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**Criminal responsibility for medical negligence
in jurisdictional practice of Serbia**

Кривична одговорност за медицинску грешку у судској пракси Србије

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Criminal responsibility for medical negligence in jurisdictional practice of Serbia

Кривична одговорност за медицинску грешку у судској пракси Србије

SUMMARY

In the field of protection and improvement of people's health, there is a special importance of legally, efficiently, regularly, professionally, and punctually providing medical care, performing other healthcare services, or simply providing medical assistance or care. In this way an essential social function is achieved, as well as the protection of the constitutionally proclaimed right of physical and mental integrity of a man. However, deterioration of an individual's health who has been medically assisted is possible in the process of providing medical, or any other medical field's assistance.

If it is a gross medical misconduct or a misconduct of any other medical profession, or gross violation of a profession's rules, because of which there is a possibility of deterioration of one's or more individuals' health, then, the crime of Medical Negligence, for which there are strict statutory offences, applies. This article speaks in the aspect of theory and practice about the significance, social jeopardy and prevalence of this crime, or criminal policy of courts in the republic of Serbia, beside many articles in the written and electronic media which provoke a great public attention and rough comments.

Keywords: health; crime; responsibility; criminal sanction; policy of the criminal prosecution; court crime policies

САЖЕТАК

У области заштите и побољшања здравља људи, постоји посебан значај законитог, ефикасног, редовног, професионалног и правовременог пружања медицинске заштите, обављања других здравствених услуга, или једноставно пружања медицинске помоћи или неге. На тај начин се остварује битна друштвена функција, као и заштита Уставом прокламованог права на физички и ментални интегритет људи. Међутим, погоршање здравља појединца услед медицинске грешке је могуће у процесу пружања медицинске помоћи или помоћи било које друге здравствене делатности.

Ако се ради о грубој медицинској грешци или непрописном понашању било које друге медицинске професије, или грубом кршењу правила струке, због чега постоји могућност погоршања здравља појединца или више особа, онда постоји кривично дело медицинске грешке за које закон предвиђа одговорност и кажњивост. Овај чланак говори о теоријском и практичном значају, друштвеној опасности и распрострањености овог кривичног дела и о казненој политици судова у Републици Србији, поред многих чланака у писаним и електронским медијима који изазивају велику пажњу јавности и грубе коментаре.

Кључне речи: здравље; кривично дело; одговорност; кривична санкција; политика кривичног гоњења; казнена политика судова

INTRODUCTION

People's healthcare, along with life protection and bodily integrity, represents a social function which every country has performed since the early ages until this day. This is proved by many crimes from which these personal and social values are protected. However, the care has not always been complete, efficient, evenly distributed and general. There had been minor or greater differences in incriminations of violating or imperiling these social values, depending on characteristics and type of a state organization. Since France's bourgeois revolution, the protection of these social values has gained significance, considering the declared human rights and freedoms. The protection of these human rights was proclaimed as

a part of universal (UN) and regional (CoE) international documents and constitutions of states as the highest legal acts.

All positive criminal legislations regulate various forms and aspects of manifestations of the crimes against health. The situation in Serbia is similar, where starting from January 1st 2006 Criminal law act [1] has been in use which in chapter 23 "The Crimes against the Health" predicts more felonies against people's welfare. Namely, these are crimes against not only the people's wellbeing but also the right to protect one's health, which are guaranteed in section 68 of the republic of Serbia's Constitution.

Among the crimes against human welfare, there is a crime which by its significance, nature, characteristics, perpetrator, a type and scope of a caused consequence is singled out from clause 251 of the Criminal law. Its name is Medical Negligence. In the protection of human health, a special significance and part has medical or any other medical field's assistance or care for the ill. People who are authorized to provide this very kind of assistance- medical doctors or other health workers, apart from the appropriate professional education should act responsibly in accordance with the regulations of the medical profession, science and skill. Hence, there is the need of stronger criminal relief for the ill. Moreover, in legal theory there are conceptions that this is the case of professional crime, or the crime of professional negligence.

The crime from clause 251 of the Criminal law of the republic of Serbia under the name of "Medical Negligence" consists of irresponsible medical assistance provided by a doctor, or irresponsible medical assistance, care or other medical practice provided by some other health practitioner, which results in health deterioration of an individual. If the perpetrator of the crime proves to be a doctor or other medical practitioner, they will be imprisoned for 3 months to 3 years. Not premeditated act, on the other hand, results in a payment fee or imprisonment up to 1 year.

