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CRIMINAL AND CIVIL ASPECTS OF HEALTHCARE WORKER LIABILITY FOR MEDICAL MALPRACTICE IN CROATIA

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Abstract A healthcare worker's liability for damage caused to patients can be criminal, civil, misdemeanour, and disciplinary, with the necessary precondition that the damage was caused as a result of medical malpractice or negligence, and not as a result of the regular course of the disease. The paper analyzes the criminal law and civil law aspects of the healthcare worker's responsibility for damage caused by medical malpractice through the provision of medical care. The imprecise definition of the legal nature of the healthcare worker's responsibility, the obligations that the law imposes on doctors, the definition of malpractice in medical treatment, as well as the legal basis of responsibility, indicate the existence of many legal dilemmas that require additional analysis to which we would like to contribute with this paper. Because of a broad concept of issues in healthcare worker's liability, this paper aims to explain the material assumptions of criminal (duty to act) and civil (negligence) liability and discusses the legal position of a medical expert in both types of proceedings.

Keywords
civil liability,
criminal liability,
damage,
medical expert,
medical malpractice

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1 Introductory Notes

The first ethical postulates stated by modern medical science date back to the ancient Greek physician Hippocrates, who we consider the founder of medical ethics. These postulates still form the basis of the ethical code of modern medicine, among which the most important postulate is *primum nil nocere*, first, do not harm the patient with your actions. The duty on behalf of healthcare workers to act is found in the ethical obligations of the healthcare profession (Jakulin, 2020, p. 54).

The concept of medical malpractice dates back to the beginning of modern medical science at the turn of the 18th and 19th centuries. Its creator was the German pathologist Rudolf Carl Virchow (1821-1902). The original definition of medical malpractice, or professional error as a violation of the generally recognized rules of the art of treatment due to a lack of due attention or caution, has undergone certain changes up until the present (Virchow, 1879, p. 514; Šepec, 2018, p. 49).

This definition was too rigid to account for the fact that the rules of medicine are changeable and depend on current scientific achievements and the results of new research. An error in treatment is the modern term defining medical malpractice. Some authors define medical malpractice as neglecting or deviating from the medical standard, i.e. the standard of medical science (Laufs-Uhlenbruck, 2002, p. 854), and others as any medical measure that, according to the standard of medical science and experience, was performed without due care (Harney, 1973, p. 295). The concept of medical standard is present in both definitions. It compares the contemporary right behavior of a specific doctor with the behavior of a doctor that is expected in his professional circle.

One should always ask how an experienced and careful practitioner or specialist would behave in a certain situation (Deutsch, 1999, p. 124). However, it is not enough to consider only the established recognized rules of the medical profession. In order to properly assess whether he violated the rules of due care expected of him, the doctor's behavior must also be evaluated within the context of the circumstances in which he found himself during the time in question. We can say that the protection of human health by criminal law represents a major basic right (Jakulin, 2020, p. 46). New incriminations may well be required in the future because medicine is evolving so rapidly at the present (Jakulin, 2020, p. 46). When analyzing

guarantor duty, from the aspect of criminal law, we need to focus on both the protection of the health of specific individuals and the health of people in general (Jakulin, 2020, p. 46).

Medical malpractice as a legal category emerged exclusively from the medical profession and it is a fundamental factor for determining the legal liability of doctors. It has been used in judicial practice for a long time. Despite its importance, it is still controversial both in the world and in the positive regulations of the Republic of Croatia.

Accordingly, the aim of this paper is to explain the material assumptions of criminal and civil liability in theory, legislation, and judicial practice, taking into account the legal position of a medical expert in both types of proceedings. The paper examines the duty to act, as part of the criminal law, and negligence, as a standard of the civil law. Although these two concepts are discrete because they are part of different branches of law (with different principles) (Šepec, 2018, p. 53), they nevertheless can be part of the same court proceedings in an adhesion procedure, and that is reason why they are explained in this paper.

2 Croatian Legal Framework - the Distinction Between Medical Malpractice and Medical Complication

Article 10, paragraph 2 of the Croatian Obligatory Relations Act requires the doctor to act with the care of a good expert. Article 155, paragraph 3 of the Healthcare Protection Act sets forth the provisions on medical malpractice. This Article obligates healthcare workers to act according to the rules of the health profession when providing health care so that their actions do not endanger the life and health of people. Article 2, paragraph 5 of the Medicine Profession Act stipulates that a doctor commits medical error when he fails to perform according to the regulations, rules of the profession, and code of medical ethics and deontology.

The term complication is not used by (medical) law. Complication is instead a term used in medicine to indicate that there is no medical malpractice and *causal nexus*. Therefore, it is necessary to connect it with legal terminology when it is desired to exclude or limit the liability of the doctor. At the same time, in terms of compensation law, the existence of the case will be referred to as an event that

cannot be attributed to anyone, that is, that could not have been foreseen, although it could have been avoided if it could have been foreseen.

Nevertheless, the standard of care should not be understood as a rigid rule that does not tolerate any deviations, but instead is pliable so that it can be adapted to the circumstances of a specific medical case, either in terms of easing or tightening the standard of due care (Klarić, 2001, p. 74). For example, a mitigation of the standard of due care can occur in medical protocols in emergencies characterized by a sudden increase in health needs with a simultaneous decrease in the number of available resources. Therefore, it is clear that the degree of care required is commensurate with the dangers and risks posed by the procedure undertaken. Procedures entailing greater risks of harm require greater attention of care and vice versa. Accordingly, the malleable concept of the medical standard should be viewed in the context of the specific situation in which the doctor finds himself (Vojković, 2019, pp. 701–704).

Medical malpractice can be systematized as violations of the rules of the health profession: 1. errors in diagnosis and treatment; 2. errors resulting from inadequate management of medical documentation (Čizmić, 2009, pp. 91–134); 3. errors caused by violation of the institute of medical secrecy (Čizmić, 2007, pp. 12–25); 4. errors related to inadequate informed consent.

3 Healthcare Worker as a Guarantor in Criminal Code of Croatia

The Criminal Code of the Republic of Croatia[1] (hereinafter: CCC), governs the criminal liability of healthcare workers, and regulates liability for multiple criminal offenses.

The most well-known criminal offense is Medical Malpractice, as regulated in Article 181 of the CCC. Article 181 applies when there is responsibility for the consequences caused by negligence. The criminalization of medical malpractice is always questionable, not only because of the uncertainty of applicable medical standards, but also because criminal law is ultima ratio (Šepec, 2018, p. 47). Since medicine is a high-risk profession connected with inherent dangers, when the legislator prescribes

[1] Criminal Code, Official Gazette, no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22.

legal provisions and when the court assesses the legal duty of healthcare workers to act, both need to take those factors into consideration (Šepec, 2018, p. 48). According to the care standards of the health profession, the term failure to act is used in the definition of this criminal offense. This term refers to the failure to apply measures to protect the patient, the use of an unsuitable means or method of treatment, as well as other forms of negligent treatment. The legislator did not further define the term, considering that the broader term facilitates expert witness testimony and serves to specify the term failure to act according to the standards of care of the profession (Turković et al., 2013). With this criminal offense, it is important to analyze the medical error that is the result of the procedure when all the accepted quality standards in the healthcare system were not respected, and for this reason, medical error is mostly associated with negligence (Mrčela & Vuletić, 2017, p. 690). When analyzing malpractice, causality is understood narrowly in criminal law and practice in Croatia. Only a cause that is the result of conduct and that represents illegal harm is criminally relevant when analyzing that harm through the legal definition of each criminal offense (Vuletić, 2019, p. 50). The connection between the breach of the duty of due care and the consequences through causality in the medical malpractice setting is different than in the case of typical, intentional criminal offenses (Jakulin, 2020, p. 48). When a healthcare worker is not acting according to the duty, then that violation of an act of duty is grounds for causality between omission and consequence (Jakulin, 2020, p. 54).

