THE UNSCRUPULOUS TREATMENT OF THE DISEASED IN THE MACEDONIAN CRIMINAL CODE

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Abstract

The unscrupulous treatment of the diseased is encompassed within the Chapter 21 of the Macedonian Criminal Code titled as Criminal Acts against Human Health. Having in mind the basic provision of this criminal act as defined in the Article 207, i.e. the physician who, when providing physician’s assistance, applies clearly inadequate means or manner of treatment, or does not apply proper hygienic measures, or in general, acts unscrupulously and herewith causes deterioration of the health of their patient, in this paper we will discuss not only the Criminal Code, but also the other relevant legislation. On the other hand, by the means of scientific analysis and description of the statistical data disposable to the Macedonian State Statistical Office, the detecting and proving activities of the Macedonian law enforcement organs shall be noted through the submitted criminal reports, initiated accusations and delivered judgments for sanctioning of the perpetrators of this criminal act. Finally, the Paper shall elaborate specific court cases with the subject of the unscrupulous treatment of the diseased.

Keywords: unscrupulous treatment; diseased person; criminal act, Criminal Code; Republic of Macedonia.

INTRODUCTION

2001, 2003, 2005, 2009, 2011, 2019), stipulating that the citizens have the right and duty to protect and to promote their own health and the health of others. The consequences that may result by performing these criminal acts are endangerment of the human health (creating an abstract or concrete danger) and health injury (deterioration of the health of diseased), while in aggravated cases there might be a severe bodily injury or severe health problems or death of one or more persons (Đorđević, 2009: 149). Then again, Počuča, Šarkić and Mrvić-Petrović (2013: 207), argue that the basic task of the modern medicine is to protect life and health, that is, to provide the best possible healing and prolongation of the life, while implementing all achievements in modern medicine. Considering the world population and its daily health care needs, they note that it is clear that the risk of a medical mistake that will occur during treatment is significantly increased.

The term professional medical malpractice was mentioned for the first time in the professional literature in the XIX century, although it was created much earlier. The first known definition was given by the German physician Virchow, who defined it as “a violation of the recognized rules of the art of healing due to a lack of proper attention or caution”. In the context of modern medicine and law, the term professional medical malpractice is any treatment that is contra legem artis (Đurišić, 2017: 152). According to Gajdova (2019: 2), such promoted definition raised many questions because the definition itself did not give a clear and unambiguous answer… and for this reason, physicians and lawyers insist on distinction between the terms of professional medical malpractice and medical accident (in Macedonian language “неспрекен случај”).

Respectively, the essence of a physician’s professional malpractice is the treatment contrary to the rules of the profession (contra legem artis), considering the non-compliance with the medical standards, which are not a permanently timed and content-based category but a variable one, where the recognized practice and established standards gradually become anachronistic and surpassed, especially in the contemporary context of rapidly advancing medical science (Vučić Popović, 2016: 26). Contrary to this, Pražetina Kaleb (2019: 70) notes that the medical procedure is justified when it fulfills three conditions: a) if it was undertaken for the purpose of treatment, b) if it was performed lege artis, and c) if it was taken with a consent, i.e. supposed or presumed consent. When a surgery is in question, it must be medically indicated, the patient must give a consent and the
ANALYSIS OF THE CRIMINAL-LEGAL FRAMEWORK

Starting from the complexity of the medical behavior and activities, generally, it can be concluded that the responsibility can be ethical, professional or legal (referring primarily to criminal liability), although it is often difficult to draw a sharp line between them. The limits of the criminal liability are narrower, because the behavior of a physician will be punished if it is a result of their obviously malicious (unethical) procedure, or particularly aggravated professional mistakes (Cihlarž, 2016: 214).

