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European Standard for the Protection of Patients' Lives

Abstract: The aim of the study it to reconstruct the European standard for the protection of patients' lives in its substantive and procedural aspects. In the case-law of the bodies of the system of the Convention for the Protection of Human Rights and Fundamental Freedoms, the scope of the state authorities' substantive and procedural obligation to protect the right to life in the health care system was defined for the first time by the European Commission of Human Rights in the decision of 22 May 1995 in *Mehmet Işıltan v. Turkey*, and then repeated in the case-law of the reformed Court in the decision on the admissibility in *Powell v. United Kingdom*. The study of the European standard for the protection of patients' lives traces its history, from *Mehmet Işıltan v. Turkey* and *Powell v. United Kingdom*; through developments of the meaning of its substantive limb, as illustrated by *Mehmet and Bekir Senturk v. Turkey*, *Asiye Genc v. Turkey*, *Aydogdu v. Turkey*, and *Elena Cojocaru v. Romania*; to developments of the meaning of its procedural limb, as exemplified by *Calvelli and Ciglio v. Italy*, *Wojciech Byrzykowski v. Poland*, *Šilih v. Slovenia*, and *Gray v. Germany*; and finally covers the Court's attempt to sum up its previous approach to the European standard for the protection of patients' lives, as expressed in the case of *Lopes de Sousa Fernandes v. Portugal*.

Keywords: human rights law, case-law of the European Court of Human Rights, European standard for the protection of patients' lives.

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Introduction

In the context of healthcare,[1] Article 2[2] of the Convention for the Protection of Human Rights and Fundamental Freedoms[3] obliges States to implement an effective regulatory framework to ensure that hospitals, both private and public, take the necessary steps to protect patient lives.[4] This framework also requires the creation of an independent judicial system that can determine the cause of death of patients under the care of the medical profession, and that can hold those responsible for failings accountable[5]. In consequence "the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2."[6] However, if a Contracting State that has made sufficient provisions for maintaining high professional standards among healthcare professionals and protecting patient lives, it cannot be held accountable under Article 2 of the Convention solely on the basis of errors in judgment or negligent coordination among healthcare professionals in the treatment of a specific patient.[7]

The scope of the state authorities' obligation to protect the right to life in the health care system is defined by the European Commission of Human Rights in the decision of 22 May 1995 in *Mehmet Işıltan v. Turkey*. In its statement on the substantive aspect of this commitment, the Commission underlines that:

> "The obligation to protect the right to life IS not limited for the High Contracting Parties to the duty to prosecute those who put life in danger

1 Katarzyna Łasak, *Prawa społeczne w orzecznictwie Europejskiego Trybunału Praw Człowieka*. Warszawa, 2013, 116–139; Robert Tabaszewski, *Prawo do zdrowia w systemach ochrony praw człowieka*. Lublin, 2016.

2 William A. Schabas, *The European Convention on Human Rights. A Commentary*. Oxford, 2015, 117–163.

3 Hereinafter: the Convention.

4 *Lopes de Sousa Fernandes v. Portugal*, Application No. 56080/13, Judgement of 19 December 2017.

5 *Calvelli and Ciglio v. Italy*, Application No. 32967/96, Judgement of 17 January 2002.

6 *Powell v. the United Kingdom*, Application No. 45305/99, Judgement of 4 May 2000.

7 *Powell v. the United Kingdom*.

> but implies positive preventive measures appropriate to the general situation – in particular the duty to ensure that hospitals have regulations for the protection of patients and to establish an effective system of judicial investigation into medical accidents."[8]

In its statement on the procedural aspect, the Commission points out that:

> "The obligation to establish an effective judicial system for establishing the cause of a dead which occurs in hospital and any liability on the part of the medical practitioners concerned."[9]

The distinction between the substantive and procedural aspect of the state authorities' obligation to protect the right to life in the health care system is perpetuated by the case-law of the reformed European Court of Human Rights in the decision on the admissibility of William and Anita Powell's application claiming violation of Article 2, Article 6 § 1 and Article 8 of the Convention lodged in connection with the loss of a child who died as a result of misconduct in diagnosis and treatment.[10] The Court declared their application inadmissible because of the settlement of a civil claim based on medical negligence against the responsible health authority, which denied them the possibility of an adversarial hearing on the circumstances of their son's death, although the domestic remedies used by the applicants had previously failed to determine the scope of responsibility of the doctors who had diagnosed and treated their late son.