Causality can be analyzed using medical expert testimony. Determining criminal causality is an inexact science, because, despite the findings of a medical expert, the court must determine if the presented evidence indicates with sufficient relevance that aggravation of the health condition was a consequence of an error (Vuletić, 2019, p. 51). In case the state attorney is not able to conclude and determine whether the timely action of the healthcare worker would have saved the patient's life, then he needs to issue a decision rejecting the criminal charge (Vuletić, 2019, p. 52). In this case, the principle *in dubio pro reo* determines the criminal responsibility of healthcare workers. There should be no criminal responsibility in situations where, for example, a healthcare worker acted contrary to the rules of the profession, but where most other healthcare workers would have acted the same way because, for example, the clinical image was atypical (Vuletić, 2019, p. 53). However, criminal liability is not necessarily foreclosed simply because causality cannot be determined with 100 percent certainty (Vuletić, 2019, p. 52). In cases where the patient can be

treated in multiple ways, all of which are within the appropriate standard of care, the healthcare workers should not be held criminally responsible for applying one of them (Šepec, 2018, p. 55).

A further criminal offense is the Failure to Render Aid in Emergency Medical Situations (Article 183 of the CCC). This constitutes a real criminal offense of omission which can only be committed with intent. Emergencies are those situations in which, due to the omission of medical assistance, permanent adverse consequences for the patient's health or life could arise. The provision of emergency medical assistance is one of the fundamental rights protected not only by Croatian positive regulations but also by international documents (Roksandić Vidlička, 2010). This criminal offense is *lex specialis versus delicta communia* Failure to Render Aid (Article 123 of the CCC). Here, the legislator took into account the special guaranteed relationship between the healthcare worker and the patient. The difference between this criminal offense and the criminal offense of Medical Malpractice is that this criminal offense requires an emergency, while Medical Malpractice does not require the existence of an emergency. In the same way, this criminal offense does not require the occurrence of a consequence, while in the case of Medical Malpractice, the occurrence of a consequence is an element of the definition of the criminal offense (Mrčela & Vuletić, 2019). The concurrence of these two criminal offenses is excluded because the area of protection against Medical Malpractice is broader than the area of protection against Failure to Render Aid in Emergency Medical Situations. However, the Medicine Profession Act[2] prescribes failure to assist in emergencies as a misdemeanor. Nevertheless, the failure to provide medical aid in non-emergency conditions should be punished as a misdemeanor, and if the medical condition requires an emergency, then criminal liability should be applied (Turković & Roksandić Vidlička, 2011).

The responsibility of the guarantor as a healthcare worker begins from the moment when the vulnerable person acquires the status of a patient (by addressing a healthcare worker, by calling an emergency service), and ends when he loses that status concerning a specific healthcare worker (by referral to another health care facility, provision of assistance or written refusal of treatment) (Mrčela & Vuletić, 2019). For this criminal offense, a healthcare worker can be held responsible only

[2] Medicine Profession Act, Official Gazette, no. 121/03, 117/08.

during the performance of his duties. The opposite interpretation would lead to the conclusion that medical assistance covers too wide a circle of people (retired health workers, those healthcare workers who do not practice medicine) (Mrčela & Vuletić, 2019). Korošec and Balažic state that this Article also encompasses a medicine graduate who lacks a valid medical license or legal person (Jakulin, 2020, p. 51). The ground for criminal responsibility in this criminal offense is that assistance was necessary, and that the healthcare worker was aware of that fact (Jakulin, 2020, p. 52).

3.1 Guarantor

As a rule, a guarantor is a natural person, but a legal person can also share guarantor responsibility with a natural person because Croatian criminal law also regulates the responsibility of legal persons for criminal offenses, which can also be committed by omission. (Mrčela & Vuletić, 2021). The above applies especially to legal entities that are authorized to perform healthcare activities (Turković et al., 2013).

Guarantor liability is characteristic of an unreal criminal offense of omission, which refers to the breach of duty to prevent the occurrence of the consequence (Mrčela & Vuletić, 2021). The guarantee relationship is not limited only to the unreal criminal offense of omission but also applies to the real criminal offense of omission (Failure to Render Aid in Emergency Medical Situations).

For the guarantor to be liable, it is necessary to prove all the assumptions under which the guarantor is liable in criminal law: the ability of the guarantor to act, the failure to act must be by its effects and meaning tantamount to committing the act by acting (clause of equal value), the failure to act must be a causal factor in the occurrence of the consequence and there must be the same form of culpability that is required concerning the criminal offense in question, taking into account the specificity of the real criminal offense of omission. This means that the guarantor has a special relationship with the protected legal good (Mrčela & Vuletić, 2021).

Where the act in question is described in a criminal offense in a Special Part of the CCC, the equality clause is quite clearly applied to that same criminal offense (Roxin, 2003). Guarantor obligations are not prescribed in the CCC. Instead, their determination is the task of legal science and judicial practice. The guarantor duty

must be prescribed by law, and not by Act, because in criminal law customs are also the source of law.

A guarantor is considered to be a person who has power and control in certain situations and therefore can be required to act. This means that the guarantor is obliged to act even in involuntary situations and conditions if these situations are under his control. So, if the matter involves a case of unreal criminal offenses of omission, difficulties can only arise in matters where, according to criminal law, there is a duty to prevent consequences (perhaps the patient's illness should be a problem for the intervention of another medical specialist). The law does not establish a general duty to act that consists of removing the consequences, but there is still a general duty to help others. One opinion can lead to believe that liability for omission can only exist if there is a duty to act which is prescribed by law, and not because the omission is considered objectively wrongful. This means that the emphasis is on legal duties and not on moral responsibility. Another opinion believes that since today's society is rapidly developing so that individuals increasingly rely on each other and the state, the criminal law should also take into account the degree of connection and alienation in a particular society and according to this approach, the interpretation of the guaranteed obligation should be applied.

We have seen that the healthcare worker is a guarantor, however, he is a guarantor only for those situations for which he is qualified, and not for all the patient's illnesses. Namely, if a patient's illness is the subject of some other medical specialization, and not that of the doctor who examines the patient, then the omission applies to the situation of *ultra posse nemo tenetur*, regarding those actions that are not subject to the qualification of the doctor in question. The example of a doctor, who is not qualified, leads us to the conclusion that under Croatian legislation, he cannot be held responsible for the unreal criminal offense of omission, but only for the real criminal offense of omission (Failure to Render Aid in Emergency Medical Situations). In other words, the unreal criminal offense of omission requires prevention of the consequences, whereas the real criminal offense of omission requires undertaking a rescue action within the scope of one's qualifications.

