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„ПРАВО У ФУНКЦИЈИ РАЗВОЈА ДРУШТВА“

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ПРЕДГОВОР

Наслов научне конференције са међународним учешћем чији смо домаћини "Право у функцији развоја друштва" је одабран после дужих консултација у редакционом одбору. Наша намера је била да обухватимо што више правних грана и области и да тема научне конференције не буде уско повезана са јавним или приватним правом, кривичним или грађанским, породичним или привредним, световним или канонским, унутрашњим или међународним. Желели смо да што већи број аутора изложи своје радове али и да се упореде правни аргументи и у цивилизованом и научном дијалогу допринесе решавању бројних правних али и проблема који се јављају у пракси у Србији и иностранству. Нажалост, ми запослени на Правном факултету Универзитета у Косовској Митровици смо свесни да друштвене околности веома утичу на испуњавање правних аката и правних норми. Годинама радимо у правном контексту и околностима које су саме по себи *sui generis*. Чиста теорија права Ханса Келзена тешко да се може применити на Косово и Метохију или на околности под којим радимо и у којима објављујемо своје научне радове и организујемо овакве научне конференције. Наравно, то не значи да одбацујемо основни правни унутрашњи и међународни оквир у којем се одвија ова научна конференција и наш рад, Устав Републике Србије из 2006. године и Резолуцију 1244 СБ УН из 1999. године који изричито прописују да је Косова и Метохија у правном и државном систему Републике Србије као њена јужна покрајина. Међутим, у нашем случају има и елемената међународног интревенционизма или оних уговора и друштвених околности ванредног стања које је најбоље описао чувени немачки правник Карл Шмит. У том контексту, публикација која је пред вама представља допринос развоју и разумевању друштва које нас окружује али и подизању правне науке на виши научни ниво. Коначно, са задовољством констатујемо да је велики број научника из Републике Србије и иностранства послао вредне и занимљиве радове који су презентирани у овој публикацији. Са задовољством смо их читали. Ауторима се и овом приликом захваљујемо и позивамо научну али и ширу јавност да са пажњом прочитају овај више него интересантан зборник. У њему има вредних доприноса научној теорији у свим гранама и областима права. Практичарима ће свакако бити интересантан и велики број правних чињеница које садржи овај зборник.

УРЕДНИК

КРИВИЧНО ПРАВНА, КРИВИЧНО ПРОЦЕСНО ПРАВНА И
КРИМИНОЛОШКА ОБЛАСТ

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MEDICAL PROFESSIONAL LIABILITY INSURANCE IN THE MACEDONIAN LEGAL SYSTEM

Abstract: Generally speaking the compensation of damage for patients in the health care system can take place in three ways: through the social insurance system, including funds, through private insurers' schemes and through the liability system. The focus of this paper is the compensation through private insurers' schemes in the Macedonian legal system. This model of compensating damage in the health care system differs significantly from the liability system. The central issue in the compensation through insurers' schemes is whether the insurance conditions have been met, and the circumstances under which the damage has occurred are of little or no relevance. On the other hand, under the liability system the damage can be compensated only if a medical practitioner or an institution can be shown to be liable. Presenting the characteristic of Macedonian liability insurance law through the normative solutions, other legal sources of medical liability insurance, comparative legal theory and realization of the liability insurance in practice aims to lead to conclusion about the meaning of this institute in Macedonian law and practice.

Keywords: *liability, insurance, damages, tort law, medical practitioners' liability, compensation*

1. INTRODUCTION

Macedonian law doesn't contain specific legal rules on liability for the medical practitioners or the medical institutions. The regulation of the liability in the health care system is to be found in the general rules for liability, in the Macedonian tort law. Having in mind the legal literature worldwide² and the legal practice in Macedonia we can conclude that there are few possibilities regarding this question. Here, the rules on fault liability apply, as well as the rules on vicarious liability, contractual liability and strict liability under the

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² P. Klarić, *Odštetno pravo*, Narodne Novine d.d. Zagreb, 2003, pp. 423.

