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PROBLEMICAL ASPECTS OF STANDARD OF CARE SETTING FOR PHYSICIAN‘S CIVIL LIABILITY

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Annotation. Changing legal relationship of doctors and patients, growing number of civil proceedings for doctor’s damage for medical patients, million worth claims for pecuniary and non-pecuniary damages, huge media attention for unqualified health care given to the patients require extensive analysis of legal literature, legislation and case law in order to determine concept of medical malpractice as a concept of civil liability and to determine what standard for doctors liability is applied in Lithuania. Based on the analysis results, it is stated that Lithuanian case law established maximum standard of medical liability (unlike the UK, where courts apply average standard of medical liability) is only an objective criterion, which is not regulated by law. According to the legal regulation of the two countries, doctors must act carefully, not causing damage, follow the appropriate scientific knowledge and level of development, applied practice of medicine, ethics rules, principles of fairness and reasonableness etc. For this reason, according to author's opinion, it is inappropriate to apply a maximum standard of medical liability and it is proposed to abolish it, seeking clarity and less confusion during civil litigations of medical liability.

Keywords: civil liability, medical malpractice, medical liability standard, duty of care.

INTRODUCTION

There are increasing number of cases when in mass media can be heard about patients' dissatisfaction with the medical or health care services provided, i.e. of poor quality or carelessly provided medical services, incorrect diagnosis of illnesses, thus inflicting damage on the health of patients. Such patient dissatisfaction and activity allows increasing number of claims when required for doctors (health care facilities) apply civil professional liability to compensate pecuniary and non-pecuniary damage caused to patient's health. Relevance of the topic could be confirmed by patient rights implementation issues, principles of physician-patient relationship, grounds of physician responsibility for the illegal actions and applicable standards. When patient's health is damaged, often problem arises when it is necessary to assess whether the doctor breached his duty of care, whether doctor's actions were legal or not, what criteria should be applied to assess doctor's malpractice. So the complexity of doctor malpractice criteria necessitates a deeper analysis of medical liability regulatory problems.

Aim of the investigation – via comparative analysis of Republic of Lithuania and United Kingdom medical liability conditions to determine what are the standards of medical

professional liability, practical implementation, similarities and differences between these countries courts.

Object of the investigation – doctor malpractice, as a legal liability clause. The article investigates the concept of doctor malpractice, criteria applied to assess medical malpractices, how they are governed by law norms, ethic rules and good medical practice. The aim is to analyze how legislation of the Republic of Lithuania and the practice of courts define criteria for the legality of doctors' actions and how they are influenced by identifying medical liability standard.

Main methods used to prepare the article, document analysis, descriptive, literature, comparative analysis, system analysis and generalization methods. Document analysis method is applied to analyze national legislation, descriptive method was describing the study findings, the scientific literature analysis method is used to determine Lithuanian legal scholars examined works of physicians liability conditions; comparative analysis method used for comparing Lithuania and UK regulated medical professional civil responsibility, standards of this type of liability, during analysis of legal doctrine and case-consistency; method of generalization was used to make conclusions in the article.

MEDICAL MALPRACTICE AS CIVIL LIABILITY CLAUSE

Not always consequences of negative health care service arise due to doctor malpractice, therefore assessing each case it is important to determine whether doctor acted properly or not. Judging doctor malpractice presence or absence must be based on criteria which allow doctor to evaluate the actions of irregularity. Unlawful acts in private law is usually interpreted as breach of own subjective duty and other person's subjective right.[1] In Lithuania pecuniary and non-pecuniary damages for person are enshrined at constitutional level, and when patient's detriment (when patient is injured or dies) due to doctor malpractice, which creates conditions for a professional civil liability and doctor‘s (or health care institution) obligation to compensate damages for injured or their relatives.[2]

The vast majority of civil cases for damages arising from doctor (health care institutions) illegal actions (poor professional performance of a particular behavior that is

[1] Kabišaitis, A. Gydytojo veiksmų standarto samprata ir reikšmė taikant gydytojų civilinę atsakomybę Lietuvoje ir užsienio valstybėse. *Teisė*. 2003, 49, p. 39.
[2] Juškevičius, J., Rudzinskas, A. Civilinės atsakomybės už netinkamą asmens sveikatos priežiūros paslaugų teikimą taikymo Lietuvoje ir Italijoje ypatumai. *Jurisprudencija*, 2008, 12(114), p. 73.

inappropriate to given doctor profession standards[3]) is related to violation of obligation of doctors. Legal doctrine presents the main reasons (they include „Tilburg Group" developed principles of tort law[4]), which is necessary to prove that a lawsuit for doctor malpractice (negligence) would be satisfied.