In the part of the justification concerning the alleged violation of Article 2 of the Convention in its substantive aspect, the Court noted that State authorities are not responsible for misconduct in the coordination of the treatment pro-

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8 *Mehmet Işıltan v. Turkey*, Application No. 20948/92, Judgement of 22 May 1995.

9 *Mehmet Işıltan v. Turkey*.

10 Jane Wright, "The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence – Views from the English Supreme Court and Strasbourg", *Journal of European Tort Law* 7, no. 1. 2016: 58–81.

cess of a specific patient if it “has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients.”[11] In the part of the justification concerning the alleged violation of Art 2 of the Convention in its procedural aspect, the Court emphasized that the applicants’ decision to settle their civil action in negligence against the responsible health authority “closed another and crucially important avenue for shedding light on the extent of the doctors’ responsibility for their son’s death.”[12] As emphasized by the Court:

> “where a relative of a deceased person accepts compensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim in respect of the circumstances surrounding the treatment administered to the deceased person or with regard to the investigation carried out into his or her death.”[13]

In the part of the justification concerning the alleged violation of Article 6 § 1 of the Convention, the Court did not share the applicants’ position as to the special legal protection which doctors responsible for the diagnosis and treatment of their son enjoyed from the domestic authorities in the course the proceedings.

Standard for the Protection of Patients’ Lives in the Case-Law of the European Court of Human Rights. The Scope of the Substantive Obligation

The Convention obliges States Parties to establish an effective regulatory framework for securing high professional standards among health professionals and the protection of the lives of patients. In assessing whether a State-Party is responsible for breaching this obligation the Court takes into account the fact

11 *Mehmet Işıltan v. Turkey*.
12 *Mehmet Işıltan v. Turkey*.
13 *Mehmet Işıltan v. Turkey*.

that "matters of health care policy, in particular as regards general preventive measures, were in principle within the margin of appreciation of the domestic authorities who were best placed to assess priorities, use of resources, and social needs and proportional in its response."[14] The Court's statement linking the substantive aspect of the positive obligation from Article 2 of the Convention with the obligation to establish an effective regulatory framework to protect judgments is illustrated by the cases of *Mehmet and Bekir Senturk v. Turkey*,[15] *Asiye Genc v. Turkey*,[16] *Aydogdu v. Turkey*,[17] and *Elena Cojocaru v. Romania*.[18]

In the judgment *Mehmet and Bekir Sentürk v. Turkey*,[19] the Court links the violation of Article 2 of the Convention with the circumstances of the death of pregnant Menekşe Şentürk, who was deprived of the possibility of access to appropriate emergency care because of the malfunctioning of the hospital departments. In one day, the deceased was denied access to appropriate medical in as many as four hospitals. In the first two hospitals, she was examined only by midwives, who did not see the necessity to call the doctors on duty. In the third hospital, she was prescribed medication for renal colic and recommended a postpartum follow-up. In the fourth hospital, fetal death was diagnosed. Because of the fetal death diagnosis, Menekşe Şentürk needed immediate surgery that was made conditional on the advance payment of an amount that the her husband did not have at that time. The surgery was not carried out, so a private ambulance without medical personnel was therefore arranged to transport

14 Martin J. R. Curtice, John J. Sandford, "Article 8 of the Human Rights Act 1998: A Review of Case Law Related to Forensic Psychiatry and Prisoners in the United Kingdom", *Journal of the American Academy of Psychiatry and the Law*, vol. 37, iss. 2. 2009: 232–238.

15 *Mehmet Şentürk and Bekir Şentürk v. Turkey*, Application No. 13423/09, Judgement of 9 April 2013.

