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The Problematic Aspects of Compensation for Damage Caused by a Doctor's Omission in Medical Law

The resolution of disputes arising within the framework of medical law is often associated with significant difficulties, especially when the damage results not from an act but from a doctor's omission. Even in cases where unlawfulness and fault are clearly established, but a causal link cannot be proven, the physician may be released from liability. In such cases, the central question is whether the harmful outcome could have been avoided if the physician had taken a specific action. Answering this question becomes complicated by the inherent limitations of medicine to predict how a patient's health condition would have evolved had the appropriate standard of care and treatment been followed.

This paper analyzes the problematic aspects of compensation for damage caused by a doctor's omission and focuses on the following key issues: the scope of the duty to treat, the difficulties in establishing causality, the allocation of the burden of proof, and the challenges related to the assessment of damages. Through doctrinal and comparative analysis, the paper explores whether theories such as the loss of chance doctrine might offer a fairer approach to compensation.

Keywords: *medical law, doctor's omission, compensation for damage, causal link, burden of proof, loss of chance.*

1. Introduction

Medical law is a highly complex and constantly evolving field. In the Georgian legal system, it has a relatively short history as an independent discipline, [1] due to its interdisciplinary nature.[2] This field aims to regulate relationships arising in the field of medical services for the protection of supreme values such as human life and health.[3] Accordingly, the regulation of these legal relationships, and, subsequently, the application of existing legal norms to practice, is associated with both legal and ethical challenges.

Establishing a causal link between a doctor's action or omission and the resulting harm is one of the most problematic issues on the agenda of medical law. Due to the diversity of medical cases, the

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1 *Kvantaliani N., Rusiashvili G*., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 1 (in Georgian).

2 *Bichia M.,* The Concept of Medical Law and Its Place in the Legal System, Law and the World, Vol. 9, № 28, 2023, 82 (In Georgian).

3 *Todorovski N.,* Medical Law and Health Law – Is it the Same?, Medical Law and Ethics Journal, Vol. 18, № 2, 2018, 34

patient's health condition, patient's reactions to medications, and the presence of various contributing factors, it becomes difficult to prove with certainty that the damage would have been avoided had the physician administered the appropriate therapy.[4] Moreover, expert opinions, which are particularly prevalent in medical disputes and serve as a basis for judicial evaluation, constitute opinions or assumptions rather than facts.[5] The capabilities of medical science are inherently limited by the above-mentioned circumstances; accordingly, it generally cannot provide a definitive conclusion regarding the existence of a causal link. In cases of omission, proving such a link is associated with even greater difficulty.

When determining compensation for damage caused by a doctor's omission, a further challenge arises in the allocation of the burden of proof between the plaintiff and the defendant. An analysis of Georgian judicial practice reveals that, in this respect, the decisions adopted by the adjudicating bodies are inconsistent.[6] Moreover, the interpretations concerning the presumption of fault on the part of the medical service provider also vary, which calls for further examination.[7]

Additionally, it should be noted that the fair assessment of the amount of damage is also a complex issue. Legal doctrine includes theories that define the amount of compensation and the scope of the doctor's liability differently, guided by the principle of evaluating which protected interest is at stake.

The purpose of the present paper is to assess, through doctrinal and comparative analysis, the problematic aspects related to compensation for damage caused by a doctor's omission, to examine the legal framework governing such liability, to analyze judicial practice, and to identify the main challenges that arise in theory and practice.

2. The Conceptual Framework of Omission in the Context of Medical Law

According to the standard definition, "a person is liable for damage caused by omission if the harm to a legal interest could have been avoided through the action that was not performed. This duty may arise from the law, a contract, or other sources."[8] When applying this definition to medical law, the following circumstances must be taken into account in determining a doctor's liability:

Duty to Treat

An omission shall be deemed to have occurred when a duty of care (treatment) arose[9] for a doctor either from a [medical service] contract or in the context of providing emergency assistance and

4 *Misic Radanovic N., Vukusic I.,* Causation in Medical Malpractice, EU and Comparative Law Issues and Challenges Series 4, 2020, 778.

5 *Merry A., McCall Smith A.,* Errors, Medicine and the Law, Cambridge University Press, UK, 2001, 176-177.

6 *Kvantaliani N., Rusiashvili G*., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 1 (in Georgian).

7 *Pepanashvili N*., *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia, Journal of Law,* № 2, 2016, 121-122 (in Georgian).

8 *Kropholler J.,* German Civil Law Code, Darjania T., TcheTchelashvili Z. (trans.), Chachanidze E., Darjania T., Tortladze L. (eds.), 13th ed., Tbilisi, 2014, § 823, abs 21 (in Georgian).

9 *Fletcher M. T.*, Standard of Care in Legal Malpractice, Indiana Law Journal 43, №3, 1968, 773.

the doctor had the objective ability to act[10] but failed to take the appropriate action, whereby the damage could have been avoided.[11]

Doctors are obligated to provide patients with care of an appropriate quality.[12] "The doctor–patient relationship is a consensual relationship within which the patient knowingly seeks the doctor's assistance, and the doctor knowingly accepts the individual as a patient."[13]

Once the doctor-patient relationship is established, the medical service provider is obligated to observe the appropriate standard of care and to carry the treatment through to completion or, if unable to do so, to ensure the patient's referral to another suitable provider in order to avoid any disruption in the continuity of care.

