Conduct of courts in south Banat District in criminal cases of medical malpractice from Art. 251 of CriminaL Code of the Republic of Serbia

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Abstract

In this paper, the authors deal with the issue of legal protection provided by criminal law in the Republic of Serbia in regards to the jeopardizing of or causing injury to the health of patients that occur due to doctors' malpractice in conducting their duty. Apart from the overview of the legal provisions regulating this area, by examining the practice of the courts of the Republic of Serbia in South Banat district, we shall see the extent to which criminal law has proven to be efficient in providing basic human rights and the protection of the aforementioned, the right to life, and the right to healthcare. Every person has the right to the protection of their physical and psychological health. That is one of the basic human rights guaranteed by relevant international conventions and the Constitution of the Republic of Serbia. Therefore, it is justifiable to ask the question whether inadequate sanctioning of medical malpractice in the practice of courts in the Republic of Serbia jeopardizes the entitlement to the basic right of every person in need of healthcare, as well as whether the standing opinion that doctors are not responsible for their oversights is valid?

Keywords: *medical malpractice, Criminal Code, court practice, South Banat District*

1. Introduction – Criminal offense of medical malpractice in The Criminal Code of the Republic of Serbia

In the Criminal Code of the Republic of Serbia, the criminal offense of medical malpractice is proscribed by the provisions of Article 251 of the Criminal Code[1]. The execution act of this criminal offense is set alternatively and exists when a doctor, in providing medical assistance, uses an evidently inadequate means or an evidently unsuitable treatment or fails to observe appropriate hygiene standards or evidently proceeds unconscientiously and thereby causes deterioration of a person's health. All forms of the execution act must occur during treatment, or while medical assistance is

[1] Official Gazette of RS, no. 85/2005, 88/2005, amendment 107/2005, am. 72/2009, 121/2012, 104/2013, 108/2014, and 94/2016.

being provided[2]. The basic form of this criminal offense is punishable by imprisonment of three months to three years. A less severe form will exist if this criminal offense is committed due to negligence. Negligence exists when the perpetrator was aware that their actions can cause the criminal offense, but they had taken lightly that this will not occur, or that it can be prevented, or in the case when they were not aware that their action can lead to the criminal offense, even though, due to the circumstances in which the offense was done and according to personal knowledge, the offender was obliged and had to be aware of that possibility. The perpetrator can then be punished by a lesser sentence – a monetary fine or imprisonment of up to a year. It is more difficult to imagine that the action could have been committed with direct intent. In that case, another criminal offense would take place. Even though the law proscribes punishment for possible intent, in practice, the execution act is most often committed due to negligence as a form of guilt. The graver forms of this criminal offense are proscribed by provisions of Art. 259 of the Criminal Code – "Grave Offenses against Health", and depend on the gravity of the occurring consequence, of the severity of bodily harm, death of a person, and a more severe punishment is proscribed in accordance. As an example, it is proscribed that if grievous bodily harm had occurred, or serious injury to the health of a person, the perpetrator is to be punished by imprisonment of one to eight years, or up to three years if the offense was committed due to negligence, and in the case of death of one or more persons, the perpetrator is to be punished by imprisonment of two to twelve years, or up to eight years if the offense was committed due to negligence.

In order for the criminal offense of medical malpractice to exist, the perpetrator must have certain subjective features. The title of the criminal offense itself indicates that the perpetrator must be a doctor. Without deeper analyzing the regulations dealing with the system of medical education, in the sense of these provisions, the term doctor is believed to be any person that has a medical faculty degree and that engages in practice in public or private sector in accordance with the regulations of this field. In regards to the aforementioned, the law presumes the doctor providing assistance, whether they are employed at the moment or not. Also, a dentist is also believed to be a doctor, with a dental faculty degree. The degree of specialization is not of importance. Apart from that, in Art. 251, para. 2 of the Criminal Code, the legislator had in mind that the executive act can also be done by other medical employees, who in providing medical services or care or while conducting other medical activity evidently use unsuitable treatment, and therefore, cause deterioration of a person's health. They are other persons that provide medical assistance or care, or conduct other health related activities, and are not doctors. These are persons who, in the scope of their degree of education and expertise, in providing medical service do not conduct those activities described within the scope of medical malpractice, as they can only be done by doctors. For example, they can be nurses, lab technicians, x-ray technicians, and others. However, in past court practice dealt with by the authors of this paper, this criminal offense most frequently occurs due to evidently inadequate means or evidently unsuitable treatment of the doctors in general, as perpetrators of this criminal offense.