Having in mind their narrow object of protection, as well as the way of endangering the protected object, the following distinction of the criminal acts against human health classified in the Chapter 21 can be made: acts of endangering health with infectious diseases; medical acts; acts in the field of drug addiction; and acts of endangering health by harmful healing and other products (Kambovski & Tupančevski, 2011: 240-241). Furthermore, several criminal-legal aspects of the responsibility of the physician and health-care professionals can be distinguished. On one hand, medicine is developing so fast, so the physician (or other health-care professional) is often facing a dilemma on the kind of methods and remedies which are to be applied to minimize the possible risks of the treatment, which are present regardless of the use of more advanced technical means and medications. And on the other hand, despite the use of much more sophisticated technical and other means, the risk of mistake is always present (Kambovski & Tupančevski, 2011: 243). In the same line is the Law on Health Protection (2012, 87/2013, 2013, 2014, 2015, 2016, 2019), by elaborating the principles on which health protection should be based, i.e. on the unity of preventive, diagnostic, therapeutic and rehabilitation measures, and on the principles of accessibility, efficiency, continuity, fairness, comprehensiveness and provision of quality and safe health treatment (Article 5), with a note that the last principle should be provided by advancing the quality of health protection with application of measures and activities that, in accordance with the contemporary achievements in the field of medical science and practice, will increase the possibility for positive outcome, will decrease the risks and other adverse consequences to the health and the health condition of the individual and the
society as a whole (Article 11). Similar protection is prescribed by the Article 2 of the Law on Protection of the Rights of the Patients (2008, 2009, 2011, 2015, 2019), stating that the protection of the patient’s rights provides quality and continuous health protection in accordance to the current achievements in health and medicine, within the system of health protection and health insurance, and appropriate to the individual needs of the patient, in the absence of any mental and physical abuse, with full respect for the person’s dignity and in their best interest. In addition, it stresses that the protection of the patients’ rights is based on the principles of humanity and accessibility.

If the criminal act of unscrupulous treatment of the diseased (Article 207) is in question, it can be noted that it falls under the second group of acts, the so called “medical acts” - acts that are done during the physician’s / medical treatment of humans. As seen from the content of its provision, the act is so called delicta propria (Marjanovic, 1998: 89), which means that it can be done only by a person with certain characteristics, i.e. a physician (in Macedonian language “лекар”). Based on “Wikipedia” (n.d.-b), a physician (American English), medical practitioner (Commonwealth English), medical doctor, or simply doctor, is a professional who practices medicine, concerned by promoting, maintaining, or restoring health through the study, diagnosis, prognosis and treatment of disease, injury, and other physical and mental impairments. Furthermore, in the Article 207 in Paragraph 1 the following ways by which the act can be performed when providing physician’s assistance are prescribed:

- By applying clearly (obvious) inadequate means or manner of treatment,
- By not applying proper hygienic measures, or
- In general, by acting unscrupulously,
- and by doing so - a deterioration of the health situation of another shall be caused.

To be exact, unscrupulous treatment of the diseased exists when it is followed by a detrimental consequence in the form of deterioration of a person’s health. In other words, it is necessary to establish the existence of a causal link between the unscrupulous treatment and the resulting detrimental consequences. Namely, it must be reliably proved that the deterioration of the health situation was caused by the physician’s malpractice, i.e. that it did not
arise from the very nature of the primary disease or injury or other factors (special circumstances of the case, personal characteristics and particular conditions of the patient’s organism) (Savić, 2010: 60). Moreover, physician’s conduct by which they violate the rules of the medical profession and science must be “obvious”, that is, must constitute a blatant mistake by the physician so that the criminal act can be stated (Pavlović, Marković & Ćetković, 2016: 19).

In addition, Paragraph 2 broadens the criminal liability towards midwives or other health workers who, while providing medical assistance or care, behave unscrupulously and herewith cause deterioration of the health of another person. However, it should be pointed out that there is a difference in these two paragraphs concerning the type of the assistance provided. In Paragraph 1 it is a “physician’s assistance” (provided by a physician), and in the Paragraph 2 it is a “medical assistance or care” (provided by a midwife or other health worker). In essence, there is a difference from the first act concerning the objective essence of the crime; the act is not performed while providing physician’s assistance, but while providing medical assistance or care, which implies different actions that do not refer to assistance provided by a physician in the narrow sense (establishing diagnosis, determining therapy, etc.). These actions are continuation of the treatment of the diseased (application of therapeutic means, bandaging of the patient, diet, maintaining the hygiene, etc. (Kambovski & Tupančevski, 2011: 246).

