Human Rights, App. No. 37703/97 (2002).
[42] *Anna Todorova v. Bulgaria*, European Court of Human Rights, App. No. 23302/03 (2011).
[43] *Cevrioğlu v. Turkey*, European Court of Human Rights, App. No. 69546/12 (2016).

Fernandes v. Portugal.[44] Finally, in the latest decision adopted on December 2018, ECHR again reiterated that in cases where the infringement of the right to life or to personal integrity is not caused intentionally, the procedural obligation imposed by the Convention to set up an effective and independent judicial system does not necessarily require the provision of a criminal-law remedy. The choice of means for ensuring the positive obligations under the Convention is a matter that falls within the Contracting State's margin of appreciation.[45]

These cases illustrate the situations where criminal and civil proceedings were initiated, so the Court conclusion that applicants' choice for civil processes is understandable and that is the reason for implementing obligations under Article 2. But what could be the statements of the Court, if the applicant initiated criminal proceedings only and did not apply with a claim to the civil court simultaneously? There are some cases where applicants have chosen the criminal process only. For instance, in the case of *Rõigas v. Estonia,* the Court did not find sufficient grounds to conclude that the criminal proceedings in the respondent State would have been inadequate or not sufficiently thorough. The prosecutor's decision to terminate the criminal proceedings was not taken hastily or arbitrarily, but rather relied on the evidence gathered, including the forensic medical assessment. By taking into account that the respondent State has demonstrated that both the civil law and criminal law remedies exist and function in practice, and considering that the criminal law remedy used by the applicant in the present case cannot be said to have been applied ineffectively, the Court finds no violation of Article 2 of the Convention.[46]

Thus, ECHR has been consistent enough for many years that criminal liability may be imposed on doctors, but it is not necessary to do so. Pursuant to Article 2 of the Convention, the state must only ensure the necessary measures are in place to identify those who have breached the rules or requirements (doctors), to apply civil or disciplinary measures (the application of criminal penalties is not prohibited at the same time) to them, and the compensations must be awarded (granted) and paid to the victims. In other words, neither the Convention nor the ECHR obliges the states to penalize the doctors under criminal law in the event of medical negligence; on the contrary, it is the full right and freedom of choice of each state.

[44] *Lopes de Sousa Fernandes v. Portugal*, European Court of Human Rights, App. No. 56080/13 (2017).
[45] *Isayeva v. Ukraine*, European Court of Human Rights, App. No. 35523/06 (2018).
[46] *Rõigas v. Estonia*, European Court of Human Rights, App. No. 49045/13 (2017).

2.2. CIRCUMSTANCES WHEN THE CRIMINAL LIABILITY IS COMPULSORY CONSEQUENCE FOR MEDICAL NEGLIGENCE

In author's opinion, three categories of cases can be distinguished conditionally by generalizing all ECHR cases (mentioned in the article or reviewed by the author) related to medical negligence and where the position about criminal liability necessity was presented. Such categorization is based on the analysis and systematization of court decisions, by keeping circumstances of the cases and the court explanations regarding the sufficiency of civil liability for medical negligence as the main point of view. Firstly, there are the cases, where the criminal liability is not compulsory remedy for medical negligence and the requirement of Article 2 of the Convention could be fulfilled by civil liability. The second group of cases is the cases with extraordinary circumstances and when criminal liability is necessary to satisfy the requirement of Article 2 of the Convention. The last category contains the cases, when medical negligence occurs usually in ordinary circumstances and when the criminal liability is often a better way to satisfy the requirement of Article 2 of the Convention.

