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COMPENSATORY LIABILITY OF HEALTHCARE PROFESSIONALS IN THE CRIMINAL OFFENSE OF UNCONSCIOUS TREATMENT IN THE REPUBLIC OF CROATIA

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Abstract The authors analyze the issue of the availability and effectiveness of a legal mechanism for resolving the consequences of injuries in health care, so the focus of the paper is primarily the liability of healthcare professionals, as patients are guaranteed, among other rights, the right to compensation for medical intervention. As liability for damages can be decided not only in civil (litigation) proceedings but also in adhesion proceedings associated with criminal proceedings conducted for the criminal offense of negligent treatment, the basic term of medical error is defined, pointing out the basic features of the criminal offense of negligent treatment with emphasis on the issue of the responsible person and their guilt. The founding assumptions of liability for damages are also presented, with an emphasis on the same issues in both litigation and adhesion proceedings. Furthermore, with regard to the setout provisions and general principles, the effectiveness of the compensatory claim in the criminal offense of negligent treatment is analyzed, and at the same time several specific issues are addressed and suggestions for possible solutions are given.

Keywords
compensatory liability, medical error, negligent treatment, compensatory claim, responsible person

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1 Introduction

The right to healthcare provided through the performance of healthcare activities includes the right of every person to achieve the highest possible level of health (Article 5, paragraph 1 of the Health Care Act[1] - hereinafter: HCA). Healthcare is performed by health care institutions, companies and private health care workers (Article 41, paragraph 1 of the Health Insurance Act), and their obligation is to act in accordance with the rules of the health profession, so that their actions do not endanger human life and health (Article 155 HCA).

However, performing health care activities can result in adverse effects that manifest as certain damages that affect the patient and/or their family members (Roksandić Vidlička, 2007, p. 68). Errors, unfortuantely, are inextricably linked to medical activities, since medicine is not an exact science and profession, and therefore a certain number of medical errors occur and some are even unavoidable. Every action of the physician in relation to the patient is associated with a certain risk and the possibility of side effects (Strinović & Zečević, 2009, p. 175).

That is why the availability and effectiveness of legal mechanisms to resolve such unintended consequences or injuries in health care is important (Roksandić Vidlička, 2010, p. 137). Depending on the severity and type of violations of the rules under which health care is performed, liability can be criminal, civil, moral-ethical and disciplinary (Klarić, 2004, p. 107).

The focus of this paper is primarily on the liability of healthcare professionals, as patients are guaranteed, among other rights, the right to compensation for damage caused by medical intervention.[2]

Liability for damages can be decided not only in civil (litigation) proceedings but also in adhesion proceedings that are associated with criminal proceedings conducted for the criminal offense of negligent treatment. However, in assessing the effectiveness of any judicial method of resolving health disputes, one should take into account not

[1] Health Care Act, Official Gazette, No. 100/18, 125/19, 147/20, 100/18, 125/19, 147/20.
[2] This right is explicitly guaranteed by the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Biomedicine, Official Gazette, MU, no. 13/03 (hereinafter: the Convention on Human Rights and Biomedicine), ratified by the Republic of Croatia in 2003.

only the effectiveness of the compensation system, but also the impact that court judgments have on medical staff and the way health services are provided (Roksandić Vidlička, 2010, p. 137).

The same event, i.e. the same "mistake", can give rise to two court proceedings, each of which explores the civil and criminal culpability of a health worker (usually a physician). This means that physicians (and other persons and entities in the healthcare system) often face lengthy court proceedings that can lead to negative media exposure and negative consequences for their mental health, and possibly negatively impacting the quality and even quantity of further health care activities they perform. The negative consequences can be devastating to medical professionals that undertake their noble calling to assist people in preserving their good health.

That is why this paper seeks to determine, through the analysis of the existing normative basis and current case law, which procedure and in what way these two conflicting rights would best be reconciled, i.e. the right of the injured party (patient) to exercise the right to compensation for damage caused by a medical error, with the right of a physician not to have to discuss their conduct twice in lengthy court proceedings, which is related to the realization of the principles of economy and efficiency of court proceedings and the need to avoid discussing and deciding on the same matter in two court proceedings.[3] The public interest aimed at punishing the perpetrator and preventing further criminal offenses should not be neglected, but equally important is the consideration that court proceedings, to the extent possible, should be carried out in ways that minimize the negative impact on the overall performance of health care activities.

Although this issue could be considered and analyzed taking into account some other aspects of liability, the research in this paper was conducted primarily from the aspect of passively legitimized (responsible) person in both procedures that can be conducted.

[3] The principle of economy is explicitly contained in the provision of Art. 10 of the Civil Procedure Act, Official Gazette nos. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11 (consolidated text), 25/13, 89/14. and 70/19 (hereinafter: CPA) which stipulates that the procedure must be carried out without delay, within a reasonable time and with as little cost as possible.

The aim of this paper is not to give a complete overview of all features of the criminal offense of negligent treatment, nor is it possible to comprehensively address the issue of damages with all its assumptions. However, in order to better understand the issues presented and the conclusions reached, it is necessary to first define the basic common concept, namely medical error, and then to address the basic features of the crime of negligent treatment with emphasis on the responsible person and their guilt. The basic assumptions of liability for damages are also presented, with an emphasis on the same issues in both litigation and adhesion proceedings.

2 Medical error - negligent treatment

To determine civil and criminal liability, the core questions are whether the unwanted outcome of treatment (damage) is the result of a complication or a medical error, (Strinović & Zečević, 2009, p. 176) which term[4] essentially corresponds to the notion of negligent treatment.

Croatian law does not recognize the term medical error or a similar term, nor the term complication, although both are fully accepted in court practice (Klarić, 2004, p. 124).

Medical error could be defined as acting contrary (or not in accordance with) the rules and methods of the health profession and / or scientific knowledge, which endangers human life and health, and / or as disrespecting the moral and ethical principles of the health profession. The mentioned legal standard of rules and methods of work means that the physician's actions should be judged in such a way that at the time when the physician was acting, they would be judged by the medical profession, taking into account all the circumstances of the case.[5]

[4] The term was created by the famous pathologist Rudolf Virchow in the second half of the 19th century under the name of professional error of physicians and defined as a violation of generally accepted rules of the art of treatment due to lack of due care or caution (Klarić, 2004, p. 123).

[5] This means assessing the complexity and risk of the medical procedure, the time the physician had to prepare and implement the procedure, working conditions (space, equipment, medicines, etc.), the support of the collaborative team, ie other physicians and / or long-term health professionals, such as medical nurses and professional and scientific knowledge that could and should have been known to him (Crnić, 2008, p. 397).

We call a complication those unexpected adverse events that are the result of an unpredictable course of the disease,[6] injuries or conditions of the patient in spite of all *lege artis* medical procedures, proper equipment, medical devices and medicines, and the appropriate organization of the health service (Domjan in Pavlović, 2015: 849). A healthcare professional is not responsible for complication.[7], [8]

When it comes to the risk that is necesarily associated with every medical procedure and which cannot be causally linked to a mistake in treatment, then it is a 'case' in legal terms.[9]

Causing damage does not always lead exclusively to the occurrence of legal obligations for the purpose of compensating or repairing the damage. It can also lead to the occurrence or termination of some other legal relations. In some instances, the medical conduct 'causing damage' can not only result in a criminal offense provided for under criminal law, but also civil liability[10] for the damage caused (Vizner, 1978, p. 620).

This is precisely the case when a medical error is committed which concurrently constitutes a violation of a subjective right[11] of an individual who not only is the subject of civil proceedings, but also is exposed to the possible criminal offense of negligent treatment which is the subject of parrallel criminal proceedings.[12]

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[6] Often, even the most urgent and appropriate method of treatment cannot prevent the harmful consequences, and sometimes even the death of the patient. Such cases are described as "the fateful course of the disease" because the blame for the damage can not be attributed to anyone (Strinović & Zečević, 2009, p. 179).

