

Round table EU eHealth law  
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topic: Medical liability in Macedonian law and practice

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# Method for compensation in general

compensation for medical injury can take place in three ways:

- through the social insurance system including funds,
- through private insurers' schemes and
- through the liability system

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# Civil liability for damages in medicine

- relatively new institute, specially having in mind that the number of damage claims against doctors and medical institutions in the comparative law has significantly increased in the second half of 20<sup>th</sup> century.
- depersonalization of the doctor-patient relationship and its transformation in pure business relation, as a result of the increased number of medical facilities and providers of health services
- excessive expectations of the patients as a result of the progress of the medicine and technique, the increased number of medical malpractice as a result of diagnostic error medical malpractice

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# Legal sources Constitution

Constitution of Republic of North Macedonia - contains few provisions that can also be classified into medical law. It is provided with the Constitution as it follows: *“Every citizen is guaranteed the right to health care. Citizens have the right and duty to protect and promote their own health and the health of others.”*

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# Law on Health Protection

Healthcare  
workers

- the employees in the healthcare sector have ethical, professional and civil liability

Healthcare  
institution

- the health care institution is obligated to insure the liability of the employees for the damage caused as a result of medical malpractice

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# Definition – term Healthcare worker/coworker

- “Healthcare worker“ is a person who provides health services in the delivery of a particular healthcare activity and is entered in the register of healthcare workers (doctor of medicine, doctor of dental medicine and pharmacist who holds a university degree or who have completed academic integrated studies with 300, that is, 360 ECTS in the field of medicine, dental medicine and pharmacy, healthcare workers with a two-year postsecondary school or higher vocational education or with 180 ECTS in the field of medicine, dental medicine and pharmacy) and healthcare workers who hold a high school degree; “Healthcare coworker” is a person who holds a university degree and independently carries out particular activities within the healthcare activity in cooperation with the healthcare workers.

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# Liability bases – Law on Health Protection

## Article 194

- *"The healthcare worker, that is, the healthcare co-worker shall be liable for the damage suffered on behalf the institution he/she has caused at work or in relation with the work in the healthcare institution, intentionally or due to gross negligence."*
- *Between institution and employees*

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# Law on Obligations

- *"When performing an obligation relating to their professional activity, a party of the obligations shall be bound to act with increased standard of care, according to the professional rules and customs (standard of care of a good expert)."*
- Healthcare worker – professional activity

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# Standard of care-medical malpractice

The standard of care in our law is set on objective bases, which means that the conduct of the professional is compared to the abstract reasonably prudent person in the same position. It is not compared to the personal characteristics of the professional.

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# Healthcare institutions

The network of healthcare institutions provided and organized by Republic of N. Macedonia is consisted of public and private healthcare institutions that perform the activity on the bases of license

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# Defendant in court procedure

## Vicarious liability

### One or more institutions (joined liability)

- Based on Art. 157
- third party liability of the employer for the damage caused by the employee during work or related to work, except in cases when the employer will prove that the employee acted according to the profession rules and practices

## The medical professional himself

- Based on the rules on fault liability
- Joined liability with the employee in case of **intention**

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# Vicarious liability

- the plaintiffs often claim damage from the healthcare institution because the success of receiving compensation is more likely to be achieved on institutional than on individual level. On the other hand, in cases when the employer has compensated the damage caused by the employee with intention or gross negligence, the employer is entitled to regress

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# In case of criminal proceeding

- The civil procedure is interrupted till the end of the criminal procedure
- The existence of guilt needs to be proved in the criminal procedure
- If the criminal procedure is negative or stopped, according to the Supreme Court:” фактот што со правосилна пресуда е ослободен од обвинението др.Т.В. вработен кај тужениот дека сторил кривично дело „Тешки дела против здравјето на луѓето“, не го ослободува судот од утврдување на граѓанската одговорност кај здравствените работници на тужениот, која е поширока одговорност од кривично правната одговорност, па во таа смисла судот треба да одлучува во рамките на поставеното тужбено барање, односно дали работникот постапил со она внимание кое се бара според правилата на вршење на професијата.”

