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THE LEGAL UNDERSTANDING OF INTENTIONAL MEDICAL ERROR

Abstract: The paper is devoted to doctor, a professional and humanist who dedicated himself to medicine and is committed to lifelong learning, ethics and assistance to victims, even against their express consent. The theme is focused on the problem of intentional medical error in order to negate it in the context that the conscientious doctors should be protected from tort and free of moral burden. This paper seeks to answer the question, if the error represents a doctor's failure to the detriment of the user (patient), how should we treat his attempt, made professionally and with the best intentions, regardless of the fatal outcome? In addition, medical-legal theory and practice beside intentional medical mistake mention also the unintentional, whose formation does not require any kind of responsibility because the doctor's behavior in that case was not inconsistent with medical ethics, standards and rules. In this regard, the author's research was based on the following questions: is there a deliberate medical error, who is ready to knowingly endanger the patient by doing medical procedures contrary to the rules (neglect, avoidance of assistance, misdiagnosis, improper treatment, indifference, discrimination), who is competent to qualify the taken action as an error (intentional, unintentional) and what evidences are required for the brutal attack on the integrity of top experts, that will be charged and prosecuted?

Literature abounds with assertions that medical errors are as old as medicine, which is not true. Also, it is incorrect to say that it had appeared for the first time in the middle of the nineteenth century. That would be a roughly canceling of ancient medical marking, bearing in mind that even before the mentioned period, there had been a very successful medicine with high quality doctors and their brilliant achievements, but also with illnesses and dead persons. As far the data on the exact occurrence of medical errors are considered, the numerous authors claim that it does not have to be communicated, since it is placed in the field of history, that unlike many science is not exact, and should not always be considered as reliable. Any medical error makes a multiple interests, firstly of the researchers in the true sense of the word, and secondly, of the sensatio-

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nalist columnists. The latter see the culprit only in the doctor, because many of them never presented the scene when defeated doctor leaves the Service ambulance, clinic, emergency room or any other health care area, because the most terrible thing in the profession has happened -the lost of a patient. Sensationalists are rarely present when despair and tears are being replaced by joy, smile and exaltation. They do not understand that it is impossible to meet the doctor who will be prepared to deliberately violate the profession, ethical values, Hippocratic oath, to directly endanger the health or life of the patient, or make a deliberate mistake and commit an offense.

Key words: medical errors, patient, medical standards, medical law, expertise

Introduction

Discussions about medical errors traditionally cause the heated controversies. In the case of its existence, the invited and uninvited persons, mostly lay people, appear by inertia to express their opinions, to argue whether the mistake was done intentionally or unintentionally, and to make an early pre-judgment with no relevant evidences. It is interesting that a large number of theorists participate in these public discussions while without any doubt put the doctor in the epicenter by ascribing him the intentional violation of standard medical rules, knowingly acting contrary to good medical practice and disregard of elementary medical ethics, unprofessional attitude towards the patient and, the worst, behavior contrary to his own profession. When it comes to medical error prima facie it is a disregard of rules that constitute the essence of the relationship between doctor and patient, where the behavior of medical professionals is particularly emphasized (5), primarily the behavior of doctors. This attitude is acceptable, but it does not mean that the doctor's disrespect of the mentioned rules must always cause a deliberate error difficult to be properly evaluated and consistently explained. The lawyer's interpretation would be (12) that the medical error is a doctor's conscious act made contrary to the rules of medical profession (lat. Contra legem artis) or non-compliance of medical standards, regulations, rules, procedures and measures that suppose to lead him, but in this case it was contrary, which generated and caused the damage to the patient. If the intentional medical error was proved and the patient's damage was identified (17), in that case it is quite natural to take actions provided by medical ordinance and / or law against the doctor (offender), but acting in good faith is highly recommended.