If the healthcare worker was obliged to provide help, and he was, because there is a criminal offense of Failure to Render Aid in Emergency Medical Situations, which prescribes the duty to assist, the question arises whether such a real criminal offense of omission, which prescribes the duty to take action, can be considered as the origin of a guarantor duty in criminal law, which implies the duty to prevent consequences. However, it is important to recognize that a guarantor obligation that includes duties to prevent consequences can never be derived from a real criminal offense of omission. Therefore, it should never be concluded that a real criminal offense of omission establishes a guarantor obligation related to the prevention of the consequence. On the other hand, if the legislator prescribed the criminal offense of Failure to Render Aid (Article 123 of the CCC), which applies to any citizen, perhaps this is precisely to include the responsibility of persons who are not guarantors, and who do not take rescue action, because Failure to Render Aid is a real criminal offense of omission that can be committed by anyone. Namely, the act of providing help should be distinguished from the duty of preventing consequences, a conclusion we reach through a systematic interpretation.

By interpretation of Article 20, paragraph 1 in the General Part of the CCC, criminal offenses prescribed in the CCC can be committed by acting or omission. This would also mean that the real criminal offense of omission can be committed by acting because such an interpretation would be following Article 20, paragraph 1 of the CCC. Namely, if in the Special Part of the CCC, a criminal offense is described as acting, and such criminal offenses can also be committed by omission, why could not real criminal offenses of omission, which are described in the CCC as omission, also be committed by acting? However, the question is whether this interpretation adheres to the principles of both *poenalia sunt restringenda* and *lex certa*. Article 20, paragraph 3 of the CCC prescribes optional mitigation of punishment for criminal offenses that can be committed both by acting and omission. Consequently, we conclude that the provision on optional mitigation of punishment in case of omission is *lex specialis*, from which it follows that all criminal offenses in the CCC cannot be committed by action and omission, although this is conceivable in some cases. Therefore, the provision on optional mitigation of punishment for criminal offenses of omission does not apply to real criminal offenses of omission and legally regulated criminal offenses of omission where only the conduct of omission is described (Horvatić, Derenčinović & Cvitanović, 2017).

3.2 Unlawfulness

When the guarantor does not prevent the consequence, the existence of a criminal offense can be established simultaneously with that act of omission. When an omission is undertaken by perpetrator, at the same time the same perpetrator is doing something else, ie. another action of acting is certainly undertaken concerning something else (Roxin, 2003). In this case, a person must not be punished twice for omission and for acting if acting is criminal.[3] However, for the guarantor to be criminally liable, his action must be unlawful. The unlawfulness of the guarantor manifests itself in the violation of the legal obligation to prevent the consequences. Here, all the reasons for the exclusion of unlawfulness, as well as necessity above the law, need to be considered (Schmidt, 2008).

The situation of conflict of duties is especially troublesome when a healthcare worker must fulfill several obligations at the same time but can fulfill one obligation only at the expense of not undertaking another. If at the same time, there is a duty to take action and a duty not to take action, then such a situation is considered within the scope of necessity. If one of the obligations has a subsidiary significance, then it is a conflict of duties. But if an obligation of a higher rank is fulfilled and an obligation of a lower rank is neglected, then there is no unlawfulness, and if one of several obligations of equal value is fulfilled, then there is no culpability. The conflict of duties, i.e. the question of which obligation should be given priority, is analyzed from the aspect of the rank of legal goods that need to be saved. Thus, the ranking of legal goods is determined according to the value of the legal good (Wessels & Beulke, 2000), according to the legal position of the addressee (the legal relationship between the perpetrator and the legal goods, whether there exists a guarantor duty or only a duty to assist), the proximity of the danger and the greater or lesser probability of damage occurring (Dunbar, 2012).

[3] Judicial practice in the Republic of Croatia has established that when the accused commits a specific criminal offense by committing any number of modalities of the same criminal offense, whether the conduct of the criminal offense is committed by acting or omission, the perpetrator must be punished only for one criminal offense and not for a combination of modalities of criminal offenses. Supreme Court of the Republic of Croatia, Kž-rz 4/2018.

Judicial practice also analyses the question of whether the consequence could have been prevented by taking precautionary measures or additional actions. However, this refers to the evaluation and is not related to the dogmatics of criminal offenses of omission. By omission, the guarantor neglected the duties that society expects of him, and for that reason, he can be considered criminally responsible. In that case, the perpetrator will be held criminally liable if the mentioned measures would have prevented the occurrence of the consequence. If a healthcare worker leaves a patient who has symptoms, even though leaving the patient is an active action that is not harmful in itself, liability may attach because the patient was not cared for before leaving. That is to say, leaving the patient by itself is not causally related to the resulting consequence. However, causation with the consequence is the failure by the healthcare worker to take appropriate measures before leaving the patient, which manifests itself as a failure to fulfill the guarantor duty.

3.3 Origins of Guarantor Duty

Some authors, when analyzing the origins of the guarantor duty, tried to limit their understanding to civil obligations to preserve life, but then the question arises as to which obligations protect life exclusively (Leavens, 1988). There is a point of view according to which a violation of the duty to act should be considered sufficient for the existence of a guarantor duty, and this violation will exist only if the provisions of civil law are violated in a manner so "abnormal" that the existence of causation is indisputable. However, this point of view is not justified on the grounds it is too inflexible. Indeed, there are many acts of violation of the provisions of civil law which do not automatically lead to criminal liability (Mead, 1991). Namely, civil law also recognizes intent, but if a person intentionally and knowingly violates a contract, then civil law sanctions, but not criminal law sanctions, are applied to him. Therefore, it can be concluded that the determination of the guarantor duty should be connected with the principles of fragmentation and subsidiarity in criminal law, and not exclusively with the creation of risk through the prism of the principle of *ultima ratio societatis*.

The theory analyzes the duty to protect certain legal goods from danger or to supervise the sources of danger concerning third parties (Horvatić, Derenčinović & Cvitanović, 2017; Mrčela & Vuletić, 2021). However, if there is an action of a person required under the law, then no guarantor duty is created. Here there only exists an

obligation to assist. In emergencies, a healthcare worker is not obliged to provide help to a person who threatens him or is physically aggressive towards him or other healthcare workers, unless he is provided with police protection or some other form of protection (Turković et al., 2013). A contrary conclusion would not be consistent with rules on self-defense.

Thus, Raz believes that moral obligations must not be imposed under the law if the moral obligation is disparate from the legal obligation to prevent the consequence (Mead, 1991). Thus, the owner of the hospital has to protect their patients.[4] However, criminal liability will be imposed on the hospital if, for example, the owner fails to take adequate precautions to secure harmful substances that could be misused, and which leads to harmful consequences. By way of further example outside medical law, Croatian criminal law mandates the owner of property to take steps to try to extinguish a fire on his property to prevent it from spreading even when he did not cause the fire himself, which also is the category of sources of danger, as an origin of guarantor duty, that are in the power of the perpetrator (Horvatić, Derenčinović & Cvitanović, 2017). The owner's duty and the duty to supervise others constitutes a civil responsibility raised to the level of criminal responsibility. Accordingly, the owner is obliged to ensure that conditions on his property do not cause harm to others (permanent danger in case of necessity). Critically, according to the theory of objective imputation, the autonomous actions of third parties cannot be imputed to the owner so as to impose criminal liability, as in the example of the case where the hospital rents some rooms to another legal or natural person for their business (Ambos, 2020).

