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THE LEGAL RESPONSIBILITY OF NURSES IN THE LIGHT OF THE TURKISH COURT OF CASSATION JURISPRUDENCE

YARGITAY KARARLARI IŞIĞINDA HEMŞİRENIN HUKUKÎ SORUMLULUĞU

Özlem TÜZÜNER*
Erkam Talat DUYMUŞ**
Harun ALGÜL***

Abstract: Nurses work in various fields related to human health. While performing their duties, their acts must be in accordance with the requirements of medical science. The actions taken by nurses to contribute to a patient's health may not always have positive outcomes. The *nurse's lack of legal responsibility for complications* is the rule. A nurse is responsible for medical malpractice, not for complications. The *nurse's legal responsibility for medical malpractice* is simply based on professional misdeeds.

In this study, the legal responsibility of nurses is examined and relevant cases that have been the subject of the decisions of the Turkish Court of Cassation are analysed. Considering the decisions of the Turkish Court of Cassation in relation to nurses, injuries that occur upon a nurse's injection are frequently encountered. The *problem of injection in the legal responsibility of nurses* has reached disturbing dimensions as a societal phenomenon. A *multidisciplinary approach to injection* is highly recommended. Injection problems must be minimized, particularly with the cooperation of medical and legal science.

Keywords: Nurse's Lack of Legal Responsibility for Complications, Nurse's Legal Responsibility for Medical Malpractice, Problem of Injection in the Legal Responsibility of Nurses, Multidisciplinary Approach to Injection

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Özet: Hemşire insan sağlığını ilgilendiren farklı alanlarda görev yapar ve bu görevlerini yerine getirirken tıp biliminin gereklerine uygun hareket eder. Hemşirenin hastanın sağlığına katkı sağlamak amacıyla yaptığı her eylem ve/veya işlem olumlu sonuçlanmayabilir. *Hemşirenin komplikasyondan sorumsuzluğu* kuraldır. Buna karşılık, tıbbî malpraktisten mesuliyetine gidilebilir. *Hemşirenin tıbbî hatadan hukukî sorumluluğu*, meslekî hatasına dayanır.

Bu çalışmada hemşirenin özel hukuktan doğan hukukî sorumluluğu Türk Hukuku'yla sınırlı vaziyette incelenirken konuyla ilintili Yargıtay kararları analiz edilmektedir. Böylesine incelemede hemşirenin enjeksiyon yapması üzerine meydana gelen rahatsızlıklara sıklıkla rastlanmıştır. *Hemşirenin hukukî sorumluluğunda enjeksiyon sorunu*, sosyal fenomen boyutundadır. *Enjeksiyona çok disiplinli yaklaşılması* önerilmektedir. Özellikle tıp bilimiyle hukuk ilminin entegrasyonuyla, enjeksiyon sorunu minimize edilmelidir.

Anahtar Kelimeler: Hemşirenin Komplikasyondan Sorumsuzluğu, Hemşirenin Tıbbî Hatadan Hukukî Sorumluluğu, Hemşirenin Hukukî Sorumluluğunda Enjeksiyon Sorunu, Enjeksiyona Çok Disiplinli Yaklaşılması

INTRODUCTION

Each agent has a unique function and value in the spectrum of healthcare professionals ranging from caregivers to physicians. Nursing is one of the noble professions that has emerged in line with the medical needs of human beings. Nursing Law No. 6283 (HK) and Nursing Regulation (HY) determine the duties and authorities of nurses.[1] Apart from these, the primary and secondary duties of nurses are defined in many laws and regulations. For instance, Law No. 657 on Civil Servants Law (DMK), Law No. 1219 on the Mode of Execution of Medicine and Medical Sciences (TİDK), Regulation on Patient's Rights (HHY) and the Operation of Inpatient Treatment Institutions Regulation (YTKİY) regulates the details of the topic (article 6 of DMK; article 63 of TİDK; article 14 of HHY; article 132 of YTKİY).[2]

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1 Nursing Regulation, Official Journal 8.3.2010, 27515. Nursing Law No. 6283, Official Journal 2.3.1954, 8647.

2 Law No. 657 on Civil Servants Law, Official Journal 23.7.1965, 12056. Law No. 1219 on the Mode of Execution of Medicine and Medical Sciences, Official Journal 14.4.1928, 863. Regulation on Patient's Rights, Official Journal 1.8.1998, 23420. Operation of Inpatient Treatment Institutions Regulation, Official Journal 13.1.1983, 17927.

The importance of the nurse among healthcare professionals is undeniable. Nursing is a scientific discipline equipped with lofty duties. So much so that, it is also the duty of nurses to protect, promote and improve the health of the individual, family and society. The nursing duty, which is coordinated with science and art, does not consist of only assisting the physician (medical doctor). They also have independent duties and powers. It should also be added that they have an important mission in terms of family planning and family medicine.[3] Hence, the Nursing Law defines the nurse and the title attached to this status as follows: "The title of nurse is given to those who graduated from faculties and colleges of universities providing undergraduate education related to nursing in Turkey and whose diplomas were registered by the Ministry of Health, and those who have completed their education abroad in a state-recognized school related to nursing, whose equivalence has been approved and whose diplomas have been registered by the Ministry of Health" (article 1 of HK). Nursing Regulation defines this title worded as follows "Health personnel authorized to practice the nursing profession according to the Nursing Law" (article 4/1-b of HY). The aforementioned regulation also details the services, duties, authorities and responsibilities offered by this profession (article 5, 6 of HY). On the other hand, nurses graduated from at least a medical vocational high school have high-level duties that require a lot of knowledge and experience, from asking the patient's health and well-being to measuring their temperature, even giving their medication to administering their injections (article 132 of YTKİY). The detailed task schedule makes it natural for the nursing profession to seek quality standards for personality and emotional resilience as well as talent. In addition, a benevolent and self-sacrificing character who can constantly take care of the patient both physically and spiritually is essential. In addition, a benevolent and self-sacrificing character who can constantly take care of the patient both physically and spiritually is essential.

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3 Halil Kalabalık, "Ebe ve Hemşirelerin İdare Hukuku Açısından Sorumluluğu", 3. Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2011, p. 334. Zekeriya Kürşat, "Hemşirelerin Hukukî Sorumluluğu", *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, 2008, 66/1, p. 293, 294. Hakan Hakeri, Tıp Hukuku, Seçkin, Ankara, 2021, Vol. 1, p. 209. Belkız Karabakır, Hemşirelerin Tâbi Oldukları Mevzuat ve Hukukî Sorumlulukları Konusundaki Farkındalıkları, İstanbul Üniversitesi Adlî Tıp Enstitüsü Sosyal Bilimler Anabilim Dalı, Master Thesis, Supervisor: Gürsel Çetin, İstanbul, 2011, p. 1, 5.

Legal definitions of the nursing profession should be fed with descriptions in the health sciences. Such that the nurse tries to help the patient to survive without help and regain his independence in his personal competence. With this wish, nurses make scientific and artistic interventions leading to health, recovery or peaceful death. At this point, the current definition of Virginia Henderson is adopted in Turkey as well as accepted by the International Nurses Association.[4]

In the history of medicine, major disasters, especially epidemics and wars, emphasized the importance and indispensability of nursing. The Roman head nurse, Saint Fabiola, was kind enough to dedicate her enormous wealth to the poor patients. She not only treated people who were excluded from society due to their disgusting diseases like leprosy, but also provided "hospice (hospiz)" service to patients on their deathbed and helped them migrate to the next world with honour.[5] Florence Nightingale not only established modern nursing by undertaking the treatment and care of soldiers injured in the war but also played an invaluable role in the medical literature as a social reformer and statistician.[6] Today, in the epidemic management, nurses have shown examples of heroism in the fight against the crisis. So much so that they worked like secret angels in the operation of epidemic hospitals.[7] Well then, what are the professional mistakes that such valuable professionals should avoid?

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4 Rukiye Pınar Bölüktaş/Zülfünaz Özer/Dilek Yıldırım, "Uluslararası Hemşirelik And'ının Meslekî Değerler Açısından İncelenmesi", *Çekmece İZÜ Sosyal Bilimler Dergisi*, 2018, 6/13, p. 86. See also Kürşat, p. 293, 302, fn. 7. Karabakır, p. 4, 5. Kalabalık, p. 334-337. Hakeri, Vol. 1, p. 205, 209.

5 Vikipedi-1, "Saint Fabiola", https://en.wikipedia.org/wiki/Saint_Fabiola (Date of Access 26.6.2021). See also Nuray Demirci Güngördü, "Hospiz Anlayışında Hasta Bakımı ve Hemşirenin Rolü: Bir İnceleme Çalışması", Tıp-Etik-Hukuk Boyutuyla Hospiz, Ed. Çağatay Üstün, Ege Tıp, İzmir, 2016, p. 13.

6 Vikipedi-2, "Florence Nightingale", https://tr.wikipedia.org/wiki/Florence_Nightingale (Date of Access 17.6.2021). Aysun Yerköy Ateş/Figen Okur, "Covid-19 Pandemisinde Gizli Kahramanlar: Hemşire Liderler", *Uluslararası Sağlık Yönetimi ve Stratejileri Araştırma Dergisi*, 2020, 6/3, p. 626.
Bayraktaroğlu Taner/Fidan Emine, "Kriz ve Pandemide Hemşirelik Hizmetleri Önerileri", *Batı Karadeniz Tıp Dergisi*, 2020, 4/2, p. 45. Karabakır, p. 3, 4.

7 Mersin İl Sağlık Müdürlüğü, "Pandemi Kahramanı Hemşireler", https://mersinism.saglik.gov.tr/TR,183252/pandemi-kahramani-hemsireler.html (Date of Access 17.6.2021). Anadolu Ajansı, "Kovid Hemşireleri Salgınla Mücadelede En Ön Cephede Savaşıyor", https://www.aa.com.tr/tr/koronavirus/kovid-hemsireleri-salginla-mucadelede-en-on-cephede-savasiyor/1836356 (Date of Access 17.6.2021). Bayraktaroğlu/Fidan, p. 46, 47. Ateş Yerköy/Okur, p. 628, 632.

Types of medical errors can absolutely lead to the responsibility of healthcare professionals. Nurses may have three different responsibilities such as criminal, administrative and legal for their unlawful medical actions. In this study, the focus is on the legal responsibility of the nurse for professional mistakes, which is limited to Turkish Law and the practice of the Turkish Court of Cassation. In the payment of compensation on the grounds of professional error of the nurse, it is necessary to briefly remind the concepts of malpractice, including primarily medical intervention, and then medical error and damage. Then, based on reasons of the legal liability, breach of debt and wrongful act are explained bilaterally; in particular, examples that illuminate the legal responsibility of the nurse are given. At this point, the jurisprudence of the Turkish Court of Cassation regarding the legal responsibility of the nurse is analyzed. It is hoped that by collecting decisions of the jurisprudence of the Court of Cassation regarding the legal responsibility of nurses, it will be easier for colleagues to access appellate division precedents similar to their concrete disputes. In fact, in the light of a substantial number of precedents on the subject, an opportunity arises to approach the problem of medical error in nursing as a social and legal phenomenon. In addition, the attention of the concerned parties is drawn to the problems in which the nurse's medical error is concentrated, and a consultation environment for the solution of these is encouraged.