[2] Z. Stojanović, *Komentar Krivičnog zakonika*, Službeni glasnik RS, Beograd, 2018, pp. 827-830.

2. "Loop holes"

The theory is dominated by the opinion that in order for the essence of this blanket criminal offense to exist, it is necessary for the perpetrator to have acted with a higher degree of negligence. The Criminal code explicitly defines this as *evident*. The term "evident" is interpreted as a noticeable error of a doctor that grossly violates the rules of medical profession and science[3]. *Evidently* can therefore be related to grossly. A gross error is an error that, under no circumstances, should not have occurred as it neglects elementary medical findings and experiences[4]. The existence of obvious, gross violation of rules of medical practice and science that is in causal relation with the harmful consequence to the patient's health is necessary to be determined in each specific case. However, this is where problems occur in practice.

The first problem can be seen in the fact that in the Republic of Serbia there are no general provisions regulating the procedures that doctors are obliged to follow in the widest sense in the process of providing medical care. This includes treatment, diagnostics measures and making the diagnosis, proscribing therapy and prophylaxis. This issue was regulated in Article 197 of the Law on Healthcare[5], where the term "professional misconduct" is used. In court practice of the Republic of Serbia, the usual term is "medical error". Similarly, the Law on the Protection of Patients' Rights[6] also does not contain a closer explanation regarding the duty of doctors to conduct standardized procedures in each specific case. Medicine is by no means an exact science. However, based on the experiences seen in practice, it is justifiable to ask the question whether Hippocratic Oath is sufficient for the doctor to act with full degree of care and expertise required in each specific case? We believe this is not the case. The term medical error describes any action of a doctor during treatment that is against the rules of the profession – *contra legem artis*. In Serbian literature, the definition of Jakov Radišić is relevant, who believes that a medical error is: "Any measure of a physician that is not in accordance with the existing medical standard"[7]. For this reason, taking into consideration that this is an area subjected to general regulations and standards of medicine, unwanted consequences during patient treatment often occur.

The rights and the duties of the members of Serbian Medical Chamber, behavior towards the patients, colleagues, society and the Medical Chamber is regulated by the Code of Medical Ethics of Serbian Medical Chamber[8]. The aim of the Code is to preserve liberty and reputation of medical profession, raise the quality of medical services and strengthen the trust between doctors and patients by respecting the concept of autonomy and the rights of patients. Apart from the general principles in conducting professional duty of doctors, the Code also regulates their medical ethics. Partially, it regulates the duty of providing urgent medical assistance, working in extraordinary circumstances, caring of health education and health culture, continuous expert training, expert proficiency of doctors, independence and autonomy of doctors, and the

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[3] *Ibidem*.

[4] J. Radišić, *Odgovornost lekara u slučaju kad nije dovoljno da je njegova greška nanela štetu pacijentovom zdravlju*, in *Revija za pravo siguranja*, no. 3/2010, pp. 48-54.

[5] Official Gazette of RS, no. 107/2005, 72/2009 – st.law, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013 – st.law, 93/2014, 96/2015, 106/2015, 113/2017 – st.law and 105/2017 – st.law.

[6] Official Gazette of RS, no. 45/2013.

[7] J. Radišić, *Medicinsko pravo*, in Pravni fakultet Union Beograd, Beograd, 2008, pp. 179-183.

[8] "Official Gazette of RS", no. 104/2016.

relationship with the Serbian Medical Chamber. However, apart from proclaiming the basic principles of medical ethics, this Code does not further regulate the procedure a doctor is obliged to follow while providing medical care to a patient. The same was failed to be done in the provisions of the aforementioned Law on Healthcare that regulates the system of health care, the organization of health services, social care for the health of the population, general interest in healthcare, rights and obligations of patients, health care of foreigners, foundation of Agency for Accreditation of Health Care Institutions of Serbia, supervision of the enforcement of this law, as well as other important issues to the organization and provision of health care. This issue is still regulated by a general principle according to which a doctor is obliged to act in accordance with the rules of medical profession.