16 *Asiye Genç v. Turkey*, Application No. 24109/07, Judgement of 27 January 2015.

17 *Aydoğdu v. Turkey*, Application No. 40448/06, Judgement of 30 August 2016.

18 *Elena Cojocaru v. Romania*, Application No. 74114/12, Judgement of 22 March 2016; Aleydis Nissen, "A Right to Access to Emergency Health Care: The European Court of Human Rights Pushes the Envelope", *Medical Law Review* 26, iss. 4. 2018: 693–702.

19 *Mehmet Şentürk and Bekir Şentürk v. Turkey*.

the patient to the gynecology and obstetrics hospital in Izmir. On the way to Izmir, Menekşe Şentürk died.

The circumstances of her death were investigated by the explanatory commission of the Ministry of Health. Criminal proceedings were also conducted, but resulted in the conviction of one of the seven defendants and discontinuation due to the statute of limitations for the other six. After exhausting domestic legal remedies, the late Menekşe Şentürk's husband and her son lodged an application to the Court for a violation of Articles 2, 3, 6 and 13 of the Convention. In its judgment the Court agreed with the applicants in the part concerning the alleged violation of Article 2 in its substantive and procedural aspect, drawing attention to the malfunctioning of the Turkish health care system, which led to the death of the patient.

In its judgment delivered in the *Asiye Genç v. Turkey* case,[20] the Court "concludes that, in the light, firstly, of the circumstances leading to the failure to provide essential emergency care and, secondly, of the insufficient nature of the domestic investigations carried out in that connection, the State must be regarded as having failed to meet its obligations under Article 2 of the Convention in respect of the child"[21] of the applicant. The applicant's child was born prematurely, in the thirty-sixth week, in urgent need of medical intervention due to respiratory distress. However, the required medical intervention was not provided by the hospital of delivery. Neither was it provided in two other Turkish hospitals, leading to death of the applicant's child. Domestic investigations carried out in connection with that circumstances were not sufficient either. In its judgment the Court found that there has been a violation of Article 2 in its substantive and procedural aspect and the applicant's late child:

> "Must be considered as having been the victim of a malfunctioning of the hospital departments, in that he was deprived of any access to appropriate

20 *Asiye Genç v. Turkey*.
21 *Asiye Genç v. Turkey*.

> emergency care. In other words, the child died not as a result of negligence or an error of judgment in the treatment administered to him, but because he was simply not offered any form of treatment at all – it being understood that such a situation was analogous to a denial of medical care such as to put a person's life in danger."[22]

In its judgment in *Aydoğdu v. Turkey*,[23] the Court ascribed the death of a premature baby with a respiratory disorder as a violation of Article 2 in its substantive and procedural aspect. The applicants' child was born prematurely in the 30th week of pregnancy and required emergency treatment but did not receive it in the hospital of delivery. The newborn was then transported to another medical facility, but owing to the lack of available space and equipment she was placed in a standard incubator instead of a specialized one, and in consequence died two day after. In its justification to the judgment stating there had been a violation of the Article 2 of the Convention the Court emphasized:

> "That this situation – common and typical for neonatology in this period – demonstrates that the authorities responsible for the health services could not claim that they have been unaware at that time of the events that the life of more than one patient, including that of the baby Aydoğdu, was in real danger, and that they take all the reasonably measures to reduce that risk, that are within their powers. […] Since the Government had not been able to show how taking such measures would have placed an unbearable or excessive burden on it in terms of the operational choices to be made in terms of priorities and resources it must therefore be concluded that Turkey has not sufficiently ensured the proper organization and proper functioning of the public hospital service in this region of the country […] in particular for lack of a regulatory framework capable of

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22 *Asiye Genç v. Turkey*.
23 *Aydoğdu v. Turkey*.