While the contract certainly implies a legal duty to act, whether the contract is sufficient to establish criminal responsibility is another matter entirely. An express contract providing for the provision of services creates an obligation to provide the services appropriately. This contract does not have to be explicit but can also be tacit if it concerns a person dependent on another. Disclosure of medical documents for which only the patient is authorized to disclose can be controversial from the aspect of guarantor duty. Nevertheless, in theory, the patient is presumed to give consent in certain circumstances such as when the patient is not able to declare himself, for

[4] But this does not mean that the owner of the hospital is obliged to protect any visitor in the hospital (for example unauthorized entry) or drug user (of whom he does not know) (BGHSt 30, 391).

example, if he has lost consciousness, or is mentally ill, or when it can be otherwise concluded from the circumstances that the patient has no interest in keeping the data confidential (Čizmić, 2009). Likewise, disclosure of information from medical records based on regulations exists when the healthcare worker has not violated the duty of medical confidentiality, only if he has made the information from medical records known or made available to others because the law or other regulations oblige him to disclose this information. It is evident here that these "other regulations" are the source of the guarantee duty for the healthcare worker in some other situations (Čizmić, 2009).

In Anglo-Saxon law, the healthcare worker-patient relationship is considered to be contractual, whereas in continental law, including in the law of the Republic of Croatia, it can be seen through the Act as a source of a guarantor duty, i.e. a duty to act in exculpatory necessity.

3.4 Culpability of the Guarantor

It is necessary when analyzing the guarantor duty of a healthcare worker to start from his culpability, and it is insufficient to consider only the fact there is a duty to act. Analyzing the intent of omission utilizes a subjective test which takes into account not only the actor's conduct but his awareness and will as well. Although the mentioned term is generally known in the criminal law of the Republic of Croatia, in foreign literature the issue of objective responsibility is considered in criminal law as well. Namely, the origin of the guarantor duty is found also in civil law, which recognizes objective responsibility, and accordingly objective responsibility should be reflected in criminal law. Certainly, such attempts should be rejected and long-standing legislation and practice in the Republic of Croatia should be confirmed with respect to this legal issue regarding subjective responsibility.

The practical test of intent at the time of the omission is to ask the guarantor whether, during his omission, he was doing "this and that" (what the legal duty requires of him), and if the answer is no, and such an answer is given based on the facts and circumstances of which he is aware, then it is an omission with intent (Hughes, 1958). The intent in omission is a decision between omission and possible action. The intent to commit a criminal offense consists of the will not to act with knowledge of all the objective characteristics of the criminal offense, and the

awareness that prevention of the threatening consequences is possible. In case of omission, the guarantor must be aware of the existence of a situation that requires action, as well as his possibility of taking action. According to the CCC, it is necessary to look at the form of culpability with which healthcare workers commit criminal offenses because the guarantors can act with intent or negligence (Kurtović & Sokanović, 2016).

4 Legal Position of the Medical Expert Witness in Criminal Proceedings

Providing expert assistance to the authority of the proceedings (state attorney's office, court) is both mandatory and necessary in view of the fact that this authority lacks specific competency in this field. The aim of the expert witness is to provide the competent authority with necessary information so as to allow it to determine the relevant facts objectively and truthfully during the procedure. The expert witness should state the medical facts that the competent authority will transform into a legal term and legal effect (Narang et al., 2017). The expert witness must use language and terminology that the court will understand. If instructions from the competent authority are unclear to the expert witnesses, then he should ask for appropriate clarifications. If the instructions are still unclear, then the expert witness should not give an expert opinion.

An expert witness in criminal proceedings is only a person who has been invited to testify by summons or by order of the authority conducting the proceedings. The medical expert witness, referring to his special knowledge and experience, can propose to the court to supplement the order if he is unable to provide opinions based on the existing order, and there are concrete conditions necessitating the supplement. The court is obliged to examine and establish the facts that both inculpate and exculpate the defendant with equal care. Otherwise, the principle of legality would be violated. Expert witness examination is mandatory in some situations (establishment of bodily injuries and mental incapability). Expert witness testimony is unnecessary in cases where the court can formulate a conclusion based on proven facts without anyone's help (Sačić, 2009). For example, the court or other competent authority may dispense with expert testimony and can determine the responsibility of the healthcare worker if the healthcare worker acted egregiously (e.g., foreign object left in a patient's body, operation of the wrong limb, or in cases

of *res ipsa loquitur* where no one other than the healthcare worker could have caused the injury).

Since attorneys often lack the knowledge or skill to cross-examine experts effectively in search of flaws, they often hire private medical expert witnesses. Of course, the party in the proceedings can hire an expert, but only as his assistant. The opinion of such "private" experts is taken into account as a party's criticism of the official expert's witness testimony (Bayer, 1997).

The expert is obliged to respond to the summons of the court, and if he is unable to respond, he must justify his absence; otherwise, he may be fined or forcefully brought to court. Expert witnesses do not have absolute immunity regarding their testimony. For instance, an expert must testify truthfully, otherwise, he can be punished for the criminal offense of Making a False Statement, which can only be committed with intent (Article 305 of the CCC). Giving a false statement is objectively false when the content of the statement does not correspond to reality, and subjectively false when the perpetrator consciously expresses the opposite of what he knows. Expert witnesses also may be subject to sanctions from professional organizations and state medical boards (Bal, 2009, p. 384).

The role of the medical expert witness is neither to evaluate the evidence nor the law (Mrčela & Vuletić, 2019). As preconditions for the court to consider the testimony of a medical expert witness, the expert must be impartial, honest, and must not provide misleading testimony. Experts can only give testimony and opinions that are within their professional competence. If the medical expert witness testimony consists of ambiguities that are not eliminated even by the new medical expert witness opinion, then the court can declare the disputed fact, that it tried to determine through the expert opinion, to be not established according to the principle of *in dubio pro reo*. The medical expert witness in criminal proceedings issues a report concerning whether the healthcare worker violated the medical standards that led to the injury. In medical law, the expert must have the same medical specialization as the defendant and must be familiar with the condition of the patient with which the defendant's *tempore criminis* was also familiar. The main task of the medical expert witness is to determine whether the defendant complied with the applicable standard of care and whether, if there was a breach of the standard, the breach proximately caused injuries and the long-term impact of medical conditions.

The medical expert witness must explain not only the steps that the competent healthcare worker should have taken to have complied with the applicable standard of care but also what steps the healthcare worker actually took in the specific case (MacDonald, 1911, p. 645) . The medical expert expresses a finding and/or an opinion. The finding reveals the facts, and/or the opinion is given by the medical expert witness to the court based on professional knowledge and skills.

The medical expert witness must perform his work and issue his report within the time stipulated by the court or other authority. Therefore, the expert may be obliged to cover the costs of delaying the hearing or other costs caused by his culpability (Mrčela & Vuletić, 2019).

5 Solutions Provided for in the Positive Law of the Republic of Croatia That Regulate Compensation for Damage Caused by a Medical Malpractice

The provision of health services by doctors and the wider medical profession represents an encroachment on the physical and mental rights of the patient's personality. It is certain that medical procedures, which can sometimes be invasive first requires the patient's consent, which is the *conditio sine qua non* of any medical procedure on the patient. Exercising the right to compensation for damage incurred in the course of providing medical assistance or service is, to the greatest extent, identical to the standard claim for the right to compensation for damage in general from any area of life. However, due to the specificity of the provision of medical services and the performance of medical activities, as well as how different types of damage can be caused to the consumers of these services (patients), there is a need to analyse the special nature of exercising the right to compensation from the providers of these services (health care institutions, doctor).