Medical Error

An isolated adverse outcome does not give rise to liability. If an undesirable result occurs despite the proper conduct and organization of treatment, it does not constitute a medical error and must be distinguished from one.[14]

Both actions and omissions that result in harm constitute forms of medical error.[15] It is essential to note that, for the purposes of establishing liability, the mere occurrence of an adverse outcome for the patient is not sufficient; rather, it is crucial that such an adverse outcome qualifies as a medical error.[16]/[17]

Unlawful Omission

Only unlawful omission gives rise to liability. A distinction must be made between negligent and deliberate omission by a doctor. Specifically, if, in the doctor's judgment, based on clinical indications, continuing treatment would not be beneficial for the patient and therapy is therefore discontinued, such conduct shall not be considered unjustified omission.[18]

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10 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

11 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 42 (In Georgian).

12 *Davies C. E., Shaul R.Z.,* Physicians' Legal Duty of Care and Legal Right to Refuse to Work During Pandemics, Canadian Medical Association Journal (CMAJ), Vol. 182, № 3, 2010, 320–321.

13 *Kim Baker,* United States: A Doctor's Legal Duty – Erosion of the Curbside Consultant, MONDAQ (Nov. 5, 2003), See cit.: *Suri S.*, Action, Affiliation, and a Duty of Care: Physicians' Duty of Care in Nontraditional Settings, Fordham Law Review, Vol. 89, № 2, 2020, 307.

14 *Misic Radanovic N., Vukusic I.,* Causation in Medical Malpractice, EU and Comparative Law Issues and Challenges Series 4, 2020, 778.

15 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 35 (In Georgian).

16 *Bichia M.,* Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018 – 2019, 226.

17 *Kvantaliani N., Rusiashvili G.*, The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 8 (in Georgian).

18 *Stauch M., Wheat K.*, Text, Cases and Materials on Medical Law and Ethics, fourth edition, Routhledge, USA and Canada, 2012, 22.

The unlawfulness of an act is assessed differently depending on whether the duty of care toward the patient arises from a contract or in its absence. More specifically, when a contract exists, a doctor's act will be deemed unlawful if the obligations stipulated by the contract are not fulfilled. In the absence of such a contract, an act will be considered unlawful if it does not conform to the recognized standards of patient care and treatment and constitutes a deviation from those standards.[19]/[20]

When the nature of the treatment provided does not reveal a medical error or a deviation from protocols recognized in the medical field, the adverse outcomes of such treatment do not give rise to the liability of medical personnel, as there is no indication of unlawfulness. Accordingly, "the basis for a doctor's liability is not the negative outcome of the treatment, but rather a deviation from the standards of medical science. Furthermore, a doctor's individual lack of knowledge or professional weakness does not constitute an exculpatory circumstance."[21] An example of this may be a situation in which, based on the patient's diagnosis, there is a medical indication for surgical intervention, recognized by various clinical protocols or applicable guidelines, but the doctor refuses to perform the medical intervention.

Deviation from the Standard of Care

The "standard of care" refers to the level of care that a reasonably competent and experienced practitioner in the same field would provide to a patient under the same circumstances and conditions.[22] In individual cases, the court must assess what the standard of care required from the doctor and whether a deviation from that standard constitutes a breach giving rise to liability. If it is established that, under the same circumstances, another doctor, acting in accordance with the applicable medical standards and guidelines, would have ordered additional examinations, prescribed medication, or undertaken surgical intervention, such conduct will be regarded as a violation of the standard of care.

The primary test for assessing the standard of care is the so-called **"Bolam test,"** established in the case of *Bolam v Friern Hospital Management Committee*. In that case, the court held that a doctor does not breach the duty of care if their conduct is consistent with a practice accepted as proper by a responsible body of medical professionals skilled in the relevant field.[23] In assessing the standard of

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19 *Bichia M.,* Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018 – 2019, 227.

20 According to the interpretation of the Supreme Court of Georgia, "a patient has the right to compensation for damage if: 1. the objective of the medical activity has not been achieved (restoration of health and preservation of life), and 2. the healthcare professional's conduct does not conform to medical standards." Decision of February 24, 2017 № ას-1206-1166-2016 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian). In connection with the burden of proof, it should also be noted that the court indicated: "according to established judicial practice, the burden of alleging the facts and the burden of proving them lies with the party to the proceedings who seeks compensation for the damage suffered, namely, the injured party."

21 Decision of May 25, 2010 №ას-1268-1526-09 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

22 *Fletcher M. T.*, Standard of Care in Legal Malpractice, Indiana Law Journal 43, №3, 1968, 773.

23 Bolam v Friern Hospital Management Committee [1957] 1 W.L.R 582.

care, it is important to note that liability does not arise automatically merely because another practitioner would have acted differently, as individual doctors' approaches and available treatment alternatives may vary. What is essential is that the doctor's conduct falls within the framework defined by professional standards. Later, in the case of *Bolitho v City and Hackney Health Authority*, the court clarified that a practice accepted by medical professionals must also be reasonable and logical, thereby excluding the assessment of the standard of care based solely on medical practice.[24]

The *Bolam* test was revisited in cases concerning informed consent in *Montgomery v Lanarkshire Health Board*, where the court departed from the previously established test. Instead of a practitioner-focused standard, the court introduced a patient-centered test, prioritizing patient autonomy. It held that "the doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment."[25]

Types of Omission

In practice, a doctor's omission may manifest in various forms, [26] including: [27]

From the perspective of treatment planning: when the doctor fails to prescribe appropriate treatment or does not carry out a medical intervention despite its necessity.[28]

Incorrect or delayed diagnosis: when the doctor fails to order appropriate examinations, the results of which would have enabled an accurate diagnosis and timely treatment, [29] or when the diagnosis is correctly established but delayed, resulting in the patient's death. [30]

Related to obtaining informed consent: [31] in such cases, omission is manifested in the inadequate provision or failure to provide the patient with information concerning the risks associated with the proposed treatment and/or procedure, which resulted in harm and to which the patient would not have consented under conditions of proper disclosure. [32]

Medical monitoring and supervision: the doctor's failure to carry out subsequent monitoring and supervision also constitutes an omission.[33]

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24 Bolitho v City and Hackney Health Authority [1998] A.C. 232.