[7] Bjelovar County Court, Gž-1944/15 of 10 December 2015: *"For complications that are an unwanted result of a medical procedure that occurs despite a medically correct procedure, performed with the proper use of the correct equipment and means, the defendant is not liable."*

[8] *"The end of this state of affairs was correctly concluded by the first instance court that it has not been proven that the defendant, as a gynecologist, decided to complete the birth vaginally after performing the birth with regard to specific knowledge of the mother's anamnesis, that such a decision would be an obviously inappropriate method of treatment, and that he would have acted unscrupulously because he had not previously performed a biometric measurement of the fetus, as a gynecologist who performed the birth, he could not predict*." Osijek County Court, Kž-219/2017 of 31 August 2017.

[9] A case is such an event for which the culprit whose liability is based on the principle of guilt will not be liable (Crnić, 2008, p. 27).

[10] The legal order cautiously encroaches on the field of medical practice due to the fact that health workers must often make urgent decisions and that they must have a neccesary degree of freedom to carry out thir activities without always being second-guessed. Therefore, only "obviously inappropriate methods and means of treatment will take the court as the basis for criminal liability provided that they cause some detrimental consequence for the patient (Horvatić, Šeparović et al., 1999, p. 289).

[11] Subjective law is a set of powers that recognize the norms of objective civil law to a legal entity in a certain civil law relationship (Vedriš & Klarić, 2003, p. 65).

[12] The task of the courts in criminal proceedings is to ensure that no innocent person is convicted and that the perpetrator is either sentenced or that other measures are taken against the perpetrator under the conditions provided by law and on the basis of lawfully conducted proceedings before the competent court (Article 1 of the

3 Criminal offenses against human health

The general protective object of criminal offenses of Chapter XIX of the Criminal Code [13] (hereinafter: CC) is human health.[14] These are acts that are directed against the health of several persons, which pose a danger to an indefinite or large number of persons (Horvatić, Šeparović et al., 1999, p. 285).

The provisions of both the Constitution of the Republic of Croatia[15] (Article 59 and 70) and also the HCA (Article 2 para. 3, Article 9) underscore the importance of the human right to a healthy life and a healthy environment and thus automatically ensure increased protection of these values. This explains why the legislator decided to sanction the violation of these rights through the provisions of the CC (Roksandić Vidlička, 2010, p. 100).

Most crimes against human health are of a blanket nature, which means that the CC does not spedifically spell out the content of criminal behavior, but only states that this behavior consists of violating certain regulations governing a particular health area.[16]

Due to the type of protected good (physical integrity), these crimes can be considered covered crimes against life and body, but their separation emphasizes the specificity and difference arising from the special characteristics of perpetrators of crimes against human health. While criminal offenses against life and limb can, in principle, be committed by any person, individual criminal offenses from the group of criminal offenses against human health can only be committed by a perpetrator with special characteristics (for example, a physician or other healthcare

Criminal Procedure Act, Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19 (hereinafter: CPA/08).

[13] Criminal Code, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21 (hereinafter: CC).

[14] According to the definition found in the Constitution of the World Health Organization, health is a state of complete physical, mental and social well-being, and not just the absence of disease and exhaustion (Medicinska enciklopedija, Zagreb, MCMLXX, p. 623) (Pavlović, 2015, p. 835).

[15] Constitution of the Republic of Croatia, Official Gazette, no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

[16] These are primarily regulations that directly regulate the field of medical law such as the Health Care Act, the Medicine Act, the Patients' Rights Protection Act, the Compulsory Health Insurance Act, the Dental Medicine Act, the Medical Biochemistry Act, the Pharmacy Act , Law on Nursing, Law on Health Activities, Law on Midwifery, Law on Physiotherapeutic Activity, etc.

professional), i.e. these are special criminal offenses (*delicta propria*) (Roksandić Vidlička, 2010, p. 94).

4 Criminal offense of negligent treatment

Negligent treatment is delineated in Croatian legislation as a separate criminal offense (Article 181 of the CC, while Article 192 prescribes qualified forms of the same offense), expressing the legislator's view that patients' rights should be provided with enhanced criminal protection. Failure of health professionals to follow the rules of the profession (lege artis) can have far-reaching adverse consequences for the health of patients, and in the worst situations can lead to death (Mrčela & Vuletić, 2017, p. 685). The issue of the physician's responsibility for the treatment provided in the CC[17] is discussed at the level of the nature of the criminal offense, i.e. whether the physician has achieved the characteristics of the criminal offense of negligent treatment (Novoselec & Bojanić, 2013, p. 209). According to Article 181 CC[18] a physician, dentist or other health care professional will be punished if, while performing a health care activity, uses an obviously inappropriate means or method of treatment[19] or otherwise obviously does not act according to the rules of the health profession or acts unconscionably[20] and thereby causes worsening of the disease other persons.[21] [22]

[17] Germany (similar to the legislation of Austria and Switzerland) does not envisage negligent treatment as a separate criminal offense, but a medical procedure, such as surgery, constitutes a criminal offense of grievous bodily harm (Roksandić Vidlička, 2010, p. 94).

[18] Para. 1. with minor linguistic changes corresponds to Article 240 para. 1 of the 1997 Criminal Code (Official Gazette nos. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11). Thus, the term doctor of dentistry was replaced by the term doctor of dental medicine, and the term health worker was replaced by the term health worker.

[19] According to medical criteria, an obviously unsuitable means or method of treatment would be any means or method of treatment that is in obvious contradiction with the achievements of medical science, and which representatives of any medical understanding or school in this case consider useless or harmful (Zečević et al. in Pavlović, 2015, p. 841).

[20] *"Inadequate treatment means that when diagnosing, and especially in treatment, procedures are used that are not indicated according to the rules of medical science, and negligent treatment in general, includes all other procedures of unprofessional behavior of physicians in providing medical care (for example, if the examination is incomplete), and this may be the case when appropriate blood tests are not performed.*" - The Supreme Court of the Republic of Croatia, in decision number Kž-120/1991 of 18 December 1991.

[21] "Although the non-application of measures to protect patients, the use of obviously inappropriate means or methods of treatment and other forms of negligence are covered by the expression of non-compliance with the rules of the health profession, the legislator did not simplify the expression as such extended expression facilitates expertise" (Turković et al., 2013, p. 240).

[22] "It should be reminded that in the criminal law sense, responsibility will exist only in cases of obvious conduct (and negligent conduct in general) contrary to the rules of the profession and science, that negligence is rightly determined by criteria seeks extraordinary ability. Therefore, even a possible misjudgment in difficult cases,

The essence and content of the provisions of the CC mentioned directed at manifestly negligent conduct which has resulted in detrimental consequences for the health of another person. Due to the nature of this activity, only in the case of obviously unscrupulous actions of responsible health workers from the legal description of incrimination can their criminal responsibility exist (Pavlović, 2015, p. 841).

Obviously, a healthcare professional who does not respect the generally recognized rules of medical science and profession in his or her health care practice acts negligently. Criminal liability will be imposed under the applicable provisions of the CC essentially for only gross violations of the professional rules of conduct,[23] and only those significant, evident, obvious, and at first sight noticeable deviations from the recognized rules of profession and science (Pavlović, 2015, pp. 842-843).[24]

In order to establish the existence of a criminal offense, it is necessary to prove that the action (acts or omissions) were performed by persons from the legal description of the incrimination, that the patient's health was damaged, and that there is a causal link between the act (or omission) and the consequence (damage). Namely, the mentioned criminal offense is a tort of injury because it includes the occurrence of a certain consequence. The legal description is blanket, as it refers to the rules of the health profession (Pavlović, 2015, p. 839).