> imposing on hospitals rules guaranteeing the protection of lives of premature children, including the life of the applicants' daughter."[24]

In its judgment in *Elena Cojocaru v. Romania*, the Court concluded that there had been a violation of Article 2 of the Convention in connection with a refusal to perform the emergency caesarean delivery that could have saved the lives of the applicant's daughter and granddaughter. The Court found certain dysfunctionalities in the coordination of the medical services involved in:

> "delay of the appropriate emergency treatment […] In this connection, the Court points out that an issue may arise under Article 2 where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care they have undertaken to make available to the population in general refused to fulfil his professional duties."[25]

Standard for the Protection of Patients' Lives in the Case-Law of the European Court of Human Rights. The Scope of the Procedural Obligation

The States Parties to the Convention are obliged to establish an effective judicial system to control for any liability on the part of the medical practitioners concerned. The Court's statement linking the procedural aspect of the positive obligation from Article 2 of the Convention with the obligation to establish an effective judicial system confirm the judgments delivered in the cases *Calvelli and Ciglio v. Italy*,[26] *Wojciech Byrzykowski v. Poland*,[27] *Šilih v. Slovenia*[28] and *Gray v. Germany*.[29]

24 *Aydoğdu v. Turkey*.
25 *Elena Cojocaru v. Romania*.
26 *Calvelli and Ciglio v. Italy*.
27 *Byrzykowski v. Poland*, Application No. 11562/05, Judgement of 27 June 2006.
28 Šilih *v. Slovenia*, Application No. 71463/01, Judgement of 9 April 2009.
29 *Gray v. Germany,* Application No. *49278/09*, Judgement of 22 May 2014.

In its judgment in *Calvelli and Ciglio*,[30] the Court focused on the alleged violation of Articles 2 and 6 § 1 in connection with the investigation of the medical negligence that led to the death of the applicants' newborn child. Domestic remedies used by the applicants had previously failed to determine the cause of death of their late son or the scope of responsibility of the doctors who had diagnosed and treated him. The civil proceedings involving the applicants and the doctor and clinic's insurers ended when the applicants agreed to a settlement and waived their right to continue the proceedings.[31] The criminal proceedings against the doctor were unsuccessful due to the expiration of the statute of limitations.[32] The applicants alleged a violation of Articles 2 and 6 § 1 of the Convention on the ground that owing to procedural delays a time-bar had arisen, making it impossible to prosecute the doctor responsible for the delivery of their child, who had died shortly after birth. However, the Court did not share their position and emphasized that through the settlement they had voluntarily resigned from further proceedings, denying themselves access to the most effective means – in the particular circumstances of this case, which would have satisfied the positive obligations pursuant to Article 2 – of determining the extent of the doctor's responsibility for their child's death.[33] In its justification the Court referred to the scope of the state's responsibility for the protection of the right to life in the health care system, as defined in the case of *Powell v. the United Kingdom*, which it supplemented with a procedural aspect requiring that "an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable"[34] and recalled its statement from the decision on the admissibility of William and Anita Powell's application by pointing out "where a relative of a deceased person accepts com-

30 *Calvelli and Ciglio v. Italy*.
31 *Calvelli and Ciglio v. Italy*.
32 *Calvelli and Ciglio v. Italy*.
33 *Calvelli and Ciglio v. Italy*.
34 *Calvelli and Ciglio v. Italy*.

pensation in settlement of a civil claim based on medical negligence he or she is in principle no longer able to claim to be a victim."[35]

The Court's view on the procedural aspect of the obligation to establish an effective and independent system of judicial control of the health care sector is also reflected in the judgment delivered in the case of *Wojciech Byrzykowski*,[36] whose wife has died as a result of postpartum complications after epidural anaesthesia, with the child being born with a serious health problems requiring permanent medical attention. In connection with these circumstances the applicant submitted a request to the Regional Chamber of Physicians to initiate disciplinary proceedings against the anaesthetist, lodged a compensation claim against the hospital and against the hospital's insurance company, and requested that a criminal investigation of the causes of his wife's death be instituted. When the Court delivered its judgment the disciplinary proceedings, civil proceedings and criminal investigations were still pending.