In order to recognize the original place of a crime of medical negligence in accordance with the modern Serbian law, it is necessary to look into the analysis of Serbia's jurisdictional practice. Accordingly, legal regulations are not only abstract terms in legal acts, but also exist in everyday police, jurisdiction and prosecution practice in various forms and aspects. In this analysis we used available data, previously published in reports of the Republic Bureau of

Statistics of Serbia [2–11], in the period of 2006-2015 which is the exact period of applying nowadays' valid, positive criminal legislations.

THE PATTERN AND EXTENT OF THE CRIMES AGAINST HEALTH

To begin with, we are going to analyze the state of crime in general and then the state of the crimes against health (the crimes against people's health), as crimes of Serbia in general in the period of 2006-2015. Afterwards, we are going to analyze the extent, pattern and tendencies of manifestations of medical negligence (Table 1).

From the collected data about the crimes in general and the crimes against health we can conclude the following:

1) the highest number of crimes in Serbia was 108.750, more specifically in the lastly analyzed year 2015, while the lowest number of crimes was in 2010, only 74.279. Since then, the number of crimes has been rising increasingly,

2) but in contrast to that, the highest number of crimes against health was in 2008 and it was 4.895, while the lowest number of these crimes was in 2014, only 3161 and

3) even though it is considered that crimes against health are significantly involved in the total number of crimes in the state (especially the crimes against people's health that involve drugs and psychoactive substances), it cannot be concluded from the collected data. Namely, health crimes are a part of crimes in general, with 5.46% in the year of 2010 (the period of the maximum share), or 4.81% in 2008 with the smallest share of these crimes as a part of crimes in general, and in 2015, with 3.43% or 2014 with 3.41% (Table 2).

After the opening statements about the crime rate in general, and the rate of the crimes against health in Serbia in the period of 2006-2015, we are moving onto analyzing the pattern and extent of medical negligence manifestations from clause 251 of the Criminal law. From the mentioned analysis on the crime rate we can conclude the following: 1) the highest number of medical negligence crimes was 101, and they were committed in 2015, and 87 in 2014. These were the years when the highest percentage share in the crimes against health was noted: 2.75% in 2014 and 2.71% in 2015 and 2) observed number of crimes committed in 2011, only 39 or 1.02% in 2009 and 1.08% in 2008.

CRIMINAL PROSECUTION POLICY

After the statements about the pattern, extent, structure and tendencies which are manifested by crimes against health in Serbia in general or medical negligence, come statements about criminal prosecution policy for a perpetrator of such a crime. Namely, the total number of reported crimes, which has been shown previously in the charts, is not the real number of the committed crimes in general, as well as the crimes against health, since there has always been a “gray” or “dark” number of crimes or the loss of crimes.

But, the data about the ratio between reported and accused individuals for crimes in general, or for specific crimes is quite interesting. Accordingly, from the total number of reported medical negligence crimes, the number of accused is significantly lower, legally supported (throwing out the appeal, adjournment or discontinuance of proceeding) so, courts of competent jurisdiction accept significantly lower number of individuals in comparison to the reported ones, or their crimes (Table 3).

In order for a statement on a medical negligence crime to be comprehensive and complete in the modern criminal law, it is necessary to take a closer look into the place, time and its analysis in the statistical practice of Serbia, apart from the theoretical analysis of the positive legal solutions for these crimes, or its forms and types of manifestations in legal theory and court practice.

From the collected statistical data on criminal prosecution of a perpetrator of this crime we can conclude the following:

- 1) there was no interruption of the investigation at any time for this crime,
- 2) the number of terminations of this crime is slightly higher because of the law. Hence, investigation was mostly terminated in 2007 or in 9.41% of the cases, in 2006 or in 8.82% of the cases (so, almost every tenth report was dismissed by terminating an investigation) and
- 3) when it comes to this particular crime there is a great number of declined reports. The highest number of declined reports was in 2015, 88.12% or 89 out of 101 reports were declined reports. Usually, the number of declined reports was more than a half of submitted

reports, except in 2012 when “only” 24.47% of reports was declined (one third) and in 2006 when 45.59% of the reports was declined.

THE CRIMINAL POLICY OF COURTS

In order to completely examine the efficiency of measures and agents which are at service to the state, or the society, for facing and terminating various forms and types of manifestations of the modern crimes in general, as well as the crimes against health, we have to look further into the place, time and analysis of the criminal policy of courts. Reportedly, it is the analysis and comparison of the numbers of the reported, accused and sentenced individuals for the crime of medical negligence, which represents the object of our empirical examination in Serbia in the period of 2006-2015, or, the analysis of a type and gravity of punishments, as well as other criminal sanctions for perpetrators of this crime.