First of all, the patient in order to demonstrate doctor malpractices, have to prove that personal injury was made for him caused by improperly carried out doctor's duty, i.e. that between doctor malpractice and patient injury is a causal link. The aim is to evaluate if behavior of professional who provided medical services, was behavior which is required of any other of the same professional field. The second step is a requirement to determine whether doctor had a duty of care for the patient when he was injured. It is necessary to determine whether doctor providing medical care has violated a general duty of care, prudence, honesty. Duty of care for doctors arises from the fact that he has undertaken to care, cure, and inspect the patient. The third requirement is related to the need of certain abilities for medical profession, knowledge, and level of care requirements, or in other words the standard of liability. In each particular case, the plaintiff must show that actions of professional providing health services did not match requirements of his profession, specialization, and thus the duty of care was violated, and hence law or medical service contract (the same requirement applies to both torts and civil and contractual responsibility).[5]

Considering any three reasons for the doctor's malpractice, it is important to note that legal doctrine distinguishes major medical mistakes (doctor malpractices) that may arise in doctor professional civil liability. First of all, it is - wrong diagnosis when the doctor has wrongly conducted medical research results, fails to perform necessary physical examination or a doctor diagnoses a patient's health status, without verification, i.e. without doing research.[6] Another reason – selection of wrong treatment method. Doctor, as professional specialist of his field while treating the patient has the right to choose the best method of treatment for their patients. It should be noted that in many instances doctors can choose from

[3] Kuszler, P., Klimas, T. Gydytojo aplaidumu padarytos žalos atlyginimo institutas. Palyginamoji analizė: JAV ir Lietuva. *International Journal of Baltic Law*. 2004, 1 (2), p. 2.
[4] European Group on Tort Law, [interactive] [accessed 2013-09-22] <http://www.egtl.org/>
[5] Montgomery, J. *Health care law*. Oxford: Oxford University Press, 2003, p. 166-169.
[6] Faure, M., Koziol, H. *Cases on medical malpractice in a comparative perspective. Tort and Insurance Law, Vol. 1.* Vienna/New York: *Springer,* 2001, p. 38–39.

several possible alternatives, and not necessarily the safest method of treatment, but the chosen treatment method should be vitally necessary for the individual treatment.[7]

Responsibility for not refused treatment - another most common medical mistake. This mistake usually occurs when a certain medical institution or an employee undertakes to treat a patient while knowing that the hospital does not have a specific technical or medical machinery or doctors do not have some of the required specific knowledge and experience, but does not refuse to treat a patient, or expel him to another medical institution having a proper medical equipment or the necessary specialists.

In Lithuania obligations linking patient and doctor (health care institution) comply with criteria, when there is a need to fulfill obligation with insertion of maximum efforts. The obligation to provide specific degree of care and diligence is that a debtor must perform under the most favorable means of ensuring the maximum degree of care and diligence, but it is not required to ensure to guarantee a certain result.[8]

In UK breakage / damage (legitimacy) of doctor's duty to provide proper treatment is also determined by the compliance with the standard of care posed. The main difference is that in common law countries, medical action is measured by the way other representative of such profession or person engaged in same activity with normal skills would behave, i.e. an average standard of liability is implemented. Although Lithuanian health law area is relatively *young* compared with UK, but Lithuanian courts takes the same position that a doctor's duty to provide appropriate treatment - is associated with the duty, with a content to provide medical duty to ensure that this obligation is carried out by adding the maximum effort (ensuring maximum degree of attention, diligence, prudence and proficiency)[9], but not guarantee a particular result. Patients requesting a doctor cannot expect to be fully healed. In general, law does not recognize such an expectation as legitimate and do not protect it[10] as a doctor providing health care services cannot do more than allows medical science development level or relevant indications of patient's organism. That is why the doctor's liability for damages arising from violations during the treatment process rather than the unmet result.

[7] *Ibid.,* p. 39.
[8] Mikelėnas, V. *Prievolių teisė. Pirmoji dalis.* Vilnius: Justitia, 2002, p. 72.
[9] Lithuanian Supreme Court Civil cases division judge board 2001 November 14 decision in civil case L. Sandienė v. Kaunas Red Cross Hospital. (No. 3K–3–1140/2001).
[10] Kabišaitis, A. Gydytojo veiksmų standarto samprata ir reikšmė taikant gydytojų civilinę atsakomybę Lietuvoje ir užsienio valstybėse. *Teisė*. 2003, 49, p. 41-42.

