THEORETICAL AND CASE-LAW CONSIDERATIONS ON THE PROFESSIONAL NEGLIGENCE OF DOCTORS THAT COULD RESULT IN CRIMINAL, NOT ONLY CIVIL, LIABILITY

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Abstract

In this study we aimed to analyze guilt, in the form of negligence, that is governed in Romanian criminal laws in Article 16 paragraph (4) of the Criminal Code, as follows:"An offence is perpetrated in negligence when the offender:a) foresees the outcome of his actions but does not accept it, deeming that it is unlikely for it to occur; b) does not foresee the outcome of his actions, although he should and could have."This form of guilt applies in the case of all incriminations stipulated in the criminal law perpetrated in a negligent manner, while keeping in mind that, in accordance with Article 16 paragraph (6) of the Criminal Code "an offence committed in negligence amounts to a criminal offence when expressly provided by law".

Keywords: *guilt, negligence, criminal liability..*

In a modern State, with a strongly developed economy and technology, a wide range of professions, jobs and other such activities useful for the society are undertaken, but which also pose a risk factor for some of the social values protected under the criminal law. That is why, the State steps in and, within the limits of a risk accepted by the society, regulates and lays down the legal frame appropriate for the performance of certain hazardous professions, jobs or other activities, in order to prevent consequences inconvenient for the society.

All these regulations specific in the performance of certain professions, jobs or other activities hazardous for the public, compels the practitioners of the above to conduct their professional activities with particular care, attention, to act in a prudent and diligent manner in fulfilling their professional obligations, in line with the legislative enactments governing the relevant activity.

Having regard to this reality of the hazard posed by the performance of certain professions, jobs or other similar activities, the Romanian criminal law maker incriminated the negligent perpetration of actions inconvenient for the society, as a result of the practitioners of such hazardous professions (jobs) failing to comply with the professional obligations originating from the governing legal frame. In that respect, as far as the Romanian criminal legislation is concerned, two incriminations are material, in particular: manslaughter [Article 192 paragraph (2) of the Criminal Code] and involuntary bodily injury [Article 196 paragraph (3) of the Criminal Code].

In both of the legal texts referred to above, the law maker provides more severe penalties for manslaughter and involuntary bodily injury, where the outcome results from "the failure to comply with the legal provisions or precautionary measures in exercising a profession or job, or for the performance of a certain activity".

Mention is to be made that, both in respect of manslaughter, and involuntary bodily injury committed by the practitioners of professions (jobs) hazardous for the society, harsher penalties are imposed than in the case of manslaughter or involuntary bodily injury perpetrated by other individuals.

The explanation for the difference in the criminal treatment, more severe in the case of the practitioners of jobs (professions) hazardous for the society, who commit manslaughter or involuntary bodily injury, as compared to other persons who commit the same offences, is simple, although, objectively speaking, the outcome is the same, more specifically death or bodily injury of another individual. Thus, there is a principle in place, according to which persons conducting activities that are hazardous for the members of the society have an obligation to act in a prudential, more careful manner and use their best endeavors in fulfilling their professional duties, so that to avoid the violation of the social values protected by the criminal law, because they are, by virtue of the nature of professional activities performed, a latent source of jeopardy for the members of collectivity.

For instance, a driver should follow with great responsibility the traffic rules on public roads and slow down when encountering crosswalks, so as not to cause traffic accidents resulting in human victims, because he is driving an automobile which, when not driven in accordance with the requirements stipulated by law, turns into a source of major jeopardy for traffic participants. On the other hand, a pedestrian who does not stop at the red traffic light, is not a source of jeopardy for traffic to the same degree as the imprudent driver who ignores the red traffic light, because the car he drives could cause irreversible consequences.

Conversely, the practitioners of hazardous jobs (professions) are trained in their field of activity by education, training or other specific forms of education, which means that they are well aware of the risks their

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activity poses to the public and of the need to conduct such job (profession) in strict compliance with the stipulations of legislative enactments and regulations governing their professional activity.

Precisely in light of these features (characteristics) of the practitioners of hazardous jobs (professions), in relation to the other members of society, the law maker deemed that their failure to fulfill their professional obligations, which led to the perpetration of offences set forth in the criminal law, should be subject to more severe punishment (for instance, simple manslaughter is penalized by 1 to 5 years imprisonment, while manslaughter further to the failure to observe legal obligations in exercising a profession, job or another activity, is penalized by 2 to 7 years imprisonment).

