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MEDICAL NEGLIEGENCE AND LIABILITY OF HEALTH PROFESSIONALS IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

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Abstract Although the European Convention on Human Rights (ECHR) does not explicitly lay down the right to health, it can be derived from the long-term jurisprudence of the European Court of Human Rights (ECtHR) which interpreted certain provisions of the ECHR (in particular articles concerning the right to life, the prohibition of torture and inhuman conduct and the right to private and family life). Based on the ECtHR jurisprudence it may be concluded that the ECHR, albeit implicitly, refers to the right to health as well. It regulates negative obligations reflected in the prohibition of interference with a certain right. It can also be interpreted as setting positive obligations of the states to ensure the exercise of the right to health, although the extent of that positive obligation is still not fully defined. The present contribution focuses on a single segment of the right to health in the practice of the ECtHR, i.e. the Court's interpretation of the state's responsibility for medical negligence, especially in the last few years.

Keywords
state's responsibility, the right to health, the right to life, prohibition of torture, the right to private and family life.

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1 Introduction

The following article addresses the case-law of the European Court of Human Rights (ECtHR) concerning the responsibility of medical professionals for medical error in the context of Contracting States' responsibility to ensure the right to health as an emerging right provided by the European Convention on Human Rights (ECHR). In its long-term practice, the ECtHR has dealt with a number of cases which concerned the health of persons who have claimed infringements of the individual rights laid down in the ECHR.

Although the ECHR does not explicitly regulate the right to health, the ECtHR considered the right to health in cases that included alleged violations of the rights guaranteed by the ECHR. In some cases, the Court interpreted the ECHR in a way that the Contracting States should also provide the right to health care to the applicant. Some of these cases concerned the responsibility of medical professionals for medical error. In those cases, the ECtHR assessed whether the Contracting State party to the ECHR ensured the rights laid down by the ECHR to the applicants. In this context, the Court noted that it was also the responsibility of the Contracting State to ensure the proper conduct of medical personnel and correlatively, the right of their patients to healthcare. In spite of the fact that the ECHR does not regulate the direct responsibility of medical personnel for a medical error, it can nevertheless, especially in the light of the latest case-law of that Court, be concluded that it imposes on the Contracting States a legal obligation to provide its citizens an appropriate health system in which medical professionals will be able to provide individuals with appropriate medical care, taking into account all the professional rules.

This contribution is based on an analysis of international law regulating the right to health, in particular the international law adopted within the Council of Europe, and on the analysis of the case-law of the ECtHR in which the right to life or the right to family and private life was dealt with from a patient's health perspective, especially the cases where the responsibility of medical professionals for medical error was addressed. Contracting States of the ECHR regulates responsibility of medical professionals in their national legal systems.

2 Medical negligence

Medical malpractice is a legal cause of action that occurs when a medical or health care professional deviates from standards in his or her profession, thereby causing injury to a patient. In common law jurisdictions, medical malpractice liability is normally based on the laws of negligence. In legal theory and practice it is commonly accepted that the medical professional does not act as necessary when the deterioration of the patient's health is a consequence of the doctor's professional irregular conduct (professional medical malpractice) or where the behaviour of the doctor is otherwise impeccable, but the patient has not given an informed consent for an intervention due to an unfulfilled or inadequate explanatory duty. How a medical professional should treat a patient is determined by the rules of the medical profession. These rules do not themselves specifically define what constitutes a medical error, but it is clear medical malpractice occurs when a health care provider acts or fails to act in a way that does not comply with the rules of the profession and the patient suffers harm (Božič Penko, 2017: 69).

The concept of professional medical error does not only cover errors in diagnosis and prescribing and the implementation of therapies, but also procedural errors, technical errors in the process of treatment, errors in the organization, management of medical documentation, etc. The concept of treatment is extremely broad and covers all health measures aimed at improving the health status of the patient (Ovčak Kos & Božič Penko, 2018: 11-12).

As regards the consequences of medical malpractice, three types of liability have been identified: the civil liability leading to the indemnification of the patients for their damages, the administrative liability leading to disciplinary or administrative penalties for the healthcare professional and the criminal liability which triggers criminal sanctions to the healthcare professionals in case of actions qualified as offences by the criminal law (Žnidaršić Skubic, 2018: 79-104).

3 The ECHR and the right to health

The 'right to health' was first explicitly stated in the Preamble of the World Health Organization (WHO) Constitution in 1946.[1] Some United Nations human rights documents directly address health, such as the right to a standard of living adequate for health and well-being, or the need for recognition of the highest attainable standard of physical and mental health (McHale, 2010: 282-314).

The ECHR[2] does not explicitly guarantee a right to healthcare or a right to be healthy. Nevertheless, the ECHR does not guarantee the right to health, its contribution to the protection in the field of healthcare must not be overlooked. The ECHR is central to the European human rights system (Da Lomba, 2014: 149-164). The rights enshrined in the Convention are civil and political, but the Convention applies to socio-economic conditions.[3] However, it may be said that in several recent cases; however, the European Court has etched out a small space within the Convention for the right to healthcare, at least in certain circumstances, while at the same time setting up fertile ground for further development (Graham, 2017).