Firstly, the public opinion should not be taken into account at any cost for all the problems under the roof of a health institution, since it always exclusively blames doctors, claiming that they should be objects of criminal proceedings. Secondly, medical

error implies the existence of irrefutable evidence of unprofessional performance of the health actions with consequences, as the only basis on which the doctor may be criminally responsible. Thirdly, the doctor's responsibility also exists when it comes to mistakes caused by irresponsible behavior of other health care workers, even though it sometimes might not seem ethical. However, a doctor who has professionally done his job without hinting by any chance at an unfavorable outcome, might be held responsible for mistakes of other health care workers, if did not professionally controlled their behavior. In all countries an identified intentional medical error is sanctioned under the criminal law. However, not every doctor's failure has to be an object of a criminal conduct, for the simple reason that health care laws precisely regulate the work and behavior of doctors and health care institutions and a large number of sophisticated cases is resolved within the institutions, therefore, on the level and within the profession.

General interest is to be known and therefore shall not be denied that the Criminal Code stands in the shadow of the Health Care Act, that its promoters (judges, prosecutors, lawyers) do not have medical training or required expertise to adequately assess the work of doctors and other health workers, for which the profession has the only competence. It is not about the competing of medical and legal institutes or their representatives, on the contrary, it's about emphasizing the importance and respect of the professions, of which there are, according to professional opinion, only three in the world (28), the medicine, law and priesthood. Others activities are considered to be occupations, trades, skills, etc. It is illusion that the behavior of doctors (and other health workers) is regulated by law, it represents more a reflection of pre universal human education, demonstration of their culture, lifestyle, manners, or the right to personal choice, which is the pinnacle of human freedom (23). However, that must not be understood as a guarantee that every conscientious doctor would not act contrary to the law just because of personal manners (5) and that before entering the clinic, surgical theater or counseling, or pre direct contact with the patient, he would read the legislation to choose his behavior.

It is not enough just to make a statement about doctor's behavior when the professional error has occurred, because that is not the right proof and offers no real reason. Therefore, the evidence is mostly determined through expertise, conducted by professionals (expert) in order to clarify the facts. Expertise requires necessary professional skills (expert) that the court does not need at disposal in particular case, although it could be characteristic and associated with complex criminal or civil court proceedings. The expert must possess the necessary knowledge in addition to the power of professional reasoning, because he might be called to a hearing regarding the issues from a variety of professional and scientific fields (medicine, transport, building, finance, etc.). The role of expert is to provide the lawyers with professional advices, support and judgment on the field that is the subject of discussion and to

inform them about different areas of human activity, to which the lawyers regarding their own general and special legal education are not very familiar with.

The goal of the paper

The aim of the paper is not to be understood only as pretentious glorification of conscientious doctors who, through their professional actions and achieved results, have managed to certify own values and take the rightful high place in the first social ranks (15), it is also the odium for all those willing to dirty procedures, also called "doctors". Since the medical errors are constantly and with a lot of arguments equally debated in academic (16) and professional circles (22), but also in the media (1), it would be irresponsible to deny their existence. However, at first place we should take a medal in hand to make sure that it really has two completely different sides and then make a clear distinction between intentional and unintentional errors, or between procedures of conscientious and unscrupulous doctors. The current medical practice has not achieved much in sanctioning the doctors who expressed unfair intentions, but also the other instances which are called to evaluate the consequences of similar behaviors have nothing to be proud of. The main goal of this paper is the negation of intentional medical error. If it really comes to it, which must be proven, it has to be followed by the determination of the essence and the assessment of the readiness of legal institutions to sanction the doctor (offender) on the basis of valid evidences and established facts.

The essence of medical error

At first, it should be noted that the medical error exists in a wider and narrower sense. In a wider sense, it does not have to be an expression of violation of the medical profession rules, but also a violation of rights guaranteed to the patient in the field of health care and broader violations of the rules of conscientious medical treatment. It has been in the middle of the interest of lawyers and doctors for more than a half of century, and represents one of the most important problems that medical law is constantly facing. Being aware of it, well-known theorists (McKee, Mossialos, Belcher) have no doubt to place the responsibility of health professionals in front of all the functionalities in the context of health services, primarily doctor's, and the existence of certain risks that are an obstacle to providing the adequate health care to the citizens, as a universal and safest resource (6). This attitude is formed on the basis of knowledge on the long-term behavior of doctors, their numerous errors and omissions of other health professionals, the quality of provided medical services and patient's satisfaction. Common mistakes have aroused interest of participants of legal theory

and jurisprudence and intensified their intention to find effective criminal legislation that would allow the use of precise determination of crimes and an end to the large number of criminal procedures unsuccessfully conducted for many decades.

