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# Government Liability to Damages Due to Defective Provision of Health Services in Turkey*

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**Abstract.**
Health service is one of the essential public services offered by the Administration with a very comprehensive and expansive staff, and due to the comprehensive nature of the service provided and the fact that the beneficiaries of the service constitute almost every segment of society, many different appearances of defect that may include the compensation responsibility of the Administration may arise. Therefore, the study is mainly about the service defect and the compensation responsibility of the Administration in providing health services within the scope of the responsibility of the Administration based on service defect. In the study, the concept of the responsibility of the Administration and the concepts of defect liability and strict liability, which are the types of responsibility of the Administration, will be discussed first. All will examine the conditions of the responsibility of the Administration. Then, the concept of service defects and the different appearances of service defects, such as poor service, late service, non-operational service, and severe service defect, will be examined. Finally, the service defects specific to health services, which constitute the main framework of the study, will be discussed in light of the decisions of the Council of State on this issue.
**Keywords:** Compensation; Damage; Service Defect; Responsibility; Health; Malpractice

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## Tanggung Jawab Pemerintah atas Kerugian Akibat Rusaknya Penyediaan Layanan Kesehatan di Turki

**Abstrak.**
Layanan kesehatan adalah salah satu layanan publik penting yang ditawarkan oleh Administrasi dengan staf yang sangat komprehensif dan luas, dan karena sifat komprehensif dari layanan yang diberikan dan fakta bahwa penerima manfaat dari layanan tersebut hampir di setiap segmen masyarakat, banyak penampilan yang berbeda. cacat yang mungkin termasuk tanggung jawab kompensasi Administrasi mungkin timbul. Oleh karena itu, penelitian ini terutama tentang cacat layanan dan tanggung jawab kompensasi Administrasi dalam menyediakan layanan kesehatan dalam lingkup tanggung jawab Administrasi berdasarkan cacat layanan. Dalam kajian tersebut akan dibahas terlebih dahulu konsep tanggung jawab Administrasi dan konsep defect liability dan strict liability yang merupakan jenis tanggung jawab Administrasi. Semua akan memeriksa kondisi tanggung jawab Administrasi. Kemudian, konsep cacat layanan dan tampilan cacat layanan yang berbeda, seperti layanan buruk, layanan terlambat, layanan non-operasional, dan cacat layanan parah, akan diperiksa. Terakhir, cacat layanan khusus untuk layanan kesehatan, yang merupakan kerangka utama penelitian, akan dibahas berdasarkan keputusan Dewan Negara mengenai masalah ini.
**Kata Kunci:** Kompensasi; Kerusakan; Cacat Layanan; Tanggung jawab; Kesehatan; Malpraktik

## Ответственность правительства за ущерб из-за некачественного предоставления медицинских услуг в Турции

**Абстрактный.**
Медицинское обслуживание является одной из основных государственных услуг, предлагаемых Администрацией с очень разносторонним и обширным персоналом, и из-за комплексного характера предоставляемых услуг и того факта, что бенефициары услуг составляют почти все слои общества. дефекта, который может включать ответственность Администрации за компенсацию. Таким образом, исследование в основном посвящено дефекту обслуживания и компенсационной ответственности Администрации при оказании медицинских услуг в рамках ответственности Администрации на основании дефекта обслуживания. В исследовании в первую очередь будут обсуждаться понятие ответственности Администрации и понятия ответственности за дефекты и строгой ответственности, которые являются видами ответственности Администрации. Все изучат условия ответственности Администрации. Затем будет рассмотрена концепция дефектов обслуживания и различное проявление дефектов обслуживания, таких как плохое обслуживание, несвоевременное обслуживание, нерабочее обслуживание и серьезные дефекты обслуживания. Наконец, дефекты обслуживания, характерные для служб здравоохранения, которые составляют основную основу исследования, будут обсуждаться в свете решений Государственного совета по этому вопросу.
**Ключевые слова:** компенсация; Повреждать; Сервисный дефект; Ответственность; Здоровье; Злоупотребление служебным положением

## A. INTRODUCTION

Public service is the general activities carried out by the Administration in person or by private legal persons under its supervision and control to realize the public interest (Gülan, 1998). For example, access to health services, which is very expensive for low-income citizens to reach in free market conditions, has started to be offered to all citizens as an essential public service by the state with the development of the social state understanding.

The issue of compensation for the damages caused by this service provided by the state to its citizens has emerged as a legal problem within Administrative Law. Developments in medical science have increased the diversity and scope of health services carried out by the Administration. However, due to the expanding content of health services, damages within the framework of which principles the Administration will be responsible for compensation have not been subject to legal regulations in positive law. Therefore, the responsibility of the Administration for the damages caused by the health services carried out by the Administration and the regulation gap in the legal system regarding compensation for the cracks are filled by the Council of State case law due to the nature of administrative law.