According to the case law, the assessment of whether the conduct at issue constituted an obviously inappropriate method of treatment is a legal issue, which is not in the domain of the assessment of a forensic expert.[25]

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such as undoubtedly this one, does not constitute liability for negligence in the criminal law sense. "- Supreme Court of the Republic of Croatia, IV Kž-244/02 of 26 June 2003.

[23] The County Court in Split, in decision number Kž 461/16 of 27 October 2016, states: *"However, the stated omissions on the part of the defendants during the examination do not constitute obvious negligent conduct, because these are not gross violations of professional rules of conduct, or at first sight noticeable deviations from recognized rules of profession and science."*

[24] Slavonski Brod County Court, Kž-8/2018 of 6 February 2018: »*The terms "acts of negligence in general" or "manifestly negligent acts" indicate manifestly negligent actions, both in the application of means and in the application of treatment, and in criminal law only gross violations of professional rules of conduct and only those obvious, evident and at first sight noticeable deviations from the recognized rules of the profession and science enter into the essence of a serious criminal offense against human health from Article 249, paragraph 4 in connection with paragraph 3 and in connection with Article 240, paragraphs 1 and 3KZ/97. certainly important, because the causal link between the action and the consequences in criminal law exists only if the actions or omissions directly caused the consequence, and the perpetrator had to be aware that such actions or omissions could cause this consequence.*«

[25] Bjelovar County Court, Kž 100/2015 of 22 October 2015.

For the purposes of further analysis, issues related to the perpetrator of the described criminal offense and his guilt are of particular importance.

4. 1 Perpetrator of the criminal offense (defendant in criminal proceedings)

This is a special criminal offense (*delictum proprium*) because the offense can be committed only by a person who has a special quality specified in the law (doctor of medicine or dentist or other health worker). The responsibility of the healthcare professional is personal. Here, too, the principle applies: everyone is responsible for their own action, within the limits of their responsibility. Acting according to instructions provided does not excluse responsibility in the case when the instruction is obviously inappropriate, wrong (Horvatić & Šeparović, 1999, p. 287).

Liability for the failure to exercise due diligence is possible only if another healthcare professional is entrusted with a job for which they are not qualified or does not fall within the scope of their duties; if a qualified worker is given a wrong, unclear or incomprehensible work instruction; if an omission has been made in the general supervision of their work or in their specific affairs, and supervision is obligatory (except for the answering physician and other medical staff if they have made an omission, so a parallel liability arises here) (Pavlović, 2015, p. 844).

Natural persons are included in the circle of possible perpetrators. The responsibility of the healthcare institution as a legal entity is not mentioned in the CC, but it follows from other legal provisions.[26] Therefore, although this Act is a *delictum proprium*, it does not exclude the liability of legal entities that are also authorized to perform health care activities (see, for example, Article 116 of the Health Insurance Act) (Turković et al., 2013, p. 240). Thus, in a case where a determination is made that the efficiency was at a very low level, the question of criminal liability of a legal entity (hospital) for negligent treatment could be raised (Roksandić Vidlička, 2010, p. 106).

[26] Liability of a legal person for this criminal offense exists according to Article 3, paragraph 1 and Article 4 of the Law on Liability of Legal Persons for Criminal Offenses (Official Gazette, Nos. 151/03, 110/07, 45/11, 143/12). The precondition for the criminality of a legal person for the criminal offense of a responsible person is a violation of the duty of a legal person. See more in Mrčela & Vuletić, 2017, p. 687.

In the Croatian criminal legislation, the basis of the liability of a legal person constitutes the criminal offense of the responsible person. The responsible person is a natural person who manages the affairs of a legal entity or is entrusted with the performance of activities in the field of activity of a legal entity, namely, health workers in a healthcare institution. A further prerequisite to impose liability on a legal person is that the responsible person violated a duty of the legal person (fro example, to secure people's lives) or that the legal person committed or should have obtained illegal property gain for herself or another by the responsible person's criminal offense (Novoselec & Bojanić, 2013, p. 500).

4.2 Guilt

The criminal offense of negligent treatment can be committed both intentionally and negligently.[27] Intention and negligence exist regarding non-compliance with regulations (Horvatić & Šeparović, 1999, p. 293).

The mere fact that a physician acted negligently does not necessarily correlate to automatic guilt on their part. Paragraph 1 of Article 181. of the CC requires intent (*dolus*) (direct or indirect) in relation to negligence: that the perpetrator is knowingly and willingly negligent, that he wills, that he allows his own negligent conduct. He must be aware that he is acting in a way that clearly deviates from the generally accepted professional rules of conduct (and he wants to and allows it). Causing aggravation of the disease or impairing the health of another person as a consequence of the act is covered by the perpetrator's negligence[28] (otherwise he may be held liable for any of the offenses against life and limb; the stated consequences are not an objective condition of criminality) (Pavlović, 2015, p. 845).

[27] Some crimes from the head of crimes against human health can only be committed with intent. For example, the transmission of sexually transmitted diseases, illicit transplantation of human body parts, non-provision of medical care, quackery.

[28] The act is mixtum compositu because the consequence of aggravation of the disease or impairment of health consists of injury and in relation to it the perpetrator must act with negligence, and is not considered an objective condition of punishment. If they were considered an objective condition of criminality in relation to them, no guilt would be sought and in that way the responsibility of the physician would be brought closer to the objective responsibility (Roksandić Vidlička, 2010, p. 112; Turković et al., 2013, p. 240).

A criminal offense can also be committed through negligence. The question centers upon the negligence surrounding the commission of the act and the ensuring consequence. If the negligence consisted of the failure to exercise due and possible attention, with a reckless attitude that the harmful consequence would not occur (conscious negligence) or that the possibility of the adverse consequences was not foreseen at all (unconscious negligence), then the negligence is considered to have been based on recklessness, self-confidence, i.e., in neglecting to carry out the minimum requirements for prudence and caution (Pavlović, 2015, p. 850).

While direct intent represents an even higher degree of guilt than indirect intent, it cannot be argued that conscious negligence is always more reprehensible while unconscious negligence ia always a less reprehensible form of guilt. The perpetrator who acts with unconscious negligence can, because he does not even notice the danger, show greater indifference to the goods of others and deserve a heavier rebuke than the perpetrator who is aware of this danger and even does something to reduce it (Novoselec & Bojanić, 2013, p. 251).

The existence of negligence requires first a violation of objective due diligence,[29] which is the attention that a conscientious and sensible person from the circle to which the perpetrator belongs would pay if in the same position. In assessing whether objective due diligence has been violated, the special knowledge of the perpetrator must also be taken into account and it must be assumed that a reasonable and conscientious person has such knowledge (Novoselec & Bojanić, 2013, p. 251).

5 Liability

It is possible that an identical illegal act has the same meaning both in criminal law and as a civil offense.[30]

[29] Due diligence is an objectively indispensable degree of attention to avoid the occurrence of harmful consequences; it suits the attention of a conscientious and careful man in the situation in which the perpetrator found himself. It compares the behavior of the perpetrator with the behavior imposed by the current standard, which in fact means a comparison with the behavior of a prudent and cautious individual from the same circle to which the perpetrator belongs, of course, under given conditions. in accordance with the requirement of due diligence in a given situation (Pavlović, 2015, p. 177).

[30] In the past, in the oldest social systems, civil liability for caused damage did not differ from criminal liability for a committed crime, because non-contractual, tortious infliction of damage was legally treated as both a civil and a criminal offense. Only later did these two responsibilities separate and be divided into separate criminal liability for committed public crimes prosecuted by the state ex officio and separate civil liability for damage caused which had the character of a private tort prosecuted privately by an interested person. Even after its independence from criminal liability, civil liability was initially treated only as tortious non-contractual liability (Vizner, 1978, p. 632).

