

MEDICAL CRIMINAL LIABILITY

Natalia-Adriana Udriștioiu*

Abstract

Ensuring the rule of the law is usually achieved by complying with criminal standard requirement; therefore, the members of the society who are not complying by committing crimes are violating the rule of the law which cannot be restored except through criminal liability.

Sensu stricto, "the criminal liability means the offender's obligation to be subjected to criminal penalty, as a consequence for perpetrating an offense".

In accordance with article 50 of the Moldovan Criminal Code, " the criminal liability is considered the public sentencing in the name of the law, of criminal acts and of persons who have committed them, sentence that may be preceded by enforcement measures carried under the law ".

Given the abovementioned country's Penal Code, "the criminal actions are those that stated in the article 14 of the Penal Code, namely harmful actions (or lack of action) as stated in the criminal law, willingly perpetrated and suited to criminal liability."

In Romania, the Criminal Code stipulates that: "The offense is the transgressive act posing social threats and committed by guilt, as stated in the criminal law". Only an offense may result in criminal liability.

Malpractice is defined as a violation of the exercise conduct of the medical profession, of methods and procedures specific to the medical act or negligently executed, in ignorance or carelessness; it is the breach of duty of care, an act committed by a medical professional who, in objective working conditions, is not abiding to the rules of the profession, recommended and acknowledged as specific and valid.

The transgressions a health practitioner may commit in the exercise of his profession are provided in a specific section of the Romanian Penal Code, as well as specific laws.

Given the importance to the medical field and the broad range and frequency of allegations made by patients, this paper will approach the following punishable offences: Article 178 Penal Code - involuntary manslaughter, Article 184 Penal Code - bodily injury by negligence, Article 196 Penal Code - Disclosure of professional secrecy, Article 254 Penal Code - Taking bribes, Article 259 Penal Code - Receiving improper benefits.

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* Natalia-Adriana Udriștioiu is a 4th year PhD student in public law at the Free International University of Moldova; Contact: adria.natal@yahoo.com

Ensuring the rule of the law is usually achieved by complying with criminal standard requirement; therefore, the members of the society who are not complying by committing crimes are violating the rule of the law which cannot be restored except through criminal liability.

Sensu stricto, "the criminal liability means the offender's obligation to be subjected to criminal penalty, as a consequence for perpetrating an offense".

The principles of criminal liability are intended as guidelines of the entire body of rules regulating this institution, and they are addressing the following:

1. The principle of legality - the criminal liability is enforced on the basis and in strict accordance with the law; "nullum crimen sine lege, nulla poena sine lege";
2. The criminal offense is the only ground for criminal liability – the fundamental principle of the Criminal Code;
3. The principle of humanity – takes into account the human condition, the determinism of the perpetrator's social behavior and his ability to enact according to his free will;
4. The principle of inevitability of the criminal liability – the criminal liability is the inevitable result of committing a crime;
5. The principle of the personality of criminal liability – it is derived from the personal aspect of respecting the criminal law personal and it is directly correlated with the psychical profile of the offender, who must have committed the crime with guilt;
6. The principle of the uniqueness of criminal responsibility - a person cannot be held criminally liable more than once for perpetrating an offense and there may be applied only one penalty of the same kind, "non bis in idem";
7. The principle of the limitation of criminal liability - the criminal liability is not considered a necessity after a great period of time had passed since committing the crime; the social impact of the crime is fading, and the offender – constantly under the threat of punishment for all this time – may have redeemed himself. This principle is not applicable to crimes against peace and humanity, which are indefeasible.

In accordance with article 50 of the Moldovan Criminal Code, "the criminal liability is considered the public sentencing in the name of the law, of criminal acts and of persons who have committed them, sentence that may be preceded by enforcement measures carried under the law".