Given the existence of regulations set out in Articles 192 and 196 of the Criminal Code, concerning manslaughter and involuntary bodily injury resulting from the failure to comply with legal provisions of precautionary measures in exercising a profession or job or in performing a certain activity, criminal doctrine created, for such cases, the phrase of "professional negligence", as a variation of negligence.

Professional negligence occurs "when the agent fails to fulfill or inappropriately fulfills his legal or regulatory duties (the rules for exercising most professions are laid down in professional, technical and ethics regulations) by lack of prudence, care or attention to the given circumstances; he fails to foresee what an ordinary professional would have foreseen in similar conditions. The same applies to the person who fails to foresee, although he should and could foresee the outcome of an action, either by lack of knowledge which he should possess, or for lack of certain qualities, proficiency or skills"[1].

In the definition of professional negligence given above, we may identify all the ingredients necessary in defining a doctor's professional negligence.

Furthermore, the law maker himself has defined medical professional negligence (medical malpractice) in law no. 95/2006[2]. Thus, in accordance with Article 653 paragraph 1 letter B) "malpractice is the professional error perpetrated while performing a medical or medico-pharmaceutical act, which may generate damages for patients, involving the civil liability of medical personnel and of the provider of medical, healthcare and pharmaceutical products and services". The second paragraph of the same article stipulates that "medical personnel shall be held under civil liability for damages caused by error, which also included negligence, imprudence, or insufficient medical knowledge for exercising that profession, through individual acts during prevention, diagnosis or treatment procedures". In accordance with paragraph (3) of the same article, "medical personnel shall also be held under civil liability for damages deriving from the failure to comply with the regulations in this section in respect of confidentiality, informed consent and obligation to provide medical care": Paragraph (4) of the same article provides that "medical personnel shall additionally be held under civil liability for damages occurred during the performance of a profession when the limits of competence are exceeded, save for emergency cases, where medical personnel of required competence is not available". Finally, paragraph (5) of Article 653 sets forth that "civil liability regulated by law does not preclude criminal liability, if the offence having caused the damage is a criminal offence, under the law".

From the regulation of Article 653 in Law no. 95/2006, as a whole, the general conclusion may be drawn in the matter of interest herein, that a doctor's tort civil liability lays the basis for criminal liability for professional negligence.

It is well-known that, among all professions and occupations, the most special and peculiar is the profession of doctor, because, by the very nature of this

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[1] Narcis Giurgiu, *Drept penal general*, Contes Publishing House, Iași, 2000, p. 142; definitions in the same respect may also be found in the works of other authors. Thus: B.A. Sârbulescu, in *Reflecţii cu privire la culpa profesională ca formă a vinovăţiei (II)*, in R.D.P., no. 3/195, p. 56, stating that: "the concept of professional negligence refers to a certain variety of negligence and occurs as a subjective element in certain categories of criminal offences, of a peculiar nature: criminal offences committed while performing or in relation to the performance of activities of a professional nature, which could entail jeopardy for the society". The perpetrator, B.A. Sârbulescu states in the cited paper p. 54-55, "is held under professional negligence whenever he knew the specific rules for performing an activity (and, implicitly, the requirements of diligence he should have foreseen) and acted lightly, not heeding them. Furthermore, a perpetrator will be held professional negligence when he acted in a reckless manner, not knowing such rules, although he should and could have known them". As concerns a doctor's professional negligence, definitions may be found in medical literature. As such: "failure to fulfill obligations pertaining to professional deontology, in the form of unpardonable severity, amounts to the doctor's professional negligence" (Ion Turcu, *Dreptul sănătăţii. Frontul comun al medicului şi al juristului*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 299); Malpractice is "the illicit action committed with guilt, which generated damages – committed while performing a medical or medical-pharmaceutical act and involving the civil liability of medical personnel and of the supplier of medical, healthcare and pharmaceutical products and services" (Gabriel Adrian Năsui, *Malpraxisul medical. Particularităţile răspunderii civile medicale*, Universul Juridic Publishing House, Bucharest, 2010, p. 395); Cristian Stan, in the paper *Malpraxisul medical*, Etna Publishing House, Bucharest, 2009, p. 15, asserts that "malpractice is the professional error committed while performing a medical or medical-pharmaceutical act which caused the patient to incur damages, involving the civil liability of medical personnel and of the supplier of medical, healthcare and pharmaceutical products and services"; In another definition, medical malpractice is "a system of legal medical liability exclusively correlated to the field of legal liability" (Gheorghe Bălan, Diana Bulgaru Iliescu, *Răspunderea juridică medicală în România*, Hamangiu Publishing House, Bucharest, 2015, p. 55).