Practice of Lithuanian Supreme Court, dealing with questions of doctor's damages and compensations due to illegal acts when there are identified doctor's civil liability applicable criteria necessary conditions are developing. Lithuanian Supreme Court in 1999 September 27 ruling, has pointed out that certain professions, such as doctors, solicitors, lawyers and so on, activity specifics is determined by the specifics of civil liability characteristics. These occupations are associated with increased risk of harm, for this reason, civil liability (compensatory) makes any, even the easiest form of guilt.[11]

Later development of the Lithuanian Supreme Court practice in more than one case it was noted that responsibility specificity of health-care professionals have individual traits. First of all, it should be noted that medical liability is one of the professional civil responsibility kinds. It is for this reason, the person who carries out his professional duties is required for a higher level of attention and care, prudence, qualification requirements than normal liability case. So, any inattention, carelessness, lack of professional duties, as well as ethical violation of a doctor can lead to his malpractice.[12]

DOCTOR'S CIVIL STANDARD OF CARE - TO PROVIDE PROPER TREATMENT IN LITHUANIA

Analysis of legislation of the Republic of Lithuania (Law of the rights of patients and health damage compensation of the Republic of Lithuania [13]; Insurance law of the Republic of Lithuania [14]; Dental Practices law of the Republic of Lithuania [15]; Physician medical practice law of the Republic of Lithuania [16]; Health care institutions law of the Republic of Lithuania [17]) leads to the conclusion that the patients in Lithuania has the right to choose a health care institution, which would provide with health care services. However, doctors (health care institutions) may not refuse to provide treatment at their discretion, excluding statutory exception. On the other hand, doctor must refuse treatment if it is not assigned to its competence, otherwise doctor will operate illegally. Legal regulation of Lithuanian health

[11] Lithuanian Supreme Court Civil cases division judge board 1999 September 27 decision in civil case L. K. v. D. J. (No. 3K-3-398/1999).
[12] Lithuanian Supreme Court Civil cases division judge board 2010 April 13 decision in civil case V. D. v. PI Kėdainiai Primary health care center and others. (No.: 3K-3-170/2010).
[13] Law of the rights of patients and health damage compensation of the Republic of Lithuania. *Valstybės žinios*. 1996, No. 102–2317.
[14] Health Insurance law of the Republic of Lithuania. *Valstybės žinios*. 1996, No. 55–1287.
[15] Dental Practices law of the Republic of Lithuania. *Valstybės žinios*. 1996, No. 35–855.
[16] Physician medical practice law of the Republic of Lithuania. *Valstybės žinios*. 1996, No. 102–2313.
[17] Health care institutions law of the Republic of Lithuania. *Valstybės žinios*. 1996, No. 66–1572.

care stipulates that civil liability of professionals providing health care services arises when a doctor makes a mistake, i.e. improperly provide treatment, inappropriate diagnoses disease, without adequate qualification refuse treatment, and so on., thus in this way violate the physical integrity of the patient, worsen patient's medical condition, patient dies or due to medical negligence damage to third parties is made.[18]

Legislative systematic analysis showed that the requirements are the same in many different doctors' specializations: family doctor[19], general practice nurse[20], surgeon[21], physician vascular surgeon[22], pediatric intensive care doctor[23], dentist prosthodontist[24], endodontist doctor[25], neonatologist doctor[26], urologist doctor[27], medical pathologist[28], oncologist radiotherapeutist[29] and others. Main areas of services of these medical professionals: in their practices effectively provide quality health care services; to provide emergency medical services within its competence; in inappropriate events of their

[18] Juškevičius, J., Rudzinskas, A. Civilinės atsakomybės už netinkamą asmens sveikatos priežiūros paslaugų teikimą taikymo Lietuvoje ir Italijoje ypatumai. *Jurisprudencija,* 2008, 12 (114), p. 74.

[19] Minister of Health of the Republic of Lithuania 2005 December 22 order No. V–1013 „For the Lithuanian medicine norm MN 14:2005 „Family doctor. Rights, duties, competence and liability" confirmation". *Valstybės žinios*. 2006, No.3–62.11 Point.