With reference to the sentence, it can be seen that CC prescribes a fine, or imprisonment of up to three years for the perpetrator of both paragraphs. However, this sentence is provided for a perpetrator who acts with intent, which means that if the act of Paragraph 1 is committed out of negligence, then the perpetrator shall be punished with a fine, or with imprisonment of up to one year (Paragraph 3). Mrčela and Vuletić (2017: 690) observe that the attention should be directed towards two key circumstances on which the degree of culpability in negligent delicts depends. These circumstances can be taken as benchmarks, and they are: 1. Is there a breach of due diligence, or failure to comply with the rules of the profession? and 2. Are they the reason for the consequence which has been caused (foreseeable) towards the health of the patient? Criminal liability will only exist if the answers to both questions are affirmative.

It is interesting to point out that Chapter 21 ends with the criminal act titled as Severe Acts against the Health of People (Article 217), in which
more severe consequences of several acts are integrated, including Article 207 (the other criminal acts are defined in Articles 205 - Transmitting an infectious disease, 209 - Quackery, 211 - Unscrupulous performing of a pharmaceutical activity, 212 - Production and release for trade of harmful medical products, 213 - Production and release for trade of harmful food and other products, 214 - Unscrupulous inspection of meat for consumption, 215 - Unauthorized production and release for trade of narcotic drugs, psychotropic substances and precursors, 216 - Enabling the use of narcotic drugs, psychotropic substances and precursors, with a note that not all of their paragraphs are encompassed, just the ones strictly stated). The more severe consequences of these criminal acts imply aggravated sentences for their perpetrators. Article 217 differs criminal acts performed by intent (Paragraphs 1 and 2) from the acts performed out of negligence (Paragraphs 3 and 4). Namely, if a person is severely injured bodily, or their health is seriously damaged, because of the criminal acts defined in Article 207’s Paragraphs 1 and 2, then the perpetrator shall be punished with imprisonment of one to ten years (Paragraph 1), and if one or more persons died, then the perpetrator shall be punished with imprisonment of at least four years (Paragraph 2). Further, if a person is severely injured bodily or their health is seriously damaged because of the criminal act stipulated in Article 207 Paragraph 3, the perpetrator shall be punished with imprisonment of three months to three years (Paragraph 3), and if one or more persons had died, the perpetrator shall be punished with imprisonment of six months to five years (Paragraph 4).

**ANALYSIS OF THE STATISTICAL DATA**

It can be noted that the statistical data about the act unscrupulous treatment of the diseased disposable to the Macedonian State Statistical Office, are very poor. Namely, the Annual reports for the perpetrators of criminal offences only contain data for the period from 2014 to 2017, that are given in the tables and charts below (Annual reports for 2018 and 2019 have not been published yet). Concerning the years before 2014, the Annual reports include data that are classified into four groups - about the entire Chapter 21, the drug related crimes divided in two sections (Unauthorized production and release for trade of narcotic drugs, psychotropic substances
and precursors - Article 215, and Enabling the use of narcotic drugs, psychotropic substances and precursors - Article 216), and the other acts.

Table 1. Reported, accused and convicted adult persons - total

<table>
<thead>
<tr>
<th>Year</th>
<th>Chapter and Criminal act</th>
<th>Reported</th>
<th>Accused</th>
<th>Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>Chapter 21</td>
<td>1590 (f. 74)</td>
<td>1131 (f. 52)</td>
<td>1049 (f. 46)</td>
</tr>
<tr>
<td>2017</td>
<td>Unscrupulous treatment of the diseased</td>
<td>72 (f. 19)</td>
<td>13 (f. 1)</td>
<td>5 (f. 0)</td>
</tr>
<tr>
<td></td>
<td>Other acts</td>
<td>1518 (f. 55)</td>
<td>1118 (f. 51)</td>
<td>1044 (f. 46)</td>
</tr>
</tbody>
</table>