[2] Law no. 95/2009 on health reform, was republished in Official Gazette of Romania no. 490 dated 3 July 2015. Title XII of the law (Articles 376-411) contains regulations for the medical profession in Romania; chapter III of Title XII governs the "organization and operation of the Romanian Doctors' College" (in Articles 412-449), and section VI of the same law governs doctors' disciplinary liability, Articles 450-459; In the same law, Title XIII (Articles 476-562) governs "the performance of the dentist medical profession and the organization and operation of the Dentists' College". Title XIV (Articles 563-651) of Law no. 95/2006, republished, governs the performance of the pharmacist profession and the organization and operation of the Romanian Pharmacists' College.

profession, a doctor is working with people, saves lives, cures or alleviates patients' suffering. The cases where a doctor may found himself face to face with his commandments and the purposes his profession are so numerous, and in certain circumstances so full of unpredictable risks, that sometimes it is difficult to determine the requisite nexus between the medical act and the damage caused by it. The medical doctrine considered that the "regulations on the performance of the medical profession are still insufficient, as it is often necessary for the correlations between doctor and patient, between their mutual rights and obligations to be treated in the light of ethics principles"[3], but also Law no. 46/21 January 2003[4].

Precisely in consideration of the complexity attached to the medical act and the consequences it may entail, doctors conduct their professional activity which may entail negligent legal liability in a highly extensive legal frame.

Thus, performance of the medical profession takes place in a legislative area made up of: Law no. 95/2006 on health reform, republished; the By-Laws of the Doctors' College, Medical Ethics Code[5] and Law no. 46/2003 on the patients' rights.

In this sequence of legislative enactments governing the delivery of the medical profession, it may be noticed that the Medical Ethics Code is one of them. As already emphasized in medical literature, "medical profession required the recording of doctors' ethics obligations in ethics codes and setting up of professional organizations, colleges or ethics orders to foster principles of ethical conduct, to ensure that they are observed, and penalize departures from the rule"[6]. Insofar as the failure to comply with ethics regulations entails the perpetration of offences stipulated under the criminal law, the doctor will be held under criminal liability.

Through its increasing complexity, the "medical act requires increasingly wider knowledge and more advance specialization, and certain circumstances occur more and more frequently where the skills of a single individual (doctor, note added) is insufficient. Therefore, the need ensues to set up more or less cohesive, more or less structured teams, with an unexpected legal impact in determining the potential damages which may occur[7].

For professional negligence in general to exist, as deriving from the provisions of Article 192 paragraph (2) and Article 196 paragraph (3) of the Criminal Code, it follows that certain requirements need to be met. These conditions are:

a) the perpetrator is a professional, a handyman or an individual performing a certain activity;
b) an offence has been perpetrated during the performance of the profession, job or of a certain activity;
c) there shall be certain legal provisions, rules of conduct or prudential measures for the performance of the profession or job or of a certain activity;
d) the offence committed further to the failure to comply with legal provisions or prudential measures in the performance of a profession, job or of another activity regulated under the law shall amount to an offence stipulated by the criminal law;
e) the requisite nexus shall exist between the offence committed further to the failure to comply with legal provisions or prudential measures in the performance of a profession, job or of another activity and the criminal outcome.

In criminal court practice, there have been cases where the courts of law have held, in the doctor's charge, negligence subject to hardship and have sentenced him. Here is one of them:

By means of the indictment issued on 16 March 2009 by the Prosecutor's Office attached to Piteşti Local Court, the defendant G.C. was sent to trial, without being detailed, for having perpetrated the criminal offence of manslaughter, as provided in Article 178 paragraphs (1) and (2) of the old Criminal Code. The court noted that the defendant, being a gynecologist in the County Hospital of Argeş, failed to provide appropriate medical treatment to the person named C.I., which resulted in the latter's demise on 21 March 2006.