Civil procedure law constitutes the basic court procedure for exercising the right to compensation for damages or elimination of harmful consequences of the provision of medical services. Since there is no *lex specialis* in the Croatian legislative system that would directly regulate damages caused by medical treatment, the general principles of liability for damage contained in Article 1045 of the Obligatory Relations Act (hereinafter: ORA) are applied, which generally regulates harmful actions:

- whoever causes damage to another, is obliged to compensate it if he does not prove that the damage occurred without his culpability,
- simple negligence is presumed.

The definition of damage is contained in Article 1046 of the ORA: damage is the reduction of one's property (ordinary damage), prevention of its increase (lost benefit), and violation of personality rights (non-property damage). Personal rights are defined in Article 19 of the ORA, which includes all rights to life, physical and mental health, reputation, honor, dignity, name, privacy of personal and family life, freedom, etc.

According to Article 1061 of the ORA, the employer (health care institution, trading company, or private health care institution) where the employee worked at the time the damage was caused is responsible for damage caused by an employee in the course of work or connection with work (in this case, a healthcare worker) to a third party, unless he proves that there were reasons that exclude the responsibility of the employee-doctor (Galiot & Brizić Babun, 2022, pp. 319–320).

In court practice based on the legal rules of the General Civil Code (OGZ), compensation for repairing non-material damage is exclusively monetary. For a medical error to be considered a harmful event, the legal prerequisites for liability for damage must be cumulatively met:

a) the subject of a mandatory relationship of responsibility for damage - the harming party, a doctor, or a health institution;
b) entity requesting compensation - injured party, patient, family members;
c) harmful conduct committed by the perpetrator (violation of the rules of the health profession - medical error);
d) damage caused to the injured party (violation of personality rights or non-property damage);
e) causal connection or (*causal nexus*) a direct connection between a harmful action (negligence of the doctor) and the resulting damage that is not foreseen;
f) the illegality of a harmful action consisting of objective and subjective elements;

- the objective elements of illegality consist in the fact that the violation of a law by a harmful action that belongs to the legal order is sufficient for its existence;
- subjective elements of illegality expressed by the culpability of the perpetrator (in addition to the fact that the harmful action is contrary to order, a certain degree of culpability of the perpetrator is required);

g) culpability - one of the key assumptions of a doctor's responsibility for damage, which can be: intent and negligence - a) ordinary (*culpa levis*), b) extreme (*culpa lata*) (Šago & Dajak, 2022, pp. 261–296).

6 Tort Liability Due to Breaches of Medical Standards

To succeed in a lawsuit regarding a claim for damages as a result of a medical malpractice, it is important to establish culpability, whether the doctor followed the standard of due diligence, and who has the burden of proving culpability. In practically all European legal systems, the standard of due care is that degree of care provided by a conscientious doctor of the same specialty and under similar working conditions. The standard is determined according to the conditions and knowledge that were valid at the time of treatment.

In the legislation of the Republic of Croatia, this wording is derived from the ORA, Article 10, which expresses the rule that the standard of care consists of the attention of a good expert in fulfilling the obligations of his professional activity (according to the rules of the profession and customs) (Šago & Dajak, 2022, pp. 261–296).

The application of these rules in liability for the resulting damage is burdened by the fact that the work of a doctor is always carried out under a certain risk of the occurrence of harmful or unwanted events that are unpredictable due to the inherent nature of the human organism. Unfortunately, both Croatian and other European continental legal systems lack strictly regulated laws or regulations that specifically delineate the kinds of damages incurred during the provision of health services for which compensation may be awarded. Accordingly, to fill this void general rule of liability for damages are applied in this setting, partially supplemented, or adapted through judicial practice.

6.1 Basis of Responsibility

We can divide the rules of responsibility for damage caused in health care into two categories: 1. according to the principle of fault - subjective or culpable, 2. objective responsibility - causal.

We can also further sub-classify liability as being either contractual or non-contractual (delict) liability. The extra-contractual relationship is most common in the case of emergency medical intervention when the patient has not previously been in contact with a doctor. The legal nature of the contractual obligation for healthcare services is a either a service contract or a work contract (Stefanović, 2020, pp. 16–17). The service contract is most often represented in legal practice. There are many service contracts that are performed in everyday medical practice, and they guarantee that the doctor will perform his work according to the rules of the profession - *lege artis*, and not according to the obligation of results (work contract).[5]

Liability according to the principle of fault - subjective liability is the most common liability for which healthcare workers are liable, and it is accepted by Croatian tort law for damages caused by medical error, both for contractual and non-contractual liability. This type of liability is employed both in Croatia and in most of the world, and it is its more favorable variant, where the fault of the harmer (doctor) is presumed. The positive aspect of this principle is that the injured party (in this case, the doctor) must prove that the damage occurred without his fault, i.e. the burden of proof rests on him, while the injured party does not have to prove the fault because it is presumed.

However, application of this principle imposes upon the injured patient the often arduous (and indeed even impossible) task of proving a *causal nexus* between the action of the responsible person and the resulting damage (Galiot & Brizić Babun, 2022, pp. 322–323).

[5] An example of a performance contract obligation would be a cosmetic procedure agreed upon by a plastic surgeon and a patient (the patient wants to have the eyes and nose of a famous actress). In Croatian legislation, there is no concept of a contract on health care services. According to its meaning and form, it belongs to informal contracts in which the will of the patient is expressed conclusively, for example by coming and agreeing to an examination and similar interventions.

The plaintiff is therefore obliged to present the facts on which the claims are based and to support them with evidence (for example, prove that the damage to the intestines during the operation was the result of the surgeon's negligence and lack of due care standards). It is very difficult for the injured patient/plaintiff as a layman to prove a causal connection, especially in the presence of a court expert.

The plaintiff in the dispute must prove the truth of the claim that there was medical malpractice, and the defendant must prove his allegations that he acted following the rules of the profession or *lege artis*.

Although the healthcare worker's responsibility for the committed malpractice derives from the legal assumptions of the general rules of tort law, there are still certain specificities and differences conditioned by the very nature of medicine as a science that must be fulfilled cumulatively, of which the most important for its origin is the relationship between the harmful action and the resulting damage (*causal nexus*) and the fault of the perpetrator.

Causal nexus is determined by the court based on the medical expert's opinion, and court practice. The patient bears the burden of proof of causation. He must prove that his deteriorating state of health is not the result of the natural, fateful course of the disease, but a medical error (Klarić, 2011, pp. 137–148). Due to the uncertain etiology of some diseases, the different and sometimes unpredictable response of the patient to certain treatment methods and drugs, and due to constant and relatively rapid changes in medical science, the causal relationship is in some cases very difficult, and almost impossible to determine.

In all tort systems recognizing subjective responsibility, culpability is the key assumption of liability for damage caused by medical error. Culpability comes in the form of intent and negligence. Here we are only concerned with negligence, considering that cases of intentional injury during treatment are practically unknown in Croatia. In negligence law, Croatia recognizes ordinary negligence or negligence (*culpa levis*), and gross or extreme negligence (*culpa lata*).