The fact that the right to health is not regulated by the ECHR does not mean that it is not an internationally recognised human right. The International Covenant on Economic, Social and Cultural Rights[4] obliges the Contracting States to recognize everyone's right to the enjoyment of the highest attainable standard of physical and mental health (Article 12, paragraph 1).

Matters such as health, housing, social benefits and other socio-economic rights are traditionally more appropriately addressed in instruments such as the European Social Charter (ESC) or the European Code of Social Security (Council of Europe, 2015: 4). The European Social Charter – ESC (revised)[5] guarantees fundamental social and economic rights of all individuals in their daily lives. The ESC (revised)

[1] World Health Organisation, https://www.who.int/governance/eb/who_constitution_en.pdf (24 January 2020).
[2] Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5.
[3] Airey v. Ireland, Application No. 6289/73, Judgement of 9 October 1979, para. 26.
[4] International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Retrieved from: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (24 January 2020).
[5] European Social Charter (revised), European Treaty Series No. 163.

guarantees fundamental social and economic rights as a counterpart to the ECHR, which refers to civil and political rights. The ESC guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare.[6] According to Article 11 of the ESC (revised) states parties "with a view to ensuring the effective exercise of the right to protection of health, undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: to remove as far as possible the causes of ill-health; to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health and to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."[7]

The revised European Code of Social Security, which updates and improves the provisions of the European Code of Social Security,[8] defines European norms for social security coverage and establishes minimum levels of protection which parties must provide in areas such as pensions, unemployment and invalidity benefits, medical care etc. The most important improvements in the revised Code are higher rates of coverage, an extension of the level and duration of benefits, the inclusion of new benefits, relaxation of the conditions of entitlement, coverage for a larger number of preventive measures and the absence of all discrimination based on sex.[9] Unfortunately, the revised Code has still not entered into force. Nevertheless, its revised content is an important indicator of the future developments in the field of social welfare, including healthcare.

Within the Council of Europe, the perceived importance of recognizing human rights in healthcare is illustrated by the Convention on Human Rights in Biomedicine (hereinafter: Convention).[10] The Convention is the first legally-binding international text designed to preserve human dignity, rights and freedoms, through a series of

[6] Council of Europe, The European Social Charter. Retrieved from: https://www.coe.int/en/web/european-social-charter (19 January 2020).
[7] Up to 19 January 2020 the RESL has been ratified by 27 states members of the Council of Europe. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035/signatures?p_auth=2wddtLLB (22 January 2020).
[8] European Social Security Code, European Treaty Series No. 48.
[9] The revised European Code of Social Security updates and improves the provisions of the European Code of Social Security, European Treaty Series No. 139. Retrieved from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/139 (26 January 2020).
[10] Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, European Treaty Series No. 164.

principles and prohibitions against the misuse of biological and medical advances. The Convention's starting point is that the interests of human beings must come before the interests of science or society. It lays down a series of principles and prohibitions concerning bioethics, medical research, consent, rights to private life and information, organ transplantation, public debate etc.[11] According to Article 1 of the Convention its parties are bound to protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.

4 The "right to health" in the case-law of the European court of Human Rights

Although the ECHR does not expressly regulate the right to health, in the case-law of the ECtHR relating to Article 2 (right to life) of the Convention the Court appeared to accept that in principle this article could extend to the provision of health care (Harris, O'Boyle, Bates & Buckley, 2014: 212-213).

In the LCB case[12] the ECtHR established that according to paragraph 1 of Article 2 of the ECHR the Contracting State is obliged not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

In the judgment concerning the case Cyprus v Turkey[13] the ECtHR observed that that there may be liability under Article 2 where the state places an individual's life at risk by denying him or her medical care that is available to the general public. But the Court did not examine in this case the extent to which Article 2 of the ECHR may impose an obligation on a Contracting State to make available a certain standard of healthcare.[14] It is reasonable to infer from the word 'extent' that such an

[11] The Convention states the principle according to which a person must give the necessary consent for treatment expressly, in advance, except in emergencies, and that such consent may be freely withdrawn at any time. The treatment of persons unable to give their consent, such as children and people with mental illnesses, may be carried out only if it could produce real and direct benefit to his or her health. See Council of Europe, Treaty office, Details of Treaty No. 164. retrieved from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164 (24 January 2020).
[12] L.C.B. v. The United Kingdom, Application No. 14/1997/798/1001, Judgement of 9 June 1998.
[13] Cyprus v. Turkey, Application No. 25781/94, Judgment of 10 May 2001.
[14] Ibid., paragraph 219.

obligation exists to some undefined degree. Confirmation of such an interpretation of Article 2 would extend the guarantee of the right to life in a way that it would be in accordance with national healthcare standards in European states and indirectly provide a partial, but welcome guarantee of the right to health. The obligation to ensure more extensive healthcare is likely to be held to be subject to 'available resources' (Harris, O'Boyle, Bates & Buckley, 2014: 213).