Crimes against health are the type of crimes for which all modern legislations (including the legislation of Serbia) impose sentences of imprisonment of different period of time. But, although imprisonment is the punishment for the crime of medical negligence, in most of the cases other criminal sanctions are also imposed. This shows the final result of the state's consistency of confronting these crimes and the efficiency of applied sanctions set by courts in the criminal procedure (Table 4).

Upon analyzing the data on the ratio between reported, accused and sentenced individuals for the crime of medical negligence in the observed period of time, we can conclude the following:

- 1) the percentage of the accused in comparison to the reported varies,
- 2) the least accused were in 2015- 19.85% (so, every sixth reported perpetrator), in 2006- 19.12% out of the total number of the reported,
- 3) the greatest number of the accused was 56.58% in 2013,
- 4) when it comes to the number of the accused in comparison to the number of the reported, the situation is not quite good. This is supported by the fact that the greatest number

of the accused (every sixth of the reported), was 15.38% in 2011, or 15.22% in 2012 and 2007 and

5) exceptionally small share of the sentenced for this particular crime, 2.94% was in 2006 and 2.97% in 2015 (Table 5).

As we could better understand the difference between the accused and the reported individuals for the analysis of the crime of medical negligence, we will analyze the ways of solving the reported crimes in the rest of the article. From the collected data we can conclude the following:

1) the numbers of terminations of procedures vary from the minimum of 0.99% in 2015 and 1.72% in 2012 to the maximum of 13.21% in 2008 and 10.59% in 2008,

2) the number of individuals who are legally exculpated varies in accordance with the year of the analysis. This number varies from the minimum of 2.13% in 2010 to 19.56% in 2009 or 18.87% in 2008 and

3) it is similar with the individuals for whom the report was declined. The numbers go from the minimum of 0.99% in 2015 or 2.56% in 2011 to the maximum of 13.16% in 2013.

Finally, it is necessary to analyze the severity or lenience of the courts' punishment policies for this crime. We will do this if we observe the type and gravity of imprisonment sentences (considering the legally imposed punishment for the crime) as well as other types of punishments (Table 6).

First, we are going to analyze imposed penalties for medical negligence because this type of punishment is the only one resolved in the Criminal law. However, the collected data shows that even this statutory punishment was rarely imposed on the perpetrators of the crimes against health.

Namely, the most usual punishment was the imprisonment of 3 to 6 months, even for two times in 2009 and in 2014 and once in 2007, 2011 and 2012. Now follows the imprisonment of 6 months to 1 year which was imposed twice in 2007 and once in 2012 and 2013. The most severe punishment of imprisonment of 2 to 3 years was imposed only once in 2012 and 2015. It is interesting that the imprisonment of 1 to 2 years, as well as imprisonment of 2 to 3 months were not imposed at all.

Even though for the crimes against health in the Criminal law of Serbia imprisonment penalties against its perpetrators are imposed in the criminal policy of courts (or the policy of imposing criminal sanctions), there are other kinds of criminal sanctions. Therefore, courts punished the perpetrators of medical negligence by: 1) fine punishment and 2) probation.

It is interesting to mention the fact that in jurisdictional statistics there is no data on imposed security measures which could serve as punishments for perpetrators of this crime, such as: 1) prohibition of doing their jobs, performing activities, duties and 2) deprivation of objects, nor is there any data on imposed measures of taking away the property gained by performing the crime (Table 7).

Although the punishment for medical negligence is imprisonment, regulated in the Criminal law in jurisdictional practice observed in the period of 2006-2015, it can be concluded that the perpetrators were punished in other ways. So, based on the analyzed data for this crime, we can conclude the following:

1) a warning by court, corrective measures (which is expected since underage individuals cannot be considered as the perpetrators a crime), an extra payment fee, as well as exculpation supported by law, were not imposed at all,

2) a payment fee as the main punishment was imposed rarely, only once in 2006 and 2015, and even three times in 2012, while in the other analyzed years this punishment was not imposed on the perpetrator and

3) probation was the most common punishment (apart from imprisonment). It was present every year, but imposed differently, at least once in 2006 and 2015, to five times in 2007 and 2011, and even six times in 2013.

CONCLUSION

Among the crimes against human welfare (so called crimes against health) there is a crime which by its significance, nature, characteristics, the perpetrator, the type and scope of the caused consequence is singled out from clause 251 of the Criminal law of Serbia. Its name is Medical Negligence. In the protection of human health, a special significance and part has medical or any other medical field's assistance or care for the ill. Individuals who are

authorized to provide this very kind of assistance- medical doctors or other health workers, apart from the appropriate professional education, should act responsibly in accordance with the regulations of medical profession, science and skill. Hence, there is need for stronger criminal relief for the ill. Moreover, in legal theory there are conceptions that this is the case of professional crime, or the crime of professional negligence.