Firstly, the first category of mentioned cases will be described. These are cases involving the state's obligation to provide various types of legal remedies: it is important that the applicant has a real opportunity to choose and exercise any type of legal liability (civil or criminal). The focus is on the effectiveness of the measures and guarantees provided by the state, while their use could identify the medical misconduct, actions or procedures, assess the damage caused, and obtain compensation for the damage caused from the guilty persons. Only if one of the possible types of liability is not sufficient, effective or efficient (as in the mentioned case of *Šilih v. Slovenia*), there could be a violation of Article 2 of the Convention. State's obligation to execute an effective investigation has been considered in the Court's jurisprudence as an obligation inherent in Article 2 that requires the right to life to be protected by law. However, in such cases, civil law remedies are generally preferred, but these remedies must be effective and available to individuals. The element of the "effectiveness" seems to be main in examining the issue of the lack or deficiency of domestic measures. In cases, when the applicant instituted only criminal proceedings and the government argues on non-exhaustion of domestic remedies, as the applicant did not attempt to regulate the dispute by means of civil proceedings, the Court examines whether such proceedings would have resulted in a more effective examination of the case.[47] The sole theoretical possibility of instituting

[47] Krešimir Kamber, "Medical Negligence and International Human Rights Adjudication: Procedural Obligation inMedical Negligence Cases Under the American Convention on Human Rights and the European Convention onHuman Rights"; in: Yves Haeck, Oswaldo-Rafael Ruiz-Chiriboga, and Clara Burbano Herrera,

civil proceedings, but the absence of adequate means of enforcing them and defending one's rights in those proceedings (*inter alia* the right to life) does not in itself constitute grounds for stating that such measure created by the state does not violate Article 2 of the Convention. However, after having established that a person has been able to make effective use of the means of civil proceedings and defend his/her rights, it is considered to be fully sufficient to guarantee the right to life. Such position of ECHR allows the author to conclude that in cases where the state does not create a legal regulation according to which a victim of a medical negligence can effectively defend his / her rights by means of civil law, the criminal liability becomes a binding legal consequence. On the other hand, such situation is more theoretical, as civil remedies are usually available in every state, although they may not always allow achieving the desired goals and adequately protecting one's rights. After having established such factual circumstances, it is more an issue of a procedural violation of the Article 2, but not an obligation to prosecute the physician.

The application of criminal liability for medical negligence is more common in the second category of cases that involve certain exceptional circumstances or atypical situations where the state has an obligation to conduct an impartial investigation and generally apply criminal law measures. Thus, the latter category of cases is closer to the limit where the prosecution in the context of Article 2 sufficiently ensures the protection of the fundamental human rights to life against violation. As stated in the Article 2 application practice review, even in the context of non-intentional infringements of the right to life, there may be exceptional circumstances where an effective criminal investigation is necessary to satisfy the requirement of Article 2 of the Convention. The ECHR has found such exceptional circumstances to arise in cases where the negligence which led to an infringement of the right to life went, inter alia, beyond a mere error of judgment or carelessness. For instance: in the context of dangerous industrial activities (*Öneryıldız v. Turkey*); in the context of a denial of healthcare (*Asiye Genç v. Turkey*); in the context of military activities (*Oruk v. Turkey*); in the context of transportation of dangerous goods (*Sinim v. Turkey*).[48] However, the subject of this study is not the exceptional circumstances where the criminal liability must be applied for medical negligence. It is because the examination and analysis of those circumstances requires a separate investigation and it can be provisionally presumed that, in such exceptional cases, the criminal proceedings are fully justified and can at the same time be regarded as a vital guarantee of Article 2. The second reason – in this article the author seeks to

eds., *The inter-American Court of Human Rights: Theory and Practice, Present and Future* (Mortsel: Intersentia, 2015).

[48] *Guide on Article 2 of the Convention – Right to life* (2020) // https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf.

establish whether the criminal liability should be imposed on simply negligent doctors in the treatment process under normal circumstances and in relation to everyday patients.