Table 1 represents the total number of reported, accused, and convicted adult persons for the period from 2015 to 2017, which means that 2014 is not represented since there is no data in the Annual report about the reported and convicted persons (for this year there is only data for the accused persons). As seen from the Table 1 and Charts 1-3, the unscrupulous treatment of the diseased participates with very low percentage in the total number of the criminal acts within the Chapter 21, i.e. the following participation can be seen:

- In the total number of 1590 reported persons, it participates with 72 persons or 4.5%,
- In the total number of 1131 accused persons, it participates with 13 persons or 1.2%,
- In the total number of 1049 convicted persons, it participates with 5 persons or 0.5%,

which means that the participation percentage of the Article 207 is decreasing from category to category - starting with 4.5%, then 1.2% and ending with 0.5%.

Charts 1-3. Reported, accused and convicted adult persons - total

Furthermore, if the data is analyzed from the gender issue aspect, then female perpetrators rarely appear in the role of reported, accused and convicted persons. And this remark stands not only for the Article 207, but also for the entire Chapter 21. So far, in the period from 2015 to 2017, 19 females were reported, only 1 was accused and none was convicted for unscrupulous treatment of the diseased.

**Table 2. Reported, accused and convicted adult persons**

<table>
<thead>
<tr>
<th>Year</th>
<th>Chapter and Criminal act</th>
<th>Reported</th>
<th>Accused</th>
<th>Convicted</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>Chapter 21</td>
<td>566 (f. 21)</td>
<td>518 (f. 18)</td>
<td>478 (f. 14)</td>
</tr>
<tr>
<td></td>
<td>Unscrupulous treatment of the diseased</td>
<td>no data</td>
<td>6 (f. 1)</td>
<td>no data</td>
</tr>
<tr>
<td></td>
<td>Other acts</td>
<td>/</td>
<td>512 (f. 17)</td>
<td>/</td>
</tr>
<tr>
<td></td>
<td>Chapter 21</td>
<td>554 (f. 22)</td>
<td>459 (f. 16)</td>
<td>427 (f. 13)</td>
</tr>
<tr>
<td>2015</td>
<td>Unscrupulous treatment of the diseased</td>
<td>16 (f. 2)</td>
<td>7 (f. 1)</td>
<td>1 (f. 0)</td>
</tr>
<tr>
<td></td>
<td>Other acts</td>
<td>538 (f. 20)</td>
<td>452 (f. 15)</td>
<td>426 (f. 13)</td>
</tr>
<tr>
<td></td>
<td>Chapter 21</td>
<td>543 (f. 26)</td>
<td>361 (f. 21)</td>
<td>333 (f. 19)</td>
</tr>
<tr>
<td>2016</td>
<td>Unscrupulous treatment of the diseased</td>
<td>31 (f. 10)</td>
<td>5 (f. 0)</td>
<td>4 (f. 0)</td>
</tr>
<tr>
<td></td>
<td>Other acts</td>
<td>512 (f. 16)</td>
<td>356 (f. 21)</td>
<td>329 (f. 19)</td>
</tr>
<tr>
<td></td>
<td>Chapter 21</td>
<td>493 (f. 26)</td>
<td>311 (f. 15)</td>
<td>289 (f. 14)</td>
</tr>
<tr>
<td>2017</td>
<td>Unscrupulous treatment of the diseased</td>
<td>25 (f. 7)</td>
<td>1 (f. 0)</td>
<td>0 (f. 0)</td>
</tr>
<tr>
<td></td>
<td>Other acts</td>
<td>468 (f. 19)</td>
<td>310 (f. 15)</td>
<td>289 (f. 14)</td>
</tr>
</tbody>
</table>


