Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 18(67) No. 1 – 2025
https://doi.org/10.31926/but.ssl.2025.18.67.1.23

MEDICAL MALPRACTICE: BETWEEN CIVIL AND CRIMINAL LIABILITY

S. BOSCHETTI[1] E. CONSTANTIN[2]

Abstract: *Our study focuses on national and international regulations regarding medical malpractice. The analysis of the concept of malpractice reveals a necessity of unifying Romania's healthcare legislation, as it contains multiple terminological contradictions. The current legal framework insufficiently regulates the rights and obligations that define the legal relationship between the medic and the patient. Medical malpractice can result in different types of liability. For civil liability to be engaged, an illicit act, a material or moral damage, a causal link between the two, and the guilt of the medical service provider must be identified. Criminal liability arises when the illicit act causing the damage is a crime, and it can coexist alongside civil liability.*

Keywords: *medical malpractice, civil liability, criminal liability, criminal negligence.*

1. Introduction

When discussing medicine, we discuss humanity, and at the core of human nature lies the predisposition to error. Thus, in a field whose activity is predominantly performed by human beings, errors are inevitable. The concept of error hides numerous facets, and studying them brings us to the institution of malpractice, defined as a professional error with legal implications which we aim to explore.

At both the national and international levels, the relationship between the medic and the patient is one defined by necessity. Nonetheless, an increase in malpractice cases has been observed, weakening trust in medical personnel, institutions, and even in the field of medicine itself. Malpractice cases also contribute to the deterioration of the citizens' perception of the state they live in, in terms of the state's ability to protect them. There is a multitude of factors which determine the increasing trend of medical errors, differing from state to state. These include the rapid technological progress, the inability of medics to adapt at the same pace, the growing complexity of medical acts, the pressure of the professional standard, and the national legislation. In our country, the causes of

[1] Transilvania University of Brașov, Faculty of Law, sasha.boschetti@student.unitbv.ro.
[2] Transilvania University of Brașov, Faculty of Law, eduard.constantin@unitbv.ro.

defective medical practices may involve the absence of a Medical Code and the inconsistencies or contradictions identified in the existing legislation.

In recent years, society has been characterized by a declining level of information among both medics and patients, regarding their rights and obligations. Misconduct rooted in the lack of information or misinformation is a critical issue requiring thorough analysis. From the perspective of the patient, if they aren't well informed, they cannot give valid consent, and when it comes to the medic, ignorance is inexcusable, as it can lead to irreversible consequences. Therefore, active information, caution, and proper medical training could reduce the likelihood of causing injury to the patients.

2. Medical Law as a Legal Branch. National and International Regulations. The Dimensions of Medical Malpractice

Medical law, at a domestic level, comprises a set of special laws, such as: Law no. 95/2006 on the healthcare reform, Law no. 46/2003 on patient rights, Law no. 487/2002 on mental health and the protection of individuals with psychiatric disorders, Law no. 266/2008 on the pharmaceutical field, and Government Ordinance no. 124/1998 on the organization and functioning of medical practices.

Law no. 95/2006 is a complex normative act, with its norms covering a variety of domains from the field of healthcare, this being the reason why the majority of authors argue that medical law is an autonomous legal branch derived from civil law. However, others strongly oppose this idea, given the fact that medical law does not exist in a codified form.

In our view, while it cannot be denied that the legal provisions in this field are comprehensive and structured, some essential characteristics of an autonomous legal branch are still missing. Notably, mention can be made of the lack of terminological consistency, which can create contradictions, and of the failure to distinguish between general and special norms, leading to an unsystematic legal framework (Kuglay, 2021, pp. 2-4). Nevertheless, given the significant number of regulations covering the healthcare sector and the fact that these norms are based on common principles, medical law can be considered a developing legal branch that has not yet fully achieved autonomy. An appropriate solution would be the development of a Medical Code, compiling all national healthcare regulations, systemized, with a revised and updated terminology.