25 Montgomery v Lanarkshire Health Board [2015] UKSC 11.

26 *Kass J., Rose R. V.,* Medical Malpractice Reform: Historical Approaches, Alternative Models, and Communication and Resolution Programs, AMA Journal of Ethics, Vol. 18, № 3, 299.

27 *Bichia M., The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law,* №2 (70), 2021, 89-90 (in Georgian).

28 *Hayward R., Asch S. M., Hogan M. M., Hofer T. P., Kerr E.A.,* Sins of Omission: Getting too Little Medical Care May be the Greatest Threat to Patient Safety, Journal of General Internal Medicine, Vol. 20, № 1, 2005, 35.

29 Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428.

30 *Liddell K., Skopek J. M., Gallez I., Fritz Z.*, Differentiating Negligent Standards of Care in Diagnosis, Medical Law Review, 2022, Vol. 30, № 1, 34.

31 Montgomery v Lanarkshire Health Board [2015] UKSC 11.

32 In contrast, the physician's liability is excluded despite the occurrence of an adverse outcome for the patient, if the patient was informed about the potential risks and nevertheless gave consent. *Bichia M.*, Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018 – 2019, 226.

33 *Kass J., Rose R. V., Medical Malpractice Reform*: Historical Approaches, Alternative Models, and Communication and Resolution Programs, AMA Journal of Ethics, Vol. 18, № 3, 299.

Administrative / organizational issues: although these do not directly relate to the doctor's personal liability, systemic problems may exist within the hospital – such as the absence of appropriate medical protocols, malfunctioning equipment, [34] and similar deficiencies. Omission is manifested in the failure to take measures to address or control such issues, which may ultimately result in harm.[35]

All of the above examples fall under cases of omission that may give rise to a doctor's liability.

3. Challenges Related to Causation in Cases of a Doctor's Omission

Causation constitutes one of the most important elements to be assessed in the process of damage compensation, as both the establishment of liability and the determination of its extent depend on identifying causation and the approaches used for its assessment.

It is practically impossible to prove with absolute certainty that the undesired outcome would not have occurred if the appropriate action had been taken or the correct intervention had been made. This is, on the one hand, due to the peculiarities of the human body and the specific nature of the disease[36] (e.g., such as disease progression, a latent course of illness, etc.),[37] due to the impossibility of guaranteeing recovery because of treatment-related outcomes,[38] or other similar reasons, and, on the other hand, due to the nature of the opinions issued by medical professionals themselves, which do not confirm a definite outcome of recovery.[39] Moreover, expert opinions tend to reflect a reluctance among physicians to criticize their colleagues, due to concerns about damaging professional relationships, reputational harm, or fear of potentially finding themselves in the position of a defendant in the future.[40] In assessing causation and examining the evidence, another problematic aspect is the frequent violation of the rules governing the maintenance of medical documentation.[41]

In order to establish causation, it is essential to answer the following questions: What would have happened if the physician had acted in accordance with the relevant standards? Would the undesired outcome still have occurred? What is the degree of probability – can it be proven with certainty, or are the chances of both outcomes equal? Does the statistical likelihood of a positive outcome, had appropriate medical intervention been provided, have substantial significance?

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34 *Wienke A.,* Errors and Pitfalls: Briefing and Accusation of Medical Malpractice – the Second Victim, German Society of Oto-Rhino-Laryngology, Head and Neck Surgery, 2013.

35 *Heywood R.,* Systemic Negligence and NHS Hospitals: An Underutilized Argument, King's Law Journal, 2021, 3.

36 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 36, 42 (In Georgian).

37 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 27 (in Georgian).

38 *Kvantaliani N., Rusiashvili G.*, The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 9 (in Georgian).

39 *Bichia M., The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law,* №2 (70), 2021, 90 (in Georgian).

40 *Seidelson D. E.,* Medical Malpractice Cases and the Reluctant Expert, Catholic University Law Review, Vol. 16, issue 2, 1966, 158-160.

41 *Bichia M.,* Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018- 2019, 227.

An ethical-legal dilemma arises when all other conditions for imposing liability are present, for example, the physician's fault is evident, and the damage is unquestionable – yet a direct link between the act (or omission) and the resulting harm cannot be established.