The evidentiary material existing in the case file revealed that the material element of the criminal offence of manslaughter materialized in actions attributable to the defendant: failure to comply with medical ethics rules, substantially consisting of having omitted to recommend certain para-clinical investigations/medical analyses in order to determine a full diagnosis, having omitted to determine such diagnosis in a timely manner and to prescribe an appropriate and full medical treatment, having omitted to have a gynecological therapeutic conduct able to preclude the complications which have led to the patient's demise.

The court noted that no routine medical investigations have been performed, generally applied to any patient admitted to a hospital section, or specific investigations, mandatory in case of threatening miscarriage, which could have shed a light on the etiology of this case and on the status of the conception outcome. The court decided that, between the immediate consequence (the patient's demise) and the

[3] Almas Bela Trif, Vasile Astărăstoae, *Responsabilitatea juridică medicală în România*, Polirom Publishing House, Iaşi, 2000, p. 47.
[4] Law no. 46/21 January 2003, on patients' rights, was published in Official Gazette of Romania no. 51 of 29 January 2003.
[5] By-Laws of Romanian Doctors' College and Medical Ethics Code were adopted by the Romanian Doctors' College by Decision no. 2 of 30 March 2012, published in Official Gazette of Romania no. 298 of 7 May 2012.
[6] Almaş Bela Trif, Vasile Astărăstoae, *Responsabilitatea juridică medicală…*, op.cit., p. 47.
[7] Almaş Bela Trif, Vasile Astărăstoae, *Responsabilitatea …*, op.cit., p. 8.

defendant's inactions there is a direct cause-effect relationship, and the form of guilt is negligence while foreseeing the result or recklessness (the defendant foresaw that the diagnosis determined upon the patient's admission to the hospital meant that the fetus could have died at any time, but thought, without any ground, that this would not occur and did not conduct any para-clinical investigation, not even the customary one, which would have helped him determine the full diagnosis of intra-uterine death of fetus, with the consequence that he failed to apply an appropriate medical conduct)[8]. The arguments issued by the court for the doctor's negligence, in this case, comply with the general pattern laid down in the doctrine in respect of negligence while foreseeing the outcome, within the meaning that the "author deems that the outcome would not occur precisely based on certain objective circumstances, which, however, are misinterpreted. Therefore, it may be said that the ground does not miss, but proves to be insufficient"[9].

This case, as well as others contained in the criminal case-law, draws attention to the form of guilt noted by the court, in particular negligence while foreseeing the outcome, in the case of the defendant doctor.

Whereas, in the case of other professional negligence instances, there are no difficulties in the court holding negligence while foreseeing the outcome, in our opinion, in the case of professional negligence of a doctor, a more thorough investigation could lead to another conclusion. Thus, in our opinion, a doctor performing his profession, but who, while delivering a medical act, departs from the regulations governing his professional obligations, as it happens in the case at hand, the court may not rule on guilt in the form of negligence while foreseeing the outcome, but always as negligence in the form of recklessness.

In making this assertion, we do not mean to criticize the rulings of "negligence while foreseeing the outcome" issued by courts in everyday practice, because they rely on the criminal law and specialized doctrine, on the contrary, our aim is to also emphasize another potential approach to professional negligence, only for the specific case of a doctor who is the active subject of a criminal offence.

Thus, the active subject of the criminal offence foreseeing the socially hazardous outcome, as indicated in Article 16 paragraph (4) letter a) of the Criminal Code cannot be brought into debate in a doctor's case, as this contradicts the very idea of medicine and the doctor's existence rationale, since doctors dedicate their lives to saving the lives or ameliorating the health of their patients. Therefore, in our opinion, the consecrated idea that, in case of a doctor's professional negligence he foresees the socially hazardous outcome (for instance: the death of his patient as a result of his actions or omissions during diagnosis and treatment) considering, in an unjustified manner, that it would not occur, is untrue and misleading. It would be absurd to believe that any doctor, while fulfilling his professional obligations, foresees the death of his patients, but he "considers in his inner belief, in reliance upon objective circumstances, that this would not occur" and would not immediately act in the meaning of precluding the patient's death.