Of great significance are also international regulations, which include the International Covenant on Economic, Social, and Cultural Rights (Article 12) and the United Nations Convention on the Rights of the Child. Within the European Union framework, various rulings and regulations, relevant in the healthcare field, address the general foundation of the performance of medical acts and elements of the medical legal relationship (Vida Simiti, 2013, p. 23).

Article 653 paragraph (1) letter b) of Law no. 95/2006 defines medical malpractice as 'the professional error committed in the exercise of medical or pharmaceutical acts, that causes harm to the patient, involving the civil liability of the medical personnel and of the providers of medical, sanitary, and pharmaceutical products and services.' It is of particular interest that, in this context, the concept of error does not align with the

general legal understanding of the error. For instance, in civil law, the error is a defect in consent that consists of a false representation of reality, without intent, its consequence being the relative nullity of the legal act in question, and in criminal law, an error is a cause of non-imputability that arises from the unawareness of a state, situation, or circumstance, on which depends the criminal nature of the act. In the healthcare sector, the error is regulated as a mere professional mistake.

As it can be observed, there is a terminological incompatibility regarding the error, which creates certain issues in judicial practice. In the general theory of professional errors, a distinction is made between an act committed by mistake and one committed by error, in the medical field (Pena, 2023, p. 119). An error is influenced by circumstances, while a mistake results from the violation of norms that a medic had the ability and, moreover, the duty to follow. If an error is not related to the medic's skills and good faith, a mistake arises precisely from incompetence and is imputable to the medic, making them responsible for the damages caused to the patient.

Considering the provisions of Law no. 95/2006 and the legal definition of the error, we can conclude that medical malpractice is a wrongful conduct which consists of committing a harmful act within a medical relationship, primarily in the performance of a medical act.

3. The Civil Liability of the Medic

3.1. The nature of the medic's civil liability

The principle of civil liability can be summarized as follows: the author of the damage is obliged to repair it. Medical civil liability is regulated under Title 15 of Law no. 95/2006, which governs not only the civil liability of the medic, but also that of the medical institution, as well as the civil liability of the manufacturers and suppliers of medical materials and utilities (Vida Simiti, 2013, pp. 170-171).

In Roman law, the distinction between contractual and tort liability emerges, essentially, from the legal technique itself (Winiger, 1998, p. 162). Classical French authors supported the necessity of separation between contractual and tort liability (Dalcq, 1955, p. 2), an idea which was utilized in Romanian law as well.

Currently, the principle of compensation of damages is found in both forms of liability existing in civil law: tort liability and contractual liability. Tort liability is established on an obligation-based legal relationship, which stems from commiting an unlawful act, causing a damage that the author must repair, while contractual liability arises from a breach of a contractual obligation.

In legal doctrine, there is a variety of opinions related to the classification of the medic's civil liability. Some authors (Lupan, 1997, pp. 7-15) argue that the medic's civil liability can only be tortious, a liability for their own actions, justifying their assertion by citing Articles 1349 and 1357 from the Civil Code. To elaborate on this idea, they claim that the medic acts independently, without being a subordinate of the medical institution. Other authors (Beligrădeanu, 1990, pp. 5-11) believe that medical civil

liability is built on contractual grounds in both the public or private healthcare system, since the relationship between the medic and the patient is based on a contract regarding treatment and interventions. A third category of authors (Boilă, 2009, p. 326) have come to the conclusion that this categorization concerning the relationship between the medic and the patient (in a contractual or non-conctractual relationship) cannot be strictly applied, on account of being believed to have a mixed nature, given both the nature of the medical act and the nature of the liability. From this point of view, the medic's liability is a professional one, meaning it is a special liability, inherent to their profession.

In this moment, the prevalent view in the legal doctrine is that the medic's tort liability is the rule while their contractual liability is the exception, having a derogatory character. As we see it, this stance on the subject is the most correct, as it aligns best with judicial practice (High Court of Cassation and Justice, 2023) and legislation. In the field of public healthcare, we cannot talk about an existing contract between the medic and the patient, since medical services are meant to satisfy a general interest, with the state authorities being responsible for protecting citizens' health through legal obligations rather than contracts; in private medical services, the relationship is contractual, quintessentially.