This article approaches the institution of criminal liability in Moldavian criminal law, as follows:

Unlawful conduct - it is an act or failure to act committed by a person responsible for his actions, an action or lack of action that proves to be contrary to legal norms, thereby rendering the liability of the guilty person. *Legal liability* – it implies the term of social responsibility that requires for each man to assume and to bear the consequences of his actions. Liability involves, to varying degrees, the state coercion. *The existence of crime* – it is demonstrated by the violation of the criminal law by certain members of society, the criminal sanctions being enforced as by applicable criminal law. *Enforcing the order of the law* - it is done indirectly, by means of criminal liability. *Criminal liability* – it is a form of legal liability that consist in public sentencing in the name of law, of the criminal acts and of the persons who have committed them, sentence that may be preceded by enforcement measures carried under the law. Strictly speaking, the criminal liability is the effect, the consequence of committing a crime. The perpetrator is required to undergo a criminal penalty

in this case. *The enforcing of criminal liability* is public condemnation by the State of the harmful act committed and of the offender, and it is expressed in the sentencing and the application of the appropriate punishment. *Exemption from criminal liability* may be made according to the criminal law (art. 54 - 60 CP) and it may be made only until pronouncing the sentence, as afterwards there may be only the case of criminal punishment exemption, because at this moment the criminal liability is already established. *Only when a specific crime is committed by a person*, the state has the right and the obligation to apply to such a person the conviction and the coercive measures that are the body of criminal liability. The state function to make accountable the person who had committed criminal offenses is carried out by the criminal investigation authorities, the prosecution and the court of law.

Given the abovementioned country's Penal Code, "the criminal actions are those that stated in the article 14 of the Penal Code, namely harmful actions (or lack of action) as stated in the criminal law, willingly perpetrated and suited to criminal liability."

In Romania, the Criminal Code stipulates that: "The offense is the transgressive act posing social threats and committed by guilt, as stated in the criminal law". Only an offense may result in criminal liability. The criminal law sanctions any action / inaction that seriously damage the protected values , and that it is committed by guilt, committed willfully, by negligence, or intentionally exceeded.

The criminal proceedings may be exercised in a criminal trial. This constitutes the notification of the court and shall be initiated by indictment act according to the law; the court, once vested, is compelled to judge.

The subject of criminal proceedings resides in the criminal liability of the persons who have committed crimes. The subjects of the criminal proceedings are in fact the main subjects of the legal criminal procedure, namely the state as an active subject of criminal proceedings, and the offender, the passive subject of the offense.

The criminal proceedings characteristics:

- ✓ The criminal proceeding is a social act (it belongs to the society and is exercised through certain state agencies vested in this respect);
- ✓ The criminal proceeding is mandatory (it is the direct consequence of the principle of excadescence of the criminal trial) unless there is provided prior complaint;
- ✓ The criminal proceeding is immutable (it cannot be withdrawn, it must be followed through until a final sentence is issued on the criminal case) unless the injured party wills to withdraw the complaint or to be reconciled with the perpetrator;
- ✓ The criminal proceeding is indivisible (it concerns all those who participated in the crime);
- ✓ The criminal proceeding is individual, following the principle of personal criminal liability, and it may be exercised only against those who participated in the offense.

The violation of criminal law by a person induces a report of legal conflict. This report of substantive law between the state and the offender assumes on the one hand the State's right to use the criminal proceedings against the offender, to hold him accountable of criminal liability, to apply a penalty to coerce him to execute it, and on the other hand the offender's obligation to be made liable for the offense committed and to execute the

appropriate penalty, and his right to make use of the counteraction to defend against the state prosecution. The latter, however, arises only when the criminal proceeding is initiated and it is founded on the basic principles of criminal proceedings, namely: the principle of the contradiction, the principle of revealing the truth and the principle of ensuring the right to defend.

The right of prosecute is virtually and impersonally contained in every legal norm, but becomes substantive and personal when the norm is violated by committing the illegal act. Similarly, the criminal proceeding is virtually contained, *in nuce*, in the incrimination norm, ever since it's passing, but it becomes substantive, exercisable since it is transgressed by the offender, *i.e.* when the offense covered by the norm is actually perpetrated.

The subject of criminal proceedings, indicated in art. 14 of the Code of Criminal Proceeding (same as Art. 9 par. 1 of the current Code of Criminal Proceeding.), is the accountability of persons who have committed crimes, a fact explained by the existence of state right to prosecute. The doctrine states that criminal liability resides in the criminal justice report and this legal relationship implies the existence of reciprocal rights and obligations established between subjects, in order to achieve the demeanor prescribed by the law.