The resulting medical errors, in addition to being an act of negligence or doctor's conduct contrary to the rules of profession (contra legem artis) in terms of gross violation of medical standards, in the same time represent the basis for a criminal or other responsibility. Modern understanding of medical and legal doctrines goes in the direction that doctor makes a deliberate error (debatable question) first, because of the lack of information about the existence of new scientific knowledge about the possibilities of application of modern technological and medical advances and / or, if he was aware of their existence, but did not use them at a given moment despite all possible options on his disposal. The doctor also makes a mistake if he does not realize in time that the medicine is like no other science subjected to drastic changes and that modern scientific knowledge is part of everyday life. He improperly demonstrates unserious understanding of his profession, avoids the labor liabilities and causes the suffering of patient. However, the mentioned views in medical science are causing different opinions. In fact, many contemporary methods, models, procedures or actions can be recognized by a large number of eminent medical experts, which does not mean that they must be generally accepted, recognized and applicable in every situation. Doing so will not highlight the intention to erase the doctor's fault, but will open a new question, does he really make a mistake while acting solely according to his conscience? Is it possible that someone who insists on health educational work, education of the patient, management of quality of life, preservation and improvement of the collective health and / or providing technical assistance, who prescribes quality therapy or successfully perform complex surgeries, might consciously (deliberately) make mistake, and make the things to go wrong? Unfortunately, it is possible and then the whole case becomes interesting for the public prosecutors, judges and lawyers.

Despite the doubt about the intentional medical error, doctors definitely make mistakes in many cases. It must be borne in mind that medical science is very dynamic and its standards are changing rapidly and continuously in accordance with present situation in the science and practice while being modified, extended and applied after the upgrade (8). The doctor, as a professional who has sworn to lifelong learning, has an obligation to keep abreast of modern medical trends (9) and must additionally count on a steadily growing level of health education of citizens (insured-patients). Nevertheless, medical error rarely occurs because of a violation of medical standards, because every doctor is expected to make a brilliant attempt in the care of the patient, regardless of the fact that many expectations will not be realized. If such an attempt was not made, it is not the standard's fault, but the doctor, a negligent to whom even a good standard cannot help. Good standard, claims Kacenmajer, is not easy to determi-

ne, particularly in medicine where there is no comprehensive code of solid rules that guarantee the safety and quality from which, now and then, the state of science could be reliably seen (3). Since the medical science and medical experiential knowledge are subjected to constant changes, as a very common problem arises the setting of the standards that will be in force at the time of providing the medical services, which suggests that doctor is not, and may not always be able to choose the safest one. If fails in the selection and application of the correct standard, the doctor should be aware that by doing so he takes a greater risk to the patient in terms of healing and must be justified for any actions taken on his own initiative (29), without being contained in a chosen standard.

Many theorists faced with everyday events in the medical or legal profession and practice are searching the reasons for which the equilibrium point in the behavior of health workers (doctors) was moved from criminal to civil liability. So far they have come to knowledge that the main reason is the fact that the legal theory until recently was significantly dealing with their criminal, rather than civil liability. The main reason for the doctor's responsibility was, at first, in hiding the violations of obligations which are reflected as a violation of due diligence (10) during the medical treatment of the patient and, second, the deliberate taking of medical acts towards the patient without his or her expressed consent. However, this variety of reasons is extending to offenses that doctors made doing other life activities (participation in the crime), although they have no direct contact with medical actions (diagnostics, medical treatment, surgical procedures, inadequate protection of pharmaceutical, etc.). It is very important to understand the doctor as a person, expert, professional ethics, but it is also important to separate his health work from other types of activities that might be doing in life. Therefore, we must distinguish the actions of doctor when he makes deliberate error from the one made as a citizen, although both are usually made in a health institution or in some other place where contact has been made between doctors and patients (or their intermediaries). In this case, "the doctor" is not a doctor, but a criminal who abuses his position, smears his profession and insults branch invited to professionally protect the health of patients.