Finding a violation of the positive obligation of a procedural nature from Article 2 of the Convention, the Court pointed out that no effective investigation has been conducted. On the contrary, a violation of a substantive limb of Article 2 of the Convention was no found so the State Party established the appropriate regulations guaranteeing the protection of patients' lives. In its conclusion the Court reiterated "that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. However, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent co-ordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life."[37]

35 *Calvelli and Ciglio v. Italy*.
36 *Byrzykowski v. Poland*.
37 *Byrzykowski v. Poland*.

When assessing its temporal jurisdiction over the procedural limb of the protection of the right to life in the health care system, the Court "reiterates that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party."[38] However, there is an exception to this particular rule expressed in *Šilih v. Slovenia*,[39] brought before the Court by an applicant who alleged a violation of Article 2, 6 and 13 of the Convention in connection with the loss of a son who died as a result of hospital treatment.[40] The circumstances of the death of Šilih's son were not clarified in the course of the criminal proceedings, which lasted for five years. These circumstances were also not clarified in the course of civil proceedings lasting for twelve years. Having regard to the presented assumptions, the Court ruled "that the domestic authorities failed to deal with the applicants' claim arising out of their son's death with the level of diligence required by Article 2 of the Convention and found that there has been a violation of Article 2 in its procedural aspect."[41] This statement was also upheld by fifteen votes to two by the Grand Chamber, which presented an exception to the general *rationae temporis* rule in assessing the procedural dimension of the obligation under Article 2 of the Convention. As the Court emphasized, "the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty"[42] and as such "can be considered to be a detachable obligation arising out of Article 2 capable of

38 Šilih *v. Slovenia*.

39 Šilih *v. Slovenia*.

40 William A. Schabas, "Do the 'Underlying Values' of the European Convention on Human Rights Begin in 1950?", *Polish Yearbook Of International Law*, no. 33. 2013: 247–258; Adam Wiśniewski, "Naruszenie prawa do życia z powodu braku skutecznego śledztwa w celu ustalenia odpowiedzialności za śmierć syna skarżącego (sprawa Przemyk przeciwko Polsce). Glosa do wyroku ETPC z dnia 17 września 2013 r., 22426/11", *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa*. 2013: 117–124.

41 Šilih *v. Slovenia*.

42 Šilih *v. Slovenia*.

binding the State even when the death took place before the critical date."[43] This obligation "include[s] not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date"[44] and "binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it."[45] However, it is not open-ended and includes only procedural acts and/or omissions where a "genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect."[46]

In the case of *Gray v. Germany*,[47] the Court examines an extraterritorial aspect of the positive obligation to provide effective remedies to determine the cause of death of a patient, and to made accountable those responsible, asking whether German authorities have jurisdiction over a German national in the case of medical negligence committed on the territory the United Kingdom. According to the Court, the German authorities had established effective remedies for determining the cause of the death of the applicant's father and the responsibility of U. in this regard. The Court also stated that the procedural safeguards enshrined in Article 2 do not give rise to a right or an obligation for a specific sentence to be imposed on a prosecuted third party under the domestic law of a specific State. The Court emphasized that the procedural obligation under Article 2 pertains to the means of investigation, not the result.[48]

43 Šilih *v. Slovenia*.
44 Šilih *v. Slovenia*.
45 Šilih *v. Slovenia*.
46 Šilih *v. Slovenia*.
47 *Gray v. Germany*.
48 *Gray v. Germany*.

Towards Clarification of the European Standard for the Protection of Patients' Lives

The Court's attempt to sum up its previous approach to the European standard for the protection of patients' lives is expressed in the Lopes de Sousa Fernandes case,[49] in which the applicant had lost her husband in hospital as a result of a hospital-acquired infection and due to carelessness and medical negligence.[50] The applicant's husband had undergone nasal polypectomy and was discharged from hospital. Two days later, he was admitted to the emergency department with violent headaches, but the doctors on duty concluded that he was suffering from psychological problems and so prescribed tranquilisers. In the morning of the next day the diagnosis of the new medical team on duty revealed bacterial meningitis, which required the patient to undergo intensive care therapy. After therapy the applicant's husband was discharged from the hospital in a stable condition. When his condition worsened, further tests were carried out, which led to the detection of duodenal ulcers and bacteria infecting the large intestine. Despite recommended treatment, the patient's condition did not improve and his last stay in the hospital ended in death, due to sepsis caused by peritonitis and a perforated viscus. Proceedings before the General Inspectorate for Health, the Regional Disciplinary Chamber of the Medical Society, the court in Vila Nova de Gaia and the administrative and tax court in Oporto brought by the applicant did not show the extent to which the standards of medical practice had been violated. The applicant therefore alleged violation of Article 2, 6 and 13 of the Convention. The Court shared the applicant's arguments in the part concerning the violation of Article