The continuous expansion of the responsibility area of the Administration with new jurisprudence due to the inadequacy of the legal regulations regarding the responsibility of the Administration arising from the execution of health services and the concept of responsibility in terms of Administration depending on the developments in the field of medical science are open to expansion. In this respect, the current Council of State decisions on the subject guide in determining the liability limit of the Administration from health services.

## B. METHODS

Responsibility can be expressed as bearing the consequences of a task done or neglected and assuming these consequences. Although it has been dramatically influenced by the concept of responsibility in private law, the responsibility of the Administration is a type of responsibility with its own rules. In Turkey, the principle of the state's irresponsibility was applied until the Republic period, perhaps with the effect of the administrative system involved in the Ottoman Empire. However, with the legal and constitutional regulations adopted in the Republican Administration over time, the understanding that the judiciary can be used against all kinds of actions and transactions of the

Administration and that the Administration is obliged to pay the damage arising from its activities and commerce has been accepted by the legal system.

This study is mainly about the service failure and the compensation responsibility of the Administration in providing health services within the scope of the Administration's commitment based on service failure. The study is about the conditions of the state's responsibility for the defective public services provided by the state. In Turkey, health services are provided by the private sector under the supervision and control of the state and the central Administration. If damage is caused by faulty behaviour in the health services offered by the private sector, the state's responsibility may also be applied for neglecting its control and supervision duty. Using the direct responsibility of the state's personnel providing the defective health service or recourse to the personnel for the damage paid by the state is outside the scope of the study. There are many different cases of service failure specific to healthcare services. However, since there is no precise legal regulation on this subject and the content of the matter is filled with judicial precedents, the decisions of the Council of State on this subject have been examined.

## C. RESULTS AND DISCUSSION

### 1. The Concept of Responsibility

With the strengthening of the social state understanding, the intervention of the Administration in the economic and social field has increased. Therefore, its lot of activity for the services it offers to society has also diversified (Günday, 2011). It is a general rule of law that the perpetrator is responsible for the damage caused. While the principle of the irresponsibility of the states was adopted until the second half of the 19th century, the focus of responsibility of the Administration started to develop with the increase in the awareness of the state of law and the development of the social state understanding (Gözübüyük & Tan, 2016). With the rise in the public activities of the Administration, whose ultimate aim is to realize the public interest, the probability of the beneficiaries of the service incurring losses due to these activities also increases (Atay & Odabaşı, 2010).

In a society where the law is dominant, the actions and transactions taken by the Administration must comply with the law. If the individuals in the community suffer pecuniary and non-pecuniary damage due to illegal activity, the Administration must cover this loss (Sarsıkoglu, 2016). With the re-activation of the Council of State in 1927, the principle of the responsibility of the

Administration began to develop and strengthen. Still, the fact that the Council of State sought the condition of gross fault in the compensation cases filed against the Administration at the beginning led to a narrowing of the liability limit of the Administration. With the Regulation in Article 114 of the 1961 Constitution states that the Administration is obliged to pay the damage arising from its actions and transactions, there have been more positive regulations in favour of individuals regarding the responsibility of the Administration (Gözübüyük&Tan, 2016). With the Regulation in Article 125 of the 1982 Constitution that "judicial remedy is open to all kinds of actions and transactions of the administration. The administration is obliged to pay the damage arising from its actions and transactions", the responsibility of the Administration has been accepted at the Constitutional level today (Yasin, 2015). The main reason for the responsibility of the Administration is the liability of defect (Güloğlu, et al., 2018, Güloğlu et al., 2017, Güloğlu et al., 2022, Altunkaya et al., 2020, Güloğlu & Belkayali, 2022). However, in the event that the conditions arise due to fairness, strict liability of the Administration may also be applied. Although there is no regulation regarding the strict liability of the Administration in the legal legislation, the way to strict liability has been paved with the jurisprudence of the Council of State (Zabunoglu 2012). In total remedy cases, first of all, it is necessary to investigate whether the Administration faults service, to examine whether strict liability principles will be applied if there is no fault of service, and to state the reason for liability when awarding compensation.