3.2. Conditions of Civil Liability in Medical Malpractice Cases

3.2.1. The illicit act

An illicit act is defined as an act that violates the legal norms of objective law, causing damage to the subjective rights of a person. More precisely, within the relationship between the medic and the patient, the illicit act takes place when the medical personnel fail to fulfil their obligations corresponding to the patient's rights. In this regard, it is important to mention one of the fundamental obligations medics have to execute, which consists of providing information, meaning they must honestly and fully disclose all necessary information, so that the patient understands their medical situation completely and unequivocally. This is a crucial condition on which depends the patient's valid consent (Bârsan, 2024, pp. 8-9), indispensable when concluding a lawful medical act. Additionally, medics have the duty to address any of the uncertainties the patient may have, providing explanations in an accesible manner.

In the matter of the legal relationship between the medic and the patient, we highlight the idea that the medics' obligations are generally obligations of means, given that any medical act imposes a certain degree of risk (Bârsan, 2024, p. 7), and only by exception they are obligations of result. Thus, the medic is not obliged to materialize a certain result, but they are required to use all means and efforts to achieve the desired outcome, while abiding by the law. There are certain instances in which, despite a correct conduct and the usage of all possible means, the medic cannot obtain the desired outcome, as it was outside of their control. However, there are exceptions, such as in the field of cosmetic surgery, where medics assume obligations of result.

3.2.2. The damage

The existence of damage is a prerequisite for medical malpractice. If there is no damage, there is no malpractice; article 642 of Law no. 95/2006 legally reinforces this affirmation. The damage represents a harmful consequence, pecuniary or non-pecuniary, produced as an effect of breaching the subjective rights of the person. Yet legal doctrine outlines a more extensive clasification of damages than the well known distinction between the ones that are patrimonial and the ones that are non-patrimonial (Vida Simiti, 2013, p. 228). In this sense, damage can be: patrimonial—financially quantifiable, moral— affecting the the patient's social or emotional personality, or bodily—impacting physical integrity and health, encompassing both moral and pecuniary components.

According to Article 1385 of the Civil Code, full compensation is required in order to repair the damage, covering not only what was lost by the injured party, but also potential gains that were prevented, and expenses incurred to prevent, avoid, or limit the damage.

Future damages can also be compensated, under the condition that they are certain (e.g., a partial disability that will worsen over time) (Năsui, 2024, p. 179).

3.2.3. The causal link

To be able to raise the medic's civil liability, there needs to be a causal link between the illicit act and the damage suffered by the victim. The causal link is determined by the court, based on the medical assessment, which constitutes a means of evidence.

3.2.4. The guilt

Medical malpractice reunites both the objective condition of the unlawful act and the subjective condition of the perpetrator's guilt (Zamșa, 2024, p. 223).

The guilt is the foundation of civil liability for the person in general and for the medic specifically. It should not be confused with fault, which is only one of its forms. Guilt reflects the way in which the author of an illicit act perceives, on a psychological level, their own actions and repercussions. However, when we state that someone is ,,guilty'' of damage, we do not only refer to the psychological component, but also to the volitional one, which determines the choice of a certain wrongful conduct from a variety of other possible choices. In the matter of civil liability, the medic will be liable even for the mildest form of fault.

Article 16 of the Civil Code classifies guilt into intent and fault. They each subdivide into direct intent and indirect intent, respectively into negligence with foresight (recklessness) and negligence.

Intention can be either direct, when the medic not only foresees, but also desires the harmful outcome, or indirect, when the medic foresees the harmful outcome and, even though they do not necessarily desire it, they accept the possibility of it happening.