Due to the complexity of the concept of medical error, it is essential to separate the failure to treat a patient with mistakes during the treatment. The failure of the treatment may not always be caused by medical error, because there are cases when doctor (or entire team) has the best intention and desire to achieve the desired outcome and does everything what is and what is not allowed in medicine. The rule is that a conscientious doctor never takes ex ante risk to himself, and never gives unrealistic estimates and guarantees for successful treatment (18), because such behavior would be the culmination of frivolity and hypocrisy. However, any doctor according to all conditions can guarantee conscientious, professional and effective actions in the treatment, which is drastically different. On the other hand, doctor should not be

expected to do the impossible, but the success can be expected, even though it does not depend exclusively on his expertise, skills in performing various medical actions or instruments and tools at disposal. It was never asked how the success was achieved, because its value makes minimal any error, if such exists. In many situations the treatment outcome is largely tied to the type of disease, stage of the illness, urgency of the patient's receipt, time of occurrence to doctor, psycho-physical characteristics of the patient, capacity of opportunities for successful treatment, although the factor of luck must not be ignored. In other situations might happen that the doctor (or the whole team) has performed all medical acts very professionally, but the patient due to lack of the necessary capacity has not been successfully cured and such outcome is considered as a failure in treatment. In this regard, it is very important to make a distinction between medical error and accidents. The above-mentioned situation, from a legal point of view could be seen as controversial, because it contains a legal assessment of the treatment, which is not always enough, and that's why there is still no clearly drawn boundaries between them.

This estimate is accepted in almost all legal systems because of the request to meticulously and carefully, medically and legally review all cases, in order to find the error in the assessment for which the doctor could be marked as the culprit. In countries with Anglo-Saxon legal system (United States of America, Ireland, United Kingdom, Canada) medical error is better clarified by adopting the terms: medical malpractice (malpractice) that applies to the legal concept of medical responsibility for the damage caused to the patient (21). Confirming the previous quote Mujović-Zornić provides more detailed explanations pertaining to other concepts. She distinguishes active error that occurs at the operational level, whose harmful effects are directly visible to the greatest extent (11). According to her opinion, the common error is synonymous for failure to achieve the planned medical action as intended, or the act of applying the wrong plan for achieving the goals. She observes the latent fault for which is known to lead to operational errors and whose effects typically remain in the system invisible for a period of time (12) through different events, usually in the form, organization, training, or maintenance. In previous comments on the deliberate medical error there is no cases which might confirm that doctor's behavior to the patient was unprofessional, the result of carelessness, ignorance or intentionally false performing of illegal medical activities.

There are a lot of cases with no direct connection to the treatment of medical errors and they are mainly elaborated by the media. The latter inform the public about the participation of doctors in the dirty business (sale of babies, mysterious disappearances of children in maternities, newborns declaring as dead, selling organs, etc.), which are not directly related to the treatment, but in the end make an important link in the chain of organized crime. The news (24) that in the Republic of China, a country that has a problem with respect for human rights, the "doctor" who kidnapped

and sold several babies from the hospital where she had worked, is condemned to death, strongly echoed. It was a very morbid recognition that she usurped the babies, but only after saying to parents that they have inherent faults for which should not be accepted. She is the members of organized crime who cooperated with the kidnappers and sold babies in other Chinese provinces and cities. According to the quoted source, after the kidnapping of a boy she earned around 3.5 thousand US $, while the vendors will later cash in almost 10 thousand USA $.

Authorities dealing with health care consider that medicine is facing problems when the role and importance of preventive health care is underestimated. This means since its promotion in 1978 in Alma-Ata (Kazakhstan), through conferences in Riga (Latvia) in 1988, in Ljubljana (Slovenia) in 1996, and so on, when it was meant to be a pillar carrier in the protection of human health (27). Taken attitude did not survive and today in every country in the world we have on the scene a "skip" of medical levels and search for assistance at higher ones (secondary, tertiary care), where the patients who cultivate this practice are mostly at lost. Then, it is usually too late for successful medical intervention, which figures as a failure in the treatment, late reaction, not belonging to the chosen doctor, etc. Is it necessary also in this case to search the medical mistake at any level? No, because there is no question of deliberate misconduct of doctor to the patient, and secondly, the patient has the right to choose a doctor and in such cases acts conscientiously, regardless of the warning of his chosen doctor to comply with professional advices and to be disciplined in relation to his own health status. Starting from the fact that the prevention has lost its position in medicine (25), despite being able to favorably solve many accidents, rises the question, how the judicial system reacts and is there any basis to require a deliberate mistake of any doctor in such cases. Clearly, it might occur and every person conscious of principles errare humanum est must count on it, but still remains the question is it human to deliberately make a mistake so the final outcome would be fatal? Of course not, and that is why it is so difficult to claim that while treating the doctor deliberately makes a mistake and harms the patient. In the Old China long time ago, in the book ''The cannons of medicine'' ("Nuci King"), which is considered to be the work of emperor Xuang Tia from 2800 bc, was particularly emphasized the rule that: "... medicine cannot save nobody from death, but it has the capacity to prolong life, to strengthen morale, by enhancing the virtue and eradicating the vice as a mortal enemy of health. Medicine cannot cure many diseases that affect the poor humanity ... but tries to strengthen the nations and state, by providing the hygiene advice "(14).