[20] Minister of Health of the Republic of Lithuania 2011 June 8 order No. V–591 „For the Lithuanian medicine norm MN 28:2011 „General practice nurse. Rights, duties, competence and liability" confirmation". *Valstybės žinios*. 2011, No. 72–3490. 10 Point.

[21] Minister of Health of the Republic of Lithuania 2000 January 28 order No. 50 „For the Lithuanian medicine norm MN 74:2000 „Surgeon. Rights, duties, competence and liability" confirmation". *Valstybės žinios.* 2000 No.11–261. 35–36 Point.

[22] Minister of Health of the Republic of Lithuania 2010 July 27 order No. V–663 „For the Lithuanian medicine norm MN 139:2010 „Physician vascular surgeon. Rights, duties, competence and liability" confirmation". *Valstybės žinios*. 2010, No. 92–4880. 11 Point.

[23] Minister of Health of the Republic of Lithuania 2010 November 8 order No. V–968 „For the Lithuanian medicine norm MN 151:2010 „Pediatric intensive care doctor. Rights, duties, competence and liability" confirmation". *Valstybės žinios*. 2010., No. 138–7079. 11 Point.

[24] Minister of Health of the Republic of Lithuania 2010 May 24 order No. V–463 „For the Lithuanian medicine norm MN 48:2010 „Dentist prosthodontist. Rights, duties, competence and liability" confirmation". *Valstybės žinios.* 2010, No. 64–3182. 11 Point.

[25] Minister of Health of the Republic of Lithuania 2009 August 28 order No. V–708 „For the Lithuanian medicine norm „Endodontist doctor. Rights, duties, competence and liability" confirmation". *Valstybės žinios.* 2009–09–08, No. 107–4491. 10 Point.

[26] Minister of Health of the Republic of Lithuania 2008 December 9 order No. V–1237 „For the Lithuanian medicine norm MN 112:2008 „Neonatologist doctor. Rights, duties, competence and liability" confirmation". *Valstybės žinios.* 2009, No. 3–74. 11 Point.

[27] Minister of Health of the Republic of Lithuania 2007 October 26 order No. V–876 „For the Lithuanian medicine normMN 140:2007 „Urologist doctor. Rights, duties, competence and liability" confirmation". *Valstybės žinios*. 2007, No.114 –4653. 11 Point.

[28] Minister of Health of the Republic of Lithuania 2007 August 1 Order No. V–632 „For the Lithuanian medicine normMN 67:2007 „Medical pathologist. Rights, duties, competence and liability" confirmation". *Valstybės žinios.* 2007, No. 88–3493. 11 Point.

[29] Minister of Health of the Republic of Lithuania 2007 April 16 order No. V–268 „For the Lithuanian medicine norm MN 99:2007 „Oncologist radiotherapeutist. Rights, duties, competence and liability" confirmation". *Valstybės žinios*. 2007, No. 46–1760. 11 Point.

competence (doctor, nurse) to send a patient consultation and treatment for a specialist in the relevant field; to carry out safety regulations and hygiene requirements; comply with ethical principles; respect rights of patients and do not damage it; respect of licensed operating practices - and other conditions. All this leads to the conclusion that legislation does not provide the standard action, which must follow a doctor in a particular situation.

Professional doctor's duty is not only legal, but also the regulatory aspects, which are embodied in law and professional codes of ethics rules. It is clear that the legislature states that doctor's liability arise during breach of law, but also in assessing whether the doctor's actions were illegal is based on ethics and good medical practice. Lithuanian Supreme Court has ruled that medical professional liability standards are assessed on the basis of not only lack of attention, attentiveness, diligence, prudence, proficiency, but also in breach of the rules of professional ethics.[30]

It is important to mention that Lithuanian Supreme Court practice repeatedly emphasized that prudence, integrity and fairness does not permit to absolute a physician professional liability. Medical liability cannot be applied in absence of fault. Lithuanian Supreme Court also stressed that doctor, as professional in particular, liability is determined by the health care as an importance of social activity field, to guarantee adequate health care services to society. Doctor's professional responsibility is specific as well, because doctor has special knowledge that is vital for humans, therefore in health care he can do more than others. Health care professionals have qualification documents which allow them to engage in medical practice. It is important to note that it is the health care professional (doctor) qualification creates a presumption of service quality when a person relying on medical professionals need to feel safe. For this reason, health care professionals are subject to stricter diligence, prudence requirements. It should be emphasized that all of this is a crucial feature of medical professional liability.[31]