It is also possible to distinguish the third category of cases where the position of the ECHR is also often slightly different from the cases analysed above when the prosecution is not obligatory in the investigation of cases of medical negligence. This sort of cases can be described like situations, when medical negligence occurs usually in ordinary circumstances and when criminal liability is often a better way to satisfy the requirement of Article 2 of the Convention. On the other hand, according to J. Murgel, these cases are also partly related to certain exceptional circumstances: in accordance with ECHR jurisprudence, the responsibility of the State under Article 2 exists only in exceptional cases as regards the acts and omissions of health-care providers: where a patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment or where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment where the authorities knew or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materializing.[49]

For instance, the case of *Mehmet Şentürk and Bekir Şentürk v. Turkey* examined the death of the applicants' wife and mother because of the pregnancy compilations after the errors made by physicians. The applicants alleged that the members of the medical staff were in breach of their professional duties on account of the serious negligence ascribed to them, but also on account of the failure to provide medical treatment to Mrs Şentürk because the deceased woman and her husband did not have the necessary financial resources. The Court founded out that the deceased woman, victim of a flagrant malfunctioning of the hospital departments, was deprived of the possibility of access to appropriate emergency care. This finding is sufficient for the Court to conclude that the State failed in its obligation to protect her physical integrity ant that there has been a violation of the substantive limb of Article 2 of the Convention.[50]

However, this is only one part of the ECHR decision and the arguments concerning the violation of the right to life in principle. Another part of this decision is more important for the author's study – the one related to procedural violation of the Article 2 of the Convention with the necessity for criminal proceedings and criminal liability.

[49] Jasna Murgel, *supra* note 15.
[50] *Mehmet Şentürk and Bekir Şentürk v. Turkey*, European Court of Human Rights, App. No. 13423/09 (2013).

In this respect the Court emphasised that the applicants' complaints also concern the fact that the doctors and midwives who were accused and found to be criminally responsible for Mrs Şentürk's death at first instance had not received criminal sanctions, since the prosecution had been discontinued as being time-barred (author`s note, similar factual situation as in the case *Macikai v. Lithuania*). The applicants had used only a domestic criminal law remedy to complain about the failings of the doctors and midwives responsible for caring for the deceased woman. After more than nine years of proceedings, all the proceedings brought against the medical staff in question were discontinued as being time-barred – except for those concerning G. E., whose acquittal was upheld. In the circumstances of this case, the negligence attributable to that hospital's medical staff went beyond a mere error or medical negligence, in so far as the doctors working there, in full awareness of the facts and in breach of their professional obligations, did not take all the emergency measures necessary to attempt to keep their patient alive. Moreover, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may entail a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative. The Court considers that the same applies where a patient is confronted with a failure by a hospital department to provide medical treatment and this results in the patient's life being put in danger. The Court concluded that there has been a procedural violation of Article 2 of the Convention.[51]

Thus, the ECHR stated that in cases where a doctor does not provide the necessary medical care, the provision of which is necessary in a specific situation and may lead to the death of the patient, the state must ensure that the doctors responsible for such inaction are held criminally liable. In this case, it is important to emphasize that criminal liability must be applied even if the state provides real opportunities for a person to choose any form of liability (civil or criminal). The ECHR stated that the Turkish legal system affords injured parties, on the one hand, criminal proceedings and, on the other, the possibility of bringing an action in the relevant civil court, together with the possibility of disciplinary proceedings if civil liability is established. So, the Turkish legal system offers litigants remedies which, in theory, meet the requirements of Article 2. However, in theory only. In this particular case, the factual circumstances and the inaction of the doctors allowed the ECHR establishing the substantive limb and procedural violations of Article 2 of the Convention.

ECHR follows the similar opinion in other cases involving civil servants or officials (the doctor in this case may be equated with a servant) and the careless but

[51] *Ibid*.

dangerous act or inaction of those persons. In the case *Öneryildiz v. Turkey,* the court stated that where it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative. The judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation. But on the other hand, the Court is not so strict without any doubts – it should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence.[52]

Although the latter decision of the ECHR examined the situation that was not related to medical negligence, however, it reflects the general approach of the court to the duty of the state to ensure a proper response, an effective and impartial investigation and appropriate sanctions for persons whose conduct has been characterized by gross and dangerous negligence. The value of high-quality investigation was mentioned in ECHR decisions later: in some cases, the Court has found that the situations are investigated and evidence is collected in conformity with the Convention requirements only by recourse to criminal-law remedies. For example, in *Mitkus v. Latvia*, the Court concluded that civil proceedings had not offered the applicant a sufficient possibility to establish facts, gather evidence and find out the truth about the circumstances of his HIV infection.[53] The same statements were repeated in the case of Gorodovych v. Ukraine.[54]