I- A BRIEF OVERVIEW OF MEDICAL INTERVENTION AND MALPRACTIS IN NURSING

In order to distinguish the cases that lead to the legal responsibility of nurses, first of all, malpractice should be defined in a large scale that will include medical intervention, medical error, complication and damage. After conceptual clarification, complications and malpractice possibilities that concern nurses should be mentioned. Of course, while the aforementioned terms are mentioned briefly, it is not possible to explain all the possibilities of nurse error one by one. However, eliminating terminological concerns from the beginning may facilitate the determination of legal issues in the decisions of the Court of Cassation, which will be examined in the following.

A- CONCEPTUAL FRAMEWORK

Under this heading, the terms of medical intervention, medical error and malpractice will be explained. Medical intervention is any activity directed at the physical and mental integrity of the person for the purpose of diagnosis, treatment or prevention of diseases by authorized persons practicing the medical profession.[8] However, although medical intervention is included in the superior purpose of protecting and maintaining health, it is directed towards the physical integrity of the person. As a rule, any unauthorized medical intervention to physical or spiritual values that the legal order considers absolute and inviolable is illegal.[9]

The intentional defining of medical intervention is to diagnose and treat the bodily, physical or psychological disease, deficiency, or to alleviate the disease or relieve the suffering even if full treatment cannot be provided, or to protect people from such diseases.[10]

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8 Mustafa Kılıçoğlu, "Yargı Kararları Işığında Doktorun Tıbbî Müdahaleden Doğan Hukukî Sorumluluğu", *Terazi Hukuk Dergisi*, 2006, 1/4, p. 17. Mehmet Ayan, Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk, Kazancı, Ankara, 1991, p. 5. İsmail Atak, "Tıbbî Müdahalenin Hukuka Uygunluk Şartları", *Türk Ortopedi ve Travmatoloji Birliği Derneği Dergisi*, 2020, 19, p. 20. Zafer Kahraman, "Medenî Hukuk Bakımından Tıbbî Müdahaleye Hastanın Rızası", *İnönü Üniversitesi Hukuk Fakültesi Dergisi*, 2016, 7/1, p. 480. Olcay Işık, Yargıtay Kararları Işığında Hekimin Hukukî Sorumluluğu, Atatürk Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Anabilim Dalı, Master Thesis, Supervisor: Metin İkizler, Erzurum, 2010, p. 54-65. Berna Özpınar, "Tıbbî Müdahaleden Doğan Hukukî Sorumluluğun Türleri", Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2008, p. 269, 270. Hayrunnisa Özdemir, "Hekimin Hukukî Sorumluluğu", *Erciyes Üniversitesi Hukuk Fakültesi Dergisi*, 2016, 11/1, p. 39, 45. Sera Reyhani Yüksel, "Hekimin Uyguladığı İlaç Tedavisinden Doğan Zararlardan Hastanın Tüketicinin Korunması Hakkında Kanun Kapsamında Korunması", 5. Tüketici Hukuku Kongresi Sektörel Bazda Tüketici Hukuku ve Uygulamaları, Eds. Hakan Tokbaş ve H. Fehim Üçışık, Bilge, Ankara, 2016, p. 367. Hakeri, Vol. 1, p. 94, 259, 260. Bayraktaroğlu/Fidan, p. 48.

9 M. Kemâl Oğuzman/Özer Seliçi/Saibe Oktay-Özdemir, Kişiler Hukuku (Gerçek ve Tüzel Kişiler), Filiz, İstanbul, 2020, p. 179, 225-229. Mustafa Dural/Tufan Öğüz, Kişiler Hukuku, Türk Özel Hukuku, Vol. II, Filiz, 2017, § 531. Sibel Adıgüzel, "Hekimin Aydınlatma Yükümlülüğü", *Türkiye Adalet Akademisi Dergisi*, 2014, 5/19, p. 945, 946. Mehmet Ayan/Nurşen Ayan, Kişiler Hukuku, Adalet, Ankara, 2020, p. 99, 116, 117. Hüseyin Hatemi, Kişiler Hukuku, On İki Levha, İstanbul, 2020, p. 69-72. Yüksel Ersoy, "Tıbbî Hatanın Hukukî ve Cezaî Sonuçları", *Türkiye Barolar Birliği Dergisi*, 2004, 53, p. 83, 184. Hayrunnisa Özdemir, "Teşhis ve Tedavi Sözleşmesinde Kayda Geçirme ve Sır Saklama Yükümlülüğü", Ankara Barosu Sağlık Hukuku Digestası, 2009, 1, p. 153. Atak, p. 21, 22. Kahraman, p. 480, 483. Işık, p. 65. Özdemir, Hekimin Hukukî Sorumluluğu, p. 39, 45.

10 Aysun Altunkaş, "Ceza Hukukunda Tıbbî Müdahalenin Hukuka Uygunluk Ko-

The aim of healing alone is not enough to eliminate the illegality of medical intervention. Even if action is taken with the aim of healing, the legality of every intervention towards the patient's physical integrity requires the cumulative realization of competent health personnel, informed consent, compliance with the most up-to-date level of medical science and meticulous service conditions.[11] In light of this information, the Supreme Court has mentioned the following conditions in its rulings since 1977: The physician should have legal authority to practice the medical profession, patient's informed consent, and the action to remain within the objective and subjective limits of medical science.[12]

In addition to blood, tissue or organ transplantation, anaesthesia, x-ray, radiation treatments, blood tests and vaccines; sex-oriented intervention, termination of pregnancy, putting IUD into womb for birth control; fillings, tooth extraction, prosthetics as well as implants and orthodontics, stem cell and infertility treatment; many activities, from relatively simple kinds of medical support to pregnancy applications to difficult surgical interventions are included in the concept of medical intervention.[13] Moreover, medical interventions, even aesthetic op-

şulları", II. Ulusal Sağlık Hukuku Tıbbî Müdahalenin Hukukî Yansımaları Sempozyumu, Seçkin, Ankara, 2015, p. 52. Alvina Gojayeva, "Avrupa Biyotıp Sözleşmesi ve Türk Tıp Hukuku'na Etkileri", Ankara Barosu Sağlık Hukuku Digestası, 2009, 1, p. 34. Atak, p. 20. Kahraman, p. 480. Işık, p. 54, 55, 149. Dural/Öğüz, § 531.

11 Perihan Çetinkaya, Hemşirelikte Tıbbî Uygulama Hataları ve Hukukî Sonuçları, Seçkin, Ankara, 2016, p. 38 ed seq. Verda L. Ersoy, "Tıbbî Malpraktis", *Toraks Dergisi*, p. 30, https://torakp.org.tr/site/sf/books/pre_migration/c68713cbd3e-5aef1177da489dc1a646d1645271e69486ea3bb79c144ff909737.pdf (Date of Access 16.6.2021). Merve Duysak, "Hekimin Tıbbî Uygulama Hatalarından Doğan Cezaî Sorumluluğu", *Ankara Barosu Hukuk Gündemi*, 2009, 5/3, p. 25, 26. Murat Akbaba/Vedat Davutoğlu, "Sağlık ve Hukuk Kıskacında Hekim: Ne Yapmalı?", *Türk Kardiyoloji Derneği Arşivi*, 2016, 44/7, p. 610, 611. Gürcan Altun/Abdullah Çoşkun Yorulmaz, "Yasal Değişiklikler Sonrası Hekim Sorumluluğu ve Malpraktis", *Trakya Üniversitesi Tıp Fakültesi Dergisi*, 2010, 27/1, p. 8, 10. Zarife Şenocak, "Hekimin Hukukî Sorumluluğunda Özel Sorunlar", Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2008, p. 244. Özdemir, Hekimin Hukukî Sorumluluğu, p. 39-41, 55-64. Özdemir, Kayda Geçirme ve Sır Saklama Yükümlülüğü, p. 153, 154. Kahraman, p. 484-502. Oğuzman/Seliçi/Oktay-Özdemir, p. 179, 225-229. Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 167-172. Atak, p. 20-24. Dural/Öğüz, § 531-560. Ayan, p. 7 ed seq. Gojayeva, p. 35-42. Işık, p. 54-65. Adıgüzel, p. 949. Hakeri, Vol. 1, p. 88, 94, 259 ed seq. Yüksel Reyhan, p. 367.

12 4th Civil Chamber of the Court of Cassation, 1976/6297, 1977/2541, 7.3.1977. Işık, p. 62, 63.

13 İlhan Gülel, "Tıbbî Müdahale Sözleşmesine Uygulanacak Hükümler", *Türkiye Adalet Akademisi Dergisi*, 2011, 1/5, p. 586. Hayrunnisa Özdemir, "Diş Hekimle-

erations, that do not cause physical distress but cause mental distress are medical interventions.[14]

In the Patient Rights Regulation, medical intervention is a physical and spiritual attempt aimed at protecting health, diagnosing and treating the disease, and it is also carried out within the boundaries of medicine (article 4 of HHY). The Law on the Mode of Execution of Medicine and Medical Sciences refers to persons qualified to perform medical interventions. According to this law, not only medical doctors and dentists, but also midwives, circumcisers and nurses are authorized in this regard (article 1, 2, 3, additional article 13, 29, 30, 47, 58, 68 of TİDK). Persons authorized to perform medical interventions are listed in the law, and nurses are among them. Only physicians (medical doctors) have the authorization to plan and prescribe treatment.[15]

The legality of the medical intervention is independent of the physician or nurse's goodwill and patient satisfaction. The legally expected conditions must be realized cumulatively. Particularly competent health personnel, compliance with the current level of medical science, attentive service and informed consent of the patient are required. Possible error during medical intervention may arise from the physician as well as from other staff members, especially nurses or health technicians. So, the opposite of legality in medical intervention is medical error, and the perpetrator of this is any or some person who is legally authorized to perform medical intervention.[16]

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rinin Hukukî Sorumluluğu", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi*, 2011, 15/1-2, p. 182-183. Atak, p. 20. Kahraman, p. 481, 484, 488. Özdemir, Hekimin Hukukî Sorumluluğu, p. 45, 46, 48. Oğuzman/Seliçi/Oktay-Özdemir, p. 180-187. Yüksel Reyhan, p. 367. Dural/Öğüz, § 561, 599.

14 Gülel, p. 586. Atak, p. 20. Kahraman, p. 480, 481. Özdemir, Hekimin Hukukî Sorumluluğu, p. 46. Oğuzman/Seliçi/Oktay-Özdemir, p. 180.

15 Ulaş Can Değdaş, "Hatalı Tıbbî Uygulamadan (Malpraktis) Doğan Hukukî ve Cezaî Sorumluluk", *Anadolu Üniversitesi Hukuk Fakültesi Dergisi*, 2018, 6/1, p. 43, 44. Filiz Yavuz İpekyüz, Türk Hukukunda Hekimlik Sözleşmesi, Yetkin, Ankara, 2006, p. 23. Mine Kaya, "Hekimin Hastayı Aydınlatma Yükümlülüğünden Kaynaklanan Tazminat Sorumluluğu", *Türkiye Barolar Birliği Dergisi*, 2012, 100, p. 49. Füsun Terzioğlu/Fatma Uslu Şahan, "Hemşirelerin Tıbbî Müdahalede Karar Verme Yetkisi ve Konumu", *Sağlık ve Hemşirelik Yönetimi Dergisi*, 2017, 3/4, p. 137. Bahu Güneş Kılıç, Hekimin Hukukî Sorumluluğu, Legal, İstanbul, 2016, p. 15, 16. Gülel, p. 590. Kahraman, p. 480, fn. 1. Gojayeva, p. 54. Özdemir, Diş Hekimlerinin Hukukî Sorumluluğu, p. 179-181. Özdemir, Diş Hekimlerinin Hukukî Sorumluluğu, p. 43.