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49 *Lopes de Sousa Fernandes v. Portugal*.

50 Julia Kapelańska-Pręgowska, "Medical Negligence, Systemic Deficiency, or Denial of Emergency Healthcare? Reflections on the European Court of Human Rights Grand Chamber Judgment in Lopes de Sousa Fernandes v. Portugal of 19 December 2017 and Previous Case-law", *European Journal of Health Law* 26, iss. 1. 2019: 26–43; Leszek Garlicki, "Prawo do ochrony zdrowia na tle 'prawa do życia' (uwagi o aktualnym orzecznictwie Europejskiego Trybunału Praw Człowieka)" in *Dookoła Wojtek… Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, eds. R. Balicki, and M. Jabłoński. Wrocław, 2018: 211–220.

2 in its procedural dimension and clarified the view expressed previously in the case-law on state liability for the consequences of medical malpractice, focusing on:

- the scope of liability of the State-Parties when the death of a patient is a consequence of the negligence of medical professionals,
- the obligation of the State-Parties to establish an effective system of judicial investigation into medical accidents,
- exceptional situations in which certain actions or omissions of medical personnel may lead to the liability of the State-Party for violation of Article 2 of the Convention in its substantive aspect.

In its statement on the first of the selected dimensions the Court indicates the nature of the state's responsibility to establish an effective regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives. The second one connects with the effective implementation of an adequate regulatory framework. The third one is related to two types of exceptional circumstances in which the responsibility of the State under the substantive aspect of Article 2 of the Convention may be invoked with regard to the acts of healthcare providers, as well as their failures to act. [51] The first type of exceptional circumstances "concerns a specific situation where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment." The second type "arises where a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment and the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives, including the life of the particular patient concerned, in danger."[52] In order to classify the examined circumstances to the exceptional one "when the responsibility of the State under the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care

51 *Lopes de Sousa Fernandes v. Portugal*.
52 *Lopes de Sousa Fernandes v. Portugal*.

providers."[53] In order to assign responsibility to the State-Party, the substantive limb of Article 2 of the Convention may be engaged in respect of the acts and omissions of health-care providers when:

- there is a violation of the professional duties by refusing to provide life-saving emergency treatment, thus putting patients' lives in danger,
- the violation is of a structural or systemic nature,
- there is a relationship between the malpractice and the detriment suffered by the patient,
- this malpractice results from the violation of the obligation to establish an effective regulatory framework compelling hospitals to adopt appropriate measures for the protection of patients' lives.

Therefore the Court found only a violation of Article 2 in its procedural aspect, because "the domestic system as a whole, when faced with an arguable case of medical negligence resulting in the death of the applicant's husband, failed to provide an adequate and timely response consonant with the State's obligation under Article 2."[54]

Conclusions

The Strasbourg case-law developed standard defining the scope of the state authorities' obligation to protect patients' lives in its substantive and procedural aspect ever since the decision of the Commission of 22 May 1995 in the case of *Mehmet Işıltan v. Turkey*. The presented distinction is reflected in the case-law of the reformed Court in the decision on the admissibility of William and Anita Powell's[55] application. The substantive aspect obliges States Parties to establish an effective regulatory framework that ensures the provision of high professional standards among health professionals and the protection of the lives of patients,

53 *Lopes de Sousa Fernandes v. Portugal*.
54 *Lopes de Sousa Fernandes v. Portugal*.
55 *Powell v. the United Kingdom*.