From the data represented in the Table 2 and Chart 4, it can be observed that in 2016 the number of reported persons was higher than the other years. Namely, 31 persons was reported in 2016, followed by 25 persons in 2017 and 16 persons in 2015. As it was mentioned earlier, there is no data about reported persons in 2014. The number of accused persons is almost the same in the period from 2014 to 2016 (7 persons in 2015, 6 persons in 2014, 5 persons in 2016), however in 2017 it decreases to only 1 person. The situation concerning the convicted persons is unimportant to be considered since only 4 persons were convicted in 2016, 1 person in 2015, none in 2017, and there is no data for 2014.
The 5 imposed sentences are represented in Table 3, with a remark that the other cells are intentionally left blank since there is no data in the Annual reports. As seen, in the given period, 3 main sentences were imposed - 2 imprisonment of up to 6 months, 1 imprisonment of 6 to 12 months, and 1 fine of up to 5000 MKD. There was only 1 alternative sanction imposed, i.e. probation-imprisonment of up to 3 months. Since the number of imposed sentences is insignificant, a relevant conclusion cannot be made, except that there is a mild sentencing policy.

<table>
<thead>
<tr>
<th>Unscrupulous treatment of the diseased</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Main - Imprisonment - 6-12 months</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Main - Imprisonment - Up to 6 months</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Main - Fine - Up to 5000 MKD</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Alternative - Probation-imprisonment - Up to 3 months</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>5</td>
</tr>
</tbody>
</table>

(MACEDONIAN JURISPRUDENCE)

The final decision (judgement) on the existence, or nonexistence of the criminal act Unscrupulous treatment of the diseased, is made by the court. It is understandable that the judge, as a lawyer, does not have an adequate expertise to make this decision on his own. Therefore, his decision is mainly based on forensic
expertise. Namely, it is logical that the assessment, whether the means or manner of treatment were clearly inadequate, should be done only by physicians, i.e. by those who are most competent in the relevant field of medical activity (Savić, 2010: 60).

This observation can be noted in the few judgements published on the Court’s portal (a database that provides access to the jurisprudence of the Macedonian courts), if Unscrupulous treatment of the diseased is chosen as search criteria for the period from 01.01.2010 to 01.04.2020. For example, the Court of First Instance Delčevo (2012) on 27.11.2012 delivered a Judgement K.No.57/2011 by which it acquitted the accused person. The Court stated that it gave a full trust to the forensic expertise because it was prepared by leading experts in the field of health (Institute of Forensic Medicine), and according to this expertise it was determined that the accused person acted in accordance with her professional knowledge of medicine and what she knew as a physician, and it cannot be seen as a matter of an unscrupulous treatment of the diseased. In addition, it elaborated that the Institute’s written opinion stressed that the given medicines were appropriate for the diagnosis made by the physician. It should be pointed out that based on the old Law on Criminal Procedure (old LCP) (1997, 2002, 2004, 2005, 2008, 2009, 2011), if the public prosecutor finds no basis for initiation or continuation of the criminal procedure, then the damaged party may stand instead as a plaintiff (so-called “subsidiary plaintiff”), and in this case the damaged party appeared as a subsidiary plaintiff.

Similar explanation can be seen in the Judgement K.No.113/10 dated 13.04.2011 of the Court of First Instance Kočani (2011). Once again, the damaged party was a subsidiary plaintiff, and the accused person was acquitted since, based on the Court’s assessment, the act was not a crime according to the law. The Court explained that the actions of the accused person did not contain the essential elements of the criminal act for which he was charged because the action of the execution and its consequence were missing (by prescribing therapy the accused person did not use an obviously inappropriate means or method of treatment). Among other evidences on which the Court based its judgement was the expertise prepared by the Institute of Forensic Medicine stating that the given therapy had no effect on the occurrence or progression of the primary disease that the damaged party had already had.

In the Judgement K.No.293/10 of 27.06.2011, the Court of First Instance Ohrid (2011) concluded that from the presented evidence, the accused person as a specialist-physician in the given situation acted in accordance with the usual standards for the treatment of such injuries, which means that he acted in accordance to the rules of profession. Based on the forensic expertise prepared by the expert-witnesses of the Institute of Forensic Medicine, and in such established factual situation, the Court found that it had not been proved that the accused person had
committed the acts for which he was charged by the damaged party as a subsidiary plaintiff.