16 Oğuz Polat, Tıbbî Uygulama Hataları, Seçkin, Ankara, 2005, p. 25. Ersoy Y., Tıbbî

According to the reports of the Turkish Medical Association, medical error is the failure to complete the planned work as intended and hoped, or the wrong plan to achieve the goal or the wrong application of the right plan.[17] Medical malpractice is that the health personnel who are competent in medical intervention cause harm to the patient due to ignorance, inexperience or indifference. Poor or unskilful practice of medicine or nursing, as well as not presenting the standard practice to the patient at all, are considered malpractice because it also causes the patient's detriment.[18] Although medical error and malpractice are basically same, the definition of malpractice seems broader as it also includes carelessness, damage and/or misconduct.[19]

Hatanın Hukukî ve Cezaî Sonuçları, p. 167-172. Kahraman, p. 480, fn. 1. Hakeri, Vol. 2, p. 1018 ed seq.

17 Füsun Sayek, TTB Kitapları/Raporları-2010 Hasta Güvenliği Türkiye ve Dünya, Türk Tabipler Birliği, Ankara, 2011, p. 17. Murat Şaşı, "Enjeksiyon Nöropatisinden Kaynaklı Tam Yargı Davalarında Risk İlkesi Uyarınca İdarenin Kusursuz Sorumluluğunun Uygulanabilirliği", *Türkiye Barolar Birliği Dergisi*, 2021, 152, p. 71. Levent Mustafa Özgönül/Berna Arda/Necati Dedeoğlu, "Tıp Etiği ve Hukuk Açısından Tıbbî Hata, Malpraktis ve Komplikasyon Kavramlarının Değerlendirilmesi", *Türkiye Klinikleri Tıp Etiği-Hukuku-Tarihi Dergisi*, 2019, 27/1, p. 49. Hakeri, Vol. 2, p. 1049. Değdaş, p. 41, 52. Ersoy V., Tıbbî Malpraktis, p. 30. Işık, p. 65-67. Özdemir, Hekimin Hukukî Sorumluluğu, p. 64, 65. Akbaba/Davutoğlu, p. 611, 612. Nesrin Özkaya/Burcu Elbüken, "Sağlık Profesyonellerinin Hatalı Tıbbî Uygulamalarından Doğan Yasal Sorumlulukları: Hekim Haricindeki Sağlık Meslekleri Özelinde", *Sağlık ve Sosyal Politikalara Bakış Dergisi*, Güz 2018, p. 110, 111. Yılmaz Yördem, "Hekim Meslekî Sorumluluk Sigortasında Hatalı Tıbbî Uygulama Sorumluluğuna İlişkin Yargı Kararlarına Genel Bakış", *Journal Of Institute Of Economic Development and Social Researches*, 2018, 4/12, p. 540. Nesrin Özkaya, "Hemşirelik Mesleğinde Tıbbî Uygulamalardan Doğan Sorumluluklar", http://www.saglikcalisanisagligi.org/sunumlar/avnesrin.pdf (Date of Access 21.6.2021). See also İstanbul Tabip Odası, "Tıbbî Uygulama Hatası", https://www.istabip.org.tr/site_icerik_2016/haberler/aralik2016/iyihekimlik/sunumlar/dr_ali_demircan.pdf (Date of Access 16.6.2021).

18 İştar Cengiz/Alper Küçükay, "Tıbbî Malpraktis, Tıbbî Malpraktisin Psikolojik Boyutları ve Özel Hastanede Çalışan Hekimin Tıbbî Malpraktisten Doğan Hukukî Sorumluluğu", *Türkiye Adalet Akademisi Dergisi*, 2019, 37, p. 110. Cantürk Gürol, "Tıbbî Malpraktis ve Tıbbî Bilirkişilik", Uluslararası Sağlık Hukuku Sempozyumu, Eds. Hakan Hakeri ve Cahit Doğan, Türkiye Barolar Birliği, Ankara, 2015, p. 303. Oktay Ahşen E., "Tıbbî Malpraktis Kavramı ve Sonuçları", http://www.turkhukuksitesi.com/makale_1183.htm (Date of Access 17.6.2021). Değdaş, p. 41, 42, 49-51. Duysak, p. 28. Özkaya/Elbüken, p. 111. Ersoy V., Tıbbî Malpraktis, p. 31. Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 167-172. Yördem, p. 540. İstanbul Tabip Odası, ibidem, fn. 17. Şaşı, p. 71. Işık, p. 67. Özdemir, Hekimin Hukukî Sorumluluğu, p. 64, 65. Özkaya, ibidem, fn. 17.

19 Değdaş, p. 49. Özgönül/Arda/Dedeoğlu, p. 49. İstanbul Tabip Odası, ibidem, fn. 17. Oktay Ahşen, ibidem, fn. 18. Cengiz/Küçükay, p. 109-111. Özkaya/Elbüken,

B- DIFFERENCE BETWEEN THE COMPLICATION AND MALPRACTIS

The golden rule of medical science is the principle of "first, do not harm (*primum non nocere*)". According to this, any medical intervention is firstly based on not doing damage.[20] In that case, medical intervention aimed at healing should not at least worsen the patient. As a result, it is possible for the patient to recover or the problem to continue or worsen.[21] Here, if the patient has been harmed by the fault of the physician and/or nurse, and if his condition has deteriorated, the questioning of responsibility begins. If the damage resulting from deterioration is subject to a claim, compensation is essential. On the other hand, the rule in complication is the perfection (clean hands) and irresponsibility of the physician and/or nurse. The distinction between malpractice and complications is like a magic wand that resolves most of the controversies in medical law. Physician and/or nurse, all persons capable of medical intervention can absolutely be held liable for malpractice. Complications do not cause liability. Due to the definition of permissible risk, complication is an acceptable hazard. That means, what counts as malpractice or complication in the attribution of legal responsibility is critical.[22]

C- OTHER APPEARANCES OF MALPRACTICE IN NURSING

Problems arising from healthcare professionals, especially the legal responsibility of physicians and nurses for medical errors, cannot be isolated from the political and economic conditions of the relevant

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p. 111. Tıbbî Hata, "Tıbbi Hata-Malpraktis Nedir?", http://www.tibbi-hata.com/Türkçe/Blog/Blog_Detay/Tıbbi_Hata-Malpraktis_Nedir%3F/1434543120.html (Date of Access 17.6.2021).

20 Çağatay Üstün, "Tıp'ta Etiğin Yerini Belirlemek", Ankara Barosu Sağlık Hukuku Digestası, 2009, 1, p. 116. Cengiz/Küçükay, p. 108, 109, 111. Yördem, p. 539. See also Vikipedi-3, "Primum Non Nocere", https://tr.wikipedia.org/wiki/Primum_non_nocere (Date of Access 17.6.2021).

21 Hüseyin Cem Barlıoğlu, Defansif Tıp Unsuru Olarak Tıbbî Malpraktis, Seçkin, Ankara, 2020, p. 26. Değdaş, p. 42, 56, 57, 60. Özgönül/Arda/Dedeoğlu, p. 49.

22 Ünal Kuzgun, "Komplikasyon mu? Malpraktis mi?", *Türk Ortopedi ve Travmatoloji Birliği Derneği Dergisi*, 2019, 18, p. 98. Hakeri, Vol. 2, p. 1023. İstanbul Tabip Odası, ibidem, fn. 17. Ersoy V., Tıbbî Malpraktis, p. 31. Özgönül/Arda/Dedeoğlu, p. 49. Değdaş, p. 41, 42, 49-51. Oktay Ahşen, ibidem, fn. 18. Şaşı, p. 71, 72. Altun/Yorulmaz, p. 8. Işık, p. 67-69. Güneş Kılıç, p. 32 ed seq.

society, nor can they be isolated from the quality of education and training. In the training of health personnel, choices should be based on objective scientific reasons rather than political motives.[23]

A nurse plays an important role in every moment of the treatment, from the simple injection in the emergency room to the severe surgical intervention. Nurses should act in accordance with medical standards in all their practices. His/her lack of knowledge and skills, imprudence, violation of standard patient care practices, carelessness and negligence, incorrect drug administration, inadequate follow-up, failure to prioritize patient safety, and non-compliance with existing protocols are among the frequently encountered reasons for malpractice.[24]

According to one project study, one in five nurses per shift falls into a medical error.[25] Most of the nurses' responsibility can be attributed to the violation of the duty of care as well as the lack of communication with the physician.[26] In particular, non-compliance with the minimum cleaning conditions during the intervention, that is, the sterilization problem, is itself a cause of medical error. Besides that, improper movement of the patient, behaviour that distracts the physician during the intervention, forgetting the gauze and/or tampon in the patient's stomach during the operations, not following the rules during the shift deliveries, being careless while conveying information to the patient may lead to the responsibility of the nurse.[27] Like that, the issues of administering the medicine prepared by someone else, voidable peripheral venous line changing and dropping the patient should

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23 Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 162, 163.

24 İ. Hamit Hancı/Yurdagül Erdem/Sevinç Polat, Adlî Hemşirelik, Seçkin, Ankara, 2020, p. 236.

25 Kahriman/Öztürk/Babacan, p. 5, 55.

26 Kürşat, p. 294. Hakeri, Vol. 2, p. 1110. Hakan Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", https://www.medimagazin.com.tr/authors/hakan-hakeri/tr-hemsirelerin-yasal-sorumluluklari-II-72-64-1271.html (Date of Access 9.5.2021). Yahya Deryal, "Hemşirelerin Hukukî Sorumluluğu", 3. Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2011, p. 428. İlknur Kahriman/Havva Öztürk/Elif Babacan, "Hemşirelerin Tanı, Tedavi ve Bakım Uygulamaları Sırasında Tıbbî Hata Oranlarının Değerlendirilmesi", Vehbi Koç Vakfı Hemşirelik Fonu, Proje 2014/2, Trabzon, 2015, https://sanerc.ku.edu.tr/wp-content/uploads/2017/04/Hemşirelerin-TanıTedavi-ve-Bakım-Uygulamaları-Sırasında-Tıbbi-Hata-Oranlarının-Değerlendirilmesi.pdf (Date of Access 2.7.2021).