Medical law and medical error

Scientific medicine has much earlier, but especially at the end of XX and beginning of XXI century, began its expansive development. Practical application of

modern achievements has contributed mostly to the advancement of global health and quality of the development of modern health care systems. In that way it provided the high status to a global healthcare and made it a very important social function. (26). The new findings, which are characteristic of modern scientific medicine are almost immeasurable, and reflected in precision diagnostics, modern operational methods and procedures, effective therapeutic procedures and / or delivering a large number of possibilities for solving the complex problems. The inability of some countries to apply contemporary achievements does not diminish their importance, because the states which are not lagging behind in development and readily and regularly apply them, had achieved outstanding results long time ago. Meaningful and quality scientific medicine is the best guarantee to policyholders / patients that they can count on modern medical treatments, modern health care and that they can have hope for a better treatment and a final cure. On the other hand, doctors and other health care workers, at once have become additionally responsible professionals not only to patients but also to the profession and community as a whole, to which overall development they give a significant contribute. Therefore, the relevant authorities were forced to take seriously their position and to make actions in order to protect them, primarily from incorrect procedures of dissatisfied patients whose needs for professional care and protection are the most numerous. For that reason, in the last decades of the twentieth century, arised the idea that medicine law as a new scientific discipline should be developed, in order to regulate the specific legal field and to solve difficult medical and legal problems.

Medical law is a branch of law which contains legal norms that regulate all types of relations between the insured persons / patients and medical workers in the context of medical activities, but also within the health system as a whole. They are the tools by which the community establishes and maintains external monitoring of the work and behavior of health workers, mainly doctors. The aim of control is to protect the guaranteed rights and interests not only of health professionals but also patients and policyholders. However, we should bear in mind that no matter how great the power of medical law and its norms was, there should not be place for great optimism and even less for unrealistic expectations that their application will lead to a quick and easy solutions, that will successfully unravel highly intricate relationships. Practice has shown that very quickly. Doctors and other health workers perceive medical law as a threat. So, It has become the target of criticism for being invasive and seen as something that directly inhibits the development of medicine in general, because excessively interferes in their work and competence. In this regard the opinions are divided. Many believe that the health workers led by doctors are more convincing in their claims, and that the legal theory and legal place has the place in courtroom, while others think that doctors and other health workers disapprovals are unfounded, since the medical authority has no right to

create mistrust between them and patients. Mutual distrust has created a space where the law is called to intervene.

When it comes to intentional medical error, the role of medical law is negligible in relation to the criminal law. Bearing in mind that represents the violation principle of the prescribed professional and ethical duties, it is essential to establish the facts about its relevance and impose a qualification of being done intentionally. The assessment starts from the point that the offender is reasonable, competent and responsible person, creating a dilemma, is it ready for the kind of behavior that results in violation of the requirement. In addition, each doctor's behavior is reflected in a particular act or omission of the doctor to the patient (while giving diagnosis, prescribing therapy, especially for complex surgeries and medical care before and after serious medical treatment), so it is very difficult to properly assess whether it is a conscious intention or omission. When the German experts give the legal assessment, it is the duty of communication (20), and when is done by the French or American lawyers, it becomes the duty of care (4). The conclusion is that there is no essential difference between the duty of careful treatment by a doctor who demonstrates it to his patient in accordance with the agreement, and the one that was formed on the basis of behavior from which a felony derived. In this sense, the contractual and tort duties of careful behavior of doctor, in principle, are identical.