The crime from clause 251 of the Criminal law of the republic of Serbia under the name of "Medical Negligence" not only consists of violation of the rules about treating an ill individual by a doctor (doctor of medicine or dentistry), but also of illegal behavior of medical practitioners while performing any medical assistance. Now, this crime consists of irresponsible medical assistance provided by a doctor or irresponsible medical assistance, care or other medical assistance provided by some other health practitioner, which results in health deterioration of an individual.

From the conducted empirical research on extent, structure, dynamics, criminal prosecution policy or criminal policy for medical negligence, which is based on statistical data in Serbia collected in the period of 2006-2015, we can conduct the following:

1) In comparison to the total number of performed crimes in Serbia, which was 108.750 in 2015, 74.279 in 2010, the highest number of crimes against health was in 2008- 4.895, while the least of these crimes were committed in 2014, only 3161. Health crimes are a part of crime in general, with a small share with only 5.46% in 2010 (when the maximum share was noted), or 4.81% in 2008, to the smallest share of these crimes, in crimes in general, in 2015 with only 3.43% and 3.41% in 2014.,

2) Regarding medical negligence, it was mostly present in 2014, with 87 crimes and in 2015 with 101 crimes. These were the years when the biggest share of these crimes was noted. In 2014 there was 2.75% and 2.71% in 2015. In 2011 this crime was least present, only 39 crimes or 1.02 % in 2009 and 1.08% in 2008.,

3) Considering the policy of criminal prosecution of this crime's perpetrator, we can say that interruption of investigation has never occurred, while a slightly higher number of termination of investigation existed, supported legally. Hence, the investigation for this crime was mostly terminated in 2007, with 9.41% of the cases, and in 2006, with 8.82% of the cases (so, every tenth report of the crime was ended by termination). However, it is obvious that there were many declined reports. Moreover, reports for this crime were declined the most in

2015- 88.12% (or 89 out of 101 received reports were declined). Mostly, the number of declined reports was more than a half of the received reports, except in 2012 when “only” 34.48% of the reports (one third) was declined, or in 2006, when 45.59% of the reports was declined,

4) Upon analyzing ways of dealing with the reports, it can be seen that the number of termination of the investigation from the legal aspects is insignificant because it varies from the minimum 0.99% in 2015 and 1.72% in 2012 to the maximum of 13.21% in 2008, and 10.59% in 2008. However, the number of individuals who were legally exculpated ranges from the minimum 2.13% in 2010 to 19.56% in 2009, or 18.87% in 2008. It is similar with the individuals who had been reported but the report was declined. This number goes from the minimum of 0.99% in 2015 or 2.56% in 2011 to the maximum of 13.16% in 2013.,

5) While analyzing the ratio of the reported, accused and sentenced individuals for medical negligence we can see that the least of them was accused in 2015, only 14.85% (so, every sixth reported perpetrator), or in 2006- 19.12% out of the total number of the reported individuals, while the highest number of the sentenced individuals, 56.58% was in 2013. Regarding the number of the sentenced individuals, in comparison to the number of the reported, the situation is not quite good. The highest percentage of the sentenced individuals (every sixth from the reported) was 15.38% in 2011, or 15.22% in 2012 and 2007. Furthermore, a very small share of the sentenced for this crime was in 2006- 2.94%, or 2.97% in 2015.,

6) Even though this crime imposed a punishment of imprisonment, it was rarely imposed. Reportedly, in most of the cases, the punishment was imprisonment from 3 to 6 months, which happened twice in 2009 and 2014, and once in 2007, 2011 and 2012. What follows is imprisonment for 6 months to 1 year, which was imposed twice in 2007 and once in 2012 and 2013. The gravest punishment is imprisonment for 2 to 3 years and it was imposed only once in 2012 and 2015. Interestingly, imprisonment that ranges from 1 to 2 years, so as imprisonment for 2 to 3 months, was never imposed, and

7) Other punishments were imposed, too. Warnings by courts, corrective measures, extra payment fees and exculpation supported legally were never imposed, but payment fee as the main punishment was imposed rarely, only once in 2006 and 2015, and up to 3 times in 2012, while the other analyzed years did not show the occurrence of this punishment. Finally,

probation was mostly present as punishment (apart from prison). It occurred every year, but differently- at least once in 2006 and 2015, to up to 5 times in 2007 and 2011, and even 6 times in 2013.

Conflict of interest: None declared.