Negligence with foresight or recklessness is also called imprudence and it is present when the medic foresees the possible consequences of his act, but doesn't accept them, and negligence without foresight can be attributed to the medic when he does not foresee the result of his act, even though he could have and should have anticipated it. Malpractice (being a ,,medical error'') can only be committed through recklessness or negligence without foresight. For example, a case of recklessness occurs when a medic refuses to admit an emergency patient, despite knowing their critical condition and major risk of death, and justifies the decision by saying there was insufficient personnel, which leads to the patient's death during the transfer to another hospital (Bârsan & Pinţă, 2023, pp. 101-102). Article 643 (1) of Law no. 95⁄2006 states that 'all persons involved in the medical act are liable in proportion to their own degree of fault'.

4. The Criminal Liability of the Medic

4.1. Regulation of the medic's criminal liability. Correlations between criminal and civil liability

The criminal liability of a medic in cases of malpractice is engaged only when they are guilty of committing an offense in their special capacity as a medical professional, that is, in the exercise of their profession. It is important to note that criminal liability is applied strictly under the ultima ratio principle (Bârsan & Pinţă, 2023, p. 98), meaning that criminal law is applied only when it represents the sole means of achieving the intended legal purpose (Constitutional Court of Romania, 2022).

In most cases, in addition to a medic's criminal liability, their civil liability is also engaged, aiming to compensate for the material or moral damage suffered by the patient (Cluj-Napoca Court, 2014). Regardless of whether the illicit act constitutes a crime or not, civil liability arises as long as a causal link between the wrongful act and the damage can be proven.

It is also important to emphasize the idea that the criminal liability of medics and other healthcare professionals is individual, which conveys that they are personally responsible for their own actions, whether by commission or omission, as criminalized by law (Kuglay, 2021, p. 53).

The degree of medical fault is determined by the professional standard, which showcases the ideal conduct a medic must follow while performing medical acts. When analyzing a case of medical malpractice, judicial authorities must consider both the conduct prescribed by criminal law and the specific rules of medical law, which are correlated with civil law provisions.

Criminal liability for malpractice requires a rigorous analysis of the alleged medical act, considering its objective component (the incriminated actions, the immediate consequences, the causal link) and its subjective one (the guilt) (Kuglay, 2021, p. 66).

4.2. Crimes associated with medical malpractice

In cases of malpractice, a medic may be held criminally liable for offenses such as: negligent bodily harm, negligent homicide, illegal abortion, fetal injury, dereliction of duty and intellectual forgery.

Negligent bodily harm is regulated by Article 196 of the Criminal Code and can be defined, in medical law, as a deviation from the professional standard, that results in harm to the patient's physical integrity. For instance, negligent bodily harm may occur due to a diagnostic error. In its standard form, the offense is punishable by imprisonment from 6 months to 2 years or a fine, albeit when committed consequently to a failure of complying with legal provisions or professional safety measures in the exercise of a profession, job or certain activity, as it happens in the case of medics, the penalty is imprisonment from 6 months to 3 years or a fine, making the sanctions more severe.

Negligent homicide is criminalised under Article 192 of the Criminal Code, with penalties ranging from 2 to 7 years of imprisonment for professionals. This offense takes place when a medic's wrongful conduct leads to the death of a patient. Negligent homicide should not be confused with first or second degree murder. In cases of negligent homicide, the medic acts with imprudence or negligence, meaning that they fail to foresee what they should have anticipated, or they do actually foresee the harmful outcome, but refuse to accept it. In contrast, murder involves a mens rea characterized by an intentional or malicious conduct, meaning the perpetrator either pursues or at least accepts the possibility of death occurring (direct or indirect intent).

Illegal abortion is defined as a crime under Article 201 of the Criminal Code, within Chapter 4, which addresses the offenses against the fetus. In certain conditions established by law, abortion is legal, and only in specific circumstances it becomes a criminal offense that leads to a medic's criminal liability being engaged. Such circumstances include: performing an abortion outside authorized medical institutions or clinics, performing the procedure without a specialization in obstetrics-gynaecology or the right to freely practice medicine in this specific field, and when performing an abortion after 14 weeks of pregnancy. However, a post-14-week abortion that is performed for therapeutic reasons, in the interest of the mother or fetus, is legal.