By way of example, in the case of serious medical malpractice during gallstone surgery, the bile ducts were damaged, which the court assessed as a serious oversight and characterized as a gross medical error. Namely, during this operation, the

surgeon injured the main bile duct due to extensive difficulties because of old adhesions from the patient's previous operations, without noticing it during the operation (iatrogenic injury). However, in such cases, the surgeon should have reasonably anticipated this type of problem, use x-ray imaging, because he should have used the method that would have diagnosed it with a high probability during the operation and would have been repaired (x-ray imaging of the bile ducts during surgery).

According to the liability rules, the doctor who committed the act is responsible for a medical error. However, several doctors may treat one patient. If the several participants cannot determine who committed the error, then each of them will be held jointly culpable, a term which comes from Roman law (Correal obligation). There is a division of labor among certain medical specialties. This does not mean that in any concrete case one part of the work is of minor importance, so that the legal responsibility for the committed mistake is correspondingly less. Medical cases often require multidisciplinary cooperation. Therefore, the question arises concerning which doctor should bear the greatest responsibility among two or more doctors. If two or more doctors jointly treat a patient, responsibility for the consequences of subsequent treatment because of damages caused by medical error will be determined by the correctness of the previously established diagnosis of each of them (Šarić, 2016, p. 76).

To establish a diagnosis when treating a patient in a hospital or clinic, there is often a need for an interdisciplinary, or consultative, approach of different specialists (for example, a surgeon, urologist, nephrologist, etc.). This is commonly referred to as the "horizontal" division of labor. In practice, this is when, for example, an internist calls a surgeon if he suspects that his patient has acute appendicitis. Therefore, doctors of different specialties are involved equally and with their own responsibilities. The division of labor is limited so that the specialist doctor in the circle of horizontal division is responsible only for his part of the work. Mutual trust based on respect for each doctor's realm of expertise should prevail among doctors on the team. Also, from a professional point of view, under the German terminology known as *Haftungssplitting* (liability splitting in English), none of the individual doctors that work in team, and comprise the team has the absolute right to control or supervise other doctors on the team. However, this basic principle is not unlimited. For example, if there are indications of justified suspicion against one

doctor in the team, the principle of mutual trust is withdrawn, and the expert panel will be advised of this suspicion. In opposite, the principle of horizontal division of work does not apply in the case where two doctors work in the same area one after the other. In this case, the one who works later bases his work on the presumed correct diagnosis of his predecessor.

To prove medical malpractice, the *causal nexus* must be unbroken. In judicial practice, this issue is particularly interesting when several doctors participate in the treatment of a patient when a mistake by one is followed by another doctor's mistake. Two questions arise, is the *causal nexus* broken by a new mistake by another doctor, and who is responsible for the damage? The German Federal Court (BGH) considers that the *causal nexus* is severed by the error of another doctor only if he deviated from the set standard of attention of a good doctor, i.e. against all the rules of the profession. If the omission of the first doctor is followed by a "normal error" by the second doctor, the causal nexus is not broken because a normal error means only a slight oversight by the second doctor, which means that the first doctor is responsible for the resulting harmful consequences.

Objective-causal liability has increased in pace with the development of modern medical technology. This concerns responsibility under the principle of causation pursuant to the ORA, which stipulates that damage caused by things and/or conduct from which the increased risk of damage originates results in doctor liability regardless of culpability. This doctrine is intended primarily for damage caused by dangerous things and activities. In this setting, the burden of proof of responsibility for the damage is transferred to the person who caused the damage or the person who is responsible for the patient. Under objective-causal liability, the culpability of the harming party is not assumed. Even in the case of objective responsibility, it is important to establish a *causal nexus*.

The policy reason underpinning this judicial paradigm is the increasing use of sophisticated diagnostic and operative techniques in today's medicine. The fact is that many new medical treatments pose a risk to the patient. In Croatia, according to the available data, several recent court decisions involving medical malpractice have been issued, where the medical activity in question was considered by the court to constitute a dangerous activity for which liability was premised on objective

liability, and the disputes were concluded in favor of the plaintiff (Šago & Dajak, 2022).[6]

7 Medical Expert Witnesses in Civil Court Cases

The court provides medical expert witnesses to offer evidence when, in order to establish or clarify some legally relevant fact, it needs expert knowledge that the court does not have (Article 250 Civil Procedure Act).[7] In situations where the court finds that the expert's opinions cannot withstand criticism based on the rules of logical reasoning and experience, the court may reject those opinions since the court is not bound by the expert's findings or opinion, even though it lacks the professional knowledge necessary to clarify disputed circumstances,

The function of an expert is doubly significant. If they inform the court about their findings (observations), then they represent classic evidence. If the expert helps the court arrive at conclusions with their expertise, by formulating their opinion about what has been observed, then they also act as a specific assistant to the court in determining the relevant facts. While this is the legal theory, in practice it often is difficult to separate an ordinary observation from an ultimate opinion based on the observed facts.

From the moment when a healthcare worker, qualified as an authorized medical expert witness, becomes involved in the proceedings conducted before the court for compensation of damage which, according to the lawsuit, occurred as a result of medical malpractice, the court sets before him two basic tasks: 1. to determine whether there is a causal nexus between the doctor's actions or omissions and the resulting consequences or damage, and 2. if there is a *causal nexus*, what the harmful consequences were that the injured party suffered (Čizmić, 2011, pp. 473–510).

When determining liability due to alleged medical malpractice, we can define the tasks of the medical expert witness through three important questions:

[6] See County Court Varaždin: Gž.3064/12-2, dated 21. 08. 2012.
[7] Civil Procedure Act, Official Gazette, no. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022.

- that based on the facts established by the court, the expert should clarify the medical condition of the case in the proceedings;
- to evaluate not only whether the procedure(s) used by the healthcare worker complied with the valid medical standards, but also whether there were deviations in some of them or deviations at all from the accepted standards of the medical profession;
- if it is determined that the healthcare worker's procedure(s) deviated from the medical standards, the expert should assess whether the deviation(s) caused damage to the patient's health or would have occurred even if the healthcare worker's procedure was carried out in compliance with the appropriate medical standards.

The most important part of the expert witnesses role is to provide the court with testimony on the issue of the causal connection (*causal nexus*), i.e. the link between the harmful conduct as a cause and the resulting damage as a consequence, as a necessary predicate for responsibility for damage. As a rule, causation is not presumed. If it is suspected, the patient, having proved the harmful conduct and the damage, could hold the perpetrator responsible for each harmful action. The expert's function is to assess which harmful conduct in the chain of causation can legally be the cause of the damage. Proving causation in medical malpractice cases, as mentioned earlier, is a complex issue, and indeed sometimes poses an insurmountable hurdle. Consequently, many medical malpractice lawsuits brought against doctors and other healthcare workers fail for this reason. Since individual physiological and pathophysiological reactions of the human organism are not subject to strict natural laws and cannot be predicted with certainty (multifactorial causes), nor can they be controlled, causality is often proven according to the criteria of "probability" and is confirmed only in the case of serious and reasonable scientific probabilities. In most cases, the specific course of health deterioration cannot be subsequently determined with certainty because "reconstruction of events" is not possible, which is feasible in some other non-medical expertise (simulation of errors in technical expertise).