5 Prohibition of torture (Article 3)

Prohibition of torture and inhuman or degrading treatment or punishment is stipulated by Article 3 of the ECHR. Article 3, which applies to human beings but not to legal persons, contains an absolute guarantee on the rights it protects. This right cannot be derogated from in time of war or other public emergency and is expressed in unqualified terms meaning that ill-treatment within the terms of Article 3 is never permitted, even for the highest reasons for public interest (Harris, O'Boyle, Bates & Buckley, 2014: 236-237).

In some of the cases the ECtHR dealt with issues involving the right to health in connection with prohibition of torture or inhuman treatment. The Court has noted that State agents must refrain from treatment which damages a person's physical health (for example, beatings or other forms of violence; Kaçiu and Kotorri v. Albania[15]). The State must also refrain from causing mental or psychological harm to individuals (for example, the wilful causing of anguish, torment or other forms of psychological suffering; Gäfgen v. Germany[16]). Furthermore, the State may also be required to take positive measures to protect the physical and mental health of individuals, such as prisoners, for whom it assumes special responsibility ((Council of Europe, 2015: 5).

The case of P. and S. v. Poland[17] related to a person's health because the applicant was denied abortion, which constituted a violation of Article 2. A 14-year-old victim of rape wished to terminate her pregnancy, but the local public hospitals refused to perform an abortion and issued a press release confirming their decision. Thereafter the applicant experienced serious pressure from various groups including medical

[15] Kaçiu and Kotorri v. Albania, Application Nos. 33192/07 and 33194/07, Judgment of 25 June 2013.
[16] Gäfgen v. Germany, Application No. 22978/05, Judgment of June 2010 (Grand Chamber).
[17] P. and S. v. Poland, Application No. 57375/08, Judgment of 30 October 2012.

professionals, journalists, a priest and anti-abortion activists. After complaining to the Ministry of Health, the applicant was eventually taken in secret for an abortion in another hospital some 500 kilometres from her home. The Court noted that, despite the applicant's great vulnerability, a prosecutor's certificate confirming that her pregnancy had resulted from unlawful intercourse and medical evidence that she had been subjected to physical force, the applicant had been subjected to considerable pressure by various medical professionals not to have an abortion. No proper regard had been given to her young age or to her views and feelings. All the foregoing led the Court to conclude that there had been a breach of Article 3 of the Convention (Council of Europe, 2015: 7).

The question of degrading or inhuman treatment was raised in D. v. the United Kingdom, a case involving the removal of an alien dying of AIDS to his country of origin (St Kitts). The Court held that because the applicant had no accommodation, family, moral or financial support and no access to adequate medical treatment in his country, his removal would constitute a violation of Article 3. However, in N. v. the United Kingdom the Court found that the expulsion of an HIV patient to Uganda, where her access to appropriate medical treatment was uncertain, would not amount to a violation of that provision. Similarly, in Bensaid v. the United Kingdom the Court held that the expulsion of a schizophrenic would not constitute a violation of either Article 3 or Article 8, despite the alleged risk of health deterioration due to a lack of adequate care in the country of destination (Council of Europe, 2015: 9).

6 The right to liberty and security of the person (Article 8)

Article 8 of the ECHR regulates everyone's right to respect for his private and family life, his home and his correspondence. This article prohibits interference by a public authority with the exercise of this right except in limited and defined cases such as where the interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Article 8 has been described as "the least defined and the most unruly of the rights enshrined in the Convention" because it places on states the obligation to "respect" a wide range

of undefined personal interests which embrace a number of overlapping and inter-related areas (Harris, O'Boyle, Bates & Buckley, 2014: 522).

The right to respect for private life guaranteed by Article 8 of the Convention has assumed prominence in the Court's case-law on "the right to health". The Court has interpreted the notion of private life as covering the right to the protection of one's physical, moral and psychological integrity, as well as the right to choose, or to exercise one's personal autonomy – for example, to refuse medical treatment or to request a particular form of medical treatment (Glass v. the United Kingdom, §§ 74-83; Tysiąc v. Poland) (Council of Europe, 2015: 5).

Article 8 also gives rise to both negative and positive obligations. The Court has found States to be under a positive obligation to secure the right to effective respect for physical and psychological integrity (Sentges v. the Netherlands; Pentiacova and Others v. Moldova; Nitecki v. Poland). In addition, these obligations may require the State to take measures to provide effective and accessible protection of the right to respect for private life (Airey v. Ireland, § 33; McGinley and Egan v. the United Kingdom, § 101; Roche v. the United Kingdom, § 162), through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures (Tysiąc v. Poland, § 110). The issue of free and informed consent to medical treatment has also been a dominant feature of the case-law under Article 8 (Council of Europe, 2015: 5).

