



REGULATORY STANDARDS IN MEDICINE / РЕГУЛАТОРНИ СТАНДАРДИ У МЕДИЦИЈИ

Criminal responsibility for medical malpractice in the jurisdictional practice of Serbia

Vladimir Miletić

First Basic Court of Belgrade, Belgrade, Serbia

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 the public. However, deterioration of an individual's health who has been medically assisted is possible in the process of providing medical, or any other assistance in the field of medicine.

If it is a gross medical misconduct or any other type of medical misconduct, or gross violation of a profession's rules, because of which there is a possibility of deterioration of health of one or more individuals, then the crime of medical negligence, for which there are strict statutory offences, applies. This article addresses 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, alongside many articles in the printed and electronic media which provoke great public attention and rough comments.

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

INTRODUCTION

People's healthcare, along with life protection and bodily integrity, represents a social function which every country has performed from the early ages to the present. This is proven 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 the characteristics and the type of a state organization. Since the bourgeois revolution in France, 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 (United Nations) and regional (Council of Europe) 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 is similar in Serbia, where a Criminal Code has been in effect since January 1, 2006 in which in Chapter 23, titled Offences Against Human Health, more felonies against people's welfare are anticipated [1]. Namely, these are crimes against not only the people's wellbeing, but also against the right to protect one's health, guaranteed in Article 68 of the Constitution of the Republic of Serbia.

Among the crimes against human welfare there is a crime which by its significance, na-

ture, characteristics, perpetrator, the type and scope of caused consequences is singled out from Article 251 of the Criminal Code, titled Medical Malpractice. In the protection of human health, medical assistance or care for the ill has special significance. People who are authorized to provide this kind of assistance – medical doctors or other health workers – apart from the appropriate professional education should act responsibly and in accordance with the regulations of the medical profession, science, and skill. Hence, there is the need for stronger criminal relief for the ill. Moreover, in legal theory there are positions that this is the case of professional crime, or the crime of professional negligence.

The crime from Article 251 consists of irresponsible medical assistance provided by a doctor, or irresponsible medical assistance, care, or other medical service provided by any other healthcare 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 between three months and three years. Unpremeditated act, on the other hand, results in a fine or in imprisonment of up to one year.

In order to recognize the position of the crime of medical malpractice in relation to 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 the everyday police, jurisdiction, and prosecution practice in various forms and aspects. In this

Received • Примљено:

January 11, 2019

Accepted • Прихваћено:

February 22, 2019

Online first: April 18, 2019

Correspondence to:

Vladimir MILETIĆ
First Basic Court of Belgrade
Savska 17
11000 Belgrade
Serbia
vlad.miletic@gmail.com

analysis, we used available data, previously published in reports of the Statistical Office of the Republic of Serbia in the 2006–2015 period, which is the exact period of applying current positive criminal legislations [2–11].

THE PATTERN AND EXTENT OF OFFENCES AGAINST HUMAN HEALTH

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

From the collected data on crime in general and the crimes against health, we can conclude the following:

1) The highest number of crimes in Serbia was 108,750, in the lastly analyzed year of 2015, while the lowest number of crimes was 74,279 in 2010; since then, the number of crimes has been rising steadily;

2) In contrast, the highest number of crimes against health was 4,895 in 2008, while the lowest number was only 3,161, in 2014;

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), this cannot be concluded from the collected data. Namely, health crimes are a part of crimes in general, with 5.46% in 2010 (the period with the greatest share), 4.81% in 2008, with the smallest share of these crimes in total number of crimes, and 3.43% in 2015, or 3.41% in 2014 (Table 2).

After the opening statements about the crime rate in general and the rate of crime against health in Serbia in the 2006–2015 period, we shall analyze the pattern and the extent of medical malpractice manifestations from Article 251 of the Criminal Code. From the mentioned analysis on the crime rate, we can conclude the following: 1) the highest number of medical malpractice offences, committed in 2015, was 101 (2.71%); 87 (2.75%) were committed in 2014 (these were the years when the highest percentage share in offences against health was noted); 2) observed number of crimes committed in 2011 was only 39, the percentage was 1.02% in 2009, and 1.08% in 2008.

CRIMINAL PROSECUTION POLICY

The statements about the pattern, extent, structure, and tendencies manifested by offences against human health in Serbia in general or medical malpractice need to be followed by statements about the criminal prosecution policy for perpetrators of such crimes. Namely, the total number of reported crimes, which has been shown previously, is not the real number of 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.