The initiation/ the exercise of the criminal proceeding are made in accordance with Art. 15 of the Code of Criminal Proceeding which lists two conditions, namely: "whether there is evidence to support the reasonable assumption that a person committed a crime and whether there are no cases which prevents the initiation or the exercise of the criminal proceeding." In the doctrine, in addition to these two conditions is also present a third, namely that the prosecution is to refer to a definite person, precisely identified, as the criminal liability is personal.

The functional ability of the criminal proceeding. The legal base of the criminal proceeding is the existence of a provision of law governing a specific crime, establishing the implicit right of action, while the substantive base of the criminal proceeding is the perpetration of the abovementioned crime.

Conditions of functional invalidity of the criminal proceeding:

- ✓ The lack of substantive base for the criminal proceeding (there is no crime committed, the offense is not committed by the accused, there is a condition that removes the criminality of the act),
- ✓ The lack of legal base for the criminal proceeding (the act is not covered by criminal law, the constitutive elements of the offense are not met)
- ✓ The existence of causes revoking the criminal liability (there is no complaint or the complaint was withdrawn, the amnesty, the criminal liability limitation, the death of the perpetrator, *is res judicata*).

The withdrawal of the criminal prosecution is mentioned at Article 17.1 of the CCP, as well as the closing, as cause for the cessation of the criminal proceeding during the criminal prosecution.

As for the civil action pursued in criminal proceedings, accordingly to the Art. 20. 2 of the new Code of Criminal Procedure, there is stipulated: "the constitution as civil party is made in writing or oral, with the indication of the nature and the extent of claims, the reasons and the evidence that they are based on", and Article 20. 4 of the new Criminal Procedure Code: "in the case of breach of any of the conditions in paragraph. 1 and 2, the injured party

or his successors cannot be a civil party in the criminal proceedings, they may, however, pursue suit in the civil court". If the right to compensation has been granted on an agreement to another person, he cannot exercise civil action in the criminal proceedings, and if the transfer occurs after his constitution as civil party, the civil action disjoins (art. 20.7 of CCP). A civil party may waive civil claims by the end of debates on appeal by written application or oral hearing in the court of law (Article 22.2 of CCP). The written request is not required to be authenticated, the text not being correlated with the Code of Civil Procedure, which requires an authenticated form for the waiver of rights, but not to drop the proceedings. In the case of death of the civil party, the civil action is of the competence of the criminal court if the heirs exercise their option to continue the civil action within two months from the date of death. Similarly, in case of death of the civilly responsible party, the civil action is of the competence of the criminal court if the civil party indicates the heirs within two months of the date on which he is aware of that fact. In these cases, the law also provides the possibility for the criminal court to disjoin the civil proceeding and send it to the civil court, if it exceeds the reasonable duration of the trial.

In the case of death of the defendant, art. 25.5 of CCP stipulates that the court leaves unresolved the civil action. Similarly, it is the same in the case the criminal proceedings are dropped, when the amnesty or the criminal limitation occurred, or when the court upheld an agreement of guilt, but not completed a transaction on the civil side.

2. MALPRACTICE likely to be committed in THE MEDICAL FIELD

Malpractice is defined as a violation of the exercise conduct of the medical profession, of methods and procedures specific to the medical act or negligently executed, in ignorance or carelessness; it is the breach of duty of care, an act committed by a medical professional who, in objective working conditions, is not abiding to the rules of the profession, recommended and acknowledged as specific and valid.

The transgressions a health practitioner may commit in the exercise of his profession are provided in a specific section of the Romanian Penal Code, as well as specific laws, such as follows:

- ✓ Article 178 Penal Code. - Involuntary manslaughter
- ✓ Article 184 Penal Code. - Personal injuries by negligence
- ✓ Article 196 Penal Code. - Disclosure of professional secrecy
- ✓ Article 246 Penal Code. - Abuse of office against the interests of persons
- ✓ Article 247 Penal Code. - Abuse of the restriction of rights
- ✓ Article 249 Penal Code. - Negligence in service
- ✓ Article 254 Penal Code. - Taking bribes
- ✓ Article 259 Penal Code. - Receiving undue benefits
- ✓ Article 289 Penal Code. – Forgery
- ✓ Law no. 46/2003, patient rights law, published in Official Gazette no. 70 of 03.02.2003
- ✓ Law no. 143/2000 updated 2011 on preventing and combating illicit drug trafficking and use, published in Official Gazette no. 362 of 03.08.2000
- ✓ Law no. 282/2005 regarding the organization of blood transfusion, blood donation and human origin blood components, quality assurance and health safety, for therapeutic use, published in Official Gazette no. 915 of 13/10/2005