Macedonian Law on Obligations (will e referred as Law on Obligations in the following text).³

The general principle of medical liability is considered to be the fault liability.⁴ In most legal systems the standard of care to be taken by medical care providers engaged in possibly risky activities is not only determinate by the court systems, but also by the legislator and the professional organizations.⁵ Under Article 11, Law on Obligation Relations, which regulates the conduct in the performance of professional obligations, an objective standard of care (conduct of an expert), is introduced to the law. The medical practitioner therefore is obliged to meet the requirement of necessary diligence and necessary knowledge: "*The party in the obligation is obliged to perform the activity with increased diligence, in accordance with the rules of the profession and the customs (diligence of a good expert) in carrying out the obligation of his professional activity.*"⁶ This is the statutory base for application of largely objectified standard of care in Macedonian liability system when medical conduct is tested against the criterion that the care provider must have sought to apply the due care that may be expected of a reasonably skilled care provider acting reasonably in the same circumstances. In theory, the fact that experts' actual individual abilities are not taken into consideration is justified the consideration that anyone who exercises an activity that requires special knowledge and powers of reasoning in spite of the lack of relevant ability, creates a source of special danger precisely by so doing, not just for any specific contractual partners, but also for any third parties.⁷

But in our legal practice there are also cases of awarded compensation of damage where the rules of strict liability where applied.⁸ This way the patient, under certain conditions, has the right to compensation if no fault was involved in a medical action, i.e. if the treatment was carried out completely *lege artis*. Also there is legal practice of establishing vicarious liability, by applying Law on obligations, Article 157 par. 1.⁹

In law theory scholars have suggested many times that liability law as a whole or in part with respect to medical treatment are replaced by an insurance-

³ "Official Gazette of the Republic of Macedonia" no. 59/2002, no.60/2006, no.29/2007, no.106/2008, no.135/2011, no.113/2012 and no.148/2015.

⁴ P. Klarić, *Odštetno pravo*, Narodne Novine d.d. Zagreb, 2003, pp. 423.

⁵ J. Dute, G. M. Faure, H. Koziol (eds.), *No-Fault Compensation in the Health Care Sector*, SpringerWien NewYork, 2004, pp. 37.

⁶ Article 11 Law on obligations.

⁷ H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, Jan Sramek Verlag KG Wien, 2012, pp. 207.

⁸ Basic Court Kocani P. 39/09 from 06.06.2011, Court of Appeal Stip GZ No. 1427/2011 and Supreme Court of the Republic of Maceodnia Rev. 2 No. 133/2012 from 19.06.2013.

⁹ Basic Court Stip P4-46/16 from 16.11.2018.

based solution.¹⁰ The advantages of insurance-based approaches are the compensations for victims that are achieved before prior examination of all the tort prerequisites and in short time. The disadvantages that are pointed out in theory are: if the reasons why the damage occurred are not taken into account than the patient will receive compensation even for damage caused by a chance or his own carelessness. This will result in increased number of damage claims and the costs on the insurers' side. In the end, the economic analyses of the insurance based approaches show that the cost of such damage would be borne by all those who applied due care in the management of their own affairs via increased premiums or via another mechanisms of the insurer.¹¹

This paper aims to present the current situation in legislation and in practice in order to come to some conclusions about the position that patient in Macedonian health care sector have. Therefore the paper will answer the question: Is there compulsory insurance and will describe in details the conditions for compulsory insurance. Furthermore, the paper aims to establish if specific regulatory regime exists under Macedonian law, as well as to answer the question if patients take out first-party insurance or if the providers of service carry liability insurance.

1. LEGAL SOURCES OF LIABILITY INSURANCE IN THE HEALTH CARE SECTOR

By its legal nature, liability insurance related to medical activity is a liability insurance contract, and hence the basic legal source for its regulation is the Law on Obligations of Republic of Macedonia. In the first place, the provisions on liability insurance¹² are applicable, and since liability insurance is considered to be a subtype of property insurance, general provisions for property insurance¹³ as well as common provisions for property and persons insurances¹⁴ are applicable too.

The legal source that is *lex specialis* regarding the liability insurance in the health care sector is the Law on Health Protection. It contains a provision that the medical practitioner is ethically, professionally and materially liable, and the health institution ensures the liability of the the medical practitioners for the damage they could have caused during the performance of the

¹⁰H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, Jan Sramek Verlag KG Wien, 2012, pp. 5.

¹¹ *Ibid*, pp. 6.

¹² Articles 996 and 997 of the Law on Obligations.

¹³ Part 2 Section 1, article 980-985 of the Law on Obligations.