On the one hand, the victim has no absolute obligation to require the prosecution of the guilty persons. The essence of ECHR jurisprudence is that the state enables victims of medical negligence to obtain an effective and adequate investigation of the circumstances, to assess the amount of damage caused impartially, proportionately and fairly, and to grant a real right to compensation for such damage. At the same time, these measures also mean the prevention of these violations in the future. On the other hand, however, it may form an impression that,

[52] *Öneryıldız v. Turkey*, European Court of Human Rights, App. No. 48939/99 (2004).
[53] *Mitkus v. Latvia*, European Court of Human Rights, App. No. 7259/03 (2012).
[54] *Gorodovych v. Ukraine*, European Court of Human Rights, App. No. 71050/11 (2017).

in situations where patients have lost their lives as a result of obvious medical negligence, failure to perform essential duties or "gross medical negligence", the criminal liability must be applied in respect of the doctors. Although ECHR does not directly use the definition "gross medical negligence" in its decisions, however, in author's opinion, this definition could describe some of the cases where the doctors are to be held criminally liable. Since the matter of "gross medical negligence" is not strictly determined, sometimes it can be the object of the discussions.

For instance, the criminal offence of gross negligence manslaughter applies in all United Kingdom (further – UK). Even in a 19th century case, the court gave as an example of gross negligence the surgeon who operated while drunk.[55] For a doctor to be convicted of gross negligence manslaughter, the following elements must be proven: the doctor owed a duty of care to the patient; the doctor breached that duty of care; the breach caused (or significantly contributed to) the death of the patient; and the breach that caused the death of the patient was grossly negligent and therefore a crime. That breach of duty of care by the doctor must itself have caused (or have significantly contributed to) the early death of the victim, albeit that there was no intention to cause harm or death. But a mistake, or even a serious mistake, should not amount to gross negligence manslaughter, notwithstanding the catastrophic outcome for the victim.[56] Lord Mackay in *Adomako* pointedly made reference to the need for a consideration of 'all the circumstances' and yet such has been the preoccupation with when simple negligence becomes gross, an assessment of whether the doctor is wholly culpable has not been given the necessary attention it demands and deserves. Terms such as 'illogical' and 'a decision that would be endorsed by no one' are expressions that provide the jury with some form of benchmark rather than be reliant on their own individual perception of what they perceive as gross negligence. Criminality requires culpability. If the doctor's actions are lacking in logic or would be endorsed by no one and the blame lies solely at the feet of this doctor, then this is a negligent and criminal doctor.[57]

Meanwhile, the other UK researches criticize *Adomako* criteria of "gross medical negligence" considered reliable in the UK for some time and state that *Adomako* should have adopted a capacity-based approach to reckless manslaughter rather than deciding that gross negligence manslaughter was the correct approach in cases of this nature. In the context of healthcare professionals, it is more important conscious departures from good practice as opposed to medical mishaps that have unfortunate consequences. It is necessary to evaluate why the inadvertent fail to appreciate a risk and the context in which the proscribed conduct occurred. Where such failure is

[55] Femi Oyebode, "Clinical Errors and Medical Negligence," *Medical Principles and Practice* 22 (2013).
[56] Leslie Hamilton, *supra* note 27.
[57] Michelle Robson, Jon Maskill, and Warren Brookbanks, *supra* note 8.

the manifestation of a reprehensible character flaw criminal responsibility should follow.[58] Thus, although the definition of gross medical negligence seems to describe the cases where the doctor may be prosecuted in sufficient detail, but there has been a recent debate about the significance and practical application of this definition even in the state of its origin.