Individual acts of healthcare institutions in the Republic of Serbia proscribe the procedure of admission, providing care and treatment of patients. However, this primarily deals with technical procedures related to registering, movement and referral of patients to various levels of health care. Valid medical standards according to which doctors act are general and their suitability must be evaluated in each specific case of a harmful consequence to the patient's health.

Practice indicates that medical error can easily occur. The reasons are various, they cannot be generalized and they depend on the circumstances of each individual case. As an example, in court practice of courts in the territory of South Banat district, it was noted that medical malpractice most often occurs during patient admission in emergency services in hospitals on duty. The nature of activities taking place in emergency services on duty requires, apart from expertise and knowledge, speed and resourcefulness of doctors. Also, in situations with aggravated conditions, where an urgent reaction and a timely response is crucial, it is necessary to analyze the problem in an adequate manner, make the proper diagnosis and provide the necessary help to the patient. From a logical standpoint, providing urgent medical attention is exhausting work for several reasons, it requires the doctor to react in aggregated conditions regardless of their years of experience, and the risk of medical error is significantly higher.

When medical error occurs and there is a consequence to the patient's health, the rules governing medical practice and the norms of criminal law regulating this area collide. Criminal legislature is the *ultima ratio* regarding the protection of human rights and goods. The Law states that the object is only protected from grave medical error, meaning error that is evident as such. In order for the "evident" aspect of the error to be determined, as indicated by the legislator, we must look back on what a doctor is required to do during patient treatment according to the standards and rules of the profession. Considering that the actions a doctor is obliged to take during patient treatment are not standardized, a doctor is required to act in best faith and in accordance with their knowledge, expertise, conscientiousness and experience. In the largest number of cases, a doctor will act in accordance with the rules of their profession regardless of the outcome of the treatment, and they will satisfy the required level of health care protection they are obliged to provide. However, in cases when unwanted consequences to the health or life of the patient do occur, it is necessary to determine whether a line of conscientiousness was crossed in the actions of the said doctor in terms of treatment, meaning, whether the doctor acted with an obvious negligence in conducting of their duty. This is where the rules of medical profession, which are not prescribed, and the rules of criminal law, which is strict and specified in its norms, clash.

Precisely, this theoretical clash creates difficulties to the courts and the procedural parties to provide proof whether the doctor acted with evident negligence in the given case. Providing evidence means giving an answer to a hypothetical question, what the outcome of the treatment would be like if the doctor had acted in the manner they were supposed to[9]. The non-existence of a norm that could classify a certain behavior of doctors as negligence and the lack of standards to compare such behavior to creates a problem in drawing a conclusion regarding the existence of a doctor's guilt for the committed error.

By impartially evaluating the evidence presented by the prosecutor and the defense in the procedure, the court is obliged to determine in each individual case, without any reasonable doubt, the existence of a causal relationship between the doctor's actions and the occurrence of the harmful consequence. Without determining the causal relationship between an evidently inadequate means or an evidently unsuitable treatment or evident malpractice of a certain doctor as a perpetrator, there is no criminal offense of medical malpractice. The court is not in disposal of expert knowledge adequate to determine whether the doctor's actions are the cause of the harmful consequence to the patient's health. This issue is resolved by providing expert knowledge in the criminal proceedings. From experience, the judge will mostly know that the cases of medical malpractice court cases are complex, so taking that as a guide, the judge will apply the provision of Art. 114, para. 4 of the Criminal Proceedings Code[10], and entrust the expert opinion to a competent institution. Competent institutions that provide expert knowledge on the territory of the Republic of Serbia are medical boards of medical faculties in Belgrade, Novi Sad, Kragujevac and Niš. Apart from that, expert opinion can be entrusted to the Military Medical Academy in Belgrade. However, as will be discussed in the continuation of the paper, the issue of expert opinion in these kinds of court cases is particularly intriguing.

3. Court practice

Through practical examples of rulings from the territory of South Banat district (a territory that spans 4245 km, and that has 293.370 inhabitants in total according to the last population census in 2011), we will show that the lack of a fixed procedure in the doctor treatment is one of the main reasons why criminal court cases resulted in an acquittal.