According to medical and criminal law the doctor acts contrary to his duty in the two cases. Firstly, when simultaneously or unrelated to his profession violates the existing rules (medical training) and secondly, when violates the established rules of attention. The doctor who has ignored the attention and caused the error cannot rely on other equal or similar medical opinions or medical practice in order to avoid liability. Thus, the doctor cannot free himself from his own mistakes (negative score) by making the objection that the same thing happens to other doctors too. As for the criteria used to measure the necessary attention, it is clearly objective, since representing the professional criterion that applies not only to doctors and health care workers, but also to employees in other industries. Careful treatment of the patient reflects the quality in the provision of medical services. When starting from the objective standard of attention that is considered to be constant, according to German law, it is the one that can realistically be expected from conscientious doctor of the same rank. According to French law, the attention can be expected from a good expert placed in the same category and the same rank with the doctor who evaluates his behavior. In common law, this assessment is done on the basis of behavior of reasonably competent doctor whose behavior and respect for due diligence are being estimated (2). It is methodological distinction, although it is considered that the expert error eo ipso embraces the negligence which makes the criterion for assessing the safety of treatment in each individual case. Therefore, representatives of the German legislation always talk about the necessary attention

(19) although it is obvious, if only interpret the law, that cannot be prescribed in detail what is considered as careful, and what is negligent behavior, keeping in mind that the assessment always depends on the specific case.

Medical error as a cause of death

Often the mistakes made by health workers, mainly doctors, are considered to be deliberate and in the case of fatal outcome disturb the patient's family, public and employees in the health institution. If patient's death was caused by a doctor whose guilt is proven and he gets convicted, it creates a dilemma, what is the real point of all that? If the doctor is arrested, it means that he will spent a specified time out of the profession because of one fatal case, but what the other patients might expect and does it really bring greater benefit or harm? Not everyone will be pleased with offered answer. As for the issue of a court judgment at the expense of doctors, it is interesting to determine are they an effective form of struggle against the misconduct of doctors and their "contributions" in making mistakes or just an incentive to carry out other unsuitable medical actions. This problem is present in corruption, but it does not have a significant impact on the outcome of the treatment, although showing the intimate relationship of doctor and patient, the one that gives the bribe. However, there is still no guarantee that the bribed doctor will make a mistake, because sometimes even the most banal treatment can lead to a fatal outcome.

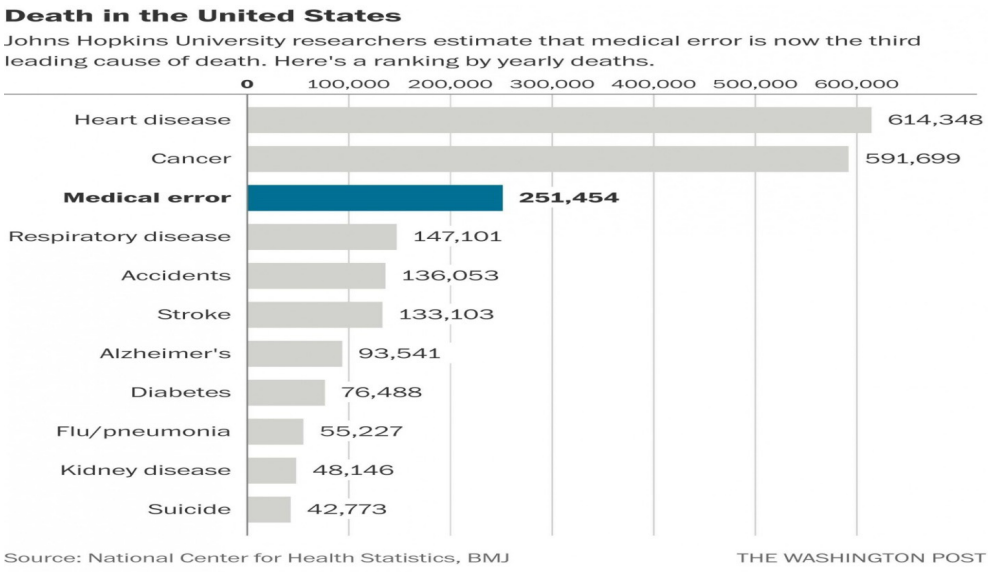
There is a lot of proves that none of the branches of law cannot put obstacles to medicine, although legally interpreted, every surgical intervention represents a bodily injury, or a direct attack on the human body, regardless of the fact that was made in order to improve the patient's health status. The absurdity is that catastrophic injuries might be caused just because of the risk of the simplest medical actions. This means that high-risk is a regular companion of actions and behaviors of conscientious and unscrupulous doctors, that causes the unfortunate events, but also a factor that protects them from liability or may just significantly increases it. Doctor must do even the things that cannot be done, and often decides to take uncertain and risky ventures firstly, because of the moral and legal obligations and, secondly, because of the dignity of his own profession. If he shows necessary attention, he cannot be responsible for the failure of the treatment nor the resulting adverse effects (7). On the other hand, the deterioration of health or death of patients, prior or during the surgery, are not the real reasons the assessment of the intervention to be unlawful and not reliable enough to declare that doctor is guilty. He might be blamed if the patient unexpectedly reacts to the used therapy, if he has prescribed the wrong medicine in the belief that the established diagnosis was correct or if deliberately has continued the surgery, when it was desirable to cancel it.