The doctor, as the one in the case described above, in light of his education and experience in his field of activity, upon the patient's admission to the hospital, did not have "ab initio", at any time during the performance of the medical act, such as it was performed, the representation of the fact that she would die because of him, however, this outcome did occur as a result of the fact that he acted in a negligent manner, after the patient was admitted to the hospital, in the medical conduct adopted in treating the patient in this case, and failed to do everything he was supposed to, in accordance with the best medical practices available to him. The patient's demise which occurred after her admission to the hospital, is, in our opinion, in terms of guilt, attributable to the doctor, in the form of simple negligence, recklessness. Because of cases of hospital doctors' recklessness related to the deaths of certain patients, there is a folks' saying that "one goes to the hospital alive and gets out dead".

In our opinion, the cases of professional negligence which have resulted in the death of bodily injury of patients are not cases particularly difficult to solve, from the medical perspective, but curable in light of medical science and which should lead to a positive outcome, in the patients' benefits, but which, precisely because of the doctors' recklessness in their approach to the diagnosis and treatment applied, have a tragic end.

In all this cases of medical malpractice with criminal implications, in our opinion, the doctors' negligence while foreseeing the outcome is excluded, as the form of guilt will always be that of simple negligence or recklessness.

According to the current regulation in matters of guilt, in respect of professional medical negligence, the trial should prove whether, although the socially hazardous outcome was foreseen, the doctor also had the strong belief that such an outcome would not occur. This is particularly important to be decided during the trial, because this is the only way of segregating, in an actual case, between negligence while foreseeing the outcome and indirect intention for the socially hazardous outcome to occur. Thus, if, in performing the medical act, the doctor estimates that a socially hazardous outcome could occur – for instance, the patient's death – and persists in that act, failing to take the measures required to preclude the outcome threatening the patient, and that outcome, more specifically the victim's death, occurs, the offence will

[8] Pitești County, criminal judgment no. 496 of 14 February 2012, referred to by Judge Roxana Mona Călin in the paper *Malpraxis – răspunderea medicului şi a furnizorilor de servicii medicale, practică judiciară*, Hamangiu Publishing House, Bucharest, 2014, p. 285.

[9] Florin Streţeanu, *Tratat de drept penal, partea generală*, volume I, C.H. Beck Publishing House, Bucharest, 2008, p. 453.

be held in his charge as manslaughter in the form of guild consisting of indirect intention, excluding the negligence while foreseeing the outcome.

For instance, in observance of the contract between the doctor and the patient, the former undertakes to cure the latter by applying a certain treatment. In fulfilling his obligation, the doctor progressively applies the treatment, but after the first procedures applied, the patient's condition worsens, and then the doctor realizes that undesirable consequences occur, which, if left unattended and continued, would further impair the patients' health and he could no longer fulfill the obligation incumbent upon him. Therefore, any undesirable consequences that could occur need to be removed by the doctor, who has to step in and stop those procedures, changing the treatment. However, undesirable consequences which endanger the patients' life or health need to be prevented or removed precisely by a more diligent control held by the doctor in respect of the patients' health and the evolution of their illness.

The regulations in the matter of guilt, in Article 16 of the Criminal Code, set forth that in certain circumstances, negligence while foreseeing the outcome may be tangential with indirect intention, and in many cases which have come before the supreme court, it was decided that the form of guilt is not negligence while foreseeing the outcome and indirect intention. Given the many such cases, where some courts have ruled, in specific files, that the guilt was negligence while foreseeing the outcome, and the supreme court decided that indirect intention applied, the question may be asked: why did that happen? The answer is that, as already emphasized in the doctrine, "the phrase used by the Romanian criminal law maker in defining negligence while foreseeing the outcome – the offender foresees the outcome, but does not accept it, believing, in an unreasonable manner, that it will not occur, may create confusion"[10]. Court practice confirms this remark.

Other authors are more decided, deeming that, in principle, the law maker did not give a scientific regulation for the concept of guilt, a remark with which we agree. Besides, the doctrine claims that the "variants of intention, as well as of negligence, should be removed for good from criminal science, which, precisely because it is a science, is not allowed to use concepts so equivocal as that of «direct intention» and «negligence while foreseeing the outcome»"[11].

We opine that, in the case of criminal medical malpractice, the concept of negligence while foreseeing the outcome and of negligence while foreseeing the outcome converted into indirect intention does not apply in the exceptional case of doctors who, in light of the noble art they fulfill in the society, but also in observance of the contract concluded with the patient, have a sacred mission of saving human lives, not end them. If, however, as a result of professional negligence, damaging outcome occurs, such as the patients' death or bodily injury, this is solely and exclusively due to their negligence in performing a medical act.