If the court expert determines that there is a justified causal nexus, this still does not mean that damage to the patient's health had to manifest itself immediately. An additional question arises that complicates the matter, namely, the patient's

subsequent development of complications that, although they do not have the same origin in legal practice, successively complicate the already damaged health of the patient. But, of course it could be a natural progression of a comorbidity that causes problems or even the various meds the patient is taking to deal with the various health conditions.

Because the expert's work consists in arriving at findings and opinions based on medical documentation and court files from which conclusions are drawn, we believe that the opinions on the basis of which the conclusions are drawn are only relevant for evaluating whether something is a mistake or not. The findings themselves do not differ in principle from any medical findings by the patient. These findings contain the patient's entire medical documentation in the disputed case (specialist's findings, discharge letters, consular specialist findings, laboratory findings of blood, urine, DNA analysis, etc., and imaging material such as X-ray images, MR, MSCT, US, and endoscopic examinations). The report that the expert provides to the court also includes a physical examination of the patient by an expert (if the expert requires it). This means that the report summarizes the patient's objective condition(s) supported by professional and recognized medical documentation, that is, the factual condition(s) supported by medical evidence.[8] An opinion, on the other hand, is intellectual work given by an expert based on his professional knowledge and experience. It comprises the expert's subjective assessment and directly indicates whether there is causation. Since the issue of causation is central to a medical malpractice dispute, the expert's subjective assessment on this question is critical to the court's ultimate decision. In this part, it is possible for court to accept opinion of expert, decline it, or take it in consideration in partly. When giving such conclusion, court needs to analyse a matter of compliance with the standards of the medical profession by the perpetrator, i.e., his competition and expertise in general concerning that standard.

The second component of the expert's work involves developing an opinion(s) concerning the patient's subsequent complications arising as a direct consequence of the medical malpractice that was *de facto* committed (Škavić & Zečević, 2008, pp. 23–29). Here, it is critical for the expert to carefully distinguish whether these

[8] For example, if the victim is missing one limb or a pair of organs, if he has obvious neurological deficits, or if he has a scar left after an operation that particularly disfigures him.

consequences or complications are the direct results of an error committed, or whether they are the result of a worsening of the patient's general preexisting condition(s), some new disease, or comorbidity, or whether they would otherwise occur in the natural course of the disease or life of the injured party (Strinović & Zečević, 2009, pp. 175–183). When preparing the opinion(s) which form the bases of the expert's conclusion(s), the expert must be careful to avoid expressing any legal interpretations of the subject of the dispute as that would invade the province of the court. Instead, the expert's opinions and ultimate conclusions must be based exclusively on the rules of medical science and skill.

The expertise of several different specialties is called "advisory expert opinions", and their special form is known as "faculty opinions" promoted by the Committee for Judicial Opinions at the Faculty of Medicine, which should represent expert opinions at the highest professional level. A court expert may find himself in a situation where he provides opinions on all professional medical provisions concerning medical ethics and deontology. Experts acting in this capacity rely upon the principles of the Code of Medical Ethics and Deontology of the Croatian Medical Chamber and the International Code of Medical Ethics and Deontology. In cases where compensation for non-property/non-material damages are at issue, experts are used according to the provisions of the ORA from 2001 and 2005. In this setting, expert witnesses examine alleged violations of personality rights, such as reduction of life activity, physical pain, and disfigurement (Crnić, 2009, pp. 56–93). Resolution of these issues are significant in assessing the severity of the injuries plaintiff suffered and their consequences, because the amount of fair compensation, i.e. legal criteria, depends on them (Šago, 2021, pp. 187–210).[9]

In practice in civil proceedings, in cases where the assistance of an expert in establishing the facts is necessary, a question that often arises is whether the court must accept the expert's opinion and agree with it. Because the court does not have

[9] As ORA views non-property damage in a more modern way compared to ORA/91, i.e. as a violation of personality rights, we find it difficult to accept the statement from Criterion 2020: "Since a considerable period has passed since their adoption (Criterion 2002, op.a.), with the fact that in the meantime the new Obligatory Relations Act entered into force (Official Gazette, No. 35/05, 41/08, 125/11, 78/15 and 29/18), but and other regulations of a mandatory or procedural nature that partially refer to this legal matter, it was necessary to harmonize the existing Orientation Criteria with the aforementioned changes". This is because the 2020 Criteria have only and exclusively increased the 2002 Criteria in terms of amount (by 50 percent), while no change - adjustment has been made concerning the changed concept of non-property damage according to the ORA, according to which non-property damage is defined as a violation of personality rights.

the necessary expertise, which is why it ordered the presentation of evidence by a certain expert in the first place, it rationally could be argued that the court is not competent to determine the facts and therefore should rely on those provided by the expert in his findings and opinion. However, starting from the principle of independence and independence of the court in arriving at its opinion, the court is not bound by the findings and opinion of the expert. This conclusion derives from the fact that the expert's findings and opinions constitute pieces of evidence, whose probative value the court can freely assess based on his conscientious and careful review of all decisive circumstances according to the Law on Patients' Rights. [10]

In the case of an unwanted treatment outcome, from a forensic medical point of view, the following circumstances of the case are relevant, based on the question of whether the unwanted treatment outcome is the result of a) deviation from the rules of the medical profession,[11] that is, deviation from the abstract standard of care of a good doctor, but without obvious medical malpractice; b) or it is a consequence of a complication of the disease (fatal course of the disease) without proven medical

[10] One protest decision of the Croatian Society for Medical Expertise (HDMV), forensic expert doctors of all specialties, and the Croatian Medical Association (hereinafter referred to as HLZ) adopted at the end of 2010 outlined the issues related to medical expertise, according to which forensic experts are exposed to increasing pressure from individual judges and lawyers, to perform an expert evaluation of non-property damage according to "tables" using the International Classification of Functioning, Disability and Health (ICF/ICF) and the International Classification of Diseases (ICF), more precisely, according to the tables published in the book "Approach to the Expertise of Compensation for Non-Property Damage According to the Law on mandatory relations from 2005" by Strinović, Škavić, & Zečević, which was also discussed at a meeting organized by the Croatian Insurance Office (HUO) in Opatija. The association claims that the lawyers of a certain insurance company, as well as some judges, refer to the mentioned tables very unprofessionally and incompetently, and that, because they do not know the significance of the IKB and MKF, they put pressure on the experts at the hearings, demanding expert testimony according to the mentioned classifications or the book of the mentioned authors. They further point out that medical expert opinions in civil proceedings due to non-property damage belong to specialist medical experts, and not to specialists in forensic medicine, because the latter is not able to perform a specialist examination, nor make a relevant opinion from a particular branch of medicine, and for this reason they are not able to make tables for evaluation of the consequences of damage, because the court medic cannot see them in practice on a living sick person. At the meeting of the Croatian Association for Medical Expertise of the Croatian Medical Association, it was decided that the members of the Association will continue to provide expert opinions through their professional knowledge, the Code of Ethics of court experts, the Law on Civil Procedure (Articles 250-263), and the Obligatory Relations Act (Article 200 ORA /78 pain, fear, mental pain due to reduced life activity and displeasure) if the harmful event occurred before 01.01.2006, i.e. according to Article 19 and 1100/05 (violation of personality rights) if it occurred after the mentioned date.