Namely, the commission of many criminal offenses causes damage to the victim for which the perpetrator is liable under the rules of civil law. A criminal offense can also constitute a civil offense, so some problems in both areas have common denominators (for example, the issue of causality, the concept of medical error, complications, guilt, etc.). The important difference is that liability for damage is a sanction of private law, while penalties and other criminal sanctions have a public law character. Liability for damage and criminal liability also differ in that criminal liability is always based on the principle of guilt, while liability for damage can also be objective. However, for reasons of economy, it is possible to resolve both the issue of criminal liability and the civil law relationship in criminal proceedings. This is the purpose of the institute of compensatory claims of the injured party in criminal proceedings, so the court may, by the same judgment, impose a sentence on the accused and oblige him to compensate the injured party (Novoselec & Bojanić, 2013, p. 12).

According to the position of the ECtHR in the specific area of medical negligence, the obligation under Art. 2. of The Convention for the Protection of Human Rights and Fundamental Freedoms[31] may also be complied with if, for example, the legal system allows victims to seek redress before civil courts and separately, and linked to redress before criminal courts, enable them to hold the physicians concerned to account, and to seek appropriate civil redress such as damages orders and / or the publication of a judgment.[32]

Such a procedure must not only exist in theory, but also work effectively in practice.[33]

Human life and health are absolutely protected by the Constitution and the law. Any inadmissible or unlawful encroachment on these goods in the civil law sense constitutes a tort which will subject the wrongdoer with certain further assumptions, to liability for damage (Klarić, 2004, p. 113).

[31] Official Gazette, International Agreements, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10 (hereinafter: Convention).
[32] Judgment of the ECtHR of 9 April 2009, *Šilih v. Slovenia* (§194).
[33] Judgment of the ECtHR of 2 May 2017, *Jurica v. Croatia* (§85).

Compensation for damage resulting from negligent treatment can be claimed on the basis of criminal or compulsory law, i.e. in criminal or civil proceedings.[34] Therefore, it is necessary to address the issue of exercising the right to compensation for damages in civil proceedings, but also in criminal proceedings by filing a compensatory claim.[35]

5.1 Compensation in civil proceedings

Liability of health workers is one of the types of so-called professional responsibilities, such as the responsibilities of engineers, lawyers, etc. Its peculiarity lies in the magnitude of the risks involved in the profession (Klarić, 2001, p. 24). There are no special rules regarding the liability of health care institutions and health care workers for damage they cause while rendering health services, either in Croatia or in other legal systems. The general rules regarding the liability for causing damage apply to professionals' liability as well, although they have been supplemented and adjusted through case law.[36]

Liability for damage is a legal relationship in which the debtor is obliged to compensate for the damage caused, while the creditor is authorized to demand its compensation (Vedriš & Klarić, 2003, p. 547).

Both contractual and non-contractual liability rules may apply to damages arising from the provision of health services. The injured party may elect whether to pursue the claim for damages under the rules of indemnity, contract or tort. Most claimants elect the rules of tortious liability (Klarić, 2004, p. 114).

Liability for damage will be imposed only when the cumulative conditions, that we call the assumptions of liability for damages, have been realized (Grbin, 2004).

For the narrower scope of this paper, the issues pertaining to the person responsible for the damage and the necessary degree of his guilt are of special importance.

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[34] In its judgment in Jurica v. Croatia (§ 90), the ECtHR states that the same is true in many comparative legislations, such as the UK, Denmark, Germany, Slovenia and others.

[35] In the event that there are several legal remedies that a person can use, one has the right to choose the legal remedy that resolves the basic complaint. Judgment of the ECtHR, Bajić v. Croatia, 13 November 2012 (§ 74).

[36] For more see Klarić, 2004, p. 112.

However, in relation to other assumptions of liability for damage, in order to be civilly liable for a medical error, it is necessary that, as a consequence of the said harmful action, [37] legally relevant damage occurs. The injured party has the burden of proof regarding damages (Klarić, 2004, p. 136).

Except in cases involving obvious gross error it is often not easy in medical cases to determine the causal link between the harmful consequences for the patient and the physician's actions.[38] When determining the causal link, the question is always whether a different procedure by the physician would have either mitigated or significantly reduced the resulting consequence (Strinović & Zečević, 2009, p. 180). The burden of proof of causation lies with the patient who must prove that his deteriorating health is not the result of the natural, fateful course of the disease, but of medical error. The patient's position in this regard is facilitated if the rules of strict liability are applied, for example, if the damage originates either from a medical device as a dangerous thing or from some diagnostic or therapeutic measure that could be considered dangerous (radiation, etc.) because then the causal link is presumed. Under Croatian, German, Swiss and Austrian case law, the application of the theory of adequate causality prevails. Adequate causalitiy is a requirement that excludes contributions that were causative only under very unexpected circumstances. According to this theory, a medical error must be adequate to the damage caused, which means that the action or omission must be objectively appropriate to cause the damage for which compensation is claimed i.e., that it is typical of a particular damage (Klarić, 2004, pp. 137-138).

[37] In its decision No. Rev 575/13 of 9 May 2018, the Supreme Court of the Republic of Croatia states: "Therefore, in each specific case, the physician's procedure is considered in that particular case, and it is decisive to determine whether the physician did everything possible in the given circumstances. A physician or healthcare professional acts unscrupulously (by doing or not doing) if he does not follow the rules of the medical profession (generally recognized rules of art and treatment), does not have the appropriate equipment or instruments to successfully perform the actions, knowingly ignores, does not respect or engages in taking certain actions even though he knows that he is not professional enough to carry them out, etc."

[38] For more see in Vizner, 1978, p. 673.

5.1.1 Responsible person

Irrespective of the fact that the origin of the relationship between the provider and the user of the health service is of a contractual nature, the rules of tortious liability are more often applied. Therefore, the responsible persons may be a private practice health worker or a healthcare institution or its owner (founder).[39]

In the case of health care institutions, the responsibility of the institution and the physician employed in the institution (for example, hospital) is equal.[40] However, this possibility is envisaged only if the health worker committed the damage intentionally. In this case, the injured party has the right to demand repair of the damage directly from the healthcare professional (Klarić, 2004, p. 121).

The presumption of responsibility for the other (healthcare institutions for the actions and omissions of the health worker) is the responsibility of the other (Article 1061 of the Civil Obligations Act) (hereinafter: COA)[41]. If the physician of the healthcare institution is not responsible for the damage, then the healthcare institution likewise is not responsible. Therefore, to prove that the physician acted as he should have, which means as the healthcare institution as the defendant should have, means to prove that the physician acted *lege artis* (Klarić, 2004, p. 140).

The healthcare worker's employer (for example, a hospital or other health clinic) is primarily responsible to the third-party injured patient. This strengthens the legal position of the injured party because he can reasonably expect the defendant/employer (healthcare institution) to be economically stronger than the defendant/employer (healthcare worker/physician), so it generally should be easier for the injured party to obtain compensation from them.

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[39] In its decision No. Gž-903/2016 of 24 August 2017, the Osijek County Court states: "Contrary to the appellate allegation of the defendant, that the first instance court did not explain its position regarding the responsibility of the defendant as the founder of the Institution, it should be pointed out that the reasoning of the challenged judgment shows that the first instance court correctly rejected the objection of health care and Article 59 of the Law on Institutions, bearing in mind that from Article 12 of the Statute of the Institute of Emergency Medicine from which it follows that the defendant as the founder of the Institution is jointly and severally liable for the obligations of the Institute".

[40] We have an exception only in France where compensation cannot be claimed from a physician, but only from a public hospital (Klarić, 2004, p. 107).

[41] Zakon o obveznim odnosima, Narodne novine, br. 35/05, 41/08, 125/11,78/15, 29/18.

If the employee intentionally caused the damage, the injured party has the right to choose whether to request repair of the damage only from the employer, only from the employee (physician) or to send the request to both. If the request covers both of them, there is passive solidarity between the employer and the physician or other health care worker (Articles 43 and 1107 of the COA) (Crnić, 2008, pp. 401-402).