The fact that medical liability as the doctor's civil liability for the prejudice caused while performing a medical act relies on the traditional idea of negligence (error)[12] and/or the concept of professional error brought forth by Law no. 95/2006 on health reform[13], could also amount to an argument and, as far as the doctor's criminal liability for professional negligence is concerned, consideration shall only be placed on negligence in the form of recklessness (error).

Negligence while not foreseeing the outcome (recklessness or mere negligence) is referred to in most unintentional criminal offences, as it also happens in the case of doctors' professional negligence. This variant of negligence contains two important items, setting it apart from negligence while foreseeing the outcome, in particular:

a) the doctor's obligation to foresee the socially hazardous outcome
b) the doctor's actual ability to foresee that outcome.

A doctor's obligation to foresee the outcome relates to an obligation of prudence or diligence imposed upon him in connection with the medical act he is about to perform, so that the act at issue does not entail a consequence able to prejudice a social value protected by the criminal law. The obligation of diligence or prudence incumbent upon the doctor may be contained in a legislative enactment governing the medical profession, in other laws, such as the patients' rights law, the doctors' ethics code, Government Emergency Ordinances or Orders of the Ministry of Health.

The doctor's ability to foresee that a socially hazardous outcome would occur as a result of the medical act or its omission shall be analyzed against the actual conditions in which the action took place (against the standard reference doctor), but also taking into account the subjective features of that doctor.

In court practice, it was decided that "in objective terms, upon determining the obligation to foresee the outcome, consideration shall be placed on the circumstances in which the offence was committed, so as to ascertain if anyone in the category of the offence had, at the time when it was committed, the ability to

[10] Florin Streţeanu, *Tratat de drept penal…*, *op.cit.*, p. 453.
[11] Mioara Ketty Guiu, *Elementul subiectiv şi structura infracţiunii (doctrină, jurisprudenţă, comentarii)*, Juridică Publishing House, Bucharest, 2002, p. 102.
[12] Roxana Maria Călin, *Malpraxisul…, op.cit.*, p. 129.
[13] In accordance with Article 653 paragraph (2) of the law, "medical personnel shall be held under civil liability for damages caused by error also including recklessness, imprudence or insufficient medical knowledge in delivering the profession, by individual acts in respect of prevention, diagnosis or treatment procedures".

foresee the outcome. If, in light of the circumstances of the case, it is decided that the outcome could not have been foreseen, than the perpetrator would not have had the obligation to foresee it"[14].

In subjective terms (if the doctor could have foreseen the outcome), the court ought to determine the doctor's professionalism, experience and training in the field, wit, expedience in finding ad-hoc solutions or the physical fatigue existing at the time when the medical act was undertaken.

In a specific case, the court ruled that the surgeon, after having performed a C-section, forgot in the plaintiff's body a surgery equipment fragment operator which caused her harm. The court, in that case, ruled that the "doctor's omission of taking out a foreign item from the patient's body amounts to negligence" on his part[15].

In court practice, it was decided that "recklessness is the omission of doing what a slightly imprudent individual, under the guidance specific to a prudential conduct, would do or acting in a manner in which a prudential and diligent individual would not. Recklessness in medical practice comes in the form of haste, superficiality, undutiful performance of obligations. Recklessness may take the form of: inappropriate consultation case history; failure to perform a suitable clinical examination; failure to undertake routine para-clinical examinations"[16].

Medical negligence by failing to foresee the outcome was largely described and explained in medical literature. Thus, it was stated that "failure to foresee the outcome, the reasonable inability of foreseeing it, are a mere variant of professional negligence involving the frustration of a professional's average, normal ability to foresee the outcome, but also and the possibility to foresee it. On the contrary, the impossibility to foresee any outcome is equivalent to a fortuitous case, when faced with risks implicit to medicine, which are specifically referred to as unfortunate or tragic cases"[17].

Specialists in the medical field opine that "the need to foresee the outcome ought not to become excessive prudence, especially in the context of current medical practice, where the risks are sometime overwhelmingly present in medical practice"[18].

Given that risk is implicit in performance of the medical profession, and may sometimes entail unfavorable consequences, we deemed necessary to emphasize several theoretical considerations in connection with medical risk.