¹⁴ Article 953-979 of the Law on Obligations.

healthcare activity.¹⁵ This implies that the health institution has the obligation to conclude an insurance contract with a provider of this kind of insurance. The liability insurance is compulsory for the health institution. The violation of this obligation is considered to be misdemeanor that can be sanctioned with a fine for the health institution in amount of 5.000 EUR in Denars counter value.¹⁶ Unfortunately, the law doesn't make any differentiation between liability insurance for health care professionals who engage in their profession as independent practitioners, businesses engaging in health care or medical treatment operations, businesses providing medical transportation services, and other specific cases, as known in the comparative law.¹⁷

Macedonian law is familiar with a specific regulatory regime of the liability insurance in the health care system. It is known as *liability insurance related to medical, dental and pharmaceutical activity*. In the comparative literature it is known as *medical malpractice insurance* and it is considered to be a type of professional liability insurance for physicians and other healthcare providers. In the event of an allegation of negligence or a lawsuit, medical malpractice insurance will cover expenses, including defense attorney fees, court costs and any settlements or judgments.¹⁸ But there is no specific scheme for first party insurance that is limited to medical accidents, and patients in Macedonia do not take out first party insurance.¹⁹ It is pointed out in the legal literature concerning this question that first-party insurance does not seem to be of any significance when it comes to the particular risks of health care. A certain percentage of the population take out general health insurance policies, but this is no special first-party insurance covering risks of medical treatment.²⁰

¹⁵ Article 152 Law on Health Protection, Official Gazette No.. 43/12, 145/12, 87/13, 164/13, 39/14, 43/14, 132/14, 188/14, 10/15, 61/15, 154/15, 192/15, 17/16 and 37/16.

¹⁶ Article 307 paragraph 307(12).

¹⁷ M. Mikkonen, "Compensation in the Finnish Health Care Sector", *Tort and Insurance Law* Vol. 8, SpringerWienNewYork, 2004, pp. 190.

¹⁸ Many states require physicians (and often other healthcare workers) to have medical malpractice insurance. Even in states that do not have such requirements, it's well-advised to have insurance, especially for physicians. According to a 2011 study in *The New England Journal of Medicine*, 7.4% of doctors in their sample had faced a malpractice claim in the previous year – that's 1 out of every 14 doctors in any given year. See more comparative data on <https://www.cunninghamgroupins.com/medical-malpractice-insurance-complete-guide/>, last visited on 28.04.2019.

¹⁹ Also England doesn't have specific scheme for first part insurance, see Michael A. Jones, *Compensation in the English health care sector in Tort and Insurance Law*, Vol. 8, SpringerWienNewYork, 2004, pp. 159.

²⁰ B. A. Koch, H. Koziol, "Comparative report and conclusions", *Tort and Insurance Law*, Vol. 8, SpringerWienNewYork, 2004, pp. 428

This liability insurance scheme is the traditional compensation mechanism. There are many traditional insurers in Macedonian insurance market that participate in the medical liability market. The scope of this professional liability insurance is determined through the insurance contract passed between the health institution and the insurance company. The insurance contract is consisted in the printed form as to the general and specific conditions (terms) created by the insurance company. The characteristics of the insurance contract will be approached later in the text.

Macedonian Law is also familiar with the existence of *actio directa* – the damaged persons' right to a direct lawsuit under which: "*In the case of liability insurance, the damaged person may request directly from the insurer compensation for the damage that he suffered with the event for which the insured responds, but not exceeding the amount of the insurer's liability. The damaged person has, from the moment he became insured, his own right to compensation from insurance, and any subsequent change in the rights of the insured against the insurer is without prejudice to the right of the injured party to compensation.*"²¹ Regarding the usage of *actio directa* – direct lawsuit, a subrogation can occur as a right of an insurance company to step into the shoes of the party whom they compensate, and sue any party whom the compensated party could have sued (recovery action).