Depending on which protected legal interest has been infringed and what standard of compensation for damage is applied, various theories of causation are distinguished. In this regard, the approach differs not only between common law and civil law legal systems but also among individual countries within a given legal tradition. For example, Germany sets a particularly high standard in this context, requiring proof of causation with a high degree of probability (90% or more).[42] Paragraph 630h of the German Civil Code regulates the scope of the burden of proof in cases of medical malpractice and failure to provide adequate information.[43] Within this framework, if a physician's omission is identified, the injured party must prove that the harmful outcome would have been avoided had appropriate medical action been taken.[44] However, if causation cannot be established, "the burden of proof shifts to the physician, who must demonstrate that the outcome would have been the same regardless of any medical intervention undertaken. [...] The issue of the physician's liability is determined based on the extent to which they acted with gross negligence and whether they can prove that the deterioration of the patient's health or death would have occurred in any case."[45]

Georgian judicial practice follows the German approach and likewise requires the establishment of causation with a high degree of probability (90% or more)[46]. According to the interpretation of the Supreme Court of Georgia, "Compensation for damage caused by treatment may be granted only if the harm suffered by the individual was directly caused by an erroneous medical action, that is, if a causal link between the unlawful act and the resulting harm is clearly established. The fact that the damage was caused by the conduct of medical personnel must be proven with certainty. Unsuccessful treatment or an adverse treatment outcome does not, by itself (automatically), give rise to the liability of medical personnel."[47] Georgia adheres to the theory of direct causation,[48] which is enshrined in the Civil Code and provides that compensation is granted only for damage that is the direct result of the injurious act.[49] In addition, special legislation also defines medical malpractice as actions undertaken by a physician that directly caused the damage.[50]

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42 *Kadner Graziano T.*, Loss of a Chance in European Private Law – "All or nothing" or partial liability in cases of uncertain causation, In: Causation in Law. Lubos Tichy (Ed.). Prague: Univerzita Carlova, 2007, 141.

43 German Civil Code (BGB), 10/08/2021, § 630 (h) (1), <https://www.gesetze-im-internet.de/englisch_bgb/index.html> [28.07.2025].

44 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

45 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 49 (in Georgian).

46 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 46 (In Georgian).

47 Decision of January 22, 2016 № ას-1102-1038-2015 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

48 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 60 (in Georgian).

49 Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 412.

50 Law of Georgia on Health Care, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, Subparagraph "n".

In summary, under this model, if direct causation is established with a high degree of probability, the physician will be held liable and required to fully compensate the damage. However, if such causation cannot be established, then – regardless of fault – the physician is fully released from liability for compensating the damage.

3.1. The Traditional Theory of Causation

Traditionally, the assessment of causation relies on the "Conditio Sine Qua Non" ("a condition without which not") formula, which evaluates whether the physician's omission was a necessary precondition for the occurrence of the damage.[51] However, this test is not always effective, as its scope is quite broad, and in order to meet its criteria, it must be established that the physician's omission directly caused the damage – yet establishing such a direct link is often quite difficult.[52] This approach is applied in Germany, and its analogue in common law countries is the so-called "but for" test, as both assess whether the defendant's culpable act (or omission) was a necessary condition for the occurrence of the damage.[53]

A classic example of the "but for" test is the court's assessment in the case of *Barnett v Chelsea & Kensington Hospital Management Committee*, in which the court held that although there was negligence on the part of the medical service providers, since the patients were not given appropriate examinations, the level of poisoning at the time the patients arrived at the hospital was so severe that, even if the examinations had been conducted promptly, the fatal outcome could not have been avoided.[54] According to the "but for" test**,** but for the negligence of the medical service provider, the harmful outcome would still have occurred; therefore, no liability was established.

In common can law, the "more likely than not" standard is applied, which is associated with the 1971 decision of the Supreme Court of Ohio in the case of *Cooper v. Sisters of Charity of Cincinnati, Inc.*, and concerns the determination of the probability of a chance of survival.[55] Even though it was evident that the hospital's medical staff had a duty to treat the patient and that they failed to fulfill this duty due to fault, the key point for the court in reaching its decision was the causal connection between the cause of death and the negligent act committed.[56] The court relied on the expert opinion presented in the case, which indicated that even with appropriate and timely medical intervention, there was only a 50% probability of survival.[57] Given that even under proper medical intervention the patient's chance of survival remained merely speculative and did not exceed a probability of 50%, the court did not establish liability on the part of the medical institution or its personnel.[58]

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51 *Rusiashvili G*., *Commentary on the Civil Code,* Book III, General Part of the Law of Obligations, 2019, Article 412, abs 3 (in Georgian).

52 Ibid, abs 4.

53 Stauch, Marc S., Medical Malpractice and Compensation in Germany, Chicago-Kent Law Review, Vol. 86, № 3, 2011, 1152.

54 Barnett v Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428.

55 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

56 Cooper v. Sisters of Charity of Cincinnati, Inc. (1971) 27 Ohio St. 2d 242.

57 Ibid.

58 Ibid.

This decision is interesting in that the court considered the patient's chances of survival, and although this decision is far from the loss of chance doctrine, had a probability of survival exceeding 50% been established, it would have constituted a basis for liability.[59]

When applying the above-mentioned approach to the assessment of causation, a critical issue arises from the fact that a doctor's conduct may reveal clear and gross negligence, which entails a heightened risk not only for the individual patient but also for future medical relationships in general, should it not be followed by the determination of appropriate liability measures.[60] As a result, a situation emerges in which a doctor breaches the duty of care, engages in grossly negligent conduct, and yet no liability is established. "The qualitative gradation of medical error, particularly when it is gross (inexcusable), should entail heightened liability for its occurrence. If we fully exempt a doctor from liability merely because the patient's likelihood of a favorable outcome was below 50%, would that not suggest that we are treating human life or health as a relative value? A person is equally valuable whether they have a 100%, 50%, or even lower chance of recovery. Every individual has the right to continue fighting for life, even for the slightest chance, through access to adequate medical treatment."[61]