In the observed period, from 1.01.2010 to 1.01.2018, 5 criminal proceedings conducted for this criminal offense were legally completed in the Basic Court in Pančevo and the Basic Court in Vršac, in the jurisdiction of which is the conducting of criminal proceedings for the criminal offense of medical malpractice from Art. 251 of the Criminal Code. This number is more than negligible compared to the total number of cases for which the basic courts have reached a verdict based on the merits – 11.118 legal cases in the Basic Court in Pančevo and 5.388 cases in Basic Court in Vršac. Out of the total number of the 5 legally completed criminal proceedings, all conducted before the Basic Court in Pančevo, only one case has ended in a conviction. Before the Basic Court in Vršac, one court case for the criminal offense from Art. 251 of CC is still in progress, and therefore it was not taken into consideration during the analysis.

[9] Jakov Radišić, *op. cit.*, 2010.

[10] Official Gazette of RS, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

By analyzing all five cases of the Basic Court in Pančevo, it was determined that criminal proceedings were conducted against 8 doctors. It was noted that the accusation was filed against specialist doctors employed in a hospital, who have been on duty in the admission department of General Hospital at the time the act took place. Furthermore, it was noted that they are all specialist doctors of roughly the same specialization. Most of them are general surgery specialists (five are general surgery specialists from the total number), the other accused are an internist rheumatologist, a radiologist and a neuropsychiatrist. The age structure of the defendants indicates that these are persons of ages 43 to 55, so there is no presumption that these are inexperienced doctors at the beginning of their professional career, but precisely the opposite. Out of the 8 accused doctors, two are women, while the others are men. According to the data from the punitive record, all defendants are persons without prior convictions. Out of all the defendants, only one procedure resulted in a legal conviction of the specialist doctor internist-rheumatologist. For the other defendants, the procedure was concluded with an acquittal. In one case, lead against a general surgery specialist and a radiologist, absolute obsolescence of the criminal case occurred, which resulted in an acquittal.

In the processed cases, it was noted that a silent solidarity in the medical profession is also manifested through concordant depositions of the doctors given as witnesses in the procedure, based on which it was not possible to precisely state whether the defendant was directly in charge of the patient. For example, in a procedure conducted before the Basic Court in Pančevo in case file K.no.399/16, where the defendant was a general surgery specialist employed in General Hospital in Pančevo, and was charged with inadequate treatment of a patient upon reception to the surgical department of the hospital as he failed to medically diagnose acute inflammation of the appendix based on previously done analyses, but instead falsely diagnosed the patient with pulmonary embolism, continued the treatment as such and applied antibiotic and painkillers, which masked the already atypical clinical picture of the inflammatory process, without previously clarifying the reason of painful cramps in the stomach of the aforementioned patient, as well as the reason for heightened bodily temperature of 39.2 degrees, increased number of leukocytes and extremely high sedimentation, all of which resulted in the death of the injured party due to bursting of the appendix and effusion of gangrenous content into the stomach cavity. The first degree ruling of the court sentenced the surgeon doctor to home imprisonment and ordered a ban on performing medical activities. As reasoned by the first instance court, depositions of the examined witnesses – doctors employed in the surgical department in the hospital, could not be accepted as truthful as none of the witnesses could state who was the ordained doctor for the deceased patient, who was directly responsible for her treatment, but instead the witnesses stated that all doctors of the department were in some form in charge of the patient. The defendant had also negated in his defense of being in charge of the patient, even though he was the doctor on duty and admitted the patient into the hospital, as well as the doctor that signed the referral for further treatment of the patient in Clinical Centre in Belgrade. So, the court had deemed the witness testimonies as a form of solidarity with the defendant. However, the decision of the second instance court upon appeal, the Court of Appeal in Belgrade, Kž1.no.1529/16 as of 23.02.2017, the named doctor was acquitted of the charges. According to the statements from the verdict, the second instance court judged that there is insufficient evidence that the defendant as a specialist doctor of general surgery in providing medical assistance proceeded with evident unconscientiousness and therefore caused worsening of the health condition of

the patient, meaning that there were no evidence that the death of the patient was in causal relation to the inadequate treatment by the defendant in the department of general surgery in General Hospital in Pančevo.