The case Erdinç Kurt v. Turkey[18] concerned two high-risk operations performed on a patient – the applicants 'daughter – which left her with severe neurological damage (92 percent disability). The applicants maintained that the authorities were responsible for the damage in question and complained of the lack of an effective remedy by which to assert their rights in the civil proceedings. They alleged that they had contested, without success, the relevance and sufficiency of the expert report on which the domestic courts had based their dismissal of the applicants' compensation claim. The Court held that there had been a violation of the right to respect for private life, finding that the applicants had not received an adequate judicial response that satisfied the requirements inherent in the protection of the right to physical integrity of the patient. It noted that the expert report on which the

[18] Erdinç Kurt v. Turkey, Application No. 50772/11, Judgment of 25 June 2019.

domestic courts had based their dismissal of the applicants' compensation claims, and which concluded that the doctors had not been at fault, had given insufficient explanations regarding the issue on which it was supposed to provide technical insight (the issue whether the doctors had contributed to the damage). The Court held that only where it was established that the doctors had carried out the operation in accordance with the rules of medical science, taking due account of the risks involved, could the damage caused be regarded as an unforeseeable consequence of treatment; were it otherwise, surgeons would never be called to account for their actions, since any surgical intervention carried a degree of risk.

Although the Court found the case S.A. v. Turkey[19] inadmissible, it raised important issues regarding the right to health. It concerned the applicant's claim that his son had sustained physical harm as a result of an allegedly botched circumcision. The applicant complained that his son had sustained physical harm as a result of complications from surgery. The Court declared the application inadmissible as being manifestly ill-founded, because the Turkish courts' decision had been neither arbitrary nor manifestly unreasonable. It noted that the national authorities had opened, of their own motion, an internal administrative investigation for disciplinary purposes and that, in dismissing the claims of the applicant, the domestic authorities had relied on medical assessments. It was not for the Court to call into question the doctors' findings or to speculate as to the nature of the experts' conclusions. Taking the view that it was not appropriate to call into question the facts as established by the national authorities or the conclusions reached by them, the Court also found that the domestic courts' decision to dismiss the applicant's claims had neither been arbitrary nor unreasonable. Lastly, the Court noted that the applicant had not taken any steps to obtain a medical assessment in support of his allegations. Nor had he accepted a second corrective operation as recommended by the doctors.

The Court has also underlined the importance of the patients' right to be given access to information regarding risks to their health. The Contracting States are, for example, required to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences of a planned medical procedure and inform their patients beforehand to enable them to give informed consent. If a foreseeable risk materialises without the patient having been duly informed in advance, the State

[19] S.A. v. Turkey, Application No. 62299/09, Judgment of 16 January 2018.

may be found in breach of Article 8 (Trocellier v. France, § 4; Codarcea v. Romania, § 105). Thus, in Csoma v. Romania the applicant was given medication to induce an abortion but owing to complications the doctors had to perform a hysterectomy to save her life. The Court concluded that because she had not been involved in the choice of medical treatment or properly informed of the risks, she had suffered an infringement of her right to respect for her private life, contrary to Article 8 (Council of Europe, 2015: 7).

7 The right to life (Article 2)

The first right guaranteed by the ECHR, the right to life, is the most basic human right of all. This right cannot be derogated from in time of war or another public emergency. According to Article 2 of the ECHR everyone's right to life to life must be protected by law. No one must be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Together with the prohibition of torture it enshrines one of the basic values of the democratic societies making up the Council of Europe.[20] Deprivation of life will not be regarded as having been inflicted in contravention of Article 2 when it results from the use of force which is no more than absolutely necessary: in defence of any person from unlawful violence; in order to effect a lawful arrest, to prevent the escape of a person lawfully detained, or in action lawfully taken for the purpose of quelling a riot or insurrection.

According to Article 2 of the ECHR state agents are obliged to refrain from acts or omissions of a life-threatening nature, or which place the health of individuals at grave risk. In case İlhan v. Turkey[21] the applicant alleged that his brother Abdüllatif İlhan had been severely beaten by gendarmes when they apprehended him at his village and that he was not provided with the necessary medical treatment for his life-threatening injuries. Having regard both for the severity of the ill-treatment suffered by A. İlhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court found that he was a victim of very serious and cruel suffering that may be characterised also as torture.

[20] McCann v. UK, Application No. 18984/91, Judgment of 27 September 1995 (Grand Chamber), para 147.
[21] İlhan v. Turkey, Application No. 22277/93, Judgment of 27 June 2000.

Without Convention-compliant justification, states must not use lethal force or force which, while not resulting in death, gives rise to serious injury. States also have positive obligations to protect the health of individuals in particular circumstances. An issue may thus arise under the same article where it is shown that the authorities of a Contracting State have put an individual's life at risk through the denial of health care they have undertaken to make available to the population in general (Cyprus v. Turkey,[22] Nitecki v. Poland,[23] Oyal v. Turkey) (Council of Europe, 2015: 5).

Cases falling under Article 2 of the ECHR in which the right to health was considered may be divided in two major groups. The first group includes cases where the Court found inefficiency of procedure and legal remedies. The second group consists of cases in which the breach of the rues of medical science may constitute a violation of the right to life. Both groups are considered in the next two sections of this paper.