The above-mentioned approaches are characterized by a highly rigid and radical stance toward liability and the scope of compensation. First and foremost, it must be emphasized that damage inflicted upon a person's life or health cannot be subjected to simple arithmetic, as such cases concern supreme and universally recognized values. Beyond this, it is particularly problematic when no liability is imposed on medical personnel in cases of gross negligence. Furthermore, the unequivocal imposition or complete exclusion of liability, without considering any intervening or contributing factors, on the one hand places an excessive burden, and on the other, creates an unjustified basis for exemption from liability. Given that liability is either fully established or entirely excluded, this approach is also known as the "all-or-nothing" model.[62]

3.2. Loss of Chance Theory

In contrast, "the loss of chance doctrine is applied in courts when the doctor's fault is established, but a definitive causal link between the doctor's conduct and the harm suffered by the patient cannot be proven, because the damage may have resulted either from the incorrect diagnosis or from another cause, such as the permissible progression of the illness. In such cases, the challenge lies not only in establishing causation but also in determining the amount of damage."[63] This doctrine broadly interprets the scope of life and health as protected interests, and it considers the right to life to

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59 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 48-50 (in Georgian).

60 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

61 Ibid.

62 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 47 (In Georgian).

63 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 47 (in Georgian).

include, among other things, the right to fight for life, the right to attempt to preserve life by any means and through all available opportunities.[64] Accordingly, if it is difficult to prove causation between the act and the harm suffered, establishing that the patient lost a chance of recovery and/or survival becomes comparatively easier, that is, qualifying the lost chance as damage simplifies the burden of proof. Moreover, a chance may be regarded as damage if the lost opportunity is real and specific.[65] In addition, the loss of chance doctrine is significant in that it provides for compensation in proportion to the lost chance, that is, partially rather than fully,[66] specifically, "unlike the *conditio sine qua non* theory, under which the establishment of causation results in full compensation for the damage, the loss of chance doctrine requires that compensation be awarded in proportion to the missed opportunity and, typically, only partially."[67]

The introduction of the standard for deliberating on lost chances by U.S. courts is associated with the 1983 decision of the Washington Supreme Court in *Herskovits v. Group Health Cooperative of Puget Sound*, in which the court departed from the traditional principles of causation and evaluated the reduction in the patient's chances of recovery caused by the medical personnel's negligence.[68] According to the factual circumstances of the case, the patient had lung cancer, which was not diagnosed in a timely manner, resulting in a decrease in his chances of survival from 39% to 25%.[69] Under the standard approach, such as the one applied in the *Cooper* case discussed above, this case too would have excluded the doctors' liability, since, despite the diagnostic shortcomings, the chance of survival was below 50%. However, the Washington Supreme Court held that, regardless of the percentage, the reduction in the patient's chances of survival constituted damage. Accordingly, the court established a causal link between the negligence and the harm. A clearer and more substantive implementation of the loss of chance doctrine can be found in the 1996 decision of the Ohio Supreme Court in *Roberts v. Ohio Permanente Medical Group, Inc.*, in which the court ruled that the amount of compensation should be calculated proportionally to the percentage of the lost chance of survival, in simpler terms, the monetary value of the damage should be multiplied by the percentage representing the lost chance.[70]

Among the civil law countries, the loss of chance doctrine is effectively applied in France, where it allows for the possibility of compensating the plaintiff even in cases where establishing a causal link is not possible.[71] The chance of survival is considered a protected interest, and instead of

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64 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

65 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 62-63 (in Georgian).

66 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 47-48 (In Georgian).

67 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 47 (in Georgian).

68 Herskovits v. Group Health Cooperative of Puget Sound (1983) 99 Wash. 2d 609.

69 Ibid.

70 Roberts v. Ohio Permanente Medical Group, Inc. (1996) 76 Ohio St. 3d 483.

71 *G'Sell-Macrez, F.*, Medical Malpractice and Compensation in France: Part I: the French Rules of Medical Liability since the Patients' Rights Law of March 4, 2002, Chicago-Kent Law Review, Vol. 86, № 3, 2011, 1114.

compensating for actual harm, proportional compensation is awarded for the deprivation of that chance.[72] It is noteworthy that the loss of chance doctrine is not limited to medical law; rather, it encompasses compensation for the loss of any opportunity that could not be realized due to the unlawful and culpable conduct of the injuring party, regardless of the field. For example, compensation may be awarded for the loss of a career opportunity, income, recovery, and similar prospects.[73] Georgia has virtually no experience with this doctrine. However, in light of the need for the development of medical law, as well as to better promote the protection of patients' rights and to enable the rational distribution of compensation, it would be desirable for Georgian judicial practice to also apply this doctrine in the resolution of medical (and potentially non-medical) cases.

It should be noted that the loss of chance doctrine represents a fairer approach to decision-making due to several advantages. First, it eases the burden of proof, and within the scope of the right to life, it also recognizes the right to fight for the preservation of life as a protected interest. It must be taken into account that the doctrine facilitates compensation for the injured party by not entirely excluding the possibility of redress; at the same time, since causation is not definitively established, it does not impose the full burden of compensation on the injuring party. This renders it the most rational and equitable approach, as "a fair resolution of the issue means not only protecting the injured party but also ensuring appropriate accountability for the injurer."[74]

In some cases, the court no longer examines the prerequisites of causation if the defendant's conduct clearly increased the risk of harm and deprived the patient of a substantial chance of achieving a better outcome, regardless of the result that ultimately occurred.[75]

4. Burden of Proof

In medical disputes, the burden of proof generally lies with the plaintiff, who must prove not only the occurrence of harm but also that the doctor acted negligently and that the harm resulted from that negligence. In addition to the inherent difficulty of establishing causation in such cases, the plaintiff's burden is further exacerbated by the fact that, unlike the medical service provider, the patient lacks the relevant professional knowledge.