2. CHARACTERISTICS OF THE LIABILITY INSURANCE OF MEDICAL PRACTITIONERS THROUGH THE PRISM OF THE SPECIAL TERM OF THE INSURANCE COMPANIES IN MACEDONIA

2.1. Subject matter of insurance

In most of European countries, the risk of claims for negligence and malpractice is seen as an occupational hazard and practitioners and health care organizations limit their risk by taking out liability insurance. The liability insurance of medical practitioners and the insurance contract in this case serves to cover the risk that the insuree himself will be liable to a third part, so this is third –party liability insurance. Third-party liability insurance serves the interests of patients as it secures the compensation payments, so it serves the compensatory function of tort law. On the other hand, it is considered to be absolutely essential for the health institutions in order to make the liability risk associated with operating the institution calculable.²² Medical professional

²¹ Article 997 Law on Obligations.

²²H. Koziol, *Basic Questions of Tort Law from a Germanic Perspective*, Jan Sramek Verlag KG Wien, 2012, pp. 60.

liability insurance provides third-party coverage, which means it reimburses a person (usually the injured person or their family) who is not one of the two original parties to the insurance contract. This reimbursement is called indemnity. In addition most insurance policies provide for first-party coverage to the physician for the cost incurred in defending a claim, whether or not indemnity is ever paid.

Incorporating the previous theoretical and practical knowledge, the special terms have defined the subject matter of insurance in this case as "*the statutory civil liability of the insured person for damages caused with death, physical injuries and damage to health.*" In terms of the basis of liability provided with the general principles of tort law, subject for insurance is mainly the fault liability. To be more precise, the insurance policy offers indemnity only for the damage that is result of negligence, i.e. the both types of negligence: gross negligence and the infringement of the duty of care that we elaborated in the text above. Fault liability of the insured person for damages caused intentionally (*dolus* as a type of fault) is excluded from the subject of insurance.²³ But analyzing the provisions in the special terms, we came across a provision that indicates that the insurance liability for strict liability in medicine has been introduced to our insurance law. According to this provision, subject of insurance is also the liability of the insured person that arises from performance of the healthcare activity, in case of damages that are caused by possession or usage of medical appliances or devices which are recognized in the medical practice and are not excluded under the terms in question.²⁴

It can be also noted that insurance companies in Macedonia are in line with the shift from "occurrence" to "claims made" systems.²⁵ As a result of this shift the insurance only covers cases that were reported during the duration of

²³ Article 9 and 10, Special term for liability insurance of doctors and other medical practitioners, Uniqa insurance (Посебни услови за осигурување на одговорност на лекари и останати здравствени работници), available on http://www.uniqa.mk/repository/media_cnt/UNIQA-Macedonia-2018/53.Posebni~20uslovi~20za~20osiguruvanje~20na~20odgovornost~20na~20lekari~20i~20ostanati~20zdravstveni~20rabotnici_hcm0105235.pdf, last visited on 29.04.2019; Article 3, Terms for liability insurance for medical practitioners, Winner-Vienna Insurance Group Skopje, available on <http://www.winner.mk/wp-content/uploads/2019/04/Uslovi-za-osiguruvanje-od-odgovornost-na-zdravstveni-rabotnici.pdf>, last visited on 29.04.2019.

²⁴ Article 3 paragraph 2 Terms for liability insurance for medical practitioners, Winner-Vienna Insurance Group Skopje, available on <http://www.winner.mk/wp-content/uploads/2019/04/Uslovi-za-osiguruvanje-od-odgovornost-na-zdravstveni-rabotnici.pdf>, last visited on 29.04.2019.

²⁵ Article 1 paragraph 2, Special terms for professional liability insurance for doctors and other medical practitioners, Eurolink AD, available on <http://www.eurolink.com.mk/uploads/13-10.pdf>, last visited on 29.0.2019.

the insurance and not just any damage that has occurred in that period, but was only reported later in time.²⁶ In the literature it is noted that this way the insurance companies are protected from any additional expenses that may arise in case the practitioners/medical institution has made a change regarding their liability insurance carriers. In case where the "occurrence" system is adopted, the new liability insurance carrier may have to take out additional coverage for the risk of damage caused during the running time of the previous liability insurance.²⁷

2.2. Contract parties

Having in mind that we are talking about liability insurance, we can emphasize that more than two subjects with different legal position should be differed in case of medical liability insurance. The contracting parties of the insurance contract are the insurer and the health institution. The first party is a company, also known as an insurer, a carrier, or a provider, that is licensed by a state to sell some or all types of insurance. The health institution is obliged to conclude this contract and its main contractual obligation is to pay the insurance premium. There is also a third subject – the insured person, that is party or parties covered by an insurance policy, also called a policyholder. The insured person may be a physical or a legal person,²⁸ although most of the special terms use only the term "person whose liability is covered with the insurance."²⁹ And the last subject that appears in the cases of medical liability insurance is the person suffering damage – the third person. The damage is consisted of death, physical injuries and damage to health.³⁰ These are

²⁶ I. Giesen, E. Engelhard, "Medical Liability in the Netherlands", in B. A. Koch, et al. *Medical Liability in Europe: A Comparison of Selected Jurisdictions*, Berlin, Boston: De Gruyter, 2011, pp.366.