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

Year	Total number of crimes	Crimes against health	%
2006	105,701	4,260	4.03
2007	98,702	4,440	4.5
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 (Article 251, Paragraph 3) in offences against human health in Serbia in the 2006–2015 period

Year	Crimes against health	Crimes from Article 251 Paragraph 3	%
2006	4,260	68	1.6
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

However, the data about the ratio between the reported and accused individuals for crimes in general, or for specific crimes, is quite interesting. Accordingly, from the total number of reported medical malpractice crimes, the number of the accused is significantly lower, which is legally supported (rejecting the appeal, adjournment or discontinuance of proceedings); hence, courts of competent jurisdiction accept significantly lower number of individuals in comparison to the number of the reported ones, or their crimes (Table 3).

In order for a statement on medical malpractice to be comprehensive and complete in the modern criminal law, it is necessary to take a closer look at the place, the 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 the legal theory and court practice.

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

1) There was no interruption of 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, in 9.41% of the cases; in 2006 investigation was terminated in 8.82% of the cases (thus, almost every 10th report was dismissed by terminating the investigation);

3) When it comes to this particular crime, there is a great number of rejected reports. The highest number of

Table 3. The way of termination of the previous proceeding for a medical malpractice crime in Serbia in the 2006–2015 period

Year	Number of reports	Rejected 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

rejected reports was in 2015, with 89 out of 101 reports declined (88.12%). Usually, the number of rejected reports was more than one half of the submitted reports, except in 2012, when “only” 24.47% of the reports was rejected, and in 2006, when 45.59% of the reports was rejected.

THE CRIMINAL POLICY OF COURTS

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

Crimes against health are the type of crime for which all modern legislations (including the legislation of Serbia) impose sentences of imprisonment for different periods of time. However, although imprisonment is the punishment for the crime of medical malpractice, 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).

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

Year	Reported	Accused	%	Sentenced	%
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

Upon analyzing the data on the ratio between reported, accused, and sentenced individuals for the crime of medical malpractice 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 percentage of the accused out of the total number of the reported individuals was the lowest in 2015 (19.85%), and in 2006 (19.12%);

3) The greatest percentage of accused individuals was in 2013 and it amounted to 56.58%;

4) When it comes to the number of the accused in comparison to the number of the reported, the situation is not very good. This is supported by the fact that the greatest percentage of the accused (every sixth of the reported), was 15.38% in 2011, and 15.22% in 2012 and 2007;

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

So that we could better understand the difference between the accused and the reported individuals for the analysis of the crime of medical malpractice, we shall analyze the ways of solving the reported crimes. From the collected data we can conclude the following:

1) The percentage of terminated procedure cases varies 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 percentage of individuals who are legally exculpated varies in accordance with the year of the analysis; the minimum was 2.13% in 2010, while the percentage amounted to 19.56% in 2009, and to 18.87% in 2008;

3) It is similar with individuals for whom the report was rejected; the percentage varies from the minimum of 0.99% in 2015 or 2.56% in 2011 to the maximum of 13.16% in 2013.

It is necessary to analyze the severity or lenience of the courts’ punishment policies for this crime. This can be done by observing the type of imprisonment sentences (considering the legally imposed punishment for the crime), as well as other types of punishment (Table 6).

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

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

Year	Proclaimed guilty	%	Terminated procedure	%	Exculpated	%	Accusation dismissed	%
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	9.9	1	0.99

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

Year	Sentenced	Imprisonment of 2–3 years	Imprisonment of 1–2 years	Imprisonment of 6 months to 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 malpractice in Serbia in the 2006–2015 period

Year	Sentenced individuals	Fine payment	Probation	Warning by court	Corrective measures	Exculpated	Additional fine
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

Namely, the most usual punishment was imprisonment of 3–6 months, twice in 2009 and 2014 and once in 2007, 2011, and 2012. Imprisonment of six months to one year was imposed twice in 2007 and once in 2012 and 2013. The most severe punishment of imprisonment of 2–3 years was imposed only once, in 2012 and 2015. It is interesting that the imprisonment of 1–2 years, as well as imprisonment of 2–3 months, were not imposed at all.

Even though imprisonment verdicts in the Criminal Code of Serbia against perpetrators of offences against human health are imposed in the criminal policy of courts (or the policy of imposing criminal sanctions), there are other kinds of criminal sanctions. Therefore, the courts punished the perpetrators of medical malpractice by fine and by probation.