If the health care institution is insured against liability, then there may be joint and several liability of the health care institution and a certain insurance company.[42]

In order for the person who did not cause the damage to be liable, there must be a certain relationship between him and the culprit that, according to the legislator, justifies this responsibility (Grbin, 2004, p. 15). Precisely because of the existence of this mutual legal relationship between the factual and presumptive culprit, objective law forces the responsible person to compensate for the damage caused by the other person (Vizner, 1978, p. 641).

5.1.2 Liability based on guilt

There are only two criteria of liability for damage in the COA: subjective liability on the basis of presumed guilt (Article 1045 of the COA) and objective liability on the basis of causality regardless of guilt (Vizner, 1978, p. 649).

Croatian tort law has accepted both tortious and contractual liability, a system of subjective liability in which the guilt of the culprit is presumed. Thus, the burden of proof is shifted to the culprit because he is liable for the damage he inflicts on another, unless he can prove that it was caused through no fault of his (Klarić, 2004, p. 115). Objective liability on the basis of causality, and regardless of guilt, is accepted only in cases provided by law.

In court practice, as well as in theory, the prevailing view is that liability in health care should be judged according to the principle of guilt (Crnić, 2008, p. 399). This means that the guilt of the healthcare professional is one of the key preconditions for responsibility.

[42] Zagreb County Court, Gžn-3501/11 of 5 June 2012: *"Considering the indisputable fact that the first defendant and the second defendant had a policy of professional liability insurance of physicians and medical staff towards third parties, the court of first instance found that the second defendant is jointly and severally liable with the first defendant for the damage up to the insured amount."*

There are two types of guilt: intent and negligence. The COA, however, does not define either, just as it did not define the general notion of guilt (Grbin, 2004, p. 9). Therefore, the above terms are used in criminal law.

Intention is the most severe type of guilt. It exists when the culprit acted knowingly and intentionally. In legal science, civil law intent is considered to correspond to intent in criminal law (Vedriš & Klarić, 2003, p. 559). When assessing whether this is an intention, only the specific culprit is considered. His state of consciousness and will is examined. The actor is not compared to other people, and how others would have behaved in the same situation is irrelevant (Grbin, 2004, p. 9).

The legal order does not require that all people behave equally carefully in all situations. However, in contrast to the intention that is assessed by some subjective criteria (namely the consciousness and will of the culprit), the criteria for determining negligence are, as a rule, objective, abstract (Grbin, 2004, p. 11).

An objective criterion for determining their professional attention or negligence is also accepted for health professionals. What is specific to the measure of their professional attention is that it is determined in two ways: according to people from the same professional circle and according to the specific circumstances in which the medical intervention takes place. The true measure when considering the actions of health professionals is whether they acted as would have "a good expert",[43] which means, according to the provisions of Article 10 of COA, with increased consideration according to the rules of the profession and customs (Klarić, 2004, p. 126).

Vizner believes that the escalation of guilt in her role is irrelevant because as soon as the culprit fails to prove "that the damage occurred through no fault of his" he is liable and is obliged to compensate the damage caused to another, regardless of whether the specific damage was caused "intentionally or negligently", therefore, without regard to possible degrees of guilt in the form of intent or negligence; with

[43] The County Court in Split in decision number Gž-16/2021 of 5 November 2021 states: *"The measure of behavior is not an averagely attentive person, but a normally attentive specialist, or a normally attentive physician. A physician is obliged to act with increased care, according to the rules of the profession and customs, with the care of a good expert, and the care of a good expert is determined objectively according to the criteria of care that it can be expected from an experienced and conscientious physician of the same rank."*

the addition - that the proof of his innocence was transferred from the injured party to him (Vizner, 1978, p. 680).

5.1.3 Liability based on causality

In the civil law sense, the issue of medical error is judged only exceptionally on the basis of objective responsibility (for example, in the use of certain specific medical devices).[44]

Damages stemming either from the use of dangerous objects or from performing dangerous activities will result in liability according to the criterion of objective, causal liability regardless of the fault of the culprit. Accordingly, it necessarily follows that the causally responsible culprit will always be liable for such damages, unless it is proven that the specific damage was not caused either by dangerous objects or by activities. Outside these cases, the legal presumption remains valid, according to which any damage stemming from a harmful event causally related to either a dangerous object or a dangerous activity originates from the object or activity in question (Vizner, 1978, p. 734).

In the modern theory of tort law, the demands for the introduction of strict liability in this area of tort law are becoming more prominent. The key reasons are, on the one hand, the mass use of various medical devices and the accelerated introduction of high technology in medicine in general, and on the other hand, the anonymization and depersonalization of the physician-patient relationship (Klarić, 2004, p. 116).

Some authors believe that strict liability would relieve physicians and other health professionals of the inconvenience that their conduct in a situation where damage has occurred will be subject to additional pressure with the guilt process as a subjective element of tort liability. This, of course, does not mean that physicians

[44] The decision of the Zagreb County Court No. Gž-55/14 of 9 September 2014 states: *"It is true that in case of failure in treatment, the defendant is liable for damages under the provisions of Article 154, paragraph 1 of the ZOO and in connection with Articles 170 and 171 of the ZOO, ie on the basis of guilt. However, the plaintiff strict liability of the defendant for the damage suffered… ..According to the position of this court of second instance, laparoscopic apparatus - thermocautery, which during regular use produces electric sparks that cause thermoelectric injuries to surrounding tissue, by its nature, purpose and position is a dangerous thing, so the defendant would be liable under the principle of strict liability if the damage stems from that matter, if he does not prove the elements for exemption from that liability. To perform a laparoscopis operation does not in itself release the defendant for any damage that may have occurred during the execution of such an intervention that would be the result of a failure in the conduct of the staff of the defendant or liability for damage arising from a dangerous thing or dangerous activity."*

and other health professionals would be unconditionally exonerated from liability, as there is their recourse liability to the employer (Crnić, 2008, p. 401).

However, for now, the prevailing view in legal theory and case law is that the rules of subjective liability are the most appropriate for cases involving medical damage, because treatment is not a dangerous activity, and the physician is responsible for procedural irregularities, not accidents or fatalities (Klarić, 2004, p. 114).

5.2 Compensatory claim in criminal proceedings

Legal protection of subjective rights that have been 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, also resolving 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).

This parallel approach to the conduct of such proceedings promotes the principle of economy of procedure, and is allowed so long as it does not contradict the rules on lis pendens and res iudicati (adjudicated matter).[45] The cost-effectiveness of such proceedings is reflected not only in the avoidance of double trials but also in the fact that for the injured party it is a quick and economical way for the criminal court to determine the legally relevant facts of the crime and decide on guilt that originates from a criminal offense (Krapac, 2015, p. 259). So, in essence, it is a civil lawsuit that is associated with criminal proceedings (adhesion proceedings).

The institute of compensatory claim is regulated by the provisions of XI. Chapter CPC/08[46] Articles 153 to 162. According to the provisions of Article 153 of the CPC/08, a compensatory claim arising from the commission of a criminal offense will be adjudicated at the request of the injured party in the criminal proceedings, if

[45] While the litigation is ongoing, the adhesion procedure cannot be conducted on the same request and vice versa, and the request on which the final decision has been decided cannot be discussed and decided on the merits again. See more in Triva & Dika, 2004, p. 90.