According to case law it could be noted that the physician must comply with posed standards of its field specialist professionals (comply with the internal rules of practice of the medical establishment, not to use dangerous or old practice of medicine surgery techniques, treatments etc.). Doctor's main duty - to provide skilled and caring medical care, and to ensure

[30] Zamarytė, K. Civilinės atsakomybės už klinikinių vaistinių preparatų tyrimų metu tiriamajam asmeniui padarytą žalą probleminiai aspektai. *Jurisprudencija*, 2008, 12 (114), p. 56–57.
[31] Lithuanian Supreme Court Civil cases division judge board 2009 October 13 decision in civil case *D. B. v. PI Kaunas medical university clinics*. (No. 3K–3–408/2009).

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that this obligation is carried out by adding the maximum effort, i.e. ensuring maximum degree of attention, diligence, prudence and proficiency. Doctor's chosen treatment tools and techniques are required to meet achievements of qualitative, informed and modern science, compatible medical services.[32]

However, despite formal legal boundaries, physician professional liability has objective limits, set by the objective biological processes in human body and development level of medical science and practice together with their ability level. While medicine as a science and as a process of full public knowledge evolve and improve, it is inevitable that in reality doctor cannot protect his patient against all diseases, as well, that while medical science develops, not all diseases can be cured, so doctor treating the patient, cannot do more than medical facilities and medical conditions allows. Civil responsibility has valid principle *nulla impossibilium obligat est* (from Latin: One cannot be obliged to perform impossible tasks), so while deciding on doctor malpractice and the resulting responsibility due to improper treatment, it is important which objective possibilities medical science and practice level has granted for doctor. If doctor did their work with due care, thoroughly and as is expected of any other qualified doctor, but despite damage was made to the patient, doctor should be dismissed from liability and damage is considered accidental. When deciding of doctor (health care institution) responsibility issues for the damage caused to patient's health, doctors' actions must be seen not as the particular outcome, but the overall aspects of entire treatment, i.e. if a doctor provided maximum medical care in a given situation, has taken all possible and necessary steps and used them carefully, diligently and competently.[33]

In cases where there is a clear doctor malpractice in order to protect the rights of patients it is facilitated the plaintiff (the patient's) burden of proof, i.e., until the defendant (doctor) deny his guilt, it is presumed that he is guilty for the damage to the patient's health.[34] This rule is applied because doctor's gained qualification creates a presumption of service quality, allowing the patient to trust, rely on the doctor to feel safe on doctor's existing expertise and experience, which allows the doctor to apply maximum (more stringent)

[32] Lithuanian Supreme Court Civil cases division judge board 2010 July 30 decision in civil case *A. Z. v. PI Klaipėda university hospital*. (No. 3K–3–342/2010).
[33] Lithuanian Supreme Court Civil cases division judge board 2011 February 21 decision in civil case *R. P. and R. I. v PI Vilnius emergency university hospital, PI Karoliniškės clinic, PI Mykolas Marcinkevičius Hospital*. (No. 3K–3–59/2011).
[34] Lithuanian Supreme Court Civil cases division judge board 2007 June 18 decision in civil case *E. J. v. Vilnius university institute of oncology*, No. 3K–3–337/2007

standards of diligence, prudence, care, proficiency. In this view, illegal doctor's actions, as a civil liability clause, may be found even if there is a lighter degree of duty to conduct carefully and cautiously for the damages than normal liability cases.

So on one hand, a physician selected treatments and methods have to meet the high-quality, well informed and modern science based medical services. On the other hand, it is not permissible to make medical professional liability absolute, in the events of absence of doctor's fault, his liability cannot be applied. Perceiving that the doctor cannot make a miracle, that impossible cannot be to claimed, in each case in determining medical malpractices, to be seen not a particular result of the treatment, but the whole treatment process, taking into account both biological characteristics of the patient's body and level of development of medical science and practice.