It is interesting to mention the fact that in jurisdictional statistics there is no data on imposed security measures which could serve as punishment for perpetrators of this

crime, such as: 1) prohibition of performing their jobs, activities, duties, and 2) deprivation of objects, nor is there any data on imposed measures of impounding the property gained by performing the crime (Table 7).

Although the punishment for medical malpractice is imprisonment, regulated in the Criminal Code 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 issued by the court, corrective measures (which is expected since underage individuals cannot be considered to be the perpetrators a crime), an additional fine, as well as exculpation supported by law, were not imposed at all,

2) Payment of a fine as the main punishment was imposed rarely – only once in 2006 and 2015, and as many

as 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 in every year, but imposed differently, at least once in 2006 and 2015, five times in 2007 and 2011, and as many as six times in 2013.

CONCLUSION

Among the crimes against human welfare (so-called offences against human 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 Article 251 of the Criminal Code of Serbia, and it is medical malpractice. In the protection of human health, medical assistance or care for the ill has special significance and role. 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 the medical profession, science, and skill. Hence, there is the 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 Article 251 of the Criminal Code of the Republic of Serbia, under the name of medical malpractice, not only consists of violation of the rules for treating an ill individual by a doctor of medicine or dentistry, but also of illegal behavior of medical practitioners while performing any medical assistance. This crime consists of irresponsible medical assistance or care provided by a doctor or some other health practitioner which results in health deterioration of an individual.

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

1) In comparison to the total number of crimes performed 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 lowest number of these crimes was committed in 2014 – only 3,161. Health crimes are a part of crime in general, with a small share of only 5.46% in 2010 (when the maximum share was noted), or 4.81% in 2008, to the smallest share of these crimes in crime in general, in 2015, with only 3.41% and 3.43% in 2014 and 2015, respectively.

2) Medical malpractice was mostly present in 2014 and 2015, with 87 101 crimes, respectively; these were the years when the biggest share of these crimes was noted: in 2014 and 2015 the share was 2.75% and 2.71%, respectively. The crime was least present in 2011, with only 39 crimes, while the percentage was 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 the investigation was never interrupted, while a slightly higher number of

terminations 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 (approximately every 10th report of the crime was ended by termination). However, it is obvious that there were many rejected reports. Moreover, reports for this crime were rejected mostly in 2015 – 88.12% (89 out of 101 received reports were rejected). The number of rejected reports was more than one half of the received reports, except in 2012, when “only” 34.48% of the reports (approximately one third) were rejected, or in 2006, when 45.59% of the reports were rejected.

4) Upon analyzing the ways of dealing with the reports, it can be seen that the number of investigation terminations 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 of 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 rejected. 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 malpractice, we can see that the least of them were accused in 2015 – only 14.85% (roughly every sixth reported perpetrator), or in 2006 – 19.12% out of the total percentage of the reported individuals, while the highest percentage 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 highest percentage of sentenced individuals (approximately every sixth out of 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 and 2015, with 2.94% and 2.97%, respectively.

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

7) Other punishments were imposed as well. Warnings issued by courts, corrective measures, additional fines, and legally supported exculpation were never imposed; a fine as the main punishment was imposed rarely – only once in 2006 and 2015, and up to three times in 2012 – while the other analyzed years did not show the occurrence of this punishment. Finally, probation was the most frequent type of punishment (apart from prison); it occurred every year – at least once in 2006 and 2015, to up to five times in 2007 and 2011, and as many as six times in 2013.

Conflict of interest: None declared.

REFERENCES

1. Official Gazette of the Republic of Serbia No. 85(2005), 88 (2005), 107 (2005), 72 (2009), 111 (2009), 121 (2012), 104 (2013), 108 (2014) and 94 (2016)
2. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 490 (2009)
3. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 502 (2009)
4. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 514 (2010)
5. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 529 (2010)
6. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 546, (2011)
7. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 558, (2012)
8. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 576, (2013)
9. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 588, (2014)
10. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 603 (2015)
11. Statistical Office of the Republic of Serbia, Monthly Statistical Bulletin, Belgrade, No. 617 (2016)

Кривична одговорност за медицинску грешку у судској пракси Србије

Владимир Милетић

Први основни суд у Београду, Београд, Србија

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, непрописном понашању било које друге врсте 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