[46] Criminal Procedure Act, Official Gazette, no. 152/08, 76/09, 80/11, 121/11, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19.

doing so would not significantly delay the proceedings. From the general provision contained in Article 153. CPC/08 derives not only the basic preconditions that must be met in order for the court to decide on a compensatory claim, but it also stipulates that only the injured party is authorized to file it (while it is assumed that the defendant is passively legitimized). At the same time, the CPC provides that a compensatory claim can refer to any claim that can be submitted in a lawsuit (Article 153, paragraph 2 of the CPC/08).[47] As this is a compensatory claim related to a certain criminal offense in connection with which criminal proceedings are being conducted and which will therefore be decided within that procedure, the provisions of criminal procedural legislation will primarily apply. However, the substantive preconditions for making a decision on a compensatory claim are contained in the regulations governing the subject of civil law, so the court in criminal proceedings will assess the merits of the compensatory claim by applying civil law regulations to the facts established in criminal proceedings (Kunštek & Pavišić, 2010, p. 167).

As a rule, the court makes a decision on a compensatory claim in a judgment[48] with the *proviso* that it is further obliged to make one of the decisions referred to in Article 158 on a compensatory claim paragraph 2 of the CPC/08, therefore, to award the injured party a compensatory claim in whole or in part, and if necessary to have any remaining issues resolved in litigation or to send him in full with a compensatory claim. Therefore, he is obliged to conduct a procedure to establish the facts on the existence of which depends on the decision to be made, and one of the methods by which he does so is to prove it (Dika, 2018, p. 361). The court may award a compensatory claim in whole or in part only in a judgment finding the defendant guilty.[49] Even in such a verdict, if "the data of the criminal proceedings do not provide a reliable basis for either a full or partial verdict", the injured party will be

[47] It is interesting to note since that the legislator accepted the views on the possibility of filing any compensatory claim that can be made in civil proceedings, what was the logic in the previous legislation in determining the circle of persons authorized to file a compensatory claim. Although the legislator has now accepted such an attitude with regard to the types of compensatory claims that can be filed, the legislator has abandoned them in terms of determining the galaxy of persons authorized to submit proposals for the realization of compensatory claims and instead limited this possibility only to the injured party. For more details see Galiot & Brizić Bahun, 2021, p. 457.

[48] They will decide on this request by a decision only when they suspend the criminal proceedings or declare themselves incompetent, but then only in a way that instructs the injured party that they can realize the compensatory claim in litigation (Article 158. para. 2 and 3 CC/08).

[49] In its Decision No. Kž-260/1992 of 11 June 1992, the Supreme Court of the Republic of Croatia: *"A compensatory claim may be awarded to the injured party in whole or in part only in a judgment finding the defendant guilty. As the defendant was insane at the time of the commission of the criminal offense, the investigation against him was suspended by the decision of the investigating judge, and the proceedings were continued on the basis of the public prosecutor's proposal to impose a security measure. Therefore, the first instance court should have referred the injured party to litigation."*

referred to litigation aware the compensatory claim can be adjudicated. When the court renders a verdict acquitting the defendant of the charges or rejecting the accusation, or when the decision suspends the criminal proceedings, it will instruct the injured party that they can realize the compensatory claim in the litigation.

In sum, the court in the criminal proceeding is not authorized to reject a compensatory claim, nor to decide on it unless it has passed a conviction (Galiot & Brizić Bahun, 2021, p. 1150).

The court in criminal proceedings must primarily present evidence in order to determine the criminal responsibility of the defendant (Pavišić et al., 2010, p. 133). The type of evidence that must be presented to resolve the merits of a compensatory claim depends on the type of claim asserted. However, the scope of evidence should be such that the facts established in the criminal case provide a reliable an credible basis for the resolution of the injured party's compensatory claim (Dika, 2018, p. 187).

For the narrower scope of this paper, the issue of passive legitimacy is of prime importance. This is where Article 153, paragraph 2 of the CPC/08 comes into play. This provision provides that a compensatory claim in criminal proceedings can be made only against the defendant and not against a third party. Accordingly, regarding the criminal offense of negligent treatment, this means that, since criminal proceedings are conducted against a healthcare worker, typically a physician, a compensatory claim in criminal proceedings can only be brought against him.

Article 153 para. 2 of the CPC, which stipulates that a compensatory claim may relate to any claim that may be filed in a litigation, makes clear the close connection between criminal and civil proceedings (Pavlović, 2017, p. 462).

By linking the above provision with the established rules on indemnification liability in civil proceedings, we reach the conclusion that a compensatory claim against a physician can be adopted in criminal proceedings only if the physician committed the criminal offense with intent.

If the criminal offense of negligent treatment was only committed negligently, a physician employed in a certain medical institution would not be liable for damages in civil proceedings[50] and therefore cannot be held liable in the adhesion proceedings initiated by filing a compensatory claim in criminal proceedings. Instead of a physician being held responsible in civil proceedings, their employer is held responsible (most often a hospital as a healthcare institution). However, a health care institution is not a defendant in the criminal proceedings, nor under existing Croatian law can a compensatory claim be made against a third party in criminal proceedings.

6 Effectiveness of compensatory claims in the criminal offense of negligent treatment

The right to compensation for patient damages caused by medical intervention is one of the basic rights of patients, guaranteed by the Convention on Human Rights and Biomedicine.

Although the Convention for the Protection of Human Rights and Fundamental Freedoms[51] does not explicitly mention the right to health or the right to compensation for negligent treatment, the ECtHR has in several decisions emphasized the positive obligation of States parties to provide victims of ill-treatment with legal redourse to compensatory damages.[52]

As we have seen from the foregoing discussion in this paper, compensation for damages stemming from negligent treatment (medical error) can be claimed both in civil (litigation) and criminal proceedings. In the context of criminal proceedings conducted to adjudicate the criminal offense of negligent treatment, this can be achieved only if the injured party (patient) submits a compensatory claim for compensation for the damages suffered, otherwise, the injured party may instead

[50] This is not the case with private health professionals who are also personally liable in civil proceedings under the general rules on liability for damages.
[51] Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, International Agreements, No. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.
[52] Thus, for example, the judgment of *Jurica v. Croatia* of 2 May 2017 (§ 84) states that the High Contracting Parties have, in parallel with their positive obligations under Article 2 of the Convention, the positive obligation under its Art. 8. enact regulations obliging both public and private hospitals to adopt appropriate measures to protect the physical integrity of their patients and to allow victims of negligent treatment access to procedures where they can obtain compensation if necessary (see *Benderskiy v. Ukraine*, *Codarce v. Romania* and other).

invoke the right to pursue a claim for monetary compensation in special civil proceedings.

The primary task of criminal proceedings is not to provide compensation to the injured party, but to protect the general social interest. However, enabling the injured party to effectively exercise the right to compensation in criminal proceedings is beneficial for the judiciary, the injured party and the wider public. Namely, this dual procedure promotes notions of judicial economy and efficiency, brings cost savings to all concerned, avoids a double trial, and relieves to some extent the emotional turmoil parties must endure by preparing for and attending multiple court proceedings.

In this regard, the ECtHR has stated that "prosecution could, in principle, if successfully carried out, lead to the determination of the physician's degree of responsibility and ultimately to the award of appropriate satisfaction and / or publication of the decision. "The Government have not shown that the remedy offered in the civil proceedings would enable the applicant to achieve objectives which would be in any way different from those which he sought to achieve by using the above remedies. Therefore, there was no reason for the applicant to initiate another civil proceeding in addition to the criminal and administrative disciplinary proceedings he had instituted (§81 and 82)."[53]

The protection provided by domestic law must not exist only in theory. To be of any practical value, it must prove effective in practice,[54] which means that the mere possibility of obtaining damages in criminal proceedings insufficient.

In theory, the views are clearly expressed that it is necessary to resolve the compensatory claim in criminal proceedings to the maximum extent possible (Pavlović, 2017, p. 468), but for now the practice (possibly due to certain normative restrictions and ambiguities) does not comport with these views.

[53] Judgment of the ECtHR, *Bajić v. Croatia*, 13 November 2012.
[54] Judgment of the ECtHR, *Bible and Blažević v. Croatia* of 12 January 2016, § 101.