**a. Liability Types of Administration**

First: Defect Liability. With the effect of private law, in today's practice, the reason for the liability of the Administration is seen as a defect (Gözübüyük & Tan, 2016). Service defect is a type of defect of an objective and anonymous nature, although the behaviour of public officials causes it. Even if the Administration proves that it has shown all the necessary care and attention in the selection and activities of the personnel who will carry out the public service, it must compensate for the damages caused by the faulty behaviour of the personnel. There must be an appropriate causal link between the action of the Administration and the damage caused (Council of State, 2004). Service fault is a unique case of responsibility different from tort liability in private law, shaped by administrative law rules in terms of content, scope, parties, and nature (Kızılyel, 2008, Sarıca, 1949)

Second: Strict Liability. The Administration can cause harm to the people with the diversification and increase of its activities even if the Administration does not have any fault. As a social justice requirement, even if there is no

administrative fault, individuals who arise from their activities should be compensated for special damages in the presence of conditions (Yasin & Şahin, 2015). This responsibility has emerged primarily due to the dangerous activities of the Administration. In addition to this, the principle of strict liability is utilized in compensating the damages incurred by those who participate in public service and the damages arising from harming behaviours contrary to the principle of equality in the face of public burdens or legal administrative actions (Belkayali & Güloğlu, 2019). It is sufficient that there is an appropriate causal link between the administrative act or activity and the resulting damage, and there is no need to prove that the Administration is defective in these actions and transactions and that these actions and transactions of the Administration are unlawful (Odyakmaz et al., 2021). This responsibility is a type of liability that is shaped following the principles of "equity", "justice", and "necessity" in the case law of the Administrative Judiciary and which is also applied to cover the damages incurred by those who participate in the public service, even if they arise due to legal actions following the principle of equality in the face of public burdens (Gözübüyük &Tan, 2016) ) and of which the occurrence of damage is considered sufficient for liability (Atay, 2009).

**b. Terms of Liability of the Administration**

For the Administration to be liable for the resulting damage, the Administration must have a behaviour that can be attributed to the Administration, such as private law contracts, tort practices, unjust enrichment cases, private law responsibilities of the Administration, administrative agreements, administrative transactions and actions (Çıtak, 2014; Akyılmaz, Sezginer & Kaya, 2019). Damage is an involuntary decrease in a person's property or personality values. It is divided into pecuniary and non-pecuniary damage. There are three elements of financial damage. First, there is an asset value. Second, there is a decrease in this asset; finally, this decrease occurs outside the will of the injured person (Eren, 2014).

Non-pecuniary damage, on the other hand, is a monetary compensation tool aimed at ensuring the moral satisfaction of the person in case of deterioration of the physical structure (Guloglu, 2017; Guloglu, 2020) and inner peace of the person, decrease in the strength and joy of life, damage to personal rights, honour and dignity, and deterioration of mental balance. The damage must have certain conditions.

1. **The Damage Must Be Certain and Real.** The damage must be accurate, current, present and definitively occurring, sure to happen and certain (Sancakdar et al., 2021). The Administration can't incur liability for possible or incidental damages (Ünlüçay, 1998, Onar, 1963).
2. **It Must Be for a Legally Protected Interest.** For the person who has been harmed due to the activities of the Administration to claim compensation from the Administration, a legally protected interest must be damaged.
3. **It Must Be Measurable in Money**. Since Administrative Courts are prohibited from making decisions like administrative actions and transactions in administrative law, requests other than monetary claims are rejected without examining the case (Şen, 2021), and if the damages suffered by individuals are measurable in money, they are compensated in cash (Atay, 2009, Gözler, 2009).
4. **It Must be Special and Unusual.** The damage should not occur as a public burden on the majority of the society but in a way that affects a certain number of individuals simply because they are a part of that society; that is, there must be special damage that leads to the deterioration of equality between individuals (Gözübüyük and Tan, 2016). For example, the injuries of individuals who are harmed in acts described as "terrorist incidents" are compensated following the social risk principle (Council of State, 2020). However, this condition cannot be applied in cases where the Administration is responsible within the framework of faulty liability principles.

There must be a connection, cause, and effect relationship between the damage and the action of the Administration (Oguzman & Öz, 2013).

## 2. The Concept of Service Defects in General

Service defect is generally defined as a malfunction or disorder in the establishment, operation or Regulation of a public service that the Administration is obliged to carry out (Sarıca, 1949). Service defect occurs if the service works poorly, late or not at all and causes the Administration to indemnify. Liability due to service defects constitutes the direct and essential reason for the detriment of the Administration. It is due to the inadequacies of the public service carried out rather than the personal fault of the personnel employed by the Administration (Gözler, 2009); however, it is not investigated which public official caused the wrong behaviour (Akyılmaz, 2011). However, a

person who has suffered from damage in private law is burdened with proving their fault and unlawful act. Therefore, the content of the service fault is determined according to administrative law, and it is an objective, independent defect type other than the public official.

**a. Types of Service Defects**

Whether a service defect is determined by whether the action expected from the Administration is carried out, whether it is done on time, and in what way and in what quality it is done. The activities of the Administration are deemed to be faulty in the following cases.