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# Example criminal sanction

Sentence of 10 months in jail – suspended for two years

Death of a mother after the birth of twins – C section

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# Regress rules

- 6 months from the day the damages were compensated on behalf the Healthcare institution
  - Only in cases of intention or gross negligence
  - In cases of ordinary negligence (when the standard of good professional is breached this possibility is not provided)

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# From the court practice

- “судот консттира дека за да дојде до примена на овие одредби потребно е **тужителот ја да докаже намера или крајно невнимание** на страната на тужената како услов за примена на одредбата. Денес тужителот со ниту еден од приложените писмен докази не го докажа постоеето на намерата или крајност невнимание кај тужената, односно дека од негова страна е водена постапка за утвдување на намера или крајно невнимание за сторување на штета, која тужителката му ја презвикала. Во конкретниот случај видно од пресудата К.бр.339/09 на ОС Битола се утврдено дека **делото е сторено од небрежност**, а крајното невнимание и намера како потешок степен на вина не може да се пресумира или предпоставува, односно тужителот не го докажа со ниту еден писмен доказ, иако според одредбите на чл.145 ст.2 од ЗОО, товарот на докажувањето на постоењето намера или крајно невнимание треба да се докажува, а товарот на докажувањето паѓа на оштетениот - тужителот, зашто тој со тужбата бара враќање на исплатениот надомест на штета.”



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# Confusion regarding the interpretation of vicarious liability in the court practice

- “Поаѓајќи од член 157 став 1 од Законот за облигационите односи, со оглед на тоа што се работи за професионална одговорност во вршењето на работите, според мислењето на Врховниот суд на Република Македонија во конкретниов случај **не треба да се утврдува вина кај работникот** за да може да одговара работодавецот, туку треба да се утврдува **само дали работникот при вршењето на работата постапувал во дадените околности онака како што требало т.е. дали го посветувал она внимание, што се бара според правилата на вршењето на таа професија, и тоа не само според правилата на работодавецот, туку и според општите норми кои се засноваат на теоријата, искуствата и другите нормативи. Товарот на ваквото докажување паѓа на страната на работодавачот односно на сега тужениот”.**

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# From the Supreme Court's decision

- *“според овој суд а како што се укажува и во ревизијата доволно е да се утврди дека докторот кој ја пораѓал не постапил со она внимание кое се бара според правилата на вршење на таа професија и тоа не само според правилата на работодавачот туку и според општите наводи кои се засноваат на теоријата, искуствата и другите нормативи. “*

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# Plaintiffs

- The plaintiff in the cases of healthcare liability is the patient himself. But in cases of patient's death or severe disability, the plaintiff can also be a member or members of the family (the spouse, the children and the parents of the patient). According to the Macedonian tort law, certain family members have the right to fair monetary compensation and the court can determine the right of these persons to monetary compensation (under Article 190 od ZOO).
- The cycle of these family members is determined by the law and is consisted of the **spouse, the children and the parents of the patient**.
- Also the cycle is consisted of the **brothers and sisters of the patient, the grandparents and the grandchildren of the patient, as well as the extramarital partner of the patient**, but only under condition that between these persons and the deceased/ injured person there was a permanent life-long community.

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# Court practice – similar cases of retinopathy in premature infants

## 2010-2013

1.violation of personal rights affecting the physical and mental health

Around 36.000 EUR for the damaged person

2.emotional pain due to severe disability of a close person

Around 8.000 EUR for each of the parents

## 2012 - 2013

- 1.Around 227.000 EUR
- 2. Around 49.000 EUR for each of the parents

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# Medical malpractice

- malpractice should be considered to be failure to comply with accepted standards of medical practice due to lack of required duty of care
- Nowadays, there is no doubt that the legal nature of the term medical error is not primarily legal, but within the civil liability of the physician it acquires a nature of civil delict and together with the presents of damage and fault/or no matter if fault exists, it results in medical malpractice liability.
- In theory the liability of the physician is always based on the fault of the doctor, and fault liability rules apply in every case, regardless of whether it is contractual or tortuous liability