Paper accepted

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Table 1. Medical negligence involvement in the total number of crimes in the Republic of Serbia in the period of 2006–2015

Year	The number of crimes in total	Crimes against health	%
2006	105,701	4,260	4.03
2007	98,702	4,440	4.50
2008	101,723	4,895	4.81
2009	100,026	4,490	4.49
2010	74,279	4,052	5.46
2011	88,207	3,409	3.86
2012	92,879	3,603	3.88
2013	91,411	3,464	3.79
2014	92,600	3,161	3.41
2015	108,759	3,731	3.43

Table 2. Medical negligence involvement (clause 251, section 3) in crimes against health in the Republic of Serbia in the period of 2006–2015

Year	Crimes against health	Crimes from article 251 section 3	%
2006	4,260	68	1.60
2007	4,440	85	1.91
2008	4,895	53	1.08
2009	4,490	46	1.02
2010	4,052	47	1.16
2011	3,409	39	1.14
2012	3,603	58	1.61
2013	3,464	76	2.19
2014	3,161	87	2.75
2015	3,731	101	2.71

Table 3. The Way of Termination of the Previous Proceeding for a Medical Negligence Crime in the Republic of Serbia in the Period of 2006–2015

Year	The number of reports	Declined reports	%	Interrupted proceeding	%	Terminated proceeding	%
2006	68	31	45.59	0	0	6	8.82
2007	85	46	54.12	0	0	8	9.41
2008	53	28	52.83	0	0	2	3.77
2009	46	36	78.26	0	0	0	0
2010	47	28	59.57	0	0	4	8.51
2011	39	26	66.66	0	0	1	2.56
2012	58	20	34.48	0	0	5	8.62
2013	76	41	53.95	0	0	0	0
2014	87	61	70.11	0	0	1	1.15
2015	101	89	88.12	0	0	0	0

Table 4. The ratio of reported, accused and sentenced individuals for medical negligence in the Republic of Serbia in the period of 2006–2015

Year	Reported individuals	Accused individuals	%	Sentenced individuals	%
2006	68	13	19.12	2	2.94
2007	85	27	31.76	8	9.41
2008	53	28	52.83	5	9.43
2009	46	22	47.83	7	15.22
2010	47	14	29.79	3	6.38
2011	39	14	35.90	6	15.38
2012	58	22	37.93	9	15.52
2013	76	43	56.58	7	9.21
2014	87	29	33.33	5	5.75
2015	101	15	14.85	3	2.97

Table 5. Ways of solving a reported medical negligence crime in the Republic of Serbia in the period of 2006–2015

Year	Proclaimed guilty	%	Terminated procedure	%	Exculpated	%	Dismissed of the accusation	%
2006	2	2.94	3	4.41	2	2.94	3	4.41
2007	8	9.41	9	10.59	3	3.53	6	7.06
2008	5	9.43	7	13.21	10	18.87	4	7.55
2009	7	15.22	2	4.34	9	19.56	2	4.34
2010	3	6.38	4	8.51	1	2.13	2	4.26
2011	6	15.38	4	10.26	3	7.69	1	2.56
2012	9	15.52	1	1.72	10	17.24	2	3.45
2013	7	9.21	6	7.89	9	11.84	10	13.16
2014	5	5.75	7	8.05	7	8.05	7	8.05
2015	3	2.97	1	0.99	10	9.90	1	0.99

Table 6. Imposed imprisonment penalties for perpetrators of the crime of medical negligence in the Republic of Serbia in the period of 2006–2015.

Year	Sentenced individuals	Imprisonment of 2–3 years	Imprisonment of 1–2 years	Imprisonment of 6 months - 1 year	Imprisonment of 3–6 months	Imprisonment of 2–3 months
2006	2	0	0	0	0	0
2007	8	0	0	2	1	0
2008	5	0	0	0	0	0
2009	7	0	0	0	2	0
2010	3	0	0	0	0	0
2011	6	0	0	0	1	0
2012	9	1	0	1	1	0
2013	7	0	0	1	0	0
2014	5	0	0	0	2	0
2015	3	1	0	0	0	0

Table 7. Other types of imposed sanctions for perpetrators of medical negligence in the Republic of Serbia in the period of 2006–2015.

Year	Sentenced individuals	Payment fee	probation	Warning by court	Corrective measures	Exculpated	Extra payment fee
2006	2	1	1	0	0	0	0
2007	8	0	5	0	0	0	0
2008	5	0	4	0	0	0	0
2009	7	0	5	0	0	0	0
2010	3	0	3	0	0	0	0
2011	6	0	5	0	0	0	0
2012	9	3	2	0	0	0	0
2013	7	0	6	0	0	0	0
2014	5	0	3	0	0	0	0
2015	3	1	1	0	0	0	0