The penalties for illegal abortion performed by a medic include 6 months to 3 years of imprisonment if the pregnancy exceeded 14 weeks, 2 to 7 years of imprisonment in the instances where the procedure was conducted without the patient's consent, and 3 to 10 years of imprisonment when the pregnant woman suffers bodily harm; if the act results in the death of the female patient, the medic faces 6 to 12 years of imprisonment. Moreover, apart from imprisonment, the medic is prohibited from practicing medicine.

The injury of the fetus is criminalized under Article 202 of the Criminal Code. The law establishes a penalty of 3 to 7 years of imprisonment if the medic causes injury to a fetus during childbirth, preventing extrauterine life. If this injury leads to the bodily harm of the newborn, the medic is sentenced to 1 to 5 years of imprisonment, and if the newborn dies, the punishment increases to 2 to 7 years of imprisonment. If the medic injures the fetus during pregnancy, and this injury later causes bodily harm to the child, the penalty ranges from 3 months to 2 years of imprisonment, increasing to 6 months to

3 years if the child dies. If the offense is committed through negligence, the penalties are reduced by half. No crime is commited if the medic or the person authorized to assist the childbirth acts within their professional responsibilities, in the interest of the mother or fetus, and it is established that the outcome was a result of the inherent risk of performing the medical act.

Dereliction of duty is regulated by Article 298 of the Criminal Code and involves a breach of professional obligations due to negligence, causing damage or violating the rights or legitimate interests of a person. Medics are guilty of dereliction of duty when: they perform a medical act with lack of diligence, violate professional standards, cause bodily harm or even negligent homicide through their actions. For medical professionals, as for other professionals, dereliction of duty is punishable by 3 months to 3 years of imprisonment, or a criminal fine.

Intellectual forgery is a crime that, in medical practice, involves the use of an official document, for example a medical observation sheet or medical certificate, made by a medic in the exercise of their professional duties, knowingly containing false circusmtances or facts, or by omitting circumstances or information intentionally (Butoi, Iavorschi & Iavorschi, 2012, p. 173). This offense is regulated in Article 321 of the Criminal Code and it is punishable by 1 to 5 years of imprisonment.

If a medic commits an offense associated with medical malpractice, the court may also prohibit them from practicing medicine for 1 to 5 years, in accordance with Article 66 of the Criminal Code.

5. Conclusions

In the case of medical malpractice, both criminal liability and civil liability may be engaged simultaneously, even during a criminal trial, with the civil action potentially being pursued at the same time as the criminal one. The harm caused by negligent medical acts, resulting from ignorance or lack of diligence by medics or other medical professionals, can only be appropriately assessed by a criminal court which will impose both civil and criminal penalties in order to ensure the reintegration of the perpetrator into society and their awareness of their fault.

The professional mistake is a form of malpractice, and medics should be supported by a clear legislation in their practice. Medical law is an evolving legal field, and inconsistencies, contradictions, as well as some outdated provisions should prompt the legislator to improve regulations in this matter, aligning them with both international legal trends and domestic social realities, while working towards the ultimate goal of codifying special norms in the field of healthcare.

References

Badea Butoi, T., Iavorschi, M. & Iavorschi, C. (2012). *Răspunderea juridică în practica medicală* [Legal liability in medical practice]. București: RCR Editorial.

Bârsan, M. M. & Pință, I. B. (2023). Etica profesională a medicului. Incidența dreptului penal în malpraxisul medical [Professional ethics of the medic. The implications of criminal law in medical malpractice]. *Revista Etică și Deontologie* nr. 3.

Bârsan, M. M. (2024). Medical malpractice: the Patient's Right to Be Informed. *The Journal of Law and Public Administration*, no. 19, vol. 10.

Beligrădeanu, Ș. (1990). Răspunderea civilă a medicilor și a unităților sanitare [The civil liability of medics and medical units]. *Revista Dreptul* nr. 3.