8 Inefficiency of (legal) investigation

The State's obligation to carry out an effective investigation has in the case-law of the ECtHR been considered as an obligation inherent in Article 2, which requires, inter alia, that the right to life be "protected by law". Although the failure to comply with such an obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is seen as a distinct obligation that can give rise to a finding of a separate and independent "interference". The Court has interpreted the procedural obligation of Article 2 as requiring States to establish an effective and independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible held accountable (Šilih v. Slovenia [GC], § 192; Lopes de Sousa Fernandes v. Portugal [GC], § 214) (Council of Europe, 2019: 30).

[22] See note 19 above.

[23] Nitecki v. Poland, Application No. 65653/01, Judgment of 21 March 2002.
The applicant was diagnosed with amyotrophic lateral sclerosis for which he was prescribed a drug used to treat his disease. He asked the Kujawsko-Pomorski Health Insurance Fund to refund him the cost of the drug. The funding was approved up to 70 percent. The Court found that, bearing in mind the medical treatment and facilities provided to the applicant, including a refund of the greater part of the cost of the required drug, the respondent State cannot be said, in the special circumstances of the case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30 percent of the drug price. Accordingly, the Court, concluded that the complaint under Article 2 of the Convention is manifestly ill-founded.

In Šilih v. Slovenia[24] the Court noted that the fact that the applicants' son's condition started significantly to deteriorate in the hospital and that his death was possibly related to the medical treatment he received had not been disputed either before the Court or in the domestic proceedings. It further observed that the applicants alleged that their son's death was a result of negligence on the part of the doctor. It follows that the State was under a duty to ensure that the proceedings instituted with regard to the death complied with the standards imposed by the procedural obligation of Article 2 of the ECHR. The Court held that there had been a violation of Article 2 of the Convention on account of the inefficiency of the Slovenian judicial system in establishing the cause of and liability for the death of the applicant's son. It observed that the criminal proceedings, and notably the investigation, had lasted too long, and that six judges had been changed in a single set of first-instance civil court proceedings, which were still pending 13 years after they had been started.

The choice of means for ensuring the respect for positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring that Convention rights are respected, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. However, for this obligation to be satisfied, such proceedings must not only exist in theory but also operate effectively in practice (Cevrioğlu v. Turkey, §§ 53 and 55; Lopes de Sousa Fernandes v. Portugal [GC], § 216). Therefore, the Court is called to examine whether the available legal remedies, taken together, as provided in law and applied in practice, could be said to have constituted legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress to the victim. In other words, rather than assessing the legal regime *in abstracto*, the Court must examine whether the legal system as a whole adequately dealt with the case at hand (Valeriy Fuklev v. Ukraine, § 67) (Council of Europe, 2019: 39).

In Dodov v. Bulgaria[25] the Court dealt with a situation involving lack of accountability for the disappearance from a nursing home of the applicant's mother, who was suffering from Alzheimer's disease. The Court considered it reasonable to assume that the mother had died and found a direct link between the failure of the

[24] Šilih v. Slovenia, Application No. 71463/01, Judgment of 9 April 2009 (Grand Chamber).
[25] Dodov v. Bulgaria, Application No. 59548/00, Judgment of 17 January 2008.

nursing home staff to supervise her, despite instructions never to leave her unattended, and her unexplained disappearance. Despite the availability in Bulgarian law of three avenues of redress – criminal, disciplinary and civil – the authorities had not provided the applicant with the means to establish the facts and bring to account those responsible. Faced with an arguable case of negligent endangering of human life, the Bulgarian legal system as a whole had failed to provide the adequate and timely response required by the State's procedural obligations under Article 2 (Council of Europe, 2019: 40).

The ECtHR found domestic proceedings were excessively lengthy also in Byrzykowski v. Poland,[26] Zafer Öztürk v. Turkey,[27] Bilbija and Blažević v. Croatia,[28] etc. In cases Bajić v. Croatia[29] and by contrast Karpisiewicz v. Poland[30] the medical experts' professional relationship with the accused was such that the medical experts could not be seen as objectively impartial (Council of Europe, 2019: 41).

On the other hand, the Court has in many cases found no failure on the part of the State to provide appropriate mechanisms whereby the criminal, disciplinary or civil responsibility of persons could be established. For instance, in the case of Vo v. France,[31] a doctor performed a medical procedure on the applicant that had been intended for another person. The applicant had to terminate her pregnancy as a result. Before the Court the applicant complained that the lack of criminal-law protection for her unborn child violated Article 2 of the Convention. The Court examined the adequacy of the mechanisms in place for proving any negligence by the doctor in the loss of the applicant's child. Noting that the applicant could, with reasonable prospects of success, have brought an action in damages against the authorities for negligence, it concluded that there had been no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere (Council of Europe, 2019: 40).

[26] Byrzykowski v. Poland, Application No. 11562/05, Judgment of 27 June 2006.
[27] Zafer Öztürk v. Turkey, Application No. 25774/09, Judgment of 21 July 2015.
[28] Bilbija and Blažević v. Croatia, Application No. 62870/13, Judgment of 12 January 2016.
[29] Bajić v. Croatia, Application No. 41108/10, Judgment of 13 November 2012.
[30] Karpisiewicz v. Poland, Application No. 14730/09, Judgment of 11 December 2012.
[31] Vo v. France, Application No. 53924/00, Judgment of 8 July 2004, Grand Chamber.