The opinion of the Court of Appeal in Belgrade stated in the verdict was explained as follows: "Namely, for the evidently unconscientious treatment to even exist, the execution act can be done by action or non-action. For example, it can be a superficial examination of the patient, due to which the illness was not determined or wrong diagnosis was given. In this specific case, superficial examination of the patient cannot be blamed, as the defendant had performed laboratory analyses during the admission to the hospital, as well as ultrasound examination of the stomach, X-ray of the stomach without contrast, measured the bodily temperature, all of which states that the doctor admitting the patient into hospital had a thorough approach, as stated in the findings and the opinion of the Medical Faculty in Niš. Furthermore, general unconscientious treatment could be taken into consideration as failure to apply examination methods necessary to exclude or confirm certain complications (e.g. testing allergy sensitivity of the patient), failure to apply preventive measure, failure to apply certain control measures, or other actions necessary to determine the health condition of the patient prior to or during the treatment, failure to provide the necessary medication, failure to inform the patient of the possible consequences of refusing certain medical intervention etc. However, considering the fact that the defendant had completed all the necessary analyses during patient admission, he proscribed infusion and antibiotics therapy, there were no signs of acute appendicitis during the examination as this was a case atypical symptoms of appendix inflammation according to findings and expert opinion, the court has determined that the defendant did not act with evident malpractice. Furthermore, we should point out that all findings and opinions of court-medical boards are correct in stating that all the doctors of General Hospital in Pančevo have committed a professional omission by not recognizing the cause as appendix inflammation, but due to the aforementioned facts, such a professional omission related to the defendant cannot be at the level of evident malpractice. Considering the fact several doctors participated in the patient's treatment, the basic medical principle of strict allocation of activities should have been followed, which includes personal responsibility of the doctors for all the tasks they are obliged to independently complete, and the doctor cannot be responsible for unfavorable effects of patient treatment considering the doctor had carried out his duties with due care and following the standards of his profession, and the fact that the defendant had masked the clinical picture by proscribing therapy cannot influence the work and actions of other doctors on duty in that period, as each of them applies their own expertise and knowledge".

By analyzing the reasoning of the second instance court decision, it is clear that the court took as the guideline the legal provision that, in order for medical practice to exist, it is necessary to characterize it as evident according to case circumstances. In the reasoning, the court provides examples where, in the situation when the doctor had applied certain diagnostic methods for the purpose of determining the health condition of the patient during patient admission, evident unconscientious procedure in proving medical assistance cannot be applied.

Similar opinion of the court was presented in the second verdict of the Basic Court in Pančevo – K.no.3471/10 as of 18.02.2014, in which internist – rheumatologist doctor was legally pronounced guilty for the criminal grave offense against health from Art. 259, para. 4, in relation to Art. 251, para. 3 of the CC, and was sentenced to house

arrest of 10 months. In this verdict, the doctor was legally sentenced to have generally and evidently used unconscientious procedure and therefore caused the health worsening of a person, resulting in death of the said person, as the doctor had failed to apply medical measures to make the proper diagnosis when the patient was admitted to the hospital with chest pain and with a referral diagnosis of EKG showing unspecific changes in the heart rate, and had failed to give the order to do further laboratory tests, for the patient to be admitted for observation with a serial repetition of EKG, but instead had proscribed a therapy of diet with certain medication, released the patient to home care, which resulted in worsening of the patient's health. In the finding of the second instance Court of Appellation in Belgrade, in the verdict Kž1.721/14 as of 15.07.2014, the defendant was found to have acted with evident unconsciousness as he failed to undertake the necessary medical measures to make the proper diagnosis. Considering the defendant's profession, he had to have applied more attention and care than is the case with the average person, particularly taking into consideration his life experience of several decades, and therefore predict the consequence.

As previously mentioned, the Court is obliged to determine the existence of a causal relationship between the doctor's actions and the harmful consequence in each specific case and without any reasonable doubt, and considering the Court is not in the disposal of the knowledge adequate to determine such a relationship, this issue is resolved by expert opinion.

In all the observed cases, the expert opinions of the so called medical error were provided by medical boards of medical faculties in Belgrade, Novi Sad, Kragujevac and Niš.