[11] "When it was determined that the plaintiff had been correctly diagnosed, a generally accepted medical procedure for treatment was determined on time, proper preoperative preparation and analgesia were performed, the procedure was performed in a health facility that is authorized for such procedures in the usual way and by a specialist doctor who is authorized for such procedures, the damage caused to the plaintiff cannot be attributed to the failure of the operator of the defendant, since in the given circumstances he acted according to the rules of the profession, but to the complication of the operative procedure in the given conditions." - Supreme Court of the Republic of Croatia, Rev-985/07 dated 28.11.2007.

malpractice; c) that the undesired outcome of the treatment occurred due to the negligent actions of the doctor.

Sometimes the expert's findings and opinions are unclear, unspecified, or too extensive, so they cause contradictory interpretations at the hearing, which leads to difficulty in establishing the truth and delaying the procedure. The court must approach every finding or opinion of an expert as critically as possible because its task is to establish the factual situation fully and correctly, and then apply an abstract legal norm. In the theory of procedural law, there is a unique opinion that the court is obliged to submit to its assessment the expert's findings and opinions, as well as any other evidence presented. In further elaboration, we come to an absurd situation, how can the court critically evaluate the expert's findings and opinions, when it lacks the necessary professional knowledge for which the specific expertise was determined. We find the solution to this paradox in the basic premise of the legal science of every legal state, which is the independence of the courts because their rulings must follow the understanding of the court, which is also responsible for its decision. It should always be emphasized that experts perform their work according to the order of the court, which evaluates that expert work based on a conscientious and careful assessment of all decisive circumstances.

8 Concluding Remarks

The first part of the paper analyzed the principles of responsibility of the healthcare worker as a guarantor from the aspect of illegality and culpability. We can confidently conclude that the expression used by the CCC is characteristic of the unreal criminal offenses of omission and refers to the legal obligation to prevent the consequences and is understandable However, when interpreting this expression, the emphasis should be on criminal law, and not on misdemeanor or disciplinary law, because under the principle of the unity of the legal order, the legal norm must have disposition and sanction in the CCC. Thus, to fulfill the principle of legality, we must look not only to the origins of the guarantor duty primarily in criminal law but also to the legal goods that protect criminal law for guidance. The situation is different in the case of real criminal offenses of omission, and the legislator prescribed omission as the conduct of commission, which represents the realization of legal certainty. With respect to the sources of guarantor duty, it is important to question the awareness of the guarantor about his duty. The situation with healthcare worker's

is unique because they must be familiar with the provisions that regulate their duty to act. Still, „impossible obligations", ie. Obligations that guarantor should fulfill but isn't capable of fulfilling them cannot be accounted as responsibility for guarantor according to the principle of *ultra posse nemo tenetur* and a provision of necessity in General Part of CCC. When legal certainty is achieved by legal provisions, then it is also clear to the authority of the proceedings which facts it will order the medical expert witness to determine, which will also affect its legal position in the criminal proceedings.

Legal protection of subjective rights violated or endangered by the commission of a criminal offense may also be provided in criminal proceedings through the institute of a compensatory claim. This means that filing a compensatory claim in criminal proceedings allows, in addition to resolving accusations made against the defendant of a criminal nature, for the contemporaneous resolution of a right or obligation of a civil nature that must be related to the main case in the same criminal proceedings (Kunštek & Pavišić, 2010, p. 75).

The underlying theory is that interests of judicial economy are best served by resolving any civil claims arising from a criminal offence in the same proceedings. The civil jurisdiction of a criminal judge leads to a consolidation of the two forms of dispute arising from the offence and avoids a duality of proceedings. The most evident advantages of combining the civil claim within an existing criminal action for the injured party are simplicity, speed and cost-effectiveness. It also relieves the injured party from having to institute a civil proceeding at his expense to advance a property claim, for example. The possibility of conducting the adhesion procedure is foreseen for procedural reasons, economy and from the aspect of the courts, which are relieved from the burden of having to determine the same facts more than once. When the guilty verdict is delivered the court may grant an indemnity claim in full or in part and direct the injured party to sue for the balance in a civil procedure. In practice, however, judges and legal professionals tend to avoid ancillary proceedings, considering it to render a foreign element within criminal proceedings (Šago & Pleić, 2012, pp. 967–999).

Because healthcare workers respond according to the general principles of liability for damage (ORA), and since doctors are constantly burdened by the fact that their duty is to promote human health, which is the most important of legal goods, we

believe that, at the current stage of medical development, it is necessary to devise a new Act that would deal with problems according to the *lex specialis* type from the area of liability of doctors and medical institutions for damages caused during treatments. The Ministry of Health and the Croatian Medical Chamber (hereinafter: HLK) should take the initiative for this. The HLK should initiate all members to participate in the process of making proposals to adopt such an Act.

45 percent of healthcare institutions in Croatia still do not have professional liability insurance for damages caused to patients, even though such insurance is compulsory on all institutions in the European Union (Šarić, 2016, p. 200).

The HLK, through authorized commissions, supervises the professional work of doctors related to medical malpractice. However, there is still no communication between the state attorney's office and the courts on the one hand, and HLK and the Ministry of Health on the other hand, regarding disputes over the responsibility of doctors for malpractice, even though the Law on Medicine obliges them to do so.

Due to the increasing number of requests for compensation for damages due to medical malpractice, we propose the formation of an independent expert committee that would have an advisory role. It would be comprised of experts from different specialties such as doctors, forensic experts, specialists in medical law, patient associations, hospitals, and insurance representatives, and at the same time would provide expert opinions on patients' compensation claims (Vrabl, 2009, pp. 226–229).

There are two reasons for this. First, although the disciplinary organs of the HLK do their job professionally, patients often do not trust the Chamber's disciplinary organs due to doubts about class solidarity. Second, these experts would evaluate the professional-medical and then the judicial justification of the request, which would be the first step in deciding on the justification of submitting the request to the court. This type of "pre-judgment" would reduce the pressure on the already overburdened courts (Šarić, 2016, p. 200).

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Povzetek v slovenskem jeziku

Odgovornost zdravstvenega delavca za škodo, povzročeno pacientom, se lahko nanaša na kazensko, civilno, prekrškovno in disciplinsko odgovornost, pri čemer je nujni pogoj, da je škoda povzročena kot posledica medicinske napake ali malomarnosti, ne pa kot posledica običajnega poteka bolezni. Članek analizira kazenskopravne in civilnopravne vidike odgovornosti zdravstvenih delavcev za škodo, ki je posledica medicinske napake pri zagotavljanju zdravstvene oskrbe. Nepopolna definicija pravne narave odgovornosti zdravstvenega delavca, obveznosti, ki jih zakon nalaga zdravnikom, opredelitev malomarnosti pri zdravljenju, pa tudi pravna podlaga odgovornosti, kažejo na obstoj mnogih pravnih dilem, ki zahtevajo dodatno analizo, k čemur želimo prispevati s tem člankom. Zaradi širokega spektra vprašanj v zvezi z odgovornostjo zdravstvenih delavcev ta članek pojasnjuje materialne pogoje za kazensko (dolžnost ravnanja) in civilno (malomarnostno) odgovornost ter razpravlja o pravni vlogi medicinskega strokovnjaka v obeh vrstah postopkov.

Ključne besede: civilna odgovornost, kazenska odgovornost, škoda, medicinski strokovnjak, medicinska napaka