Similarly, in Sevim Güngör v. Turkey[32] the Court dealt with the death of an elderly patient from bronchopneumonia in a hospital. The applicant's mother was an elderly woman with a history of cardiac and hypertension problems and was suffering from severe malnutrition and decubitus ulcers when she was admitted to hospital. She died a few days later from respiratory and circulatory insufficiency as a result of bronchopneumonia. The applicant alleged that doctors had failed to undertake the necessary measures to properly treat her mother, thereby causing her death. The Court noted that it is not its function under Article 2 of the Convention to gainsay either the doctors' assessment of the applicant's mother, or their decisions regarding how she should have been treated. These assessments and decisions were made against the background of the deceased's state of health at the time and the doctors' perceptions as to what steps needed to be taken for her treatment. Having due regard for the detailed rules and standards laid down in the domestic law and practice of the respondent State in the area under consideration, the Court held that it could not be maintained that the relevant regulatory framework disclosed any shortcomings which would provide the basis for an arguable claim of a breach of the domestic authorities' obligation to protect the right to life of the applicant's mother.

In the following cases courts held that on the facts before them there either was no violation of Article 2 or declared the cases inadmissible. Ursu v. Romania (death caused by cardiac arrest); Maruseva v. Russia (death of a child in the course of a cardiac surgery operation); Besen v. Turkey (death of the applicant's mother following surgery); E.M. and Others v. Romania (death in hospital due to a bacterial infection following surgery); Buksa v. Poland (death of a baby due to an undiagnosed abdominal non-malignant tumour in her liver;, Çakmak v. Turkey (electrocution of the applicants' relative while picking up pinecones from a tree in the garden of a primary school); and, Aktaş v. Turkey (death of the applicant's son when his motorcycle collided with a pickup truck) (Council of Europe, 2019: 41).

The Court has underlined that, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation to established an "effective judicial system" will be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the

[32] Sevim Güngör v. Turkey, Application no. 75173/01, decision on inadmissibility.

criminal courts, enabling any responsibility to be established and any appropriate civil redress to be obtained. It has also accepted that disciplinary measures may also be envisaged (Calvelli and Ciglio v. Italy [GC], § 51; Mastromatteo v. Italy [GC], § 90; Vo v. France [GC], § 90; Anna Todorova v. Bulgaria, § 73; Cevrioğlu v. Turkey, § 54; Lopes de Sousa Fernandes v. Portugal [GC], §§ 137 and 215) (Council of Europe, 2019: 41).

9 Negligence and liability of health professionals

The ECtHR has, especially in more recent cases, dealt with the question concerning circumstances involving a medical error and which constitute a breach of a right provided by the ECHR and is therefore the State's responsibility. Additionally, the Court has considered cases in which it concluded that under the evidence presented a Contracting State cannot be held responsible for violation of the rights enshrined in the ECHR which implicitly include the right to health. In the latter case, the legal responsibility lies with an individual (i.e., the healthcare service provider rendering the service to the patient) according to the internal law of each State.

In Calvelli and Ciglio v Italy[33] the ECtHR stated that positive obligations under Article 2 of the Convention "require States to make regulations compelling hospitals … to adopt appropriate measures for the protection of their patients' lives" and "an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable …". The Court held in Sevim Güngör v. Turkey[34] that the first sentence of Article 2 requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The latter positive obligation extends to the public-health sphere. Consequently, States must regulate the health service, whether private or public, in order to provide appropriate measures for the protection of patients' lives. However, where adequate provision has been made for securing high professional standards in the health service and the protection of patients, an error of judgment (even if established) on the part of a

[33] Calvelli and Ciglio v Italy, Application No. 32967/96, Judgment of 17 January 2002 (Grand Chamber), para. 49.
[34] Sevim Güngör v. Turkey, Application No. 75173/01, 14 April 2009, Decision on inadmissibility, para. B. The Court recalls the case Byrzykowski v. Poland, Application No. 11562/05, Judgment of 27 June 2006, para. 104.

health professional or negligent co-ordination in the treatment of a particular patient do not necessarily or automatically trigger the State's liability under Article 2 of the Convention.

However, the State is not directly liable under Article 2 for deaths resulting from medical negligence by state health personnel, except for deaths occurring in prison (Harris, O'Boyle, Bates & Buckley, 2014: 213). In Lopes de Sousa Fernandes v. Portugal, the Court underlined that even in cases where medical negligence was established, it would normally find a substantive violation of Article 2 only if the relevant regulatory framework failed to ensure proper protection of the patient's life.[35] In this connection, the Court considered that where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient cannot be considered sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to Protect Life (Powell v. the United Kingdom (dec.); Dodov v. Bulgaria, § 82; Kudra v. Croatia, § 102; Lopes de Sousa Fernandes v. Portugal [GC], § 187) (Council of Europe, 2019: 12-13).