- ✓ Law 95/2006 on healthcare reform, published in Official Gazette no. 372 of April 28, 2006

Given the importance to the medical field and the broad range and frequency of allegations made by patients, this paper will approach the following punishable offences:

- ✓ Article 178 Penal Code - involuntary manslaughter
- ✓ Article 184 Penal Code - bodily injury by negligence
- ✓ Article 196 Penal Code - Disclosure of professional secrecy

A. Article 178 Penal Code - involuntary manslaughter

"Involuntary manslaughter as a result of failure to comply with regulations or safety measures in practicing a profession, or in performing a particular activity, is to be punished with imprisonment for 2 to 7 years."

Defined as the act of a person who causes, by negligence, the death of another person, involuntary manslaughter involves an infringement to the right to live. The substantive object is defined as the body of the deceased patient. Speaking in the terms of the crime subjects, as it is the case of the medical field, both are qualified because they each possess a certain quality when the offense is perpetrated: the medical professional (as the active subject) – the patient (as the passive subject).

In the case of this particular infraction, in the medical sector is also possible the **criminal participation**, both in its impersonal and in its personal form; by this we mean that the criminal liability extends over all professionals who intentionally caused, facilitated or helped in any way to commit the crime of manslaughter (impersonal participation), as well as when the crime was committed by several medical practitioners, by referring, this time, to the common liability.

The Constitutive Content

a) The objective aspect

The offense of manslaughter is a committable crime. The basis of criminal liability for a health practitioner may reside in the objective finding of a violation of medical duty - of care and caution in the practice of medicine. The immediate consequence is the death of patient.

Causal relationship. It is mandatory to be present in all cases. It is important to remember that we must refer to the causal nature of the medical act, which may also contribute indirectly to the same result.

If the result was due to the action / inaction of more than one professional, all of them will be held criminally liable, as the authors of the crime.

Finally, in the medical field we talk about victim-patient fault in two respects:

- * concurrent guilt - the patient's actions / inactions contributes to the abovementioned result; however, as this is achieved contributory, it DOES NOT revoke the criminal liability of the perpetrator
- * exclusive guilt - the patient is solely responsible for the disastrous result, and then the criminal liability of the health practitioner IS revoked.

b) The subjective aspect

The subjective aspect is the malpractice, in its aspects acknowledged in the field:

- The prevision guilt, when the offender has foreseen the possibility of the result but he unfoundedly hoped that it will not occur; as a rule, this type of fault occurs when

the medical professional underestimate the risk associated with the medical act, or overestimate the possibilities of action to avoid the adverse consequences of his action / inaction.

- Simple guilt, when the offender did not foresee the possibility of the result, although he should and could be able to do so.

These stipulations of the Criminal Code, applied in the medical field, are exceeded as exemplification, but may actually be circumscribed to the criminal law, as they are provided.

The examples in the medical-legal literature strongly highlight the quality of training of health practitioners, their decision-making abilities and medical conditions assessment skills, and the acknowledgment of their professional competence limitations. In other words, the incompetence, the excess of power, the poor training, the ignorance of professional standards and practice guidelines, the negligent performance of their professional duties - all these are forms of medical malpractice.

Forms of crime

As for the forms of the crime of manslaughter, it cannot be that case of attempted crime, because the offense is committed by negligence; the offense is taking place at the time of death of the victim-patient.

Also, in the medical field may become aggravating incidents forms provided by the Penal Code such as:

- ✓ Involuntary manslaughter as a result of failure to comply with regulations or safety measures in practicing a profession, or in performing a particular activity;
- ✓ misdemeanour committed by any other person in the exercise of their profession, and who is drunk;
- ✓ the action causes the death of two or more persons.

By these provisions the legislature has sought to determine a preventive, serious and competence based professional conduct for those practicing certain professions or trades, as is the case of medical professionals.

Furthermore, it is to be emphasized that in the medical practices, drinking on duty is susceptible to liability of any kind, including criminal, should the state of drunkenness is proved, without any limits of any kind stipulated in the law concerning the alcohol intoxication of the health practitioner.