Risk is a future event. In common language, the term of risk is synonymous with "jeopardy, danger, unfortunate event, objective threat"[19].

Any medical procedure or surgery intervention performed for a diagnosis or therapeutic purpose poses a potential risk of accident totally unconnected with the primary pathology or with medical error, but whose severity could result in the patient's demise or infirmity[20].

In every therapeutic act, there may be severe and exceptional risks involved, or frequent risks[21].

Risk goes hand in hand with medical act. One may never know, in undertaking a medical act when, where and why risk occurs. That is why, medical doctrine underlined that "the difficulty in determining the existence of therapeutic risk which does not originate from medical negligence, requires careful consideration of each and every case by experts, so that to remove any suspicion related to the surgeon's lack of dexterity or inappropriate handling of the patient by the medical team in charge of his care"[22]. It was further emphasized that "any medical procedure cannot escape a certain element of risk, which could lead to unsuccessful cure or to side effects. Risk forms part of the medical procedure itself, in most medical interventions, the risk of unfavorable evolution occurs independent of the doctor's fault"[23].

Doctors always accept risk exclusively for the best interest of the patient. In their turn, patients also freely and strongly accept risk both for their interest, but also in order to cover the doctor's responsibility. In accordance with Article 6 of Law no. 46/2003 on patients' rights, "patient shall have the right to be informed on his state of health, on the medical interventions proposed, on the potential risks attached to each procedure, on the alternatives available for the procedures proposed, including on the failure to undergo treatment and comply with medical recommendations, but also on the diagnosis and forecast". In accordance with Article 13 of the above-mentioned law, patients shall also be entitled "to stop a medical intervention, undertaking liability in writing for their decision; the consequences deriving from refusing or from discontinuing medical acts shall be explained to the patient". Objectively speaking, the doctor and the patient accept the risk by solving a medical necessity. The doctor not undertaking the risk in a particular case could have unfavorable repercussions. Thus, this matter was detailed in medical literature, and attention was drawn to the fact that

[14] The High Court of Cassation and Justice, criminal division, decision no. 2259/4 April 2005, in *Culegere de decizii ale I.C.C.J. pe anul 2005,* p. 4.
[15] Bucharest Tribunal, Third Civil Division, decision no. 515A of 18 May 2012, referred to by Roxana Maria Călin in the paper *Malpraxis…, op.cit.*, pp. 145-146.
[16] Bucharest Court of Appeals, civil decision no. 150A of 23 April 2013, referred to by Roxana Maria Călin in the paper *Malpraxis…*, *op.cit.*, 158;
[17] Gh. Scripcaru, M. Terbancea, *Coordonatele deontologice ale actului medical*, Medicală Publishing House, Bucharest, 1999, p. 194.
[18] Aurel Teodor Moldovan, *Tratat de drept medical*, All Beck Publishing House, Bucharest, 2000, p. 383.
[19] Ion Turcu, *Dreptul sănătăţii. Frontul comun al medicului şi al juristului*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 197.
[20] Cristian Stan, *Malpraxisul medical*, Etna Publishing House, Bucharest, 2009, p. 77.
[21] Ion Turcu, *Dreptul sănătăţii…, op. cit.*, p. 196.
[22] Cristian Stan, *Malpraxisul medical…, op.cit.*, p. 77.
[23] Idem, *op.cit.*, pp. 77-78.

"failure to undertake the risk, because of the doctor's unjustified caution, limited skills or even indolence, becomes of form of negligence known under the name of refusal to intervene"[24].

10. We deemed necessary to also refer, herein, to a series of practical variants of medical negligence in general, also widely known by lawyers, which may result in civil or criminal liability, as the case may be, placed on the doctor. It is good to know that all these instances of negligence derive from the doctor's breach of professional obligations, such as:

- an obligation of diligence in the treatment applied to patients;
- an obligation of result in certain dentistry treatments;
- an obligation of correct diagnosis of the patient's suffering;
- an obligation of caution the patient on the risks involved in the treatment he is about to undergo;
- an obligation of permanent supervising the patient's evolution, following an applied treatment;
- an obligation of monitoring the patient.

These obligations listed as examples, in addition to many others, are set forth both by the enactments delineating the general legal frame in which medical profession is conducted, but also from Law no. 46/2003 on patients' rights.