Concerning the criminal offense of negligent treatment and compensation for that offense, it should be borne in mind that any legal proceedings, in any forum (judicial or administrative) are extremely emotional, which makes them more demanding and burdensome for all participants, and which strongly militates in favor of consolidating proceedings to the extent feasible. Therefore, from the position of a physician (health worker), it is certainly more acceptable not to discuss their alleged guilt twice, once in the procedure to determine whether the criminal offense of negligent treatment was committed, and the second time in the procedure to compensate for the damage caused by the same act. But of course, duplicative proceedings are difficult and vexing for all persons involved in the proceedings, primarily the injured claimant, but also ancillary witnesses and even the legal professionals and judical personell.

After analyzing the basic provisions and general principles that are relevant to both procedures, it is necessary to focus on their mutual influence and on the following issues:

1. Can compensation for negligent treatment be effectively achieved by filing a compensatory claim?
2. Could legislative intervention improve the current situation?
3. What are the numerical indicators in practice?

6.1 Effectiveness of meeting requests in criminal proceedings

Regarding the effectiveness of the realization of claims in criminal proceedings, it is important to keep in mind that according to the current legislation, a compensatory claim can be made only against the defendant healthcare worker (typically a physician) and only the compensatory claim that the injured party could make in litigation.[55]

In the case of criminal proceedings for the criminal offense of negligent treatment, this means that a compensatory claim can be made only against a physician (doctor), dentist or other health care professional because they are explicitly indicated as possible perpetrators of this crime. The injured patient is authorized to claim

[55] About who may be the injured party see more in Galiot & Brizić Bahun, 2021, p. 466.

compensation for the damage caused to him due to negligent treatment in civil proceedings, so in that sense such a request is possible and permissible in criminal proceedings. However, in civil proceedings, the injured patient may only exceptionally claim damages directly from the healthcare professional as the culprit. If that healthcare worker is a culprit who is employed at a certain healthcare institution (and this is usually the case), then compensation can be claimed directly from him only if he caused the damage intentionally. In all other cases, the healthcare institution as the healthcare worker's employer is liable for the damages.

This specifically means that if the damage was negligently caused, then in the civil proceedings, the culprit can not be directly liable. Accordingly, the compensatory claim that would be made against him in criminal proceedings could not be accepted if it is established that the crime was committed from does not stop.

The court in the criminal proceedings under the current legislation in this case has only one option, and that is to refer the injured party to litigation, although preferable approach would be for the court to reject the compensatory claim in relation to the accused culprit.

Namely, the court in the criminal proceedings decides on a compensatory claim by applying the relevant provisions of civil law and therefore, in the same way as deciding on the adoption of a compensatory claim, it may decide to reject it (in whole or in part). of all grounds of appeal. In this way, the rights of the injured party would be protected, and the possibility of two proceedings on the same claim would be avoided (Galiot & Brizić Bahun, 2021, p. 1151).

In that sense, Pavlović also states that the provisions of the CPC are formalistic and contrary to legal logic. Accordingly, regardless of the verdict reached in the CC, it is not possible to accept or reject the submitted IPZ or its part or find it irrelevant, but only refer the injured party to civil litigation. At the same time, it is not possible to glean from the legal texts which legally protect such provisions of the law and what their purposes are (*ratio legis*) (Pavlović, 2017, p. 468).

A further problem is that the injured party who is referred to civil litigation by the criminal court will not, as a practical matter, initiate such litigation against the culprit (physician) because his only recourse is against the healthcare institution where the culprit is employed. The question also arises whether in the criminal proceedings against the injured party as a defendant interrupted the statute of limitations based on damages. Namely, the criminal proceedings do not in themselves toll the running of the statute of limitations with respect to the injured party's claim fir compensatory civil law. Instead, the injured party must file a compensatory claim in the criminal proceedings and then, after being instructed in the criminal proceedings, file a claim for damages within three months from the decision. In that case, Croatian regulations provide that the statute of limitations is tolled by filing a compensatory claim in the criminal proceedings (Article 243 of the Civil Obligations Act).[56] It is questionable whether this rule can be applied in cases where the injured claimant fails to file a compensatory claim against the defendant in the civil proceedings because in such an instance no criminal proceedings were conducted against him.

Although the criminal offense of negligent treatment is delictum proprium, the theory postulates that the criminal liability of a legal person for that criminal offense is not excluded. However, in such a case the liability is a matter of one's own responsibility, not that of another.

In other words, what we might term the characteristic of strict individuality, or the personal responsibility of the perpetrator of a criminal offense, excludes the criminal responsibility for another, while civil liability for another is possible (Vizner, 1978, p. 630). This means that a healthcare institution cannot be a defendant (instead of a physician) for a criminal offense committed by him, so according to the current legislation, a compensatory claim could not be filed against him in criminal proceedings.

In any case, there are no known cases in practice in which a medical institution was charged with the criminal offense of negligent treatment.

The consequence of the current legal regulation and its vagueness in practice is compensatory claims may not be decided in criminal proceedings.

[56] Also Zagreb County Court in decision number Gž-7154/15 of 11 October 2016.

6.2 Possible legislative solutions

To enable a compensatory claim to be decided in criminal proceedings, regardless of whether the defendant healthcare worker committed the act with intent or negligence, it would be necessary to first allow a compensatory claim in criminal proceedings against a third party or a healthcare institution.[57]

In doing so, it then also would be necessary to provide the third party (healthcare institution) with all procedural rights, which according to the current legislation do not exist in criminal proceedings. Otherwise, the third party's constitutionally guaranteed rights would be violated, in particular the right to equal legal protection and the right to a fair trial (Articles 26 and 29 of the Constitution). Therefore, it would be necessary to enact legislation to prescribe (as was done, for example, in the case of confiscation of property gain in Article 558 of the CPC/08) which procedural rights would belong to the third party. Legislation should be focused on prescribing the obligation to summon a third party to all hearings, enabling the third party to present evidence and to otherwise actively participate in said hearings, and obligating the court to submit all decisions affecting the third party's rights while establishing the right to appeal (Galiot & Brizić Bahun, 2021, p. 466).

Notably, the participation of a third party in a way that encroaches on his rights is not unknown in criminal proceedings because a very similar solution was adopted in the confiscation of property.[58]

[57] It could also be the insurer of the healthcare institution who is jointly and severally liable with the same institution.
[58] With its amendments from 2017, the CPA / 08 significantly amended the institute of confiscation of property and determining temporary measures to secure it by implementing Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on freezing and confiscation of property and property committed by criminal offenses in the European Union. Amendments to the CPC from 2017 in the provisions of Articles 557-563. It is also envisaged that temporary measures to ensure the confiscation of proceeds of crime and the confiscation of proceeds may be determined in relation to another person to whom the proceeds have been transferred. However, the rights of that "other person" or a third party who claims that has a right to the property to be secured or confiscated, which precludes the application of the provisions on interim measures and confiscation of property are ensured by that person's participation in the proceedings which concerns property gain and by giving the authority to declare legal remedies against court decisions (Article 557a, Article 558 and Article 464 para. 5 CPA/08).

6.3 Numerical indicators in practice

In the Republic of Croatia, there are incomplete records on the number of compensation lawsuits against health care institutions and health care workers stemming from alleged errors in treatment, but no records on the number of criminal proceedings conducted for alleged negligent treatment and their ultimate resolution.

Research we conducted established that from January 1, 2016. to December 31, 2021, 129 cases were conducted at the Municipal Civil Court in Zagreb against healthcare institutions claiming compensation for damages caused by alleged medical error. In the same period, 21 final judgments were rendered, so that the claim was accepted in 12 final cases, which means that a medical error was found in them and all other preconditions for compensation were established.