²⁷ Ibid.

²⁸ Introductory provisions, Special terms for professional liability insurance for doctors and other medical practitioners, Eurolink AD, available on <http://www.eurolink.com.mk/uploads/13-10.pdf>, last visited on 29.0.2019.

²⁹ Article 2 Special term for liability insurance of doctors and other medical practitioners, Uniqa insurance (Посебни услови за осигурување на одговорност на лекари и останати здравствени работници), available on http://www.uniqa.mk/repository/media_cnt/UNIQA-Macedonia-2018/53.Posebni~20uslovi~20za~20osiguruvanje~20na~20odgovornost~20na~20lekari~20i~20ostanati~20zdravstveni~20rabotnici_hcm0105235.pdf, last visited on 29.04.2019; Article 2, Terms for liability insurance for medical practitioners, Winner-Vienna Insurance Group Skopje, available on <http://www.winner.mk/wp-content/uploads/2019/04/Uslovi-za-osiguruvanje-od-odgovornost-na-zdravstveni-rabotnici.pdf>, last visited on 29.04.2019.

³⁰ This is provided in article 3 Special term for liability insurance of doctors and other medical practitioners, Uniqa insurance (Посебни услови за осигурување на одговорност

damages arising from personal injury. In legal theory there is a differentiation of two types of damages in personal injury cases: general and special damages. Originally “general damage” reflected a pleading rule, referring to a loss which was presumed to be the natural and probable consequence of the tort. Also “general damages”, on the other hand, comprise all non-pecuniary losses, past and future, as well as future earnings (earning capacity). On the other hand “specials” refers to all items of damage capable of (more or less) precise quantification, comprising medical and other expenses as well as lost earnings.³¹ Special damages claims can also comprise: loss of promotion prospects, past care and future care needs, aids and equipment, future medical treatment, prosthetics, pension loss, and other.

But the mentioned special terms in Macedonian insurance law don't offer this differentiation and it is left to the practice to define which damages will be compensated under the terms. There are provisions that the insurer is obligated to compensate the pecuniary and non-pecuniary damages up to the amount of the actual damage, but not more than the fix amount of money.³² The amount of the compensation for damage is determinate and estimated by the insured person, the insurer and the person suffering damage all together, or by an authorized court expert.³³ On the other hand, there is a category of damages called "pure financial loss" that by definition differs from the personal injury mentioned above, and that is covered with the insurance in cases of medical liability.³⁴ But this is not a regular case as the personal injury coverage, and

на лекари и останати здравствени работници) , available on http://www.uniqa.mk/repository/media_cnt/UNIQA-Macedonia-2018/53.Posebni~20uslovi~20za~20osiguruvanje~20na~20odgovornost~20na~20lekari~20i~20ostanati~20zdravstveni~20rabotnici_hcm0105235.pdf, last visited on 29.04.2019; Article 3, Terms for liability insurance for medical practitioners, Winner-Vienna Insurance Group Skopje, available on <http://www.winner.mk/wp-content/uploads/2019/04/Uslovi-za-osiguruvanje-od-odgovornost-na-zdravstveni-rabotnici.pdf>, last visited on 29.04.2019; Article 1 of the Special terms for professional liability insurance for doctors and other medical practitioners, Eurolink AD, available on <http://www.eurolink.com.mk/uploads/13-10.pdf>, last visited on 29.0.2019.

³¹J. G. Fleming, *The law of torts 9th ed.*, Sydney: LBC Information Services, 1998, pp. 267.

³² Article 14 Special terms for professional liability insurance for doctors and other medical practitioners, Eurolink AD, available on <http://www.eurolink.com.mk/uploads/13-10.pdf>, last visited on 29.0.2019.