DOCTOR'S CIVIL STANDARD OF CARE - TO PROVIDE PROPER TREATMENT IN UNITED KINGDOM

In UK, as well as in Lithuania, courts find that it may not require impossible from a doctor. However, the doctor must answer for his illegal actions, if he was not reasonably considerate, caring and operated without appropriate qualifications. In most common law countries, including UK, "Bolam" test is used to determine doctor's standard of actions, or better standard of care, which means that a doctor cannot be charged with careless behavior on the patient's injury if he was acting according to the practice that would any other reasonable, responsible clinician follow in adequate situation. "Bolam" test assesses whether other professionals of the same field providing medical services would carry out (may carry out) the same treatment steps in a particular situation. However, this does not mean that other health care professionals should definitely apply the same methods of treatment. This test just attempts to determine whether the defendant's (doctor's) actions are acceptable medical practice, as well as the assistance for the court in such a way to remain objective according to the medical level of development and achievements in the field of medicine, from the moment of damage to the court hearing time. So, if it will be proved, that doctor has reached the minimum level in accordance with accepted medical practice, there will be held no illegality of his actions and he will avoid liability. Innovative treatments application, if it is not normal, is also not doctor's negligence. Doctor is not required to have the highest expert skills, he can

use normal, usual treatment skills in his field of competence. So mentioned test was basis for the average standard of medical liability consolidation in UK.[35]

UK courts resolving medical liability issues also take into account the doctor's specialization. Average normal experience and qualifications standard of behavior is applied for doctor's, specialist's of specific field, actions. If doctor's qualification or specialization is not sufficient in a particular patient case of sickness, doctor willing to provide qualitative skilled health care service have to enlist the assistance of a qualified and specialized doctor. In other cases, courts find that the doctor breached his duty, acted carelessly, and doctor must compensate damage caused for the patient.[36]

Taken court decisions[37] show, that in cases for diagnosis of illness and treatment are events, when despite the medical examiner (another doctor) opinion for deciding on a doctor's malpractice, doctor may be held liable for negligence, regardless of expert's opinion. Such cases occur when it is not proved that doctor expert in providing opinion for the court was based on prudence and accountability criteria. Especially in the events, when specific medical practice benefit and possible risk are being analyzed, court makes a presumption, that responsible doctor's opinion regarding decision to implement specific treatment is when doctor evaluates possible benefit and threat of the treatment. However, if it is determined that a professional doctor's opinion in case is not able to provide a logical analysis, courts consider that expert's opinion is irrational, irresponsible and it does not follow.[38] However, in UK case law it is held that, doctors malpractice, negligence have to be established by professionals of medical field, but not the courts. Therefore in UK's court practice has only minor court rulings, when court decides that professionals providing medical health care were negligent, despite their actions were according to the medical practice.

As can be seen from the above set forth, UK courts in determining the causal relationship of health damage caused between the doctor's and the patient's are using the help of experts and their conclusions. However, in cases when medical negligence, malpractice is obvious, it must be the exception of the rule, and a medical expert assistance is not needed.

[35] Decision of House of Lords 1957 case *Bolam v. Friern Hospital Management Committee* (Op. Cit.: Montgomery, J. *Health care law*. Oxford: Oxford University Press, 2003, p. 170.)
[36] Mikelėnas, V. *Prievolių teisė. Pirmoji dalis.* Vilnius: Justitia, 2002, p. 310–311.
[37] Decision of House of Lords 1998 case *Bolito v. City & Hackney Health Authority* byloje (Op. Cit.: The Right Honourable The Lord Woolf. Are the courts excessivelty deferential to the medical profession? *Medical Law Review,*2001, 9 (Spring), p. 9–10.)
[38] Decision of House of Lords 1993 decision *Hucks v. Cole* case (Op. Cit.: Brazier, M., Miola, J. Bye - bye Bolam: a medical litigation revolution? *Medical Law Review*. 2000, 8 (Spring), p. 101.)

Such cases could be if doctor operating the patient removes his only kidney, believing that it is cyst or when it is determined that after surgery a extrinsic object was left in the patient's body. In such event courts follow the rule of *res ipsa loquitur* (Latin (evidence) the thing itself speaks), and the claimant is dismissed from the burden of proof.[39] In this case, expert help is not needed to prove medical negligence, as it is understood for every reasonable person who has life experience. This rule of conduct can be applied to ordinary medical negligence situations, such as: surgeon cuts off the right leg instead left; doctor during surgery leaves the patient's body bandages; patient wakes up during surgery, of inappropriate anesthesia etc. In such cases, case law shows that evidence are "used" instead of the expert's opinion, because it is clear that the damage for the patient's health could not occur without a doctor's negligence. In these cases, United Kingdom courts have to decide whether doctors acted negligently, unless the defendant produces evidence to contradict these findings. Doctor's evidence have to be persuasive rather than speculative or too remote, not related to the damage, but the doctor is not required to prove that his actions, the choice of treatment was significantly better than the one used by other doctors. It is enough to prove for the doctor that, although method used is not common in clinical practice, but it can be used. So evidence of a doctor must convince the court that his conduct met the standard of care. If unfavorable result of treatment is actually very rare or difficult to explain having current level of development of medical science, plaintiff requirements will be rejected and doctor's behavior will be considered eligible.[40]