According to the ECtHR a Contracting State may not be held accountable for the health risks for which it could not have known. The case G.N. and Others v. Italy[36] concerned the infection of the applicants or their relatives with human immunodeficiency virus (HIV) or hepatitis C. The persons concerned suffered from a hereditary disorder (thalassaemia) and were infected following blood transfusions carried out by the State health service. The applicants complained in particular that the authorities had not carried out the necessary checks to prevent infection. The Court held that there had been no violation of Article 2 of the Convention regarding the obligation to protect the lives of the applicants and their relatives, observing in particular that it had not been established that at the material time the Ministry of Health had known or should have known about the risk of transmission of HIV or

[35] Lopes de Sousa Fernandes v. Portugal, Application No. 56080/13, Judgment of 15 December 2015 (Grand Chamber), para 187.
[36] G.N. and Others v. Italy, Application No. 43134/05, Judgment of 1 December 2009.

hepatitis C via blood transfusion, and that it could not determine from what dates onward the Ministry had been or should have been aware of the risk.

In two very exceptional circumstances, the Court has accepted that the responsibility of the State under the substantive limb of Article 2 was engaged as regards the acts and omissions of health-care providers. The first situation was where an individual patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment. Mehmet Şentürk and Bekir Şentürk v. Turkey[37] concerned the death of a pregnant woman following a series of misjudgements by medical staffs at different hospitals and the subsequent failure to provide her with emergency medical treatment when her condition was known to be critical. The applicants, her husband and her son, alleged that the right to life of their wife and mother and the child she had been carrying had been infringed as a result of the negligence of the medical staff involved. The Court held that there had been a violation of the right to life. It found that the deceased had been the victim of blatant shortcomings on the part of the hospital authorities and had been denied the possibility of access to appropriate emergency treatment, in violation of the substantive aspect of Article 2. The second exceptional case where the Court accepted State responsibility for medical error involved a situation where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment and further where the medical authorities knew or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger (Council of Europe, 2019: 13-14). In Asiye Genç v. Turkey[38] the applicants, whose daughter was born prematurely and died two days later at the hospital to which she had been transferred for emergency treatment, alleged that the death of their daughter had been caused by professional negligence on the part of the staff of the hospital where she had been treated. The Court held that there had been a violation of Article 2 of the Convention, finding that the baby had been the victim of a lack of coordination between healthcare professionals, coupled with structural deficiencies in the hospital system, and that she had been denied access to appropriate emergency treatment, in breach of her right to protection of her life.

[37] Mehmet Şentürk and Bekir Şentürk v. Turkey, Application No. 13423/09, Judgment of 9 April 2013.
[38] Asiye Genç v. Turkey, Application No. 24109/07, Judgment of 27 January 2015.

For the Court, in order for a case to rise to the level that constitutes a denial of access to life-saving emergency treatment under Article 2, the following factors, taken cumulatively, must be met: firstly, the acts and omissions of the health-care providers must go beyond a mere error or medical negligence in the sense that the health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given; secondly, the impugned misconduct (whether act or omission) must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities; thirdly, there must be a direct causal link between the impugned dysfunction and the harm sustained; and finally, the dysfunction must result from the failure of the State to meet its obligation to provide a regulatory framework in the broader sense (Lopes de Sousa Fernandes v. Portugal [GC], §§ 191-196) (Council of Europe, 2019: 13-14).

Violation of the right to life was found also in a more recent case, Altuğ and Others v. Turkey[39] which concerned the death of a 74 year old relative of the applicants as the result of a violent allergic reaction to a penicillin derivative administered by intravenous injection in a private hospital. The applicants alleged that the medical team had not complied with their legal obligations to conduct an anamnesis (questioning of patients or their relatives on their medical history and possible allergies), to inform the patient of the possibility of an allergic reaction and to obtain their consent to administration of the drug. The Court held that there had been a violation of the right to life.

The Court examined several other cases raising issues of medical negligence and/or denial of access to treatment in hospital, such as:

- administration of drugs to a disabled child despite his mother's opposition (Glass v. the United Kingdom);
- death of a pregnant woman suffering from ulcerative colitis (Z v. Poland);
- death in a hospital related to pulmonary complications and the patient's refusal to consent to treatment (Arskaya v. Ukraine);
- death of the applicant's son in a hospital where unlicensed medical acts were carried out on him by doctors who lacked either the necessary licences or

[39] Altuğ and Others v. Turkey, Application No. 32086/07, Judgment of 30 June 2015.

qualifications in violation of domestic law (Sarishvili-Bolkvadze v. Georgia).[40]

10 Does a narrowly open window for the right to health in the ECHR shift responsibility from the state to medical professionals?

Although the ECHR does not explicitly guarantee the right to healthcare, this traditional view must be read in the light of developments in the case-law under the ECHR. The analysed jurisprudence of the ECtHR shows that there is a thin line between the fundamental rights and freedoms enshrined in the ECHR and socio-economic rights such as the right to health(care). As it was presented, the Court has considered a significant number of cases which involved a socio-economic dimension, including health in which one or more issues were raised under one or more fundamental civil and political rights guaranteed under the ECHR. Consequently, health issues have arisen before the Court in a wide variety of circumstances (Council of Europe, 2019: 4).