Criminal liability is provided for perpetrators of serious or gross medical error which entails the judicial process and requires specific criminal sanction. Before that, its classification and assessment of caused damage must be given, but also the conclusion has to be made, whether and in what cases it might occur to conscientious and recognized doctor-specialist. In practice, as the culprit may be declared only the doctor, who according to his own abilities and individual medical knowledge, has gained the capacity to behave according to expectations, respectively as the average capable and conscientious member of a certain specialty. Nevertheless, the negligent provision of medical care is completely legitimate reason to initiate criminal proceedings against the irresponsible doctor. As for crime, it exists only in the case that the doctor has applied (prima facie) obviously inappropriate means or inappropriate method of treatment (accepted the culpability of severe, gross errors) to the patient.

Lawyer's interpretation is contained in the fact that the formation of medical error generates tangible or intangible damage to the patient and therefore must be determined the cause of its creation in order to be used as evidence by which the doctor will (not) be held guilty. The damage is assumed as deteriorated state of health of the patient from which it is necessary to abstract all factors, except direct medical error. The assessment and final judgment on the existence of a causal link between medical error and resulting damage to the patient's health, will be given by the judge based on the opinion of medical experts, and understanding of legal science and practice (13). When it comes to causal link between medical error and the resulting tangible / intangible damage, the prosecutor must prove that the doctor has made a mistake, and that according to the findings of medical science and medical practice it led to the caused damages. In order to prosecute the doctor and to incur criminal responsibility for his mistake, the surety of the causal link between the damage and the consequences must be established with greater certainty. Accordingly, Nenadović starting from the patient's death, as the worst solution, that occurred as a result of medical error, emphasizes that the causal link between "... medical error and patient's death is considered as established only if the Court, based on the opinion of medical experts came to the conclusion that the properly conduct of doctor would save or prolong the patient's life with probability bordering on certainty "(14). It means a degree of certainty which excludes any reasonable doubt (in dubio pro reo).

Health worker's errors are common practice, since they occur as a result of negligence and become very dangerous for the life of treated patients, which is something that might be new for the uninitiated persons. Whether intentional or unintentional, medical errors have found their place on the list of vicious killers. They take more lives than members of organized, brutal and growing crime. A recent study carried out on the territory of the United States showed that they are the third cause of death, just behind cardiovascular diseases and cancer.