It is the duty of each expert to make an oath before providing the opinion. The oath is used to remind and oblige the expert to provide their opinion in accordance with the rules of science or profession, conscientiously, impartially, and in their own best knowledge, as well as that they will accurately and completely state their findings and opinion. However, when it comes to criminal procedures against doctors, it seems that the content of the oath is forgotten. This is indicated by the fact that in none of the cases before the court that we had insight into was sufficient to get the expert opinion of a medical board of only one faculty. In order to clarify the contested issues and remove any ambiguities and contradictory facts of the given depositions and opinions of a faculty, it was required for the expert opinion to be provided by another or even a third medical board of various faculties. For this reason, it is justified to ask the question whether this indicates solidarity of medical professionals with colleagues who are charged for a criminal offense while performing their duty. There is no need to particularly point out that the repetition of expert opinion also causes a prolonged span of time, which is why the criminal procedure itself is made more complicated and lasts for a long time. In a great number of cases, absolute obsolescence of the criminal proceedings takes place, so the procedure "infamously" results in an acquittal.

The following characteristic of these cases is that the defense used by the defendants during their criminal proceedings is usually the same and comes down to shifting the blame to the injured party. In the stated defenses during the proceedings, all the accused doctors have shifted their blame and the reason of their professional error to the injured party and the members of their families for incompletely or falsely giving the patient's anamnesis. The accused doctors invoked wrongly or incompletely provided information regarding the patient's medical history, both by patients and the members of their families, which, in the opinion of the defendants, was the reason for the falsely

made diagnosis, or the objective impossibility for the doctor to make the correct diagnosis in the given conditions. In the above cited verdict of the Basic Court in Pančevo, K.br.399/16, the defendant stated as his defense that the husband of the deceased patient had not indicated that the issue is the appendix during the initial examination, but instead only held his wife's hand for support. Furthermore, in the verdict of the Basic Court in Pančevo, K.no.671/16 as of 11.05.2018, the defendant, as the surgeon on duty in the General Hospital in Pančevo, stated in her defense that she only learned from the patient and the patient's father that the injury occurred while managing a grinder and a grinder plate, and that she was not notified that the grinder plate had dispersed, or broke up into pieces, which is why she couldn't visually see or presume that a large piece of the grinder plate was left in the wound of the patient, which she later stitched up, leading to worsening of the patient's health condition.

This neglects the fact that a doctor is responsible to take into consideration the wider picture of the clinical anamnesis based on their expert knowledge and in accordance with the rules of the profession, and based on that draws a general conclusion regarding the manner in which the injury or illness in the patient had occurred. The courts have the responsibility to objectively and, in accordance with logic and life experience, analyze whether the doctor had the possibility to properly and completely perceive the patient's condition in the given circumstances.

Finally, in the defenses of the accused doctors, it was noted that harmful consequence is also attributed to objective, technical faults, to the failure of the necessary diagnostic devices of the institution used to conduct proper analyses, which would enable a proper diagnosis of the patient's condition. However, this cannot be treated as a justified and logical defense, as in the case that the institution does not have diagnostic devices necessary to conduct proper analyses available or if the doctor does not have sufficient expert knowledge, it is the doctor's duty to refer the patient to another institution that meets the criteria necessary for the treatment. This is proscribed by the Code of Medical Ethics in Article 12 – that doctors must be aware of the limits of their of their professional abilities and possibilities, and should not overstep those boundaries. In the case that the examinations and treatment are above the expert abilities of the doctor, they must summon another doctor with these necessary abilities.

So, in the verdict of the Basic Court in Pančevo, K.no.631/12, doctors, surgery sub-specialist, and the chief of surgery in the hospital were acquitted of the charges to have committed a criminal offense. The public prosecutor charged the doctors as they, upon admitting the injured party into the hospital with a self-inflicted wound in the chest area, treated the injury as a light bodily injury, failing to determine that this is a grave bodily injury dangerous to the life of the patient, and even though the patient was held at the department, he was left without the necessary psychiatric examination, therapy or supervision, even though they had been informed about the possible suicide attempt and aware that due to the superficial examination of the wound and without a complete diagnosis of the degree of the injury, the condition of the patient can worsen, after which the patient had committed suicide by jumping for the third floor window of the hospital. The courts of the first and second instance did not accept such a charge by the public prosecutor. The court had not found any elements of medical malpractice in such actions of the doctors and had accepted the defense of the doctors that they have acted conscientiously and in accordance with the medical practice, as due to the unclear manner of injury, the patient was retained at the surgical department, that a neuropsychiatrist was notified of the issue, who examined the patient, did not proscribe

any therapy believing one to be unnecessary as the patient was "calm and of cheerful nature".