In practice, there are doctrines that serve to ease the burden of proof:

In common law, there is a well-established doctrine known as *Res Ipsa Loquitur*, which shifts the burden of proof to the injuring party. Under this doctrine, the defendant's negligence is presumed unless they themselves prove otherwise.[76] This doctrine requires the cumulative presence of three elements: "1. The accident is such that it would not ordinarily occur unless someone were negligent; 2.

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72 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 54 (in Georgian).

73 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

74 *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 63 (in Georgian).

75 Herskovits v. Group Health Cooperative of Puget Sound (1983) 99 Wash. 2d 609.

76 *Pepanashvili N.*, *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia*, *Journal of Law,* № 2, 2016, 126-128 (in Georgian).

The instrumentality which caused the accident was under the control of the defendant; and 3. The plaintiff in no way contributed to the accident."[77]

The presumption of the defendant's fault also serves to ease the burden of proof, and this will be examined below in the context of the Georgian legal framework.

For its part, the burden of proof for the medical service provider is significantly eased by the proper maintenance of medical documentation in accordance with established procedures, as the adequate performance of procedures may be confirmed through the submitted documentation.[78] Such documentation includes both material and electronic medical records, as well as any written information that forms part of the patient's medical history.

Within the framework of comparative analysis, it should be noted that Germany recognizes the possibility of shifting the burden of proof and acknowledges the concept of gross treatment error. This refers to an unjustifiable error that manifests in a clear violation of established treatment standards, and in such cases, the burden of proof shifts to the defendant.[79]

5. Georgian Legal Framework and Judicial Practice

Under Georgian legislation, the norm that gives rise to a doctor's duty to treat a patient is found in the Law of Georgia on Healthcare, which links the obligation to provide medical assistance either to an agreement or to an emergency situation.[80] According to the same law, "liability for the deterioration of a patient's physical or mental condition, or for death, caused by the actions or omissions of healthcare personnel, as well as for moral or material damage inflicted on the patient, shall be determined in accordance with the legislation of Georgia."[81] The grounds for liability defined by legislation are established by the Civil Code of Georgia, which provides that "damage caused to a person's health during treatment in a medical institution (such as the outcome of a surgical operation or a result arising from an incorrect diagnosis, etc.) shall be compensated on general grounds. The injuring party shall be released from liability if they prove that they were not at fault for the occurrence of the damage."[82] Article 1007 of the Civil Code of Georgia constitutes a special provision governing compensation for damage caused by a medical institution. It is important to evaluate the several prerequisites established under this article:

a) The provision refers to damage caused during treatment in a medical institution. In this regard, an important question arises: does the article apply exclusively to treatment provided within a hospital setting, or does it also encompass any action or omission by medical personnel outside the hospital? Judicial practice indicates that the granting of compensation is not limited solely to damage inflicted during treatment within a medical institution. However, to avoid misinterpretation, legal

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77 *Mackey W. R.*, Torts – Res Ipsa Loquitur in Malpractice Cases, the Superior Knowledge Factor, UC Law Journal, Vol. 9, issue 3, 1958, 322.

78 *Bichia M., The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law,* №2 (70), 2021, 91 (in Georgian).

79 *Wienke A.,* Errors and Pitfalls: Briefing and Accusation of Medical Malpractice – the Second Victim, German Society of Oto-Rhino-Laryngology, Head and Neck Surgery, 2013.

80 Law of Georgia on Health Care, Parliamentary Gazette, 47–48, 31/12/1997, Article 38, paragraph 1.

81 Ibid, article 103.

82 Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 1007.

scholarship has suggested that the wording of the article be revised, replacing "treatment" with "medical assistance", in order to eliminate this ambiguity. Such a revision would broaden the scope of the provision by focusing on the subject providing medical assistance, regardless of the location of the service, and would also render the non-exhaustive list in parentheses unnecessary.[83]

b) Article 1007 of the Civil Code is also noteworthy from the perspective of the burden of proof, as it establishes a presumption of fault on the part of the medical service provider.[84] Specifically, it states that liability shall not arise only if the injuring party proves that they were not at fault for the occurrence of the damage.[85] In this regard, it is noteworthy that, despite the uniform content of the provision, judicial practice has developed in a rather inconsistent manner. Courts have, for the most part, not embraced the presumption of fault on the part of the medical service provider, and the burden of proof has often been shifted onto the injured party. However, in recent years, a shift in this approach has become evident. For example, in its 2010 decision, the Supreme Court of Georgia stated the following regarding the presumption of fault: "due to the specific nature of the relationship between the patient and the doctor, the doctor is liable only for an erroneous medical action, and a presumption of fault does not apply to their professional activity."[86] In its recent practice, the Supreme Court deliberated on the purpose of the presumption and its relationship[87] to the allocation of the burden of proof as defined by the Civil Procedure Code,[88] stating: "The purpose of a presumption in law is to pre-determine which party to a legal relationship is in a better position to objectively prove a particular fact. By introducing a presumption, the legislator protects a party to a legal relationship from bearing an insurmountable burden of proof and, for this purpose, establishes a standard of proof. Accordingly, it is presumed that harm to the patient's health was caused through the fault of the medical institution, and the burden of disproving this lies with the medical institution. [..] Therefore, the defendant's fault is presumed until the defendant proves otherwise."[89]/[90] Legal scholarship has put forward the recommendation that it may be justified to incorporate a presumption of fault into Article 992 of the Civil Code and to reinforce it within the disposition of the general provision governing tort liability.[91]

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83 *Bichia M., The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law,* №2 (70), 2021, 88-89 (in Georgian).