27 Kürşat, p. 294. Hakeri, Vol. 2, p. 1110. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Deryal, p. 428.

also be considered.[28] Moreover, vaccinating the child for tuberculosis instead of measles, not writing one of the drugs on the discharged patient's medication use card, inadvertently administering an anesthetic drug to the patient coming out of the operation, giving HIV-containing blood to an eighteen-month-old baby who was treated for burns are the cases that refer to malpractice in nursing.[29] On the other hand, mild pain and redness at the catheter or entry site may be considered a complication after the medically appropriate catheter is inserted in the right place and sterile.[30] In summary, the nurse's legal responsibility for medical error is simply based on professional error. A nurse may be held liable for medical malpractice. However, a nurse's irresponsibility for complications is the rule.[31]

In the research conducted on nurses who are responsible for medical errors; it is remarkable that the workload is high, the number of nurses working is low, the nurses are loaded with non-duty jobs, and they are worked under stress and fatigue.[32] Inadequate job descriptions of nurses, low wages, limitation of promotion opportunities, lack of communication with the manager and with each other create the ambiance of medical errors peculiar to them.[33]

The probabilities and causes of medical errors of nurses were examined, especially from the perspective of drug administration. In this review, necessary precautions to be taken are listed to prevent injection application errors and to ensure safe injection. Fatigue, excessive

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28 Kahriman/Öztürk/Babacan, p. 56.

29 Derya Şahin et al., "Hemşirelikte Malpraktis: Olgu Sunumları", *Adlî Tıp Bülteni*, 2014, 19/2, p. 101.

30 Arzu Karayavuz, "Kateter Hemşireliği", Türk Hematoloji Derneği-Hematoloji Pratiğinde Uygulamalı Kateterizasyon Kursu, p. 60, http://www.thd.org.tr/thdData/userfiles/file/KATATER__KURS_14.pdf (Date of Access 17.6.2021).

31 For the distinction between malpractice and complication, see Kuzgun, p. 98. Ersoy V., Tıbbî Malpraktis, p. 31. Özgönül/Arda/Dedeoğlu, p. 49. Değdaş, p. 41, 42, 49-51. İstanbul Tabip Odası, ibidem, fn. 17. Oktay Ahşen, ibidem, fn. 18.

32 Musa Özata/Handan Altunkan, "Hastanelerde Tıbbî Hata Görülme Sıklıkları, Tıbbî Hata Türleri ve Tıbbî Hata Nedenlerinin Belirlenmesi: Konya Örneği", *Tıp Araştırma Dergisi*, 2010, 8/2, p. 106. Cumhuriyet, "Yargıtay'dan Sağlık Çalışanlarına Emsal Niteliğinde Fazla Mesai Kararı", https://www.cumhuriyet.com.tr/haber/yargitaydan-saglik-calisanlarina-emsal-niteliginde-fazla-mesai-karari-1796111 (Date of Access 21.6.2021).

33 Sema Kuğuluoğlu et al., "İlaç Uygulamalarında Hemşirenin Meslekî ve Yasal Sorumluluğu", *Maltepe Üniversitesi Hemşirelik Bilim ve Sanat Dergisi*, 2009, 2/2, p. 88.

workload, length of working hours, inexperience, stress and lack of professional knowledge and skills were counted among the factors causing medical errors. In addition, the lack of fixed or clear protocols and procedures, the irregularity of the records and the lack of attention to information transfer in shifts are among the factors that pave the way for malpractice.[34] Moreover, errors such as not washing hands, not using gloves, breaking the bulb with a solid object, interfering with the sciatic nerve, reusing the used needle, wiping the already sterile end of the needle with cotton should also be included.[35]

The drug administration process under the responsibility of the nurse needs to be evaluated. When the physician examines the patient, he determines which drug will be administered, how and at which dose. He conveys his requests in this direction to the nurse. A nurse should administer medications as they are communicated to her, he/she should monitor and record any after effects. The nurse plays a very effective, active and prepotent role in the drug administration process. The leading mistakes of the nursing activities are related to injection, that is, to administer drugs with a needle. Injection error can be caused by reasons such as inappropriate application point, incorrect dosage adjustment, wrong mixing and dilution, not paying attention to sterilization, using tools and equipment that are not suitable for the service, and daring to apply despite lack of technical knowledge and artistic skills.[36] If there is a causal link between the failure to comply with the dose or timing in the doctor's instructions and the harm in drug administration, the nurse may be held responsible.[37] As a result of careless and inattentive intramuscular injection, undesirable results such as nerve damage, regression in foot functions, crippling and/or skipping may occur. In intravenous injections, in addition to physical distress due to vein damage and/or infection, weakness or loss of

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34 Fatma Er/Serap Altuntaş, "Hemşirelerin Tıbbî Hata Yapma Durumları ve Nedenlerine Yönelik GörüşlerininBelirlenmesi", *Sağlık ve Hemşirelik Yönetimi Dergisi*, 2016, 3/3, p. 132-139.

35 Esin Çetinkaya Uslusoy/Emel Duran Taşçı/Medet Korkmaz, "Güvenli Enjeksiyon Uygulamaları", *Hacettepe Üniversitesi Hemşirelik Fakültesi Dergisi*, 2016, 3/2, p. 50, 51, 53. Kürşat, p. 294, 295.

36 Çetinkaya Uslusoy/Taşçı Duran/Korkmaz, p. 50-57.

37 Deryal, p. 432, 433.

a limb is unfortunately encountered.[38] Negative consequences on the injection problem are not just injuries. It is possible for the patient to go into a coma after the medicine is given quickly by the nurse, which should be given at least two hours under the control of the doctor. It should also be mentioned that the patient whose surgery was completed and because of repeated narcosis medication could fall into a vegetative state.[39]

II- LEGAL RESPONSIBILITY OF A NURSE

First of all, the legal responsibility of the nurse will be discussed in general. The purpose of such a summary is to remind the subject. Then, the jurisprudence of the Court of Cassation concerning legal responsibility in nursing will be chronologically conveyed. Academic quality in the analysis of the cases subject to the judicial decisions can be achieved by duplicating examples as well as by having a good command of terminology. The issues that the Supreme Court has focused on, both in the form of complications and malpractice, should be examined legally at the level of social facts and with communal awareness.

A- SUMMARY OF RESPONSIBILITY FOR NURSE'S MALPRACTICE

A nurse's faulty violation of the rules of medicine and medical law due to his/her profession may result in her administrative, legal and criminal liability. The legal responsibility characterized by paying compensation is directed towards the elimination of the damage done to the patient. In the responsibility of the nurse, it is necessary to clarify the definitions of nurse, patient, complication and malpractice in each concrete case. Once the malpractice description is fixed, the institutions of breach of debt or tort in Turkish law of obligations direct the nurse's legal responsibility for medical error. Moreover, the nurse's responsibility for breach of debt includes also fault in contract negotiations (*culpa in contrahendo*). Responsibilities of nurses arising from

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38 Çetinkaya Uslusoy/Duran Taşçı/Korkmaz, p. 53. Kürşat, p. 294, 295. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Halide Savaş, Yargıya Yansıyan Tıbbî Müdahale Hataları Tıbbî Malpraktis Tıbbî Davaların Seyri ve Sonuçları, Seçkin, Ankara, 2009, p. 83-84.

39 Şahin et al., p. 101.

tortious acts and breach of contract due to their professional activities remain. It is also possible to assign responsibilities to the nurse based on acting without authority (*negotiorum gestio*).[40]

In disputes originating from private law, it is not possible to cover the legal responsibility of the nurse in a few pages. Nevertheless, the

[40] Fahriye Oflaz, "Hemşirenin Görev ve Yetkileri", 3. Sağlık Hukuku Kurultayı, Ankara Barosu, Ankara, 2011, p. 411. Pınar Aksoy Gülaslan, "Tıbbî Kötü Uygulamaya İlişkin Zorunlu Malî Sorumluluk Sigortası", Uluslararası Sağlık Hukuku Sempozyumu, Eds. Hakan Hakeri ve Cahit Doğan, Türkiye Barolar Birliği, Ankara, 2015, p. 269, 270. Çelik Ahmet Çelik, Tazminat ve Alacaklarda Sorumluluk ve Zamanaşımı, Seçkin, Ankara, 2018, p. 848 ed seq. Murat B. Alkanat, "Tıbbî Müdahalelerden Doğan Hukukî Sorumluluk", *Sürekli Tıp Eğitimi Dergisi*, 2002, 11/5, 177-180. Hakeri, Vol. 2, p. 961 ed seq. Kaya, p. 59, 60, 70. Terzioğlu/Şahan, p. 139, 140. Çetinkaya Uslusoy/Duran Taşçı/Korkmaz, p. 51, 54. Gülel, p. 587 ed seq. Kalabalık, p. 344-352, 355-358. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Kuğuluoğlu et al., p. 89. Kürşat, p. 303-308. Şenocak Z., Hekimin Hukukî Sorumluluğunda Özel Sorunlar, p. 242-251. Cengiz/Küçükay, p. 123. Oktay Ahşen, ibidem, fn. 18. İstanbul Tabip Odası, ibidem, fn. 17. Şahin et al., p. 100. Özkaya/Elbüken, p. 118-122. Duysak, p. 29-38. Akbaba/Davutoğlu, p. 611-613. Altun/Yorulmaz, p. 7-11. Deryal, p. 426-439. Dural/Öğüz, § 560, fn. 337. Oğuzman/Seliçi/Oktay Özdemir, p. 225-229. Özpınar, p. 270-291. Özdemir, Diş Hekimlerinin Hukukî Sorumluluğu, p. 183-229. Özdemir, Kayda Geçirme ve Sır Saklama Yükümlülüğü, p. 151, 163. Karabakır, p. 12-39. Özkaya, ibidem, fn. 17. Ayan, p. 51 ed seq. Yüksel Reyhan, p. 368-377. Güneş Kılıç, p. 67-99. About culpa in contrahendo, see also Fikret Eren, Borçlar Hukuku Genel Hükümler, Yetkin, Ankara, 2020, p. 40. Aydın Zevkliler/K. Emre Gökyayla, Borçlar Hukuku Özel Borç İlişkileri, Vedat, İstanbul, 2020, p. 678-680. Ahmet Kılıçoğlu, Borçlar Hukuku Genel Hükümler, Turhan, Ankara, 2021, p. 57. Andreas Furrer/Markus Muller-Chen/Bilgehan Çetiner, Borçlar Hukuku Genel Hükümler, On İki Levha, İstanbul, 2021, p. 584-589. Şener Akyol, Dürüstlük Kuralı ve Hakkın Kötüye Kullanılması Yasağı, Filiz, İstanbul, 1995, p. 53, 54. Huriye Reyhan Demircioğlu, Güven Esası Uyarınca Sözleşme Görüşmelerindeki Kusurlu Davranıştan Doğan Sorumluluk (Culpa In Contrahendo Sorumluluğu), Yetkin, Ankara, 2009, p. 43 ed seq. Mustafa Arıkan, "Culpa in contrahendo Sorumluluğu", *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, 2009, 17/1, p. 69-89. Aylin Görener, "Culpa in contrahendo Sorumluluğu", *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi*, 2019, 36/2, p. 67-80. Hamdi Yılmaz, "Sözleşme Görüşmelerinde Kusur-Culpa In Contrahendo- ve Sorumluluğun Hukuksal Niteliğinde Yeni Görüşler", *Yargıtay Dergisi*, 1975, Ocak-43, p. 234-252. Özgür Güvenç, "Culpa in Contrahendo Sorumluluğu Bağlamında Sözleşme Görüşmelerinin Kesilmesi", *Gazi Üniversitesi Hukuk Fakültesi Dergisi*, 2014, 18/3-4, 364-370. For negotiorum gestio, see also Belgin Erdoğmuş, Roma Borçlar Hukuku Dersleri, Der, İstanbul, 2014, p. 125-128. Kübra Erçoşkun Şenol, "Gerçek Olmayan Vekâletsiz İş Görmenin Sistematik Açıdan Türk Borçlar Kanunu'ndaki Yeri ve 2020 İsviçre Borçlar Kanunu Tasarısı'ndaki Durum", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi*, 2018, 12/4, p. 38-50. Fikret Eren, Borçlar Hukuku Özel Hükümler, Yetkin, Ankara, 2021, p. 909 ed seq. Sera Reyhani Yüksel, "Hekimin Vekâletsiz İş Görmeden Doğan Sorumluluğu", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, 21/2, Mehmet Akif Aydın'a Armağan, p. 793-804.

legal reasons that give rise to such responsibility in accordance with the Turkish Code of Obligations No. 6098 (TBK) will be addressed from a bird's eye view.