In medical literature[25], from the perspective of the manners which could result in medical malpractice, a segregation was made between:

a) negligence by doing ("in agendo"), a case in which malpractice is committed by the doctor following his clumsiness, imprudence, lack of skill, lack of dexterity, indifference to the patient's needs; caution not justified by need, inappropriate use of working conditions or failure to work with particular care or prudence;
b) negligence by not doing ("in omitendo"), which takes place when the patient loses the chance to be cured or survive because of the doctor's failing to take necessary actions. Omission itself may manifest as the doctor's indifference, failure to take note or recklessness, and the doctor will be held liable if the requisite nexus is identified between his negligence and the damage incurred;
c) negligence "in eligendo", consists of the doctor choosing the wrong technical procedure, delegating certain obligations to an unsuitable person, or delegating his own obligations to someone else, in breach of the principle according to which "delegated obligations shall not be further delegated";
d) negligence "in vigilando", consists of the doctor infringing a duty of collegiality as regards the request and obligation to attend an inter-clinical examination, by failing to provide aid, by failing to inform on the patient's fate or by inappropriate supervision of subordinates.

The criterion against which negligence will be appraised is the customary – reasonable professional conduct of a doctor who, under the same working conditions, would not have committed the error.

To conclude, we want to emphasize that intense publicity of various cases of medical malpractice may incite an attitude of revolt and reproach from the public to the doctors who were in charge of patients who, because of their negligence, have died or suffered bodily injury. At the same time, excessive publicity of malpractice forces medical professionals to conduct their professional activity under the pressure of public eye, which could be prejudicial to the image of the medical profession.

Therefore, we have sought to combine here medical and criminal considerations and set out commented theory and court practice on doctors' criminal professional negligence, in order to better understand, from the legal perspective, the immense responsibility carried by doctors in performing medical acts, while having regard to the risks of this profession.

Medical criminal liability needs to be correctly understood by doctors, within the meaning that when they err and should not have, they will pay, but also by the families of those who suffered from professional medical negligence, because the process of curing a patient is a long road, sometimes full of unforeseen events and complications, along which the doctor endeavors to use all his art in the patient's favor, to save him, and not to end his life. If, however, this happens, this ought to be food for thought for medical professionals, who cannot take patients' lives easy and should use more wit, precision and diligence in performing a medical act.

References:

- Giurgiu N, Drept penal general, Contes Publishing House, Iaşi, 2000;
- Streţeanu F., Tratat de drept penal, partea generală, volume I, C.H. Beck Publishing House, Bucharest, 2008;
- Ketty Guiu M, Elementul subiectiv şi structura infracţiunii (doctrină, jurisprudenţă, comentarii), Juridică Publishing House, Bucharest, 2002;
- Scripcaru Gh., Terbancea M., Coordonatele deontologice ale actului medical, Medicală Publishing House, Bucharest, 1999;
- Moldovan A.T., Tratat de drept medical, All Beck Publishing House, Bucharest, 2000;

[24] Aurel Teodor Moldovan, *Tratat de drept medical…., op.cit.*, p. 388.
[25] Almoş Bela Trif, Vasile Astărăstoae, Responsabilitatea juridică medicală în România…, op.cit. pp. 67-68.

- Turcu I., Dreptul sănătăţii. Frontul comun al medicului şi al juristului, Wolters Kluwer Publishing House, Bucharest, 2010;
- Stan C., Malpraxisul medical, Etna Publishing House, Bucharest, 2009;
- Law no. 95/2009 on health reform, was republished in Official Gazette of Romania no. 490 dated 3 July 2015;
- Trif A.B., Astărăstoae V, Responsabilitatea juridică medicală în România, Polirom Publishing House, Iaşi, 2000;
- Law no. 46/21 January 2003, on patients' rights, was published in Official Gazette of Romania no. 51 of 29 January 2003;
- Piteşti County, criminal judgment no. 496 of 14 February 2012, referred to by Judge Roxana Mona Călin in the paper Malpraxis – răspunderea medicului şi a furnizorilor de servicii medicale, practică judiciară, Hamangiu Publishing House, Bucharest, 2014;
- The High Court of Cassation and Justice, criminal division, decision no. 2259/4 April 2005, in Culegere de decizii ale I.C.C.J. pe anul 2005.