84 *Pepanashvili N.*, *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia, Journal of Law,* № 2, 2016, 126-128 (in Georgian).

85 However, this does not preclude the injured party's ability to present evidence in order to establish the fault of the medical institution. *Bichia M.*, The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law, №2 (70), 2021, 91 (in Georgian).

86 Decision of May 25, 2010 №ას-1268-1526-09 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

87 *Pepanashvili N., Compensation for Damage Caused by a Medical Institution,* Dissertation, Tbilisi, 2016, 160-161 (in Georgian).

88 Civil Procedure Code of Georgia, Parliamentary Gazette, 47–48, 31/12/1997, Article 102, Paragraph 1.

89 Decision of November 17, 2022 № ას-1169-2022 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

90 Decision of June 19, 2024 № ას-45-2024 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

91 *Pepanashvili N.*, *The Presumption of Fault of the Medical Service Provider in the Civil Code of Georgia*, *Journal of Law,* № 2, 2016, 129 (in Georgian).

c) It is also necessary to assess whether the disposition of the provision encompasses cases of omission. In this regard, it should be noted that the norm is general in nature and applies to cases of treatment. Moreover, the list of types of damage does not specifically distinguish between harm caused by action or omission, nor is it exhaustive. Therefore, Article 1007 of the Civil Code applies to damage caused by omission as well.[92]

This provision, in turn, refers to the general elements of a tort[93] and, accordingly, to the emergence of the obligation to compensate for damage caused by an unlawful, intentional, or negligent act. [94] It is necessary to assess whether the prerequisites for compensation are the same in cases of damage caused by action and by omission, or whether differences exist between the two. [95]

It should be noted that Georgian legislation does not provide a definition of omission. As for medical error, the Law of Georgia on Healthcare defines erroneous medical action as "the unintentional performance by a physician of diagnostic and/or therapeutic measures that are inappropriate for the patient's condition and that directly[96] caused the inflicted harm."[97] It is noteworthy that the provision does not explicitly refer to omission; such reference is merely implied. Therefore, for greater clarity, it would be desirable for the provision to be expanded to include an explicit reference to omission.[98]

The patient is entitled to "apply to the court and request compensation for pecuniary or non-pecuniary damage caused by an erroneous medical action."[99]

In order for damage caused by a doctor's omission to be compensable, the following cumulative conditions must be evident from the circumstances of the case: "1. the doctor must have a duty to treat; 2. that duty must have been breached (unlawfulness); 3. the breach must have resulted in harm (damage); 4. the harm would have been avoidable had the doctor acted (causal link in omission); and 5. the medical personnel must have had the ability to act and fulfill their obligation without delay (absence of exculpatory circumstances)."[100]

Duty to Treat

As noted, under Georgian legislation, a doctor's duty to treat arises if there is a contractual relationship or if the patient is in a life-threatening condition or a condition requiring emergency

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92 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

93 *Bichia M.,* Peculiarities of Medical Torts in Georgian Judicial Practice, South Caucasus Law Journal, 09/2018 – 2019, 231.

94 Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 992.

95 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 36 (In Georgian).

96 The special norm establishes direct causation and specifies that the direct cause of the damage must be the medical error. *Gelashvili I.,* The Significance of the Loss of Chance Doctrine in Medical Disputes: Justice and Law, № 4, (80), 2023, 60 (in Georgian).

97 Law of Georgia on Health Care, Parliamentary Gazette, 47–48, 31/12/1997, Article 3, subparagraph "n".

98 *Gujabidze N.*, Compensation for Damage Caused by a Doctor's Omission, presentation delivered at the Medical Law Forum, Alte University, 23 February 2024 (in Georgian).

99 Law of Georgia on the Rights of Patients, LHG, № 19, 25/05/2000, Article 10.

100 *Makhatadze Sh.,* The Standard of Causation in Compensation for Damage Caused to a Patient by a Doctor's Omission, Medical Law and Management Journal, № 1/2022, 36 (In Georgian).

assistance. The doctor may refuse to provide such assistance only if it is established that the patient will continue to receive uninterrupted medical care, if the patient no longer requires emergency assistance, or if the doctor's own life is at risk.[101]

Fault

For damage to be compensable, it must be established that the harm resulted from the culpable action or omission of the medical service provider. It should be noted that intentional harm to a patient is not a common occurrence; in this regard, negligence must be assessed, which may be manifested by the doctor through a breach of either internal or external standards of attentiveness.[102]

Damage

Damage is compensable only if the unlawful conduct of medical personnel, specifically, a medical error manifested in an omission, results in a deterioration of the patient's condition or in some specific harm,[103] which must be the direct consequence of the breach of duty.[104]

Causality

Georgian law is characterized by the theory of adequate causation, the legislative standard for which is codified in Article 412 of the Civil Code of Georgia. According to this provision, "only such damage shall be subject to compensation that was foreseeable for the obligor in advance and constitutes the direct result of the act causing the damage"[105] and which is interpreted in Georgian judicial practice as follows:

"According to the theory of adequate causation, a single condition may be sufficient to qualify as the cause of the outcome, if it creates the objective possibility of that outcome occurring. That is, in establishing causation, decisive importance must be given to the existence of an objective connection between events, and to the fact that the link between cause and effect matters only in the specific case at hand. A person's unlawful act constitutes the cause of damage only when it is directly connected to the harm that occurred."[106] The practical application of this theory entails assessing whether the doctor could have prevented the harm through the provision of proper medical care.