Boilă, L. R. (2009). *Răspunderea civilă delictuală subiectivă* [Subjective tort liability]. București: C.H. Beck.

Cluj-Napoca Court, Penal Section. (2014). Criminal Sentence No. 1491. In Năsui, G. A. (2024). *Malpraxisul Medical. Particularitățile răspunderii civile medicale, jurisprudență internă relavantă, malpraxisul profesiilor liberale* [Medical malpractice. Particularities of medical civil liability, relevant domestic jurisprudence, malpractice in liberal professions]. București: Universul Juridic.

Constitutional Court of Romania, Decision No. 176/2022. Available at: https://www.ccr.ro/wp-content/uploads/2022/05/Decizie1762022.pdf (online, accessed: March 3, 2025).

Convention of the United Nations regarding the Rights of the Child. (2001). Ratified by Romania through Law No. 18/1990, republished in the Official Journal of Romania no. 314 of 13.06.2001.

Convention regarding the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols. (1994). Ratified by Romania through Law No. 30/1994, published in the Official Journal of Romania no. 135 of 31.05.1994.

Dalcq, R. (1955). Le problème du concours des responsabilités contractuelle et délictuelle et la jurisprudence récente. [The issue of concurrence between contractual and tortious liability and recent jurisprudence]. *Revue Générale des Assurances et des Responsabilités* no. 5480. Available at: https://search.app/14zuQYmbwaxr1oSf7, https:// bib.kuleuven.be/ (online, accessed: December 24, 2024).

High Court of Cassation and Justice, Civil Section II, Decision No. 638/2023. Available at: https://lege5.ro, https://search.app/GvwdaDtaLEi8hDZe8 (online, accessed: February 25, 2025).

Kuglay, I. (2021). *Răspunderea penală pentru malpraxisul medical* [Criminal liability for medical malpractice]. București: C.H. Beck.

Law No. 46/2003 on Patient Rights. (2003). Published in *the Official Journal of Romania*, No. 51 of 29.01.2003.

Law No. 95/2006 on the Health Reform. (2015). Republished in *Official Journal of Romania*, No. 652 of 28.08.2015.

Lupan, E. (1997). Raporturile juridice de protecția mediului de viață al populației [Legal relations for the protection of the population's life environment]. *Revista Dreptul* nr. 12.

Lupașcu, D. (2024). *Codul civil* [Civil Code]. București: Universul Juridic.

Lupașcu, D. (2024). *Codul Penal. Codul de procedură penală*. [Criminal Code. Code of Criminal Procedure]. București: Universul Juridic.

Năsui, G. A. (2024). *Malpraxisul Medical. Particularitățile răspunderii civile medicale, jurisprudență internă relavantă, malpraxisul profesiilor liberale*. Third edition. [Medical malpractice. Particularities of medical civil liability, relevant domestic jurisprudence, malpractice in liberal professions]. București: Universul Juridic.

Pena, A. (2023). *Malpraxisul medical. Jurisprudență națională și europeană*. [Medical malpractice. National and european jurisprudence]. București: Universul Juridic.

The International Covenant on Economic, Social, and Cultural Rights, ratified by Romania through Decree No. 212/1974, published in *the Official Journal of Romania* no. 146 of 20.11.1974.

Vida Simiti, I. (2013). *Răspunderea civilă a medicului* [Civil liability of the medic]. București: Hamangiu.

Winiger B. (1998). Les effets de la responsabilité contractuelle et délictuelle: une histoire ambigue [The effects of contractual and tortious liability: an ambiguous history]. In A. Dufour, B. Winiger, et al. (eds.), *Pact, convention, contract: Essays in honor of Professor Bruno Schmidlin*. Basel: Helbing & Lichtenhahn. Available at: https://archive-ouverte.unige.ch/ unige:23674 (online, accessed: December 24, 2024).

Zamșa, C. E. (2024). *Drept civil. Teoria generală a obligațiilor*. Thirs edition. [Civil law. The general theory of obligations]. București: Ed. Hamangiu.