Without debating any more deeply the reasons used by the court during decision-making, this is one of the examples when, from everyday experience, it seems to a layman that the court had acted unjustly as it acquitted the doctors that had admitted the patient with a wound that was left without a clear reason of how it was inflicted, and that was suspected to be a result of self-harm, that was lightly understood to be, by its own merit, non-life-threatening, but the doctors have also taken lightly that the patient was of no danger to himself, which had proven to be a wrong judgement considering the patient had committed suicide by jumping from the window of the hospital.

A similar situation is with another verdict of the Basic Court in Pančevo K.no.1476/12, where apart from the general surgery doctors in the hospital, neuropsychiatrist specialist was also included in the public charge. In this case, during the hospital treatment a patient had developed organic mental disorder, due to which she was to be supervised 24 hours a day, as risk for irrational behavior of the patient could be presumed, and the doctors were to not leave the patient alone in the room, without bars, unrestrained to the bed, on the ground floor of the hospital, due to the lack of which the patient jumped from the window of the hospital. In this case, the court had also concluded that there is no room for criminal responsibility of the doctors, as there was no causal relation between the action of the criminal offense and the resulting consequence. "In favor of the conclusion that there is no evidence that the defendants have committed a criminal offense they are being charged with, is the content analysis of the report of the general hospital, which clearly states that in the critical period in the aforementioned institution no general or internal act had existed that would proscribe treatment of patients diagnosed with mental disorder"[11].

4. Conclusion

By shortly overviewing the court practice of the South Banat district in the Republic of Serbia, we have seen that the courts are of unified stance when it comes to "medical malpractice".

Criminal-justice responsibility of the defendant will depend firstly on the facts of the situation, but also primarily on the skill of the public prosecutor to prove in the court procedure that the doctor acted with a higher degree of negligence, that their actions roughly violated the rules of medical practice and science[12].

The existence of the evident aspect of the case is always difficult to prove. We have seen that the reasons can be various, and they range from systemic problems, lack of general regulations in this area, to problems that the courts face during evidence presentation. Doctor solidarity is evident at all levels – support to the accused colleague by doctors in witness roles, doctors providing expert opinion upon order of the court, the evidence crucial to determining guilt.

All of this makes the role of the public prosecutor more difficult, it alleviates the position of the accused doctor, and the court is left to apply the law from the standpoint of logic and practice, and to draw the right conclusion regarding the guilt of the perpetrator. When there is insufficient reliable evidence necessary for the court to draw

[11] Verdict of the Court of Appeal in Belgrade, Kž1.no.1196/14, as of 16.09.2014.

[12] Z. Stojanović, *op. cit.*

conclusions on the level of certainty regarding a fact, for the reason of doubt, a doctor or any other defendant must be acquitted of the charge.

The fact is that the largest number of criminal cases dealing with medical malpractice results in an acquittal. From the standpoint of legality, the verdict can be examined before higher instance courts. However, from the standpoint of righteousness, the displeasure of the injured party, the members of their families, as well as the general public regarding the outcome of the procedure where the justice was not met is justified.

Often, law and justice are on opposite sides. The court can be expected, but must not be, to reconcile these two, sometimes conflicting, parties. The aim of the court is to satisfy both justice and law. However, due to the circumstances of the life event, procedural and legal matters presented during the procedure, this ideal is unattainable. Therefore, a judge, with all the effort, cannot create justice for the injured party and adequate social condemnation for the committed medical malpractice.

All the while the issue of medical responsibility is left systematically unresolved, with clearly proscribed procedures, technical actions that are subject to be empirically evaluated and that can be qualitatively and quantitatively compared, a step further cannot be made in providing efficient legal-justice protection of medical malpractice. Apart from that, we can continue to hope that isolated cases of legally convicted verdicts will have a sufficiently strong preventive effect on the conscientiousness of doctors that are responsible for the basic human right – the right to life.

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10. Verdict of the Basic Court in Pančevo, K.no.3471/10;
11. Verdict of the Basic Court in Pančevo, K.no.399/16;
12. Verdict of the Basic Court in Pančevo, K.no.631/12;
13. Verdict of the Basic Court in Pančevo, K.no.671/16;
14. Verdict of the Court of Appeal in Belgrade Kž1.no.721/14;
15. Verdict of the Court of Appeal in Belgrade, Kž1.no.1196/14;
16. Verdict of the Court of Appeal in Belgrade, Kž1.no.1529/16.