Justifying the causal link, which is a fundamental element of a tort, lies with the plaintiff according to Georgian judicial practice.[107]

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101 *Ibid*, 38.

102 *Kvantaliani N., Rusiashvili G*., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 10 (in Georgian).

103 Decision of July 26, 2019 № ას-645-2019 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

104 Decision of June 27, 2011 № ას-260-244-11 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

105 Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 412.

106 Decision of October 13, 2021 № ას-960-2020 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

107 Decision of May 11, 2018 № ას-111-111-2018 of the Civil Case Chamber of the Supreme Court of Georgia (in Georgian).

Exemptions from Liability

In order to determine a claim for compensation, it is also necessary to assess whether there are any circumstances that exclude the physician's liability. A distinction is made between subjective factors (related to the personality of the actor or the injured party) and objective factors (force majeure) that exempt from civil liability.[108] The Civil Code of Georgia takes into account the fault of the injured party in the occurrence of the damage, in which case "the obligation to compensate for the damage and the extent thereof depend on whose fault was more decisive in causing the damage."[109] An example of this may be a case where the patient fails to follow the prescribed treatment, resulting in the deterioration of their health condition.

Among the objective factors, special attention should be given to circumstances beyond the control of the healthcare provider that independently contributed to the occurrence of the damage.[110] For example, an increase in demand for medical services due to a pandemic, which in turn leads to overcrowding in emergency departments and delays in the provision of medical care.

The low rate of medical dispute claims in Georgia may be explained by the complex burden of proof imposed on the injured party and the rigid policy regarding the determination of the amount of compensation.[111] Court proceedings are inherently associated with costs – especially in the field of medical law, where, due to the specific nature of the discipline, it becomes necessary to engage independent professionals and base judicial decisions on their expert opinions. It is crucial that legislation and judicial practice be revised in a way that facilitates the rational and fair resolution of medical disputes, so as to ensure the effective realization of the constitutionally guaranteed right to a fair trial.[112]

6. Conclusion

Medical law in Georgia is still in the process of development; therefore, it is not surprising that it is "characterized by unacceptable extremes and an uncertain outlook."[113] An analysis of court practice related to medical disputes reveals that the approaches of the adjudicating bodies are inconsistent.

The legal norms and case law governing compensation for damage caused by a physician's omission have been analyzed in this paper.

As a result of the legal analysis, it has been revealed that the legislative provisions regulating medical torts in Georgia are deficient and require amendments to ensure greater clarity and practical applicability by the courts.

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108 *Bichia M.,* The Specifics of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law, №2 (70), 2021, 94 *(in Georgian).*

109 This also includes the patient's omission, where the patient could have avoided the damage through appropriate action. Civil Code of Georgia, Parliamentary Gazette, № 31, 24/07/1997, Article 415.

110 Art. 7.1.(7) UNIDROIT Principles 2016.

111 *Makhatadze, Sh.,* Regulation of Physician's Liability for Medical Error under Georgian Legislation, Journal of Medical Law and Management, № 3(6), 2024, pp. 56–57 (in Georgian).

112 Constitution of Georgia, Parliamentary Gazette, 31-33, 24/08/1995, Article 31.

113 *Kvantaliani N., Rusiashvili G*., The General Systematics of a Doctor's Civil Liability and the Significance of the Doctor's Fault, Georgian-German Journal of Comparative Law, 1/2022, 1 (in Georgian).

It has also been identified that case law lacks consistency in determining the burden of proof – an issue that should itself be clarified through judicial practice. While recent trends indicate movement in this direction, a stable standard has not yet been established.

As for the determination of causation in the context of compensating damage resulting from a physician's omission, this represents one of the most significant challenges not only for Georgia, but globally. There is no clear guideline for addressing this issue, and the choice of approach largely depends on the internal standards of each state, which leads to differing outcomes. In this regard, it is important to note that the selection of the applicable theory of causation is primarily within the discretion of the courts, and it would be desirable for Georgian courts to adopt and implement the lost chance doctrine in practice.

Resolving the issues arising within the field of medical law is of paramount importance, as already noted at the beginning of this paper, it is a branch that governs relationships involving fundamental values such as human life and health. A citizen's right to accessible and high-quality health care is a value enshrined in the Constitution.[114] On the other hand, it must not be overlooked how deficiencies in the regulation of medical liability can negatively impact the integrity of the medical profession.

The limited practice of medical dispute litigation in Georgian courts does not indicate a low incidence of medical errors, but rather suggests that injured parties are not turning to the judiciary to restore their violated rights. This may be explained by the fact that the existing legislation fails to provide adequate guarantees for their protection.[115]

It is essential for the state to establish a legal framework that safeguards patients' interests by reinforcing the highest standards of health care.

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[114] Constitution of Georgia, Parliamentary Gazette, 31-33, 24/08/1995, Article 28.

[115] *Makhatadze, Sh.,* Regulation of Physician's Liability for Medical Error under Georgian Legislation, Journal of Medical Law and Management, № 3(6), 2024, pp. 56-57 (in Georgian).

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