First of all, it should be explained that there are dependent, independent and semi-dependent roles in nursing. Indeed, the nurse's spectrum of duties is not limited to merely following the physician's instructions. At the same time, a nurse can enter into a contractual relationship directly with the patient. A nurse works dependent on the physician in terms of administering treatment. However, a nurse is equipped with independent decision-making abilities in terms of nursing diagnosis process and nursing care.[41] Nursing Regulation illuminates these roles as follows: "based on evidence within the framework of the needs determined within the scope of the nursing diagnosis process plans, implements, evaluates and supervises" (article 6/1-a of HY).

In the first case, the nurse may be held liable pursuant to the provisions of tort (article 49 et seq. of TBK). The conditions for the nurse's conviction to pay compensation arising from the wrongful act can be listed as follows within the framework of the general provisions: A nurse's unlawful act or inaction when necessary, attribution of fault to the nurse, harm to the patient, causality between the harm and the unlawful act. Indeed, the nurse's wrongful act targeting the patient violates the physical integrity, in other words, the physical and/or mental health, which is an element of the right of personality. Therefore, such interventions are illegal as a rule. Damage may occur upon the violation of personal rights by the unlawful intervention of the wrongful nurse. If there is a causal link between the harm and the unlawful behaviour of the nurse, it can now be said that the patient can receive compensation arising from the wrongful act. A contractual relationship is not sought in the patient's claim for compensation based on the tortious act. As a rule, a claim for compensation can only be brought against the self-employed nurse herself/himself. A lawsuit can also be brought to the hospital for the wrongful act of the dependent nurse related to her profession, in that case the strict liability of the employer comes to the fore (article 66 of TBK). In the second possibil-

41 Kuğuluoğlu et al., p. 89. Terzioğlu/Şahan, p. 136, 140.

ity, the compensation in the legal responsibility of the nurse may arise from the breach of the debt. The conditions for this should be classified as follows: The existence of a contract between the nurse and the patient, the breach of the debt arising from this contract by the nurse, the nurse being deemed at wrongful, damage to the patient and the causal link between the damage and the breach of the debt. The legal nature of the contract between the nurse and the patient is mostly mandate (*mandatum*) (article 502 of TBK). Here, it is not the typical appearance of the *mandatum*, but the modest version of a fee for work. If a nurse does not fulfil or perfoms late or poorly regarding the obligation of providing the medical service that is within the province of him/her in accordance with the patient's will and health benefit, the general provisions regarding the breach of contract shall be applicable in addition to the special provisions regarding the mandate contract (article 502, 112 of TBK). On the other hand, the principle of honesty, which is expressed in the Turkish Civil Code No. 4721 (TMK), imposes culpa in contrahendo responsibility on future contracts that come into contact to make a contract (article 2 of TMK). Although the legal nature of this liability is still discussed in the doctrine, it is mostly considered as a breach of debt. Therefore, the nurse's failure to act honestly in pre-contract negotiations, as a rule, with the application of special provisions regarding the mandate contract; the blanks are resolved by filling in the general provisions regarding the breach of contract (article 502, 112 of TBK; article 2 of TMK). In the preparation phase, if the nurse damages the patient with careless statements and/or behaviours attributed to her wrongful, it may result in compensation. Although it is rare, it should be pointed out that the nurse may act without authority. If the nurse's act without authority is in accordance with the patient's interests and his hypothetical will, then it is in favour of the patient's interest namely substantial (real) agency without authority; otherwise, it is mentioned about insubstantial (unreal) acting without authority (article 526 et seq. of TBK). Even if it is not based on a contract, the degree of the nurse's duty of care does not change. He/she should always show the care expected from his/her profession in all his medical interventions. The nurse acting without authority is responsible for all kinds of negligence. However, the responsibility of healthcare professionals aiming to protect the patient from greater damage who act

without authority, is considered lighter as per the law (article 527/1 of TBK). The nurse's liability arising from private law, especially for tortious act or breach of contract, ensures that the patient's damage is compensated with material and/or moral compensation.[42]

In emergency situations, the treatment of the patient without obtaining his/her permission may be subject to the provisions of agency working without authority. Like that, tort (wrongful act) and/or violating the rules of good faith during pre-contract negotiations are within the scope of breach of debt from the *culpa in contrahendo* point of view. It is in this manner that the patient's condition who linger by creating the expectation that he will be treated, worsens.[43] Finally, the possibility of wrongful behaviour and acting without authority can be exemplified in covenant negotiations. It is sufficient for the nurse to use her medical knowledge in the best way and to choose the most appropriate method for treatment. Otherwise, a nurse does not guarantee a curative result such as healing. It is known that a nurse can provide health services independently of the physician. It is important for a nurse to be honest while the covenant negotiations are going on to undertake the care and supervision of the patient. For this reason, vain promises such as rapid recovery or life extension should not be voiced. The legal order does not protect medical knowledge and nursing status for being used as a hope-monger (article 502, 102 of TBK.; article 2 of TMK). In addition, a nurse, who is out of duty and gives medical treatment to a lonely person who was injured and unconscious in a traffic accident can be considered to be acting without authority. Similarly, when a patient who is unconscious and is brought to the emergency room by third parties, the urgent medical intervention of the physician and the nurse can be thought as the agency without authority. In these exam-

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42 Kürşat, p. 303, fn. 9, 304, 307-317. Çetinkaya Uslusoy/Duran Taşçı/Korkmaz, p. 54. Karabakır, p. 155-20. Aksoy Gülaslan, p. 269, 270. Özkaya/Elbüken, p. 118-124. Duysak, p. 25. Akbaba/Davutoğlu, p. 611. Altun/Yorulmaz, p. 7, 8, 10. Yüksel Reyhan, p. 368-377. Hakeri, "Hemşirelerin Yasal Sorumlulukları-II", ibidem, fn. 26. Ersoy Y., Tıbbî Hatanın Hukukî ve Cezaî Sonuçları, p. 183-187. Terzioğlu/Şahan, p. 139, 140. Cengiz/Küçükay, p. 120-127. Kuğuluoğlu et al., p. 89. Alkanat, p. 177-180. Arıkan, p. 69-89. Demircioğlu, p. 43 ed seq. Güvenç, p. 364-370. Akyol, p. 53, 54. Görener, p. 67-80. Erçoşkun Şenol, p. 38-50. Zevkliler/Gökyayla, p. 678-680. Eren, Özel Hükümler, 909 ed seq. Eren, p. 40. Kılıçoğlu, p. 57, Erdoğmuş, p. 125-128. Yüksel Reyhani, Vekâletsiz İş Görme, p. 794-802. Güneş Kılıç, p. 67-99.

43 Yüksel Reyhani, Vekâletsiz İş Görme, p. 794, 802.

ples, the nurse is, as a rule, liable for any negligence. Nevertheless, it is at the judge's discretion to evaluate the responsibility of the nurse as a slight liability, who only aims to save the patient or the injured from greater damage (article 527/1 of TBK; article 4 of TMK).

B- VERDICTS OF THE JURISDICTION CLARIFYING NURSES' LEGAL RESPONSIBILITY

Verdicts under this heading are related to compensation cases filed due to medical error with the claim of nurses' wrong**.** In fact, due to the nurse's wrongful act, in addition to the weakness or loss of limbs in the patient, even coma, vegetative life and death stand out in concrete events. Besides, there are jurisprudences pointing to the separation of duties between the administrative and judicial judiciary. Similarly, it should be mentioned that the recourse by the State Treasury to the offending civil servant nurse is possible. Based on the various verdicts of the Court of Cassation, the legal responsibility of nurses can be analyzed realistically. Objectivity is valuable in the analysis of events that paved the way for nurses to pay compensation. Because, in such sensitive matters, a methodological approach to social and legal events ensures avoidance of bias and provides permanent solutions with a multidisciplinary perspective. The compilation from 1973 to 2020 is listed below.

In 1973, anaphylaxis shock and death as a result of penicillin allergy were evaluated. Antibiotics such as penicillin can cause death in some individuals due to an allergic reaction. The importance of this jurisprudence is that it questions the workload distribution between the physician and the nurse. The Court of Cassation was sceptical that only the nurse, not the doctor, was held responsible for the sudden injection of a full dose of allergic shock drugs rather than gradually.[44]

[44] "As the purpose of the profession of the doctor and auxiliary health personnel is to protect human life, eliminate diseases and prolong life, it is necessary for the physician to warn the patient and the auxiliary personnel and, if necessary, to give the injection himself when giving a drug that can cause shock. The fact that the council of health determines that the fatal result is possible with this drug and on the other hand does not consider the doctor responsible depends on the fact that the doctor, in this application, clearly determines that there is no other method of manner that can prevent this result. However, this aspect is not mentioned in the report. Drugs that cause allergies or shock, and thus pose or may pose a very

In 2002, it was evaluated to be written 36.5 degrees as if the fever of the kidney patient was checked even though no fever was measured. Twenty minutes later, it was noticed that the patient's temperature approached 39 degrees. The General Assembly of Civil Chambers in the Court of Cassation has confirmed that this behaviour, which is incompatible with truth, is wrongful.[45]

When a lawsuit was filed against the physician due to the medical error of the nurse in 2003, the fault of the physician and the nurse together or separately was discussed; it has been decided that the employer is responsible for the employee's breach of contract. In fact, it was based on the provision of the repealed Turkish Code of Obligations No. 818 (EBK), which deals with the absolute liability of the employer for the employee's infraction (article 100 of EBK).[46] In this case, it is jurisprudence that the physician is absolute liable for the wrong of the assistant nurse.[47]

In 2004, for the first time, the injury of the sciatic nerve with the injection and the fact that the incident took place in the state hospital resulted in the lack of jurisdiction of the judiciary. Persons who do not have personal wrongs, have worked in a public hospital and left their jobs may not be prosecuted in the civil jurisdiction.[48]

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serious danger to life, should be administered to prevent this, even if the danger is rare. As far as it is known, this can be implemented in the following way; after the drug to be applied is applied in a very small amount and injected in trace amounts or in the amount required in general, the patient's reaction should be waited, and if no reaction is shown and thus it is understood that there is no danger for the patient, it can be injected completely. Otherwise, the act done is not treatment, but ignorance and causing death with gross negligence… The Council of Health reports, which determine the doctor's irresponsibility in the file, are far from apprehending in terms of the quality and quantity of the problem in all details and are insufficient, and do not bind the court under the provisions of Articles 275 and next articles of the proceeding. The decision should be examined by the university professor, whose knowledge and impartiality the court trusts, and the degree of fault should be determined according to the result. Otherwise, the decision made with incomplete examination should be reversed" (4th Civil Chamber of the Court of Cassation, 1973/2684, 1973/2978, 13.3.1973).