It is also important that this definition is normally used in the states of common law legal systems (UK, Canada, US) and it is not significant in other European states with the civil law legal system. In the states of civil legal system, the criminal liability for negligent crimes (*inter alia* medical negligence) arises from negligent fault, their consequences, the causal link between them, others subjective and objective features of the crime. The degree of negligence does not have a significant effect on the occurrence of criminal liability. Thus, the criminal policy and case law in Lithuania (as well as large part of Europe with a civil law legal system) are fundamentally different from the states of the common law legal system. These differences illustrate other examples from foreign countries researchers.

Compared to England, where criminal liability is reserved for egregious lapses that result in the patient's death - in such circumstances the doctor may be convicted of 'gross negligence' manslaughter, in Germany, the criminal proceedings appear to be more frequent: it has been estimated that some 3,000 criminal investigations against doctors are initiated each year, of which around 10 percent result in prosecution. This follows from one of the features of German law - it knows a crime of 'negligent bodily injury' that has no common law equivalent and applies to lower-level unintentional injuries. It means that in any case that involves the injury allegedly stemming from medical malpractice, the patient has the option of reporting the doctor to the police.[59]

The scholars in Italy discuss the legal reform by limiting to one type of doctors – surgeons' criminal liability in high-accuracy and high-risk surgery. It suggests that surgeons should be relieved from criminal liability in cases of simple/ordinary negligence, where the guidelines have been observed. From a legal point of view and with great emphasis on subjectivity, it is proposed that a surgeon shall only be held criminally liable for gross negligence.[60] It means that at least these countries still apply criminal liability for simple medical negligence.

In general, in European countries with the continental (civil) legal system, the criminal law prosecution is common for healthcare providers who provide professionally poor medical treatment and cause a deterioration of a patient's health, or which leads to the patient's death, and which could have been avoided if the

[58] Cath Crosby, *supra* note 8.
[59] Marc Stauch, *supra* note 10.
[60] Polychronics Voultsos, Giovanna Ricci, Vittoradolfo Tambone, *et al*., *supra* note 5.

medical professional had not been negligent or careless in the performance of the treatment. The European countries often incriminate professional errors of doctors in the context of general crimes against the body and life – that is, wounding or causing grievous bodily harm, or causing the death of a person due to negligence – involuntary manslaughter.[61]

The same situation concerning criminal liability of simple medical negligence is present in such countries as Ukraine, Belarus, Russia, Saudi Arabia,[62] Japan.[63]

So, the doctor who work in the mentioned countries and has made an error during treatment or was negligent and caused the patient's death or health impairment will be subject to traditional or customary conditions of criminal liability. In this case, the doctor's liability will depend on the possibility to identify the composition of the specific crime that consists of the objective and subjective features. In the UK the same doctor will not be prosecuted for similar negligence actions because of "gross medical negligence" criterion application. However, this criterion is not entirely clear and universal, so that it alone is sufficient to prosecute a doctor or even more to take it over and use it in much of Europe. At the same time, the author has reasonable doubts as to whether the model of medical criminal liability operating in Lithuania is appropriate and correct.

After having summarised the ECHR jurisprudence, reviewing foreign countries researches in this field and analysed the situations examined in Lithuanian case law, the author agrees with the opinion expressed by lawyers of other states that the criminal prosecution for simple medical negligence does not achieve the objectives of an appropriate response to unintended harm to a patient; notably it is expensive, it does not reliably identify correctable faults in the system, does not necessarily reduce the likelihood of recurrence, and does not usually address the need for compensation.[64]

We should not punish simple medical negligence as it is done in Lithuania, France or elsewhere mostly in civil legal system states. Such model of criminalising doctors for simple negligence should not be followed in the UK. Only obvious disregard for the life or health of another should be punished in a criminal setting but this should include failure to rescue, and conduct that results in injury or death. In the context of healthcare malpractice, gross negligence manslaughter is difficult to apply. That is why the criminalisation of healthcare malpractice in England leaves too