as illustrated in *Mehmet and Bekir Senturk v. Turkey*,[56] *Asiye Genc v. Turkey*,[57] *Aydogdu v. Turkey*,[58] and *Elena Cojocaru v. Romania*.[59] The procedural aspect "requires an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable"[60] as illustrated in *Calvelli and Ciglio v. Italy*,[61] *Wojciech Byrzykowski v. Poland*,[62] *Šilih v. Slovenia*,[63] and *Gray v. Germany*.[64] In the *Mehmet and Bekir Sentürk v. Turkey* case,[65] the Court linked the violation of Article 2 in its substantive aspect with the circumstances of the death of pregnant Menekşe Şentürk, who was deprived of the possibility of access to appropriate emergency care because of the malfunctioning of the hospital departments. In the *Asiye Genç v. Turkey* case,[66] the Court connected the violation of Article 2 in its substantive aspect with the circumstances leading to the failure to provide essential emergency care in respect of the applicant's child. In the *Aydoğdu v. Turkey* case,[67] the Court found the example of the violation of Article 2 in its substantive aspect in the "lack of a regulatory framework capable of imposing on hospitals rules guaranteeing the protection of lives of premature children, including, including the life of the applicants' daughter."[68] In the *Elena Cojocaru v. Romania*[69] case, the Court concluded that there had been a violation of Article 2 of the Convention in the "apparent lack of coordination of the medical services and the delay in administering the appropriate emergency treatment attested to a dysfunctionality of

56 *Mehmet Şentürk and Bekir Şentürk v. Turkey*.
57 *Asiye Genç v. Turkey*.
58 *Aydoğdu v. Turkey*.
59 *Elena Cojocaru v. Romania*.
60 *Calvelli and Ciglio v. Italy*.
61 *Calvelli and Ciglio v. Italy*.
62 *Byrzykowski v. Poland*.
63 Šilih *v. Slovenia*.
64 *Gray v. Germany*.
65 *Mehmet Şentürk and Bekir Şentürk v. Turkey*.
66 *Asiye Genç v. Turkey*.
67 *Aydoğdu v. Turkey*.
68 *Aydoğdu v. Turkey*.
69 *Elena Cojocaru v. Romania*.

the public hospital services, although no real systemic or structural deficiencies were detected"[70] in connection with a refusal to perform the emergency caesarean delivery that could have saved the lives of the applicant's daughter and granddaughter. In its judgment in *Calvelli and Ciglio v. Poland*,[71] the Court focused on the violation of Article 2 in its procedural limb in connection with the investigation of the medical negligence that led to the death of the applicants' newborn child by pointing out that a relative of a deceased person who has accepted a settlement of a civil claim based on medical negligence is no longer able to claim as a victim in other proceedings. In *Wojciech Byrzykowski v. Poland*[72] the Court connected the violation of Article 2 in its procedural limb with a lack of effective investigation after the applicant's wife had died as a result of postpartum complications after epidural anaesthesia, with the child being born with a serious health problems requiring permanent medical attention. In *Šilih v. Slovenia*[73] the Court presented an exception to the general *rationae temporis* rule in assessing the procedural dimension of the obligation to carry out an effective investigation under Article 2 when the death of a patient took place before the date of the entry into force of the Convention with respect to the Party. In *Gray v. Germany*,[74] the Court presented its view on an extraterritorial aspect of the positive obligation to provide effective remedies under procedural limb of the Article 2 of the Convention, concluding that the German authorities have jurisdiction over a German national in the case of medical negligence committed on the territory of the United Kingdom. In *Lopes de Sousa Fernandes* the Court made an attempt to sum up its previous approach to the European standard for the protection of patients' lives, with a special emphasis on the responsibility of the State-Party under the substantive limb of Article 2 of the Convention in respect to the acts and omissions of health-care providers.

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70 *Elena Cojocaru v. Romania*.
71 *Calvelli and Ciglio v. Italy*.
72 *Byrzykowski v. Poland*.
73 Šilih *v. Slovenia*.
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