45 Court of Cassation, General Assembly of Civil Chambers, 2002/9-550, 2002/561, 26.6.2002.

46 Abolished Turkish Code of Obligations No. 818, Official Journal 29.4.1926, 359.

47 13th Civil Chamber of the Court of Cassation, 2003/2333, 2003/6348, 22.5.2003.

48 21st Civil Chamber of the Court of Cassation, 2004/7439, 2004/8136, 11.10.2004.

In 2004, the capacity to sue for damages against the obstetrician and his nurse was evaluated. The doctor did not supervise the nurse, the nurse did not follow the doctor's instructions, the doctor left the plaintiff's birth and went to another birth, the nurse tried to deliver the pregnant woman without waiting for the doctor, the nerves in the new-born's arm were damaged, and as a result of the strong pressure on the pregnant woman's abdomen, the baby's arm was disabled. The Court of Cassation decided that the case should be accepted because it was based on the defendants' personal wrong. So much so that just because personal fault is mentioned in the petition, the court should enter the merits of the case and a judgment should be made according to this determination after determining whether the defendants have personal wrongs.[49]

In 2004, the lawsuit was filed against the obstetrician and his nurse for causing the death of the mother and the baby. However, this time, since the lawsuit was not based on the personal wrongs of the civil servant defendants working in the public hospital, it is obvious that the administrative jurisdiction was directed.[50]

In 2005, it was mentioned that in the lawsuit of complete loss of sensation in the left foot following the pain that started after the injection, the provisions of the agency contract (*mandatum*) and the absolute liability of the employer could be applied.[51]

In 2005, new-borns were mixed-up by nurse error. Because the name bands of the babies of the plaintiff mother and another mother who gave birth in the same hospital were changed somehow. The mother, who stayed away from her own baby unknowingly breastfed someone else's child until she learned the truth. The decision had to be reversed due to the amount of non-pecuniary compensation determined without investigating the social and economic conditions of the parties.[52]

In 2005, the fake prescription incident written by the nurse is interesting. Defendant nurse arranged forged prescriptions on behalf of

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49 4th Civil Chamber of the Court of Cassation, 2004/11762, 2004/10881, 30.9.2004.
50 21st Civil Chamber of the Court of Cassation, 2003/10347, 2004/765, 9.2.2004.
51 4th Civil Chamber of the Court of Cassation, 2005/5837, 2005/5679, 26.5.2005.
52 13th Civil Chamber of the Court of Cassation, 2004/15903, 2005/3133, 2.3.2005.

two beneficiaries of health benefits. However, these patients did not use these fake written prescriptions medicines.[53]

In 2007, this jurisprudence is again about injection. The plaintiff, who came to the emergency room with severe kidney pain, was given a painkiller injection. The injection was prescribed by the physician, and the administration was carried out by the nurse. However, the needle that came into the nerve caused paralysis of the plaintiff's right leg. The fact that the plaintiff's body is very weak, that is, lean, is mentioned among the reasons for the defendants to defend themselves. The decision of the first-instance court ruling on compensation was overturned by the Supreme Court. Because the report from the Council of Forensic Medicine is insufficient. The wrongful acting rate of 4/8 was attributed to the nurse. However, it is not discussed why the defendant doctor did not have the rest of the wrongful acting rate of 4/8. It is not possible to establish a judgement based on an incomplete report.[54]

In the 2011 jurisprudence, the faultiness of the nurse was indisputable. Because she caused the paralysis of the right foot of a seven-year-old child by injecting the injection needle to the vein, which was supposed to be applied to the muscle and in which's prospectus has a warning that it may not be applied to the vein. However, since the action was carried out by the nurse working in the state hospital, the aforementioned case was rejected due to the lack of jurisdiction and the administrative jurisdiction was pointed out.[55]

In 2012, it was jurisprudence that the civil jurisdiction was not responsible for the liability of the nurse for intramuscular injection, who works in the state hospital.[56] In 2013, the degree of wrongful act of the nurse who gave the wrong injection was determined as 4/8 in criminal proceedings. This rate was also taken into account in the civil proceedings and half of the damage was compensated to the nurse who performed the faulty injection.[57]

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53 4th Civil Chamber of the Court of Cassation, 2004/6066, 2005/290, 25.1.2005.
54 13th Civil Chamber of the Court of Cassation, 2007/7502, 2007/9890, 9.7.2007.
55 Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011.
56 4th Civil Chamber of the Court of Cassation, 2012/6576, 2012/10015, 7.6.2012.
57 4th Civil Chamber of the Court of Cassation, 2012/8778, 2013/8959, 16.5.2013.

In three separate jurisprudences in 2014 and 2015, in the case brought against the nurse due to the wrongful acting of the public servant nurse, while the local court should have dismissed the case due to lack of capacity, its rejection in terms of duty and base was found to be wrong.[58] However, dissenting opinion were written in the decisions. In the dissenting opinions, it was criticized that the civil servant's personal wrongful acting was not separated. As a result, if it is understood from the material facts that the lawsuit is based on the defendant's personal wrongful act, hereupon the evidence must be collected and evaluated in line with this claim, and thus a legal conclusion must be reached.[59]

In 2016, the Supreme Court evaluated whether the criminal sentence regarding the nurse who was convicted of reckless injury binds the civil judge. For this, it was based upon the provision of the repealed Turkish Code of Obligations, which regulates the relationship between civil and criminal judges (EBK article 53 of EBK). Based on the true-life material facts mentioned in the sentence, the legal responsibility of the nurse can be applied.[60]

In 2016, the injection administered by the nurse is still on the agenda as a legal issue. This time, the decision of the local court was overturned because the patient's consent form, signed by the plaintiff, was not sent to the file so that the nurse's wrongful acting could not be determined from the aforementioned injection.[61]

In another jurisprudence in 2016, the plaintiff, who could not step on his foot after the injection, did not heal despite receiving physical therapy. In order to determine whether the nurse has a professional wrongful acting in the case, experts with academic careers from the neurologists of the universities should be selected and a committee report should be obtained from them. The Court of Cassation preferred the way of reversal, since there was no expert examination of this quality.[62]

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58 4th Civil Chamber of the Court of Cassation, 2015/9285, 2015/9678, 10.9.2015. 4th Civil Chamber of the Court of Cassation, 2015/4017, 2015/4876, 16.4.2015. 4th Civil Chamber of the Court of Cassation, 2014/7428, 2014/10382, 23.6.2014.

59 4th Civil Chamber of the Court of Cassation, 2014/620, 2014/1593, 4.2.2014. 4th Civil Chamber of the Court of Cassation, 2011/1694, 2012/4172, 15.3.2012.

60 13th Civil Chamber of the Court of Cassation, 2014/43885, 2016/2467, 2.2.2016.

61 13th Civil Chamber of the Court of Cassation, 2015/30631, 2016/7474, 10.3.2016.

62 13th Civil Chamber of the Court of Cassation, 2015/4491, 2016/9749, 6.4.2016.

In 2016, another jurisprudence showing that the injection problem continues should be mentioned. The defendant nurse administered painkillers intramuscularly to the left hip of the plaintiff who had undergone plastic surgery. However, the plaintiff's left leg was injured. The expert's report states that the clinical picture is compatible with injection neuropathy, and nerve damage occurs with the intra-tissue spread of the injected medicine. If the administration is not made in the wrong place, that is, if the injection is suitable for the medical technique, unforeseen and unpreventable symptoms may occur. According to the report, despite all care and attention, there are complications that are not caused by any wrongful act. However, the fact that even the hospital's irresponsibility was expressed in this expert report necessitated the reversal of the decision of the first instance court due to incomplete examination.[63]

In 2017, after the abortion procedure, numbness occurred in the right leg and foot as a result of painkillers administered from the calf. In the report prepared by the Council of Forensic Medicine, the current picture is described as a complication that can occur despite all care and is not based on any wrongful act. Medical incompatibility in the injection place and technique, and therefore, a wrongful act attributable to the healthcare personnel who administered the injection was not detected. However, the Supreme Court overturned the first-instance court decision due to incomplete examination. Because this report coming from the Council of Forensic Medicine is not enough and should not be contented with. The court should form an expert committee of three academicians, who are experts in their fields and have academic careers. Whether the injection subject to the case is suitable for medical science in terms of its place and technique should be clarified by a committee with academic competence. In addition, the committee should also enlighten whether the negative result grows after the necessary medical interventions are withheld from the patient after this injection, whether it is a mistake or not. It is against the procedure and the law to decide that there are no wrongful act attributable to the defendants, without obtaining such a qualified committee report, with an incomplete examination.[64]

63 13th Civil Chamber of the Court of Cassation, 2015/19241, 2016/13610, 26.5.2016.
64 13th Civil Chamber of the Court of Cassation, 2015/18038, 2017/3975, 5.4.2017.

In two verdicts corresponding to 2018 and 2020, the responsibility of the nurse in charge of the cold chain in the immunization activities of the family health centre was evaluated. The cold chain aims to preserve the effectiveness of the vaccine. Because of the nurse who did not fulfil this duty, the vaccines were become dysfunctional and the relevant institution suffered a loss. However, the lawsuit was dismissed on the grounds that the damage was caused by the lack of adequate equipment. On the other hand, the Supreme Court stated that the lack of sufficient equipment did not constitute sufficient grounds for dismissing the case, and this situation could only be considered as a reason for deduction from compensation.[65]

In 2019, the Supreme Court reiterated that the nurse is responsible for all kinds of her wrongful acts, including slight negligence.[66] In another incident that was reflected in the case in the same year, the patient under the influence of narcosis was taken to his room by the nurses after he came out of the operation. However, because the nurses did not raise the safety armrests of the bed, the semi-conscious patient fell to the ground. After the re-operation was performed on the patient whose spleen ruptured, the responsibility of the nurses came to the fore.[67]

In two lawsuits in 2019, the Court of Cassation found the report issued by the Council of Forensic Medicine incomplete. The court, finding its justification insufficient because "the technique of injection and its incompatibility with the area applied" could not be identified with medical evidence, requested "sufficient and satisfactory explanation on whether the health personnel who performed the procedure showed the necessary care". In addition, although loss of work and strength, recovery time and disability rate, if any, are requested, the court criticizes the interim decision not to include these issues in the report. The Court of Cassation requested the judge of the first instance court to "obtain a report open to parties and judicial review from a committee of three experts, who will be composed of expert lecturers in medical faculties of universities". Due to incomplete examination, the Supreme Court went to the way of reversing.[68]

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65 4th Civil Chamber of the Court of Cassation, 2016/11513, 2018/7622, 5.12.2018. 4th Civil Chamber of the Court of Cassation, 2019/1856, 2020/199, 22.1.2020.

66 13th Civil Chamber of the Court of Cassation, 2016/24615, 2019/12860, 19.12.2019.

67 13th Civil Chamber of the Court of Cassation, 2018/4890, 2019/11954, 2.12.2019.

68 13th Civil Chamber of the Court of Cassation, 2016/10242, 2019/5070, 18.4.2019.