Contrary to the above acquittal judgements, the Court of First Instance Gostivar (2019) on 14.10.2019 delivered a Judgement K.No.148/19 by which it agreed with the motion for issuing a penal warrant putted forward by the public prosecutor in accordance with the Article 497 of the new LCP (2010, 2012, 2016, 2018), and sentenced the accused person with a probation-imprisonment as an alternative sanction. Based on several evidences, among which was the opinion of the medical board, the Court ruled that the dentist acted unscrupulously, by which he caused a deterioration of the health situation of the damaged party.

Another judgement of conviction was delivered by the Court of First Instance Tetovo (2019). Namely, on 12.07.2019 the Court with the Judgement K.No.416/19 found the accused person guilty because he did not apply an appropriate hygienic measures, and by doing so he caused deterioration of the health condition of the damaged party (as a medical specialist of general surgery while performing the operation on a fracture, he inserted infected fixators that caused a severe purulent infection, after which the damaged party had to have another surgery). With the judgement, that was based on the motion for issuing a penal warrant, the accused person was sentenced to 24000 MKD. Same as the case before, the evidence on which the judgement was based was composed of numerous medical documents.

CONCLUSION

As stated in the Article 19 Paragraph 2 of the Code of Medical Deontology of the Macedonian Medical Chamber (n.d.), the physician should consistently take into account the achievements of medical science and the principles of professional behavior, and also should freely choose the method and the way of treatment. When deciding on the method of treatment, physicians are obliged to rely on their knowledge and conscience, and at the same time they should be independent of various influences or inappropriate desires of the patient, their relatives and others. In connection to this obligation, there are several Macedonian legal acts that pronounce that human health must be protected and promoted. In order to realize such task, physicians must comply with the principles of humanity and accessibility, and provide the required assistance lege artis to the diseased. In other words, if the provided assistance was contra legem artis, i.e. contrary to the rules of
profession, then the physician can be held responsible for the criminal act Unscrupulous treatment of the diseased. In addition, a causal link between the unscrupulous treatment and the resulting detrimental consequences should be established, which is done by the court. However, having in mind that the judge is a lawyer, their decision is based on the forensic expertise. This can be seen through the Macedonian jurisprudence (a common characteristics of the analyzed judgments is that the court based its decision on the medical documentation, especially on the expertise provided by the Institute of Forensic Medicine), with a note that so far only few judgements were published on the Court’s portal. On the other hand, such small number of published judgments is not a surprise, since there is a poor data in the Annual reports of the State Statistical Office about the perpetrators of this criminal act, with a remark that for most of the years there is no data at all. Furthermore, from the judgments that are based on the old LCP, it can be noted that the cases were initiated by the damaged party as a subsidiary plaintiff, and the court acquitted the accused persons. When it comes to the last two judgements delivered in accordance to the new LCP, in both of them the accused persons were pronounced guilty and were sentenced to a probation-imprisonment (the first case) and a fine (the second case). From the sanctions pronounced by the Macedonian courts, a mild policy tending towards the legally prescribed minimum can be seen. Therefore, as a final remark that should initiate a further debate on this issue is the Code of Hammurabi (“Wikipedia”, n.d.-a), regulating the physician’s responsibility for their behavior, i.e. if a physician caused death to a rich patient, they would have their hands cut off, but if they caused death to a slave, only financial restitution would have been required. This certainly does not mean that such severe sanctions should be promoted into our legal system. It means that the imposed sanctions towards the perpetrators of the criminal act Unscrupulous treatment of the diseased should be tightened in compliance to the two aims of the prevention (special and general prevention), as well as in compliance to the third aim - the justice to be realized. But then again, in order the case to reach the court, the public prosecutor as a plaintiff must be far more active in detecting and prosecuting this criminal act.
REFERENCES