While most of the cases were filed only against healthcare institutions (most often hospitals), in several cases the defendant was the insurance company that insured the healthcare institution. It is more common for the insurer to participate in the proceedings as an intervener on the defendant's side. In none of the examined cases, was a healthcare worker sued personally along with the healthcare institution. From the available records and data it was not possible to check whether any lawsuit was filed only against the healthcare worker.

On the other hand, in the same period, the Municipal Criminal Court in Zagreb conducted six proceedings involving the criminal offense of negligent treatment. Three cases resulted in a final verdict, but none resulted in a conviction.

Although our data admittedly was incomplete and did not include the entirety of the Republic of Croatia, we nevertheless believe the data we did obtain, and study is reflective of the real situation in practice. The fact is that the number of convictions for the criminal offense of negligent treatment is extremely small, as is reflected both in the published case law and by observations of many legal experts.

7 Alternative solutions

The small number of criminal proceedings conducted, and especially the extremely small number of final convictions for the criminal offense of negligent treatment, inevitably raises the question of the purpose of the special criminal responsibility of physicians by prescribing the criminal offense of negligent treatment in all its forms.

Thus, the ECtHR stated that if the violation of the right to life or bodily integrity was not caused intentionally, the positive obligation of the state to establish an effective judicial system does not necessarily require the provision of a criminal remedy in every case. In a specific area of negligent treatment, the obligation can also be met if, for example, the legal system provides victims with a remedy before civil courts, either separately or together with criminal courts, and which allows for the adjudication of the liability of the physicians concerned and appropriate civil satisfaction, such as damages. and / or publication of the decision.[59]

However, the theory states that it is necessary to anticipate which are the most serious violations of the rules of providing health care activities that deserve a criminal response. The criminal law regulation of health crimes must be ultima ratio, which in turn allows for certain crimes from the Chapter of Crimes against Human Health de lege ferenda to eventually become misdemeanors (Roksandić Vidlička, 2010, p. 136).

This would be particularly useful in the case of negligent treatment committed through negligence. Namely, intent is also a fundamental form of guilt because the intentional violation of all legal goods is punished, while negligence is punished only when the most important legal goods (usually life and body) are violated. The exceptionality of punishment for negligence is also emphasized in Article 27 para. 1 of the CC according to which, while on the one hand, it is punishable to act with the intention of committing a criminal offense, while on the other hand, acting out of negligence is punishable only when it is explicitly prescribed by law. In many crimes, only intent is punished, although some of them can be committed out of negligence (Novoselec & Bojanić, 203, p. 239).

[59] Judgment of the ECtHR *Šilih v. Slovenia.*

Due to the growing number of disputes in the health system, many countries are introducing alternative methods of resolving disputes. Some European Union countries have already developed "no fault" models for resolving disputes arising in medicine (Scandinavian countries, partly France, Belgium). However, even if the parties use some alternative techniques for resolving health disputes, their access to court (Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms) should not be jeopardized and serious violations should be left to ordinary proceedings in the courts (Roksandić Vidlička, 2010, p. 136).

Bearing in mind that the need for compensation plays a larger role than the need to punish the perpetrator, and that it is also difficult for victims to understand the logic behind separating the same matter into both the criminal and civil spheres of the legal system, a sensible solution would be to resolve the problem comprehensibly is one unified criminal proceeding.

Therefore, even the possible introduction of strict liability for damages in medicine, according to which health care providers would be liable for damages regardless of their guilt, based on the principle of presumed causality, while certainly relieving doctors and other health professionals from the stress that their actions in a situation where damage has occurred will be subject to the additional pressure associated with the procedure of establishing guilt as a subjective element of liability (Crnić, 2008, p. 401), would not mean that healthcare workers would be exempted from criminal liability (Roksandić Vidlička, 2010, p. 141).

In this sense, a possible solution is to provide for the possibility of waiving criminal prosecution, provided that the injured party is compensated. Such a scheme exists in the German Criminal Code (Article 153a Strafgesetzbuch (StPO) which prescribes the possibility of inducing the accused to compensate the victim for the damage either during the investigation stage, or during the main proceedings. payments as compensation for the damage caused by the offense. In the case of serious criminal offenses, the consent of the court to which the indictment may be filed is required.

This is one of the "discretionary decisions" under criminal law that mitigate the strict rule of compulsory prosecution stemming from the principle of legality. Even after the "court has filed a lawsuit", the procedure may be suspended with the consent of the State Attorney's Office, subject to compensation or the provision of services (Loffelmann, 2006).

8 Concluding remarks

Liability for medical error is treated differently in criminal and civil proceedings. Thus, criminal liability exists only for gross, obvious violations of professional rules of conduct, while in civil proceedings there is liability for any damage caused and for any negligence. For criminal liability it is necessary to prove the guilt of the perpetrator while in civil proceedings guilt is presumed.

Increasingly, it has been proposed that the issue of liability for medical errors should be addressed in litigation for damages.

Presently, this is not the case in the Republic of Croatia. The distinction between civil and criminal liability still exists, and in theory the need to maintain such an arrangement is emphasized.

However, the small number of criminal proceedings for the criminal offense of negligent treatment compared to the high number of civil proceedings for damages for medical malpractice (based on negligent treatment) inevitably raises the question of the justification for retaining this criminal offense in criminal law, particularly those which were committed negligently.

While respecting the views that such a need persists because healthcare professionals are required to perform healthcare professionally, and also because the failure to follow the rules of the profession can have far-reaching consequences for patient health, nevertheless it would be preferable to decide on compensation for damage to the injured patient during the procedure.

In this sense, it would be necessary to consider the possibility of filing a compensatory claim in the criminal proceedings not only against the accused physician (health worker) but also against the healthcare institution (and / or its insurer) in which he is employed, and which is ultimately responsible in civil proceedings instead of him.

It would also be advisable to consider some other solutions, such as the possibility of suspending criminal proceedings against a healthcare worker in the event that the injured party is compensated for the damage caused by his conduct.

Legislation, Acts, Regulations and Court decisions

Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of proceeds of crime in the European Union, http://eur-lex.europa.eu.

Criminal Code of the Republic of Croatia, Official Gazette, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19.

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Biomedicine, Official Gazette, MU, br. 13/03.

Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette, MU, 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10.

Judgment of the European Court of Human Rights of 13 November 2012, Bajić v. Croatia, available on the Case Law Portal of the Constitutional Court of the Republic of Croatia, http://usud.hr/hr/pregled-prakse-esljp.

Judgment of the European Court of Human Rights of 12 January 2016, Biblija and Blažević v. Croatia, available on the Case Law Portal of the Constitutional Court of the Republic of Croatia, http://usud.hr/hr/pregled-prakse-esljp.

Judgment of the European Court of Human Rights of 2 May 2017, Jurica v. Croatia, available on the Case Law Portal of the Constitutional Court of the Republic of Croatia, http://usud.hr/hr/pregled-prakse-esljp.

Judgment of the European Court of Human Rights of 9 April 2009, Šilih v. Slovenia, available at https://hudoc.echr.coe.int/eng#

Constitution of the Republic of Croatia, Official Gazette, br. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

Supreme Court of the Republic of Croatia, Case Law Portal, https://sudskapraksa.csp.vsrh.hr/ - for all decisions of the Supreme Court of the Republic of Croatia and county courts.

Criminal Procedure Code, Official Gazette, br. 152/08, 76/09, 80/11, 121/11, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19.

Civil Obligations Act, Official Gazette, br. 35/05, 41/08, 125/11, 78/15, 29/18.

Act on the Responsibility of Legal Persons for the Criminal Offenses, Official Gazette, br. 151/03, 110/07, 45/11, 143/12.

Civil Procedure Act, Official Gazette, br. 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08 (official consolidated version), 57/11, 148/11 (consolidated version), 25/13, 89/14, 70/19.

Health Care Act, Official Gazette, br. 100/18, 125/19, 147/20.

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