Another jurisprudence in 2019 is about State recourse to a nurse whose personal wrongful act has been proven. So much so that the compensation paid by the State Treasury was collected through recourse from the deliberate nurse who killed the patient with a potassium injection. Because the nurse caused the death of the patient by injecting potassium through the neck path without the knowledge of the medical doctor following the patient.[69]

In the case of injury to the sciatic nerve by injection in 2020, the fact that the incident took place in a state hospital paved the way for the rejection of the case in the judicial court. The reason is for that is, enmity may not be directed at the people who work in a public hospital and whose personal wrongful acts cannot be proven in the judicial court.[70]

In 2020, the Court of Cassation stated that the focus should be primarily on the medical benefit of the patient: "All the faults of the nurse and the hospital, even if they are slight, should be accepted as an element of responsibility…In cases that cause hesitation even at the minimum level, a nurse is obliged to carry out research to eliminate this hesitation and to take protective measures in the meantime. While choosing between various treatment methods, it is necessary to consider the characteristics of the patient and the disease, to avoid attitudes and behaviours that will put the patient at risk, and to choose the safest way".[71]

In 2020, the case of forgetting gauze on the patient's body was submitted to the Court of Cassation. Although the defendants, including a nurse, were deemed to be at wrongful act by forgetting the gauze on the patient's body during the operation, the Supreme Court reversed the decision of the court of first instance on the grounds that it did not consider equity while determining the amount of non-pecuniary damage. That is, the local court should decide on reasonable compensation by taking into account the social and economic conditions of the parties, the degree of pain and suffering caused by the wrongful act at the victim, the place of the plaintiff in the society, his personality and his degree of sensitivity".[72]

13th Civil Chamber of the Court of Cassation, 2016/13768, 2019/6769, 29.5.2019.

69 4th Civil Chamber of the Court of Cassation, 2018/3874, 2019/3615, 26.6.2019.

70 4th Civil Chamber of the Court of Cassation, 2020/3974, 2020/8071, 26.6.2020.

71 13th Civil Chamber of the Court of Cassation, 2016/31093, 2020/2079, 12.2.2020.

72 3rd Civil Chamber of the Court of Cassation, 2020/3289, 2020/5633, 8.10.2020.

In 2020, the medical error of the nurse in the home care service carried out by a metropolitan municipality was the subject of the Supreme Court case law. Naturally, a referral was made to the administrative jurisdiction with reference to neglect of duty.[73]

Another case examined in 2020 is the nurse's wrongful injection after tonsillectomy. According to the Court of Cassation, the report of the Council of Forensic Medicine is not enough. An additional report should be requested from the expert committee of independent academics working at State universities. Thus, it should be determined whether the physician has a wrongful act with the nurse.[74] Finally, in relevant jurisprudence, although physical therapy is recommended in case of temporary paralysis of the leg because of the injection, the responsibility of the nurse for all kinds of wrongful acts is mentioned.[75]

C- ANALYSIS OF THE VERDICTS AND THE INJECTION PROBLEM

A nurse, who has duties attached to and independent of the physician, also has sole responsibility. Each attendant must be held accountable within his realm of authority.[76] Bringing a lawsuit against the physician due to the nurse's medical error can be based on the strict liability for auxiliary persons (article 100 of EBK; article 116 of TBK). In addition, it is possible to file a lawsuit to the hospital for the wrongful act of the nurse (article 66 of TBK). The Court of Cassation is well aware that the nurse has duties attached to and independent of the physician. With this awareness, the physician's fault with the nurse or separately is determined by experts.[77] After all, if there is authority, responsibility can be mentioned. It may be appropriate for the physician not to be held responsible for the action of the nurse, which is not included in the reason for his or her employment.

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73 13th Civil Chamber of the Court of Cassation, 2017/8615, 2020/4264, 12.6.2020.
74 13th Civil Chamber of the Court of Cassation, 2016/30032, 2020/25, 13.1.2020.
75 13th Civil Chamber of the Court of Cassation, 2017/6263, 2020/3386, 25.3.2020.
76 Kürşat, p. 302, 303. See also Çelik, p. 876.
77 4th Civil Chamber of the Court of Cassation, 1973/2684, 1973/2978, 13.3.1973. 13th Civil Chamber of the Court of Cassation, 2003/2333, 2003/6348, 22.5.2003. 13th Civil Chamber of the Court of Cassation, 2017/6263, 2020/3386, 25.3.2020.

While assessing and determining whether nurses fulfil their duty of care, the requirements of medical science and legal science are jointly taken into account, that is, the law mentions the level of "behaviour that must be displayed by a prudent attorney who undertakes work and services in a similar field" (article 506/3 of TBK). In some of the reviewed cases of the Court of Cassation, nurses are incapable of showing the necessary importance and sensitivity. For example, falling of the patient to the ground who is under the influence of narcosis due to being left on the bed with the safety armrests not lifted; paralyzing of the child's right foot due to the injection of the needle although it is written ''may not be administered to the vein" on it; harming to the nerves in the arm of the new-born as a result of severe pressure on the pregnant woman's abdomen; forgetting the gauze on the patient's body during the surgery are some of the disturbing examples of the violation of the duty of care within the scope of the Supreme Court verdicts.[78]

As stated by the Court of Cassation, if the nurse's reckless injuring or killing actions are proven as a material fact in the criminal prosecution, they are of course taken into consideration in the civil court as well. Undoubtedly, civil and criminal judges are not subject to each other. Turkish Code of Obligations also regulates this issue (article 53 of EBK; article 74 of TBK). Therefore, as it is determined that it took place during the investigation and prosecution process, tangible (cold/material) facts bind the judge of civil court.[79]

The expression "it also takes into account the title of the parties, the position they occupy and their other social and economic conditions" in the repealed Turkish Code of Obligations has not been included in the current Turkish Code of Obligations (article 49/2 of EBK; article 58 of TBK). The degree of pain and suffering is included in the evidentiary activities carried out by the parties.[80] For example, in severe

78 13th Civil Chamber of the Court of Cassation, 2018/4890, 2019/11954, 2.12.2019. Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011. 4th Civil Chamber of the Court of Cassation, 2004/11762, 2004/10881, 30.9.2004. 3rd Civil Chamber of the Court of Cassation, 2020/3289, 2020/5633, 8.10.2020. See also Kürşat, p. 294, 295.

79 13th Civil Chamber of the Court of Cassation, 2014/43885, 2016/2467, 2.2.2016.

80 Oğuzman/Seliçi/Oktay-Özdemir, p. 275, fn. 925. Dural/Öğüz, § 803, 808.

consequences such as paralysis, higher non-pecuniary compensation may be awarded as the suffering of the victim is high.[81] According to an opinion in the doctrine, the title of the parties and the position they occupy can only be taken into account if it creates an obligation to bear more. The social and economic situation of the parties may constitute the maximum and minimum measure for the obligator of compensation[82] The opposing view opposes this calculation method of immaterial compensation. Considering the social and economic status of the plaintiff in determining the moral compensation in the jurisprudence of the Turkish Court of Cassation is a total violation of the principles of social equality and justice.[83] In another opinion in the same direction, there is no parallelism between the explanations of the Supreme Court about the function of immaterial compensation and the criteria that it recommends to be taken into account in determining the amount of non-pecuniary damage.[84] It is possible to agree with the last two views. The assumption that the severity of pain varies according to the social status and economic situation of the parties is also reflected in the Supreme Court verdicts regarding the legal responsibility of the nurse.[85] When it comes to immaterial compensation in the case of the mixing-up of new-borns with the fault of the nurse, the Court of Cassation demands that the social and economic conditions of the parties to be taken into account. In the concrete case, the plaintiff mother breastfed someone else's baby until she reunited with her real baby. Moreover, until she learned the truth, she had to put up with that her baby was fed by someone else, maybe even starved. The amount of such suffering, if the claimant mother is rich, educated, middle class; if he is poor, uneducated; if he is working class, does it increase or decrease? Or, can the amount of immaterial compensation deserved by the aforemen-

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81 Kürşat, p. 317, fn. 52.

82 Dural/Öğüz, § 806, 807.

83 Gökhan Antalya, "Manevî Zararın Belirlenmesi ve Manevî Tazminatın Hesaplanması-Türk Hukuku'na Manevî Zararın İki Aşamalı Olarak Belirlenmesine İlişkin Bir Model Önerisi", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi*, 2016, 22/3, Prof. Dr. Cevdet Yavuz'a Armağan, p. 241. Gökhan Antalya/Murat Topuz, *Medenî Hukuk* (Giriş-Temel Kavramlar-Başlangıç Hükümleri), Vol. 1, Seçkin, İstanbul, 2015, p. 320.

84 Hülya Altan, "Beden Bütünlüğünün İhlâlinde Manevî Tazminat Miktarının Belirlenmesi", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, 2016, 65/4, p. 2667.

85 13th Civil Chamber of the Court of Cassation, 2004/15903, 2005/3133, 2.3.2005. 3rd Civil Chamber of the Court of Cassation, 2020/3289, 2020/5633, 8.10.2020.

tioned mother vary according to the position occupied by the defendant? Again, according to the plaintiff's or his opponent's social and economic situation, changing of the amount of immaterial compensation deserved by the plaintiff, in whose body a gauze had been forgotten, who lived with the gauze bandage until this situation was noticed and faced the misfortune of being re-operated, is not an example of jurisprudence balancing the interests of the parties. On the contrary, it is the unlawful continuation of the exercise of judicial discretion that the law no longer grants to the judge. The amount of compensation to be paid by the nurse to the patient whose gauze had been forgotten in his body cannot change according to the status occupied by the patient and/or the nurse, his place in the society and/or the belongings the patient/the nurse owns. In fact, before the Supreme Court, it is advocated that the process of clarifying the amount of immaterial compensation should not even be revived, but should be reconstructed from the beginning all over again. The amount of immaterial compensation should be isolated from the criteria such as the recognition of the plaintiff and/or the defendant in the society, living on rent, owning a car, working as a deputy/engineer/manager, living abroad, having dependents. These criteria can be taken into account in determining the amount of child support. However, this important issue should be postponed to a comparative study of the amount of non-pecuniary damage in another study. These criteria can be taken into account in determining the amount of alimony (payment). However, this important issue should be postponed to a comparative study exclusively about the amount of immaterial compensation in another study.