Figure 1. Deaths in the United States as a result of medical error



Despite the opinion that it is impossible the health worker to act contrary to medical rules, that there is no intentional medical error and that the principle of humanity represents a paradigm of behavior par excellence, the data from the aforementioned studies and comments of respondents have imposed the opposite conclusion. Statements taken by the nurses regarding the cases where a patient was given stronger drugs than previously prescribed by therapy, induce a nightmare for patients or their relatives, who are aware that such assistance will not be helpful. Sounds schocking the fact that surgeons even during routine surgical procedures on patients for some reason have removed the wrong bodies or parts of it. This research has shown that medical errors (does not indicate to be intentional or unintentional) occur in hospitals and other health facilities in the United States and have a common dimension, to cause the death of about 250 thousand people every year, which is much more than from respiratory diseases, different accidents, strokes or Alzheimer's disease. Researchers from Johns Hopkins University School of Medicine stated in an interview with the Washington Post, that they have covered all categories of doctors during the studies and data showed that performed surgeries on patients accounted for 80% of deaths. It comes down to the fact that more people died from the effects of used medical services than from the disease for which the latter was provided. This example is certainly not unique, but it is devastating because applies to the most advanced medical system in the world which for health care annually gives from gross domestic product (GDP) about 18 thousand US $ per capita (27).

Conclusion

The term medical error is used to indicate a medical omission or failure, which is relevant from the legal aspect, because only in that way can be qualified to initiate a certain form of responsibility (disciplinary, criminal). The question, whether the doctor has make a mistake during medical treatment of the patient, or has failed to show due care, is more legal issue than medical. Its formation, assessment of damage, prosecution and punishment of the culprit, is primarily a question for lawyers, since the authoritative decision can be made only by the competent court. As for the medical categorizing of doctor's behavior and the final outcome of his endeavor, these are only the starting points in such cases. In judicial or litigation processes, judges often alone or only with the help of medical experts can properly assess the severity of the case, but they are not bound to agree with the statement of the doctor who made a mistake and to take his (medical) opus terms. This is the correct position because doctor's opus in some matters might be wider or narrower than the legal, which is during the application of law taken as the basis for the proceedings. Although the medical error is subject of the legal profession, widespread opinion suggests that it is not necessary to provide forensic medical expertise for every type of controversial actions for which the perpetrators are suspected. So, not all medical errors represent the violations of the legal rules and medical profession, respectively the medical profession in the narrow sense.

Lawyers claim that medical error could be a violation of the constitutionally and legally guaranteed rights of patients and occurs only if there is a violation of due medical treatment. Given that the conclusion cannot contain the reliable ascertainment that a deliberate medical error really exists (although is been a part of daily life), it is necessary to promote the merits of experts who decisively influenced the determination of the doctor's fate and the amount of caused damage to the patient. Expertise is defined as the assistance of an expert (an expert in a particular area) in proceedings before the court while determining the facts in regard to medical error. The term medical error is present in the medical and legal theory and practice, although neither of them currently does not offer the precise definition of it. This is quite understandable, because medical error cannot be precisely defined, but does not do any harm if an author communicates its general or vague formulation in order to provide only some declarative attributes. Except those left by medical error, there are other consequences that are highly correlated with direct / indirect provision of health services and which might also cause fatal damage to their users. Legal theory deals with the classification and systematization of medical errors and their consequences in each country where the health protection of citizens is regulated by legal norms. Given that the legal theory does not define precisely the intentional medical error, it is difficult to expect that in this regard a significant step will be made by medical law. There is even a fear that the latter might bring additional confusion and contribute to flare-up the conflicts between the medical and legal profe-

ssions. Its mission is the evaluation and sanction of the acts taken by health workers, which among them, but also among patients, cause a new wave of discontent.

The effort to find a source in the available literature specifically referred to the deliberate medical error (except the sale of babies in Republic of China) ended without success, therefore, as such, it might be rather negated than affirmed, which is very good. In the end, the doctor will not (and should not under any circumstances) blindly follow the law, if he can effectively help a man to fulfill his one true desire, reflected in possession and preservation of quality of health. This means that any law must not affect the doctor to take the opposite view from that paradigm of its humane mission. After all, there are no known laws that guarantee the happiness to people, but the opposite might be said for medical advances. The mutual happiness of patient and doctor cannot be compared to anything, when a health problem is solved in a satisfactory manner. Then, the patient will not be thankful to any law for high-quality provided health services, but to doctor, which means (not a too strong word) that the latter is the authority who consciously decides on his own actions according to only one law which is the oldest and always wins, and that is the love of work, profession, patient ... it excludes the law, judge and prosecutor, it is a reward to his conscience, because while doing his work he does not make a distinction on those who judge and those who are being tried and judged.

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