Generally, UK professional duty of a doctor to provide appropriate treatment (unlawful acts giving rise to liability) can occur in many different ways. It can be concluded that doctor's negligence often occur when: disease is not treated in time, doctor fails to visit ill patient at home, have not examined or not fully examine patient's medical condition, mistakenly diagnose disease, appoint improper treatment, improperly carry out operation, have not checked patient's response for individual medicines, ignoring their duty to advise the patient or not having competence not use other doctors to help and give himself advice or treatment for the patient etc.[41]

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[39] Mikelėnas, V. *Prievolių teisė. Pirmoji dalis.* Vilnius: Justitia, 2002, p. 310-312.
[40] Decision of House of Lords 1998 m. case *Ratcliffe v. Plymouth and Torbay Health Authority* (Op. Cit.: Faure, M. G., Koziol, H. Cases on medical malpractice in a comparative perspective. *Tort and Insurance Law, Vol. 1.* Vienna/New York: *Springer,* 2001, p. 234.)
[41] Mikelėnas, V. *Prievolių teisė. Pirmoji dalis.* Vilnius: Justitia, 2002, p. 312–313.

Thus in United Kingdom, doctor does not require having the highest medical professional skills, it is enough to have such knowledge and experience which is expected from an average physician in specific field, acting in the same situation and circumstances. Doctor will not be liable if he proves that he acted in accordance with the normal, accepted practice, despite the fact that in the event there would be other medical professionals opinions. Doctor may use treatments or methods, if based on the practice of medicine they can be used, even if they are not widespread. If a doctor does not have special skills, he must summon the assistance of a qualified and specialized doctor, in order patient is provided with a quality skilled medical care, otherwise doctor would violate his duty to act with due care and will have to pay damages for the patient. As it is clear, to determine doctor's malpractice in UK it is used the help of medical experts, unless a clear medical negligence could be seen. The analysis of case law shows that in cases where medical expert opinion is not justified, the courts can carve it, and make decisions based on inner belief to protect rights and legitimate interests of patient.

To summarize, it could be noted that in analyzed countries a physician's standard is an objective rather than subjective category, a complex institute covering medical knowledge used in the practice of medicine, professional ethics and practice rules, medical standards, physician's assessment of the legality under specific circumstances, principles of fairness and reasonableness. Comparative analysis of the case law leads to the conclusion that in Lithuania and United Kingdom it is initially assessed whether doctor had a total obligation to act (whether he was acting legally in accordance with the qualification requirements) and only then his actions is evaluated in terms of legality. Average doctor's liability standard is established in UK, requiring a doctor to operate, just as it is expected from another average physician in the field. Maximum standard of care for doctors is established in Lithuanian case law, which requires that the physician while providing medical care would act to the most careful and use all their knowledge and best skills.

Natural question arises whether the maximum standard does not bring a doctor's medical liability to strict liability (liability without fault)? Theoretically evaluating the maximum standard, a doctor acting maximally careful, cautious, skillfully, putting maximum effort can still be found guilty for the damage incurred for the patient's health. However, case law in both countries states that no matter what is the standard established doctor's obligation to provide proper treatment is not absolute, i.e. cannot be doctor's malpractice, if there is no

his fault. To summarize the above, it is possible to rely on A. Kabišaitis opinion that the assessment of the doctor's actions in pragmatic point of view is difficult to determine the difference between the maximum provided treatment (Lithuania) from an average mean of services (the United Kingdom) (or the criteria assessing the most careful, cautious, careful from the average considerate, prudent, careful medical specialist).[42] Doctor's actions must be at a level that does not harm the health of the patient and third parties. This means that from liability point of view it makes no difference if the doctor has made the maximum effort, but still the damage was not avoided. On the other hand, when doctor in Lithuania did not make harm with its actions such functioning from liability point of view is correct and it can be assumed that he has made the maximum effort, while in UK it would be considered just an average doctor's effort. As can be seen, the differences between the maximum and average medical liability standard - is rather theoretical separation of categories. So it can be concluded that the maximum standard of medical liability established in Lithuania practice is only an average.