Half of the thirty-six case-laws collected are about intramuscular or intravenous injection. The specific medical problem that caused half of the disputes should be deemed as high rate and be considered important. In many jurisprudences of 2003, 2004, 2005, 2007, 2011, 2012, 2013, 2016, 2017, 2019 and 2020; disability, loss of sensation or drop foot as a result of intramuscular injection have been examined. Besides, studies reflect the medical error of the nurse at the rate of twenty percent in each shift. In fact, preventing malpractice requires addressing mistakes in the first place. However, it has been written by some authors that nurses tend to hide their mistakes.[86] If the bodily harm as a result

[86] Kahriman/Öztürk/Babacan, p. 5, 55.

of the injection is purely due to the complication, the nurse's fault is not mentioned. The nurse is irresponsible in the injection neuropathy which is characterized as complication. Conversely, sciatic nerve damage leads to malpractice if it is due to error in needle technique or incorrect choice of medicine, dose, or area.[87] This is why the Court of Cassation attaches great importance to expert examination in cases of injection neuropathy. However, the competent person may characterize the concrete event as malpractice or complication. The court should obtain a scientifically reasoned committee report that is suitable for adjudicating. Reports from the Council of Forensic Medicine are mostly seen as insufficient. In addition, a committee report prepared based on academic expertise such as EMG and/or MR is expected from independent neurologists occupying positions at universities.[88]

"It is not a coincidence that the number of lawsuits filed alleging medical malpractice has increased. With the technological and scientific developments, the education level and social interaction of the society has increased… Along with the social awareness, the expectations of the patients who receive service from the health industry have also increased…".[89] Like that, the opinion that explains the physician in the consciousness of the victim in the clamp of law and attributes the frequency of malpractice cases to the physician's lack of minimum physical conditions to provide ideal health care should be mentioned.[90]

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87 Kaya Kenan/Necmi Çekin, "Enjeksiyon Sonrası Gelişen Nöropati: Komplikasyon/Malpraktis Ayrımında İnce Bir Çizgi", *Kahramanmaraş Sütçü İmam Üniversitesi Tıp Fakültesi Dergis*i, 2018, 13/2, p. 64, 65. See also Şaşı, p. 70, 86.

88 21st Civil Chamber of the Court of Cassation, 2004/7439, 2004/8136, 11.10.2004. 4th Civil Chamber of the Court of Cassation, 2005/5837, 2005/5679, 26.5.2005. 13th Civil Chamber of the Court of Cassation, 2007/7502, 2007/9890, 9.7.2007. Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011. 4th Civil Chamber of the Court of Cassation, 2012/6576, 2012/10015, 7.6.2012. 4th Civil Chamber of the Court of Cassation, 2012/8778, 2013/8959, 16.5.2013. 13th Civil Chamber of the Court of Cassation, 2015/30631, 2016/7474, 10.3.2016. 13th Civil Chamber of the Court of Cassation, 2015/4491, 2016/9749, 6.4.2016. 13th Civil Chamber of the Court of Cassation, 2015/19241, 2016/13610, 26.5.2016. 13th Civil Chamber of the Court of Cassation, 2015/18038, 2017/3975, 5.4.2017. 13th Civil Chamber of the Court of Cassation, 2016/10242, 2019/5070, 18.4.2019. 13th Civil Chamber of the Court of Cassation, 2016/13768, 2019/6769, 29.5.2019. 13th Civil Chamber of the Court of Cassation, 2016/30032, 2020/25, 13.1.2020. 4th Civil Chamber of the Court of Cassation, 2020/3974, 2020/8071, 26.6.2020. 13th Civil Chamber of the Court of Cassation, 2017/6263, 2020/3386, 25.3.2020.

89 Yördem, p. 539. Özkaya/Elbüken, p. 110. See also Cantürk, p. 304.

90 Akbaba/Davutoğlu, p. 609.

The reasons for the increase in the malpractice cases which are estimated by the cited authors are not substantial. If we look from the view of nurses, it is absolutely impossible to agree with these estimates. The reason for the increase in malpractice-related lawsuits in Turkey is not the fact that patients' increasing awareness to claim their rights through the media and other technological opportunities. Participation of some foundation (private) universities in the health education system should be taken into account. Medicine, dentistry and nursing education should not be organized as inadequate, inattentive and most importantly with a focus on making money; on the contrary, it should closely follow the developments in the scientific knowledge and technological advances. When it comes to nursing education, one-to-one and face-to-face training should be carried out in the skilled artistry aspect of medical intervention, for example in practices such as vascular access, branule or catheter insertion, injection into muscle or vein.

It is obvious that nursing education should be given importance. The sociological research on nurses shows that they do not know the legislation and legal responsibilities they are subject to, and that their level of knowledge on this subject does not rise depending on their professional experience; however, as their education level increased, it is shown that they have answered the survey questions correctly.[91] In addition, the nurse's working hours and workload should be decided in accordance with justice and conscience. It can be suggested to standardize the nursing service by preparing the instructions, to strengthen the communication between the physician and the nurse, and to focus on the science of nursing.[92]

Post-injection neuropathy is one of the common health problems. It is the cause of high "morbidity/disease (morbidity)" and "death (mortality)" in developing countries. Although intramuscular injection may seem like a very simple procedure, the practitioner should be equipped with adequate training to reduce the possibility of malpractice and complications.[93] Equipping the injecting personnel with adequate training may play an important role in preventing neuropathy as well as sciatic nerve damage.[94]

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91 Karabakır, p. 114-125.
92 Şahin et al., p. 103.
93 Kaya/Çekin, p. 63, 65.
94 Şaşı, p. 86.

In the Supreme Court verdicts reviewed between 1973 and 2020, post-injection neuropathy resulting from nurse's malpractice is surprising in terms of its frequency. The problem of injection in the legal responsibility of nurses has reached disturbing dimensions as a societal phenomenon. Injection should be approached multidisciplinary so that radical solutions can be produced. In particular, while educating nurse candidates about injection, medical science and legal wisdom should work together. In nursing education, it is recommended that nurse candidates be subjected to stricter exams on injection and that they are both medically and legally enlightened about the negative consequences of this practice.

Finally, the claim that the nurse administered the wrong injection, as a rule, is not a personal fault; but that is neglect of duty (service failure).[95] As a rule, administrative jurisdiction is in charge in cases of malpractice caused by a civil servant nurse in state hospitals. The Court of Cassation has repeatedly stated this rule.[96] The exception to the rule has been the subject of the provision clause and the dissenting votes. Indeed, attributing personal fault to a civil servant nurse in substantive law may reverse the conflict of competence from administrative into civil procedural law.[97]

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95 Erkin Göçmen, "Yargıtay, Hemşirenin Hatalı Enjeksiyon Davası İçin Ne Karar Verdi?", https://www.medikalakademi.com.tr/yargitay-hemsire-hatali-enjeksiyon-dava-karar-ceza-erkin-gocmen/ (Date of Access 21.6.2021). For the exact same short article, see also Taner Onay, "Yargıtay, Hemşirenin Hatalı Enjeksiyon Davası İçin Ne Karar Verdi?", http://dijitalhemsire.net/yargitay-hemsirenin-hatali-enjeksiyon-davasi-icin-ne-karar-verdi/ (Date of Access 21.6.2021). "Different approaches are seen in the case law of the Court of Cassation in cases of droopy foot injury after intramuscular injection applications". In this short article, the distinction between criminal and private law is not clear. The identity of the said Supreme Court decision is not certain. Some statements violate the fundamental principles of the liability law. In addition, it gives rise to unexpected conclusions as if the Supreme Court no longer holds the nurse responsible for the intramuscular injection or its decisions are unstable. In fact, for the distinction between personal and service (duty) faults in the legal responsibility of the physician, see Çelik, p. 879-883, 901 ed seq. Hakeri, Vol. 2, p. 979-992.

96 21st Civil Chamber of the Court of Cassation, 2003/10347, 2004/765, 9.2.2004. Court of Cassation, General Assembly of Civil Chambers, 2011/4-64, 2011/200, 20.4.2011. 4th Civil Chamber of the Court of Cassation, 2015/9285, 2015/9678, 10.9.2015. 4th Civil Chamber of the Court of Cassation, 2015/4017, 2015/4876, 16.4.2015. 4th Civil Chamber of the Court of Cassation, 2014/7428, 2014/10382, 23.6.2014. 13th Civil Chamber of the Court of Cassation, 2017/8615, 2020/4264, 12.6.2020.

97 4th Civil Chamber of the Court of Cassation, 2004/11762, 2004/10881, 30.9.2004. 4th Civil Chamber of the Court of Cassation, 2014/620, 2014/1593, 4.2.2014. 4th Civil Chamber of the Court of Cassation, 2011/1694, 2012/4172, 15.3.2012.

CONCLUSION

The nurse contributes to care and therapy in all treatment processes by focusing on protecting and improving individual, family and community health. Unfortunately, even nurses who perform such a lofty task can make professional mistakes that malpractice may lead to their legal, administrative and/or criminal responsibilities. Of course, nurses are also irresponsible for complications, just like any health personnel qualified for medical intervention.

The nurse's legal responsibility for medical error can find its source in torts and/or breach of contract. In addition, it is among the rare possibilities that the nurse acts against the obligation of good faith in precontractual negotiations (*culpa in contrahendo*) and acts without authority (*negotiorum gestio*). Charges can be preferred against the nurse, who has duties both attached to and independent of the physician. As a rule, physicians and nurses are separate within their realm of authority and jointly responsible when these areas intersect. In fact, it can be argued that the physician should not be held responsible for the action of the nurse, which is not included in the reason for their employments. On the other hand, when certain conditions are occurred together, a lawsuit may be brought against the physician or hospital due to the medical error of the nurse, on the grounds of the strict liability of the employer (article 66 of TBK) and the strict liability for auxiliary persons (article 116 of TBK).

The fact that the social status and economic situation of the parties are still taken into account in determining the amount of non-pecuniary damages in the Court of Cassation decisions violates the principle of social equality. The Supreme Court's resurrection of the repealed legislation against the law and recommending the courts of first instance to evaluate the amount of moral compensation according to criteria contrary to the principle of social equality, unfortunately affected the jurisprudence about the legal responsibility of the nurse. The fact that this method is contrary to the statements and spirit of the current Turkish Code of Obligations is exemplified by concrete cases regarding the request for moral compensation from the defendant nurse. It is considered that there is no correlation between the place or profession of the parties in the society, the position they occupy, their economic qualifications and the amount of non-pecuniary compensation.

Under the responsibility of civil servant nurses working in public hospitals, the qualification of neglect of duty (service failure) is essential and the place of competent court is administrative jurisdiction as a rule. The only exception to this rule is the personal fault attributed to the civil servant nurse.

The legal liability of the nurse has frequently been the subject of Supreme Court jurisprudence. In Turkey, when the legal responsibility of the nurse for medical error is mentioned, the main problem can be called injection. Half of the ruling-cases of the Court of Cassation between 1973 and 2020 focused on the injection problem. This issue preoccupies the Court of Cassation.

Of course, the number of nurses who are unknowing and incapable of injection is very low compared to the total. However, the injection problem is suspicious in terms of its frequency and has the status of a social phenomenon. This situation reveals the necessity of better training of nurses in their specific medical knowledge, professional experience and artisanal intervention. In jurisprudence, disability, loss of sensation, drop foot, or more precisely, accumulation in sciatic nerve damage after injection is observed as a result of bad intramuscular injection. The inadequacy and lack of reports from the Council of Forensic Medicine is the reason why many local court decisions are overturned. The Court of Cassation requests the courts not to be contented with the report from the Council of Forensic Medicine and requests a committee report from independent neurologists working at respectable state universities. Injection should be approached multidisciplinary so that radical solutions to this problem can be produced. A multidisciplinary approach to injection is highly recommended. Injection problems must be minimized, particularly with the cooperation of medical and legal science.

Extra sensitivity should be given to medicine (drug) administration in nursing education. Nurse candidates should be subjected to stricter examinations regarding injection and should be informed both medically and legally about the negative consequences of this medical intervention. In nursing practices that require artisanship one-to-one and face-to-face lessons should be preferred, not group training nor online lessons.

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