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# Burden of proof

## Intention and gross negligence

- The plaintiff has to prove that the defendant caused the damage intentionally or with gross negligence

## Ordinary negligence

- The defendant has the burden to proof that the standard of care was met in the specific case with compliance with the specific rules of the medical profession

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# Comparative views

- In Croatian court practice, a decision by the Constitutional Court of the Republic of Croatia states: *"The hospital is liable for medical malpractice based on the principle of presumed fault, which means that the hospital must prove that the employee acted in accordance with the rules of the medical profession and that the damage did not occur because of the negligence of the physician performing the operation ... The first-instance court incorrectly states that the liability of the medical institution for a medical malpractice is decided on the basis of the principle of proven fault."*

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# Strict liability

- In the early case-law of the Yugoslav courts there were court decisions in which medical activity was treated as a dangerous activity and the rules of strict liability were applied to cases of physicians' liability. This practice was interrupted by decisions of the Federal Court of Yugoslavia and the supreme courts of the republics and provinces. (Radišić, *Odgovornost zbog štete izazvane lekarskom greškom u lečenju i u obaveštavanju pacijenta*, 2007, стр. 90) One of those decisions was made by the Supreme Court of Serbia and it states: "*A medical institution that performs medical interventions can only be held liable for the consequences of interventions that result from the unprofessional and careless or improper treatment performed by its employees, i.e. for consequences that may be attributed to the fault of doctors and other medical personnel for acts which were not in accordance with the rules of medical science.*"

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# nowadays

Interpretation on strict liability by the court practice?

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# Our views

- We consider that our law provides a legal possibility to apply both grounds of liability. According to Macedonian law strict liability is not regulated by the principle of numerous clauses, but as liability arising from a dangerous object, that is, carrying out a dangerous activity. One of the characteristics of this type of liability is the assumption of causality i.e. the damage arising from an object, movable or immovable, whose position, use, feature or its very existence present an increased risk of harm to the environment (dangerous object) or activity that can be considered to present an increased risk of harm to the environment (hazardous activity), is assumed to originate from that object or activity, unless it is proved that the cause of the damage lies in the plaintiff himself, in a third person, or that it occurred due to force majeure.

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# Court practice – differing decisions

## Applied strict liability

- *"When it is established that the cause of bodily harm to a juvenile plaintiff is the compulsory vaccine that the victim received at the health center, and the control is carried out by the Ministry of Health, solidarity liability for non-pecuniary damage incurred under the principle of strict liability exists in the person who applied the vaccine and in the person who controls the process."*

## Non-applied strict liability

- *the Ministry of Health "... as a body that provides centralized supply of all vaccines in accordance with the mandatory and continuous immunization calendar and as a body that oversees the procurement and supply of vaccine health facilities and control over the legality and expertise of the work of the health organizations as well as the vaccination process itself, had not strict liability in the case."*

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# Increased level of danger

- There are medical, surgical or gynecological procedures that may cause harm to the health service user during regular medical procedures only because of their medical nature and procedure that may be threat for the life or the health of the people to whom they applied
- *An activity is considered to be increased danger only if by its regular course, by its very technical nature, or the manner in which it can be performed, it is endangering human health or property, so the endangering itself requires increased standard of from the person performing the activity*

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# Damages (справедлив паричен надомест)

Вид на штета	Износи на штета
Претрпен физички бол	250.000 денари (13 илјади евра)
Претрпен страв	
Претрпени душевни болки поради намалена општа животна активност	300.000
Душевен бол поради нагрденост	600.000
	250.000
Нематеријална штета за претрпен душевен бол поради смрт на блиско лице	4.000.000 денари (65 илјади евра)
повреда на личните права по телесно и душевно здравје	2.200.000 денари за оштетената (35.772 ЕУР) 14.500.000 денари (235.777 ЕУР)
Душевна болка поради траен инвалидитет на блиско лице	По 500.000 денари за родителите (8130 ЕУР) По 3.000.000 за родителите (48.780 ЕУР)

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