CONCLUSIONS

Legal doctrine distinguishes main types of medical malpractice, namely: inadequate treatment, improper diagnosis, not refusal of treatment, without appropriate qualification for treatment.

Legal regulation of Lithuania does not provide what doctor's duty standard is used for doctor's duty completion to provide adequate treatment. Based on a systematic analysis of the law, doctor (health care institution) must be caring, considerate, competent performing his duties in objectively assessing the legality of his actions, from the compliance of the standard of the same area of specialty and medical knowledge, skills, decisions under the same circumstances.

Legislation, doctrine and case law analysis allowed to conclude that in Lithuania doctor (health care) malpractice, arises in breach of duty of care when: a doctor does not cure the disease, have not examined or not fully examined patient's medical condition, mistakenly diagnosed disease, wrongly provided treatment and medications, does not comply with hygiene requirements, improperly performed operation, without having needed competence

[42] Kabišaitis, A. Gydytojo veiksmų standarto samprata ir reikšmė taikant gydytojų civilinę atsakomybę Lietuvoje ir užsienio valstybėse. *Teisė*. 2003, 49, p. 48.

did not use other doctors to help and give advice or treatment for the patient himself etc., which thereby causes damage to the health of the patient, patient dies or due to doctor negligence damage to third parties is made.

In Lithuanian court practice it is established maximum standard of care for doctors, which requires that physician providing health care services would put maximum effort, i.e. ensuring maximum degree of attention, diligence, prudence and proficiency. In UK average standard of doctor's liability is established, requiring a doctor to operate, just as it is expected from another average physician in the specific field.

Conducted court practice analysis showed that in both countries regardless of the entrenched medical liability standard, doctor's actions must be at a level that does not harm the health of the patient and third parties. This suggests that differences between the maximum and average standard of medical liability - is a theoretical separation of categories, therefore in Lithuanian as also in UK case law established maximum standard of medical liability, in practice is only an average.

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GYDYTOJO CIVILINEI ATSAKOMYBEI TAIKOMO STANDARTO NUSTATYMO PROBLEMIANIAI ASPEKTAI

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Santrauka

Remiantis gydytojo pareiga suteikti tinkamą gydymą analizuojamas gydytojo veiksmų neteisėtumas, apžvelgiant gydytojo ir paciento santykių, gydytojo teisių bei pareigų, gydytojo kvalifikacijai keliamų reikalavimų teisinį reguliavimą. Analizuojant Lietuvos ir Jungtinės Karalystės teismų praktiką lyginamosios analizės metodu, siekiama nustatyti esminius skirtumus bei panašumus vertinant gydytojo civilinės atsakomybės standartą dėl gydytojo neteisėtų veiksmų, t. y. kai jis nesilaiko pareigos teikti tinkamą gydymą.

Atlikus teisės aktų sisteminę analizę bei pasirinktų valstybių lyginamąją analizę, nustatyta, kad pagrindinių skirtumų civilinės atsakomybės standarto taikymui dėl gydytojo pareigos suteikti tinkamą gydymą nėra. Vis dėlto, Lietuvos teismų praktikoje įtvirtintas maksimalus gydytojo civilinės atsakomybės standartas, o Jungtinės Karalystės teismų praktikoje taikomas vidutinis gydytojo civilinės atsakomybės standartas.

Remiantis tyrimo rezultatais, darytina išvada, kad abiejose valstybėse tai – objektyvus kriterijus, todėl pragmatiniu požiūriu nėra įmanoma nustatyti, kada vertinama, kad gydytojas veikia maksimaliai, nes nėra objektyvaus, įstatymais reglamentuoto atskaitos taško. Analizuojamų valstybių teismų praktikoje įtvirtinta, kad gydytojai turi veikti rūpestingai, nepadaryti žalos, vadovautis atitinkamu mokslo ir žinių išsivystymo lygiu, taikoma medicinos praktika, etikos taisyklėmis, sąžiningumo ir protingumo principais ir kt. Dėl šios priežasties manytina, kad netikslinga taikyti maksimalų gydytojo civilinės atsakomybės standartą bei siūlytina jo atsisakyti siekiant aiškumo ir mažiau painiavos sprendžiant teisminius ginčus dėl gydytojų civilinės atsakomybės taikymo.

Pagrindinės sąvokos: civilinė atsakomybė, gydytojo veiksmų neteisėtumas, medikų atsakomybės standartas, rūpestingumo pareiga.

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