[61] Miha Šepec, *supra* note 11.
[62] S. S. Vitvitskiy, O. N. Kurakin, P. S. Yepryntsev, *et al*., "Professional Negligence When Providing Medical Care: Criminal and Procedural Aspects" *Medico-legal Update* Vol. 21, No. 3 (2021).
[63] Robert B Leflar, "'Unnatural Deaths', Criminal Sanctions, and Medical Quality Improvement in Japan," *Yale Journal of Health Policy, Law, and Ethics* (2009).
[64] Mélinée Kazarian, *The role of the criminal law and the criminal process in healthcare malpractice in France and England*, A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities (2013).

great a scope for moral luck as only conduct resulting in death is criminalised whereas morally culpable conduct which results in injury is not. Criminal law should only be used as last resort as it is not necessarily an effective response to counteract healthcare malpractice.[65]

Similar opinions can be found in other states. For instance, the negligence of doctors caused the outrage in Japan and criminal liability was a common "assessment" of their misconduct. However, there have been proposals in this state not to punish doctors under criminal law: highly publicized arrest, detention, and prosecution of an obstetrician for a patient's death during childbirth in rural Fukushima prefecture, and his acquittal, seem to have crystallized Japanese public opinion around the view that the criminal justice system is too heavy-handed tool for proper regulation of medical quality. A systemic reform based on the concept of impartial non-criminal external review of medical accidents, if enacted, could serve as one guidepost for other nations seeking to design improved structures for compensation and prevention of medical injury.[66]

The content of the danger of a crime as one of the main features of the crime has been repeatedly analysed in the theory of Lithuanian criminal law by emphasizing that criminal liability is possible only for acts of the appropriate level of danger[67], while also mentioning the *ultima ratio* as one of the fundamental principles of criminal law, according to which the criminal liability must be applied only as a last resort, after less severe measures have been exhausted.[68] The same ideas are usually reflected in the case law. It is therefore reasonable to ask whether, in the event of medical negligence, we must in all cases apply the criminal liability in accordance with the usual model of criminal composition for a simple negligence. Without a doubt, the current criminal law obliges the applying subjects to do so. However, in author's opinion, it can be discussed whether such law is correct. The criminal law is an important regulatory tool to employ against health professionals who grossly deviate from safe practice but not when a negligent act, however tragic its outcome.[69] Both the analysis of the ECHR practice and studies by foreign authors suggest that doctors must not be prosecuted for simple medical negligence, and this could only be done by identifying extremely gross, irresponsible and manifestly inappropriate behaviour or inaction. In author's opinion, this act could have criminal consequences,

[65] *Ibid*.
[66] Robert B Leflar, *supra* note 63.
[67] Darius Pranka, *The conception of marking the line between crime and tort in the criminal law of Lithuania*, Doctoral Dissertation (Vilnius, 2012).
[68] Aušra Dambrauskienė, *Implementation of the ultima ratio principle in criminalising acts in the criminal code of the Republic of Lithuania*, Doctoral Dissertation (Vilnius, 2017).
[69] Fiona McDonald, *supra* note 3.

because only then it would be possible to talk about the level of danger inherent in a negligent crime and situation when the criminal law is justified as last resort.

CONCLUSIONS

1. Pursuant to the law and the doctrine of criminal law of the states of civil law legal system (for instance, Italy, France, Germany, Lithuania), the gross or simple medical negligence is evaluated through general features of the specific negligent crime. Usually, the law there has no exceptions or special rules for simple medical negligence cases.

2. During the interpretation and application of the Convention, the European Court of Human Rights does not create an obligation for states to punish the doctor under criminal law for simple medical negligence. Such possibility exists, but it is more important that the state has a legal mechanism ensuring an effective and sufficient protection of the rights of the victim by means of civil law.

3. According to the jurisprudence of the European Court of Human Rights, the researches of foreign authors, the danger of simple medical negligence, and *ultima ratio* principle, it can be reasonably discussed whether the current practice in large part of civil law countries, when doctors are prosecuted for simple medical negligence, should be changed. In such case, (the criminal) law could reflect the idea that a doctor should be punished by criminal punishment only for extremely negligent, manifestly irresponsible and gross performance or omission of duties that has caused the patient's death or health impairment.

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