³³ Ibid, art. 17 and 18.

³⁴ Article 5, Special terms for professional liability insurance for doctors and other medical practitioners, Eurolink AD, available on <http://www.eurolink.com.mk/uploads/13-10.pdf>, last visited on 29.0.2019.

therefore we can come across special terms that exclude financial damages from the scope of liability insurance coverage.³⁵

But, there is an actual limitation for the damaged person to achieve full compensation through the liability insurance system. It is consisted of the mentioned fixed amount provided in the insurance contract, usually for one damage event. The amount of compensation to be awarded to the claimant cannot exceed the amount covered by liability insurance. If case of several claims originating from same event and the total amount of compensation exceeds the covered amount, the rights of the claimants are proportionally diminished.³⁶

The amount of coverage obtained depends on numerous variables including affordability, requirements of institutions, degree of protection desired to protect assets, and trends in judgments and settlements. The willingness of individuals to accept risk and protect assets is a strong consideration of determining policy limits.

Exclusions in a policy describe specific exclusions from coverage for the policy. The specifics of exclusions vary but include particular types of medical treatment or practices, coverage offered under other policies, business associated activities that are not directly related to the primary coverage ie, administrative work. Additional activities for which coverage is desired that may be excluded must be included under endorsements.

In the table below the Macedonian liability insurance practice, for the period 2013-2018, is presented in order to analyze the compensation for damage achieved through the insurance system.

Table 1 Medical liability insurance³⁷

³⁵ Article 13 paragraph 2(4) of Terms for liability insurance for medical practitioners, Winner-Vienna Insurance Group Skopje, available on <http://www.winner.mk/wp-content/uploads/2019/04/Uslovi-za-osiguruvanje-od-odgovornost-na-zdravstveni-rabotnici.pdf>, last visited on 29.04.2019.

³⁶ Article 2 of the Special terms for professional liability insurance for doctors and other medical practitioners, Eurolink AD, available on <http://www.eurolink.com.mk/uploads/13-10.pdf>, last visited on 29.0.2019.

³⁷ Liability insurance related to medical, dental and pharmaceutical activity, CLASS 13 - General liability insurance

The data is obtained from the insurance undertakings through regularly reporting according to the article 104 from the Insurance Supervision Law ("Official Gazette" no. 27/02, 84/02, 98/02, 33/04, 88/05, 79/07, 8/08, 88/08, 56/09, 67/10, 44/11, 188/13, 43/14, 112/14, 153/15, 192/15, 23/16, 83/18 and 198/18) and it is available on http://www.aso.mk/index.php?option=com_fjrelated&view=fjrelated&id=0&Itemid=91&lang=mk, last visited on 28.04.2019.

Period	Premium			Claims 000mkd			
	Number of contracts concluded	Gross written premium	Gross unearned premium provisions	Number of claims liquidated	Gross claims paid (liquidated)	Number of claims reserved	Gross RBNS provisions
3к 2018	2.631	9.969,42	6.233,07	0	0	9	7.095,00
2к 2018	2.305	7.663,02	7.605,57	0	0	6	1.910,00
1к 2018	1.511	4.679	8.042	0	0	7	3.964
4к 2017	3.010	15.519	7.169	0	0	6	3.927
3к 2017	2,481	11,553.83	6,999.87	0	0	5	2592
2к 2017	2.021	9.749,32	9.288,00	0	0	4	2032
1к 2017	1.382	6.248,44	9.945,03	0	0	2	753
4к 2016	2.249	16.757	7.767	2	1.980	2	753
3к 2016	1.769	14.678	9.984	1	1.232	1	200
2к 2016	1.129	8.914	8.152	0	1	2	816
1к 2016	693	5,286	8,415	0	1	3	853
4к 2015	1,948	14,003	6,427	0	0	1	1,661
3к 2015	1.460	11.456	7.513	0	0	1	1.661
2к 2015	957	7.745,04	7.154,84	0	0	1	1.661,00
1к 2015	569	4.067,92	7.087,88	0	0	1	1.661,00
4к 2014	941	12.693	6.305	0	0	1	1.661
3к 2014	524	9,289	5,921	0	0	1	1,661
2к 2014	371	6.522,27	5.989,84	0	0	1	1.661,00
1к 2014	263	4,410.44	5,518.45	0	0	1	1,661.00
4к 2013	780	8.319	3.814	0	0	1	1.661