Penalties

In the case of the simple form of the offense, the penalty is imprisonment from 1-5 years; for the aggravated forms are provided prison sentences of 2-7 years (cpv. 2), 5 to 15 years (cpv. 4) and the aggravated form of cpv. 5, to the maximum penalties may be added a supplement of up to 3 years.

In terms of criminal proceedings, competence for the cases of manslaughter belongs to the first level courts (court of low); the rules are those of common procedural law.

It should be noted that in the case of medical malpractice, establishing the guilt is made after performing a mandatory forensic examination. This report is carried out by forensic experts or legal experts - to the extent that they exist. In case two or more examination reports, the court will take into account the one they consider more meaningful,

more scientifically documented in accordance with the objective reality, corroborated with filed evidence.

In Romania cases of this kind are relatively scarce, manslaughter charges to the medical staff being relatively few in number. On global level, however, the specialty literature has consecrated several particular cases, such as:

- ✓ the death of a patient operated without prior medical examination, which would have revealed the inadvertence of the intervention
- ✓ death of a patient operated by a drunk surgeon
- ✓ death as result of exploratory or experimental operation
- ✓ death as result of medication administered without the patient's consent, and without the patient's condition development to require it
- ✓ death as result of the health practitioner's omission to inform about the medication contraindications
- ✓ death occurred as result to poor professional training
- ✓ death occurred due to misuse of a prescription drug, wrong dosage, defective administration, unknown compatibilities
- ✓ death due to unjustified departure from the patient (unsupervised, failure to take measures to compensate for the absence, etc.)
- ✓ Failure to seek the help of another medical specialist, when he was absolutely indispensable for saving the life of patient
- ✓ Etc.

B. Article 184 Penal Code - bodily injury by negligence

"The act provided in art. 180 cpv. 2:21, which caused an injury requiring medical treatment for more than 10 days, as well as that provided in art. 181, committed by negligence, is punishable by imprisonment from one month to three months or a fine."

It is defined as the act of a person who causes, by negligence, the person-patient injury by hitting or other violence, and causes the need for medical treatment exceeding 10 days. The substantive object is defined as the body of the injured patient. Speaking in the terms of the crime subjects, as it is the case of the medical field, both are qualified because they each possess a certain quality when the offense is perpetrated: the medical professional (as the active subject) – the patient (as the passive subject).

In the case of this particular infraction, in the medical sector is also possible the **criminal participation**, both in its impersonal and in its personal form; by this we mean that the criminal liability extends over all professionals who intentionally caused, facilitated or helped in any way to commit the crime of manslaughter (impersonal participation), as well as when the crime was committed by several medical practitioners, by referring, this time, to the common liability.

The Constitutive Content

a) The objective aspect

The offense of manslaughter is a committable crime. The basis of criminal liability for a health practitioner may reside in causing directly or indirectly injury to the human body, as result of the practice of the medical act. In the healthcare practice these could occur when administering treatment, active assistance in daily care, performing medical maneuvers and techniques, delay in administering treatments, and the like.

The immediate consequence is the bodily or the health injury of the patient who needs as result medical care for at least 11 days and at most 60 days.

Causal relationship is represented, in principle, by the same rules specified in the offense of manslaughter.

As in the previous case, the forensic examination and the report of the professional organizations are instrumental in investigating the case.

b) The subjective aspect requires the medical practitioner's guilt. As in the case of the offense of manslaughter, it may be the case of may be involved with the prevision guilt, when the offender has foreseen the possibility of the result but he unfoundedly hoped that it will not occur; as a rule, this type of fault occurs when the medical professional underestimate the risk associated with the medical act, or overestimate the possibilities of action to avoid the adverse consequences of his action / inaction, or the case of the simple guilt, when the offender did not foresee the possibility of the result, although he should and could be able to do so. Both forms are likely to be criminally punished. In terms of criminal law, the actual penalty may not be influenced by the fault (*culpa lata*, *culpa levis*, *culpa levissima*).

Forms of crime

As for the forms of the crime of bodily injury, it cannot be that case of attempted crime, because the offense is committed by negligence; the offense is taking place at the time the medical care of the victim-patient exceeds the time limit in days provided by the law. It is a progressive offense; therefore it is not necessary to wait for the completion of the result.