Why is it so significant for a certain human right to be recognised expressly by the ECHR if it is already encompassed in another international treaty, e.g. ESC? This distinction relates to the binding nature of the ECHR and other international treaties. The most relevant expression of such nature is rooted in different systems of monitoring of the implementation of the ECHR and other international instruments. The ECHR is binding for all its Contracting States,[41] and this liability is further strengthened by the provision of its Article 46. It lays down that the High Contracting Parties have undertaken to abide by the final judgment of the Court in any case to which they are parties. The same article regulates the mechanism to be employed should a State fail to comply with a judgment of the ECtHR. According to the established case-law of the ECtHR, a failure to comply with its judgment may constitute breach of the ECHR itself.[42]

[40] Altuğ and Others v. Turkey, Application No. 32086/07, Judgement of 30 June 2015.
[41] According to Article 1 of the Convention the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.
[42] Council of Europe, Human rights files, No. 19, The execution of judgments of the European Court of Human Rights, 2nd Edition, Council of Europe Publishing, January 2008. See also Handbook on European non-discrimination law, Council of Europe and the European Union, Publications Office of the European Union, Luxembourg 2018, p. 250. See cases García Mateos v. Spain, Hulea v. Romania and Sidabras and Others v. Lithuania.

No other international treaty adopted within the Council of Europe requires its implementation to be monitored of. Implementation of the ESC is submitted to a different system of control developed both by the Amending Protocol of 1991 and the Additional Protocol of 1995 which provide for a system of collective complaints. According to Article 21 of the ESC (applicable also for the revised ESC), State Parties are required to regularly submit reports on their implementation of the Charter not only in law bit in practice. These reports are in turn examined by the European Committee of Social Rights, which decides whether the national situations they describe comply with the Charter. In 1995 the 'Collective Complaints procedure' was introduced by the Additional Protocol providing for a system of collective complaints. The goal of the Collective Complaints procedure was to increase the effectiveness, speed and impact of the Charter's implementation.[43] In contrast with the ECHR, the ESC does not provide for the expressly binding decisions of the European Committee of Social Rights. Nor does the competence of the ECtHR include the rights enshrined in the ESL. Obligations under the ECHR thus have far more binding force than obligations under the ESL or, for that matter, any other international treaty providing for rights in the field of healthcare. Only if the ECtHR interprets a right guaranteed by the ECHR in a way that it includes also a right provided by other international instruments on human rights does it become possible to conclude that the ECHR implicitly guarantees such rights as well. As regards the right to health, the Court's jurisprudence shows that the window for such interpretation has been open. It remains to be seen in the future to how extensive this interpretation will become.

If the ECHR is interpreted as providing the right to health care, the Contracting States will be bound to ensure that right in their national legislations and policies. According to the analyzed case-law, this obligation includes States' responsibilities to take appropriate steps to safeguard the lives of those within their jurisdiction by regulating the health service, whether private or public, in order to provide appropriate measures for the protection of patients' lives. This obligation includes adopting adequate provisions for securing high professional standards among health professionals. Contracting States are not directly liable under Article 2 for deaths resulting from medical negligence by State health personnel. Even in cases where

[43] Council of Europe, European Social Charter, Collective complaints procedure. Retrieved from: https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure (20 January 2020).

medical negligence is established, such negligence would constitute a substantive violation of Article 2 only if the relevant regulatory framework fails to ensure proper protection of the patient. An error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a patient standing alone cannot be considered sufficient to impose liability upon a Contracting State from the standpoint of its positive obligations. In accordance to the ECtHR jurisprudence, as discussed earlier, the responsibility of the State under Article 2 exists only in exceptional cases as regards the acts and omissions of health-care providers: where a patient's life was knowingly put in danger by a denial of access to life-saving emergency treatment or where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment where the authorities knew or ought to have known about that risk and failed to take the necessary measures to prevent that risk from materializing.

If the State fulfils its responsibilities according to Article 2 of the ECHR and yet a medical error occurs, the question of direct responsibility of a medical professional will arise. Since the ECHR only binds Contracting States, the ECtHR does not have jurisdiction over individuals. This question would have to be addressed within the national legal system and according to its rules. In a procedure before a national court all the national rules on the responsibility for medical negligence would be applicable, including the direct responsibility, civil or criminal, of the medical professional concerned. In such cases the ECtHR case-law involving the right to health could be used as an important benchmark in assessing whether the State has complied with its obligations enshrined in the ECHR relating implicitly to healthcare. If the Contracting State has done so, it would be an important argument to the benefit of a person claiming the direct criminal or civil responsibility of a medical professional either in criminal or especially in civil procedure.

It may be concluded, that based on the ECtHR case-law it is not possible to shift the responsibility for medical error from Contracting States to health professionals. However, the analysis of the Court's jurisprudence enables parties to make a clearer distinction when it comes to the question under which circumstances it is possible to hold a State responsible for violation of the rights as provided by the ECHR, especially the right to life, and in which case this responsibility is on an individual health professional.

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