As resulting from the official data, in the past period of 5 years only three claims were liquidated, although the number of insurance liability contracts since 201 is in a constant growth, as well as the amount of the gross written premium. These numbers showed that the meaning of the liability insurance system in Macedonia regarding the compensation of damage in the healthcare system is minor or rather non-existing from the legal, financial and also social standpoint. Regardless of the existence of medical liability market and special terms that offer some adequate indemnity in cases of medical malpractice, the compensation of these damages is compensated otherwise (if even compensation is claimed). This indicates that there is a need for profound research into the reasons why medical insurance isn't alive in Macedonian system, and we can only note that these data opened more questions that they have answered, questions that can be approached in another occasion.

3. Tendencies in medical liability insurance

Today the liability insurance is considered to be the traditional compensation mechanism regarding compensating damage in the health care sector. But analyzes show that the medical malpractice is considered to be consisted of elements that affect the insurability. The comparative studies show that especially in U.S. insurers have claimed that medical practice has become an uninsurable risk as a result of the liability crisis which arose in the late eighties. Other markets also follow the example and traditional insurers have increasingly withdrawn from medical liability insurance market.³⁸ Also in Europe "*...it is often said that insurances for medical risks are hardly if ever profitable and this is also seen as explanation for the relatively small number of insurers that offer these insurance, especially where hospital and other health care institutions are concerned.*"³⁹ Therefore new tendencies have appeared, not only in legal theory, but in legislation as well. A new system called "no-fault compensation in the health care sector" (NFCS further in the text) has been already introduced and has been in operation for some time as NFCS that covers most or all of the health care system, in New Zealand, Norway, Sweden, Finland and Denmark. In all five countries the system is regulated by law and it is noted that there are number of differences between them, particularly as regards the method of funding, the extent of cover, the costs that are eligible for

³⁸M. Faure, "Economic observations concerning optimal prevention and compensation of damage caused medical malpractice", *Tort and Insurance Law*, Vol. 8, SpringerWien NewYork, 2004, pp. 79.

³⁹ I. Giesen, E. Engelhard, *Medical Liability in the Netherlands*, in B. A Koch, et al. *Medical Liability in Europe: A Comparison of Selected Jurisdictions*, Berlin, Boston: De Gruyter, 2011, pp.366

compensation and the relationship between the NFCS and the liability system.⁴⁰ The general remarks about NFCS are that these systems come in many shapes and sizes. Also the notion of fault still plays a significant role in determining the right to compensation, so it is noted that the term NFCS is misleading.⁴¹

4. Concluding remarks

The liability system alone as a method for compensation of damage suffered in the health care sector does not provide a sufficient guarantee of compensation given the insolvency risk. The idea that numerous problems of medical liability can and should be solved through insurance is accepted in Macedonian positive law. But the question that remains to be answered is to what extent insurance liability should replace liability system. The basic principles of tort law should be protected, and one of it is that risk should be borne by the part creating it. Otherwise, the increase of security through insurance will decrease the care implied in the matter.

It is noted in the literature that from an economic prospective liability insurance will provide protection for the risk averse injurer and only indirectly for potential victims. The health institution is accepting a certain loss in the form of payment of a premium so that the future risk in case an injury would happen can be removed from this insurer. Although the provision on statutory duty of the healthcare institution to obtain liability insurance for the medical practitioners implicates that this is a case of mandatory insurance, the analyses of the official reports of the insurance companies indicate that this provision lives only on paper, but not in practice. Our liability insurance reality is that injured persons don't use the right to direct claim to the insurance companies (*actio directa*), nor the right to address their claim to the insurance company aside from the courtroom. Cases of medical liability do exist⁴² and currently most of them are financial burden for the health institutions, and not the insurance companies. The compensation of damage is achieved on the basis of general tort law principles and rules in civil procedures. The medical liability system contains a number of inherent defects, including the length of the civil procedure, the fact that liability claims harden relations between parties, high costs, selective access to the liability system, problem of proof, uncertain and

⁴⁰ J. Dute, "A comparison of non-fault compensation schemes", *Tort and Insurance Law*, Vol. 8, SpringerWien NewYork, 2004, pp. 479.