Also, in the medical field may become aggravating incidents forms provided by the Penal Code such as:

- ✓ Personal injury by negligence, aggravated by the fact that the act results in an injury requiring medical treatment lasting longer than 60 days;
- ✓ Personal injury by negligence, aggravated by the fact that the act results in harm that, alternatively, may include: loss of an organ, the loss of function of an organ or sense, a permanent disability - physical or mental, disfiguration, abortion, endangering the patient's life;
- ✓ Personal injuries by negligence, by not complying to the regulations, or the precautionary measures for the profession or professions, or to perform a particular activity;
- ✓ negligent act committed by any other person in the exercise of profession or trade, and who are intoxicated.

Penalties

In this regard, the offense of negligent injury in any of its forms is punishable with imprisonment for a period of time that varies from case to case, depending on the legal classification of criminal offense.

Criminal proceedings shall be initiated on complaint of the victim, while the party reconciliation results in revoking the criminal liability. The complaint is addressed to the prosecution, it is of the competence of the court (see paragraph 1 and 3), and moves on its own, in the other variants of the offense.

C. Article 196 Penal Code - Disclosure of professional secrecy

"Disclosure, without right, of data by those to whom they were entrusted, and who acquired them as result of their occupation or function, if the action is likely to harm a person, is punishable with imprisonment of 3 months to 2 years or a fine."

It is defined as the act of a person - health practitioner who violates the patient's freedom to entrust secrets, by virtue of the medical profession and in exercising this function, by disclosing them without patient consent, and thus causing injury to his dignity or material liabilities. There is no substantive object in the case of disclosure of professional secrecy. Speaking in the terms of the crime subjects, as it is the case of the medical field, both are qualified because they each possess a certain quality when the offense is perpetrated: the medical professional (as the active subject) – the patient (as the passive subject). Important for this offense is that the perpetrator must have acquired the disclosed information in the exercise of his profession, in order to be criminally liable.

In this case, in the medical field, there is possible the criminal participation in the form of incitement or complicity. Furthermore, there can be no accessory to crime because the medical secrecy obligation is individual and incumbent upon each professional.

The Constitutive Content

a) The objective aspect

The substantive element resides in an action of disclosing information that have been entrusted to the offender, and who acquired them as result of their medical profession or function; the substantive element is also constituted if the disclosure is made directly or indirectly, in whole or partially.

Conditions:

- Disclosure must concern the secret information
- Disclosure must be made without the right
- Disclosure must be likely to prejudice patient person.

Immediate consequence is the violation of personal freedom of the patient.

Causal relationship must exist; the immediate consequence resides in personal patient data becoming public data, act contrary to the obligation of the medical personnel to refrain revealing this information.

b) The subjective aspect - requires intent - direct or indirect.

Forms of crime

The attempt is not punishable, the offence is committed when the harmful consequence occurs and the individual patient's freedom is violated.

Penalties

The offense of disclosure of professional secrecy shall be punished with imprisonment from 3 months to 2 years, or fine.

Criminal proceedings shall be initiated on complaint of the victim, while the party reconciliation results in revoking the criminal liability.

3. CONCLUSIONS AND RECOMMENDATIONS

Given the previously detailed lines in the present paper, it can be concluded that the premises of an offense may appear even in the medical field, since the victims-patients incriminate more and more frequently. Therefore we consider being appropriate and even necessary to perform the mediation of the conflict between the medical specialist and the patient or his/her legal representative. Moreover, the New Code of Criminal Procedure stipulates the novelty of the mediation procedure in criminal cases under Article 10 cpv. 1, lett. H), in accordance with Law 192/2006, section A2A, "Specific provisions on mediation in criminal cases."

The conclusion of a mediation agreement is possible only for crimes with reconciliation, or with the withdrawal of criminal liability complaint.

Mediation can take place:

- Before addressing the judiciary
- Between the act of apprehension and the prosecution act
- After the prosecution
- In the trial phase.

Public health is a fundamental social value and for its achievement, the state represented by its competent authorities, is obliged to regulate the healthcare field. The commitment to the protection and the welfare of all its members is a defining element for the existence of the state, which must ensure the welfare of all citizens in all aspects, including public health safety.

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