⁴¹ More on this matter in J. Dute, "A comparison of non-fault compensation schemes", *Tort and Insurance Law*, Vol. 8, SpringerWien NewYork, 2004, pp. 479.

⁴² This research also included analysis of the court practice and we came across a significant number of medical liability cases in civil procedure. Some of them are previously cited in the text.

sometimes arbitrary outcome of the process, risk of over and under compensation.⁴³ This way, the injured person faces a long way to compensation, a way that is financially and emotionally exhausting. The health care system could possibly face financial crisis in order to pay the damages, but there are also other main problems for the care provider as high cost of the process, the length of the process, the stigmatizing effect which the process can cause, the high insurance premiums and associated threat of uninsurability. Regarding the main problems for the health institutions, from a social standpoint, the quality, costs and continuity of health care are at stake.⁴⁴ The only beneficiary are the insurance companies as they generate premiums from the medical liability insurance but according to the official reports, have faced only 3 liability insurance claims in the past five years. For us, this are enough reasons for changes to be introduced in the medical liability and insurance system, and during the process the new tendencies of the so called "no-fault compensation system in the health care sector" should be taken into consideration.

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⁴³ J. Dute, "A comparison of non-fault compensation schemes", *Tort and Insurance Law*, Vol. 8, SpringerWien NewYork, 2004, pp. 462.

⁴⁴ Ibid, pp. 463.

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Summary

The author has conducted an research regarding the medical insurance liability in Republic of North Macedonia. This scientific research took path in three ways: legislation on liability in general, and medical liability in particular; provisions contain in the special terms of the insurance companies that offer liability insurance for medical practitioners and healthcare institutions; and the practice regarding the compensation of damage suffered in the health care sector through the prism of court decisions and insurance claims. As a result of the research the paper called Medical professional liability insurance in the Macedonian legal system was composed.

The paper aims to show that although Macedonian legal system doesn't incorporate special medical liability norms, the general tort law principles, through their implementation by the courts, serve well the goal to provide adequate protection for the patients in the health care sector. We can also note that in theory the patients are even better protected by providing the mandatory liability insurance, and in Macedonia there are quite a number of insurance companies that offer this kind of insurance. The insurance system created by the special terms is on occasions even progressive and in line with the modern tendencies of compensating damage in the health care sector. But unfortunately these norms are living only on paper, and as the reports show, in period of more than 5 years there has been only three claims for medical insurance liability that have been liquidated. Overall the compensation for damage is left to be accessed through the civil liability system, and that is the hardest way for the injured persons. The paper shows the need to amendments in the medical liability system in general in Macedonia, and new tendencies in this area should be taken into consideration.

РЕЗИМЕ

Аутор је спровео истраживање о здравственог осигурања од одговорности у Републици Северној Македонији. Ово научно истраживање се одвијало у три насоке: законодавство о одговорности уопште, и посебно медицинска одговорност; одредбе садржане у посебне услове на осигуравајућа друштва која нуде осигурање од одговорности за лијечнике и здравствене установе; и праксу у вези са накнадом штете претрпљене у здравственом сектору кроз призму судских одлука и потраживања од осигурања. Као резултат истраживања састављен је рад под називом Осигурање медицинске професионалне одговорности у македонском правном систему.

Циљ рада је да покаже да иако македонски правни систем не садржи посебне норме о медицинској одговорности, принципи општег

деликтног права, кроз њихово спровођење од стране судова, добро служе циљу пружања адекватне заштите пацијентима у здравственом сектору. Можемо такође приметити да су у теорији пацијенти још боље заштићени обезбеђивањем обавезног осигурања од одговорности, а у Македонији постоји велики број осигуравајућих друштава која нуде овакву врсту осигурања. Систем осигурања, створен посебним условима, повремено је чак и прогресиван и у складу са савременим тенденцијама компензације штете у здравственом сектору. Али, нажалост, ове норме живе само на папиру, и како показују извештаји, у периоду од више од 5 година дошло је до само три потраживања за обавезу здравственог осигурања од одговорности која су ликвидирана. Генерално, накнада штете остаје да се приступи кроз систем грађанске одговорности, а то је најтежи начин за оштећене. Истраживање показује потребу за измјенама у систему одговорности у здравство уопште у Македонији, а нове тенденције у овој области треба узети у обзир.