First: Malfunctioning of the Service. The Administration is responsible for establishing the organization for the proper functioning of the public service and for preparing the tools, equipment, and personnel following the requirements of that service. Service malfunction is the most common service failure. The public services offered by the Administration do not provide the expected benefit, the activity carried out has poor quality, and the service carried out is not at the scheduled care. Attention can be defined as the impaired functioning of the service (Günday, 2011). For example, it is necessary to clarify without hesitation whether there is an error in hemodialysis applications due to catheter interventions for the deceased and its effect on the death event (Council of State, 2021).

Second: Late Processing of the Service. Public service can be a service that citizens need only for the moment or an uninterrupted or continuous service. Considering the conditions required by each service, public services that should be provided to the citizens continuously and uninterruptedly are considered service defects if damage occurs when they are not carried out within a reasonable period (Gözübüyük & Tan, 2016). Although it has been determined in the legislation for the fulfilment of the public service, the performance of the service after this period has passed is considered a late processing service defect. However, if there is no legal regulation regarding the duration of public services, a reasonable period should be determined by taking into account the nature of the service, the place, the time, the possibility of the Administration, and the need for the service recipient (Özgüldür, 1996). The Council of State determines the lateness of the service, that it is not performed at a certain speed and time, and that the expected size and

speed are not shown in similar situations by comparing it with the duration of similar actions and transactions of the Administration.

Third: Non-Operational Service. In cases where the Administration is obliged to perform public service, there is a dependent authority, and the Administration's failure to implement the judicial decisions by not taking any action is one of the situations in which serious service fault is caused. If a public service is necessary and cannot be fulfilled by the Administration even due to financial inadequacies, it is considered a service fault (Özgüldür, 1996). For example, suppose the fire services, which are among the duties of the municipalities, are not fulfilled by the Administration because of the fire trucks that they could not buy, arguing that their financial resources are insufficient. In that case, they should be considered defective due to their neglect of essential public service.

**b. Severe Service Failure**

Today, the judicial bodies decide that the Administration is extra responsible in some exceptional cases and that it should pay compensation even if it is not the one causing the damage; however, they seek service defect as a condition by taking into account the difficulty of operating in some areas and in order not to extend the financial responsibility of the Administration unlimitedly to prevent it from facing a financial burden that it cannot bear. A slight defect is an error or fault a well-functioning administration will not make. They are defects that exceed a certain difficulty level and are effective enough to cause damage (Anayurt, 1989). Therefore, the service defect must be specific and complex (Council of State, 2007).

Severe-service defects are significant faults that reveal beyond doubt that the Administration is functioning very severely and that the deficiencies can be understood without research (Duran, 1974). For example, suppose the beneficiary of the health services, one of the risk-bearing services, incurs a loss. In that case, it is fixed that the compensation for this damage can only be possible in the presence of a severe service defect of the Administration. In Turkey, gross fault is required for liability in law enforcement, security activities, and justice services. In addition to these areas, horrendous fault conditions will be necessary for risky services offered directly to the beneficiary.

For example, in the complete remedy lawsuit filed by the plaintiff, who received chemotherapy even though it was not necessary due to an erroneous

diagnosis of lymphoma, the Court decided to dismiss the case by stating that even the most experienced physicians may experience difficulties in diagnosing the plaintiff's disease with lymphoma and in the face of the fact that the medical practices applied as a result of misdiagnosis are aimed at protecting the patient and that these practices do not adversely affect the health of the person is revealed with the Forensic Medicine Institute report, it is concluded that there is no liability for compensation for the financial and non-pecuniary damages, which are claimed to have been incurred due to the failure of the defendant administration to mention the severe service fault in the erroneous diagnosis of lymphoma.

For many years, the Council of State has accepted health care as a public service that carries risks within its structure and has deemed it possible to compensate for the damage only in the presence of the Administration's gross service defect (Council of State, 2015) if the person benefiting from the health service suffers a loss (Council of State, 2012). However, since 2015, the Council of State has changed its case law regarding the "severe service fault" condition sought by the Administration for compensation responsibility in entire remedy lawsuits filed due to the faulty execution of the health service and has accepted the "service fault" as sufficient (Council of State, 2015). In another case, it was concluded that the defendant administration had a severe service defect because it was understood that the obstetrician and anaesthesia technician should be on duty in the hospital, but they only came to the hospital as attending doctors; that is, they were on duty by coming to the hospital when they were called by phone (Council of State, 2015).

In France, the responsibility of the Administration is taken in the presence of severe service faults, while simple defects are now accepted in surgical and medical operations (Kaplan, 2004). Although it is claimed that strict liability should be applied instead of looking for severe faults in healthcare activities that carry risks, such as nuclear medicine practices, brain surgeries, and care and protection of the mentally ill (Güran, 1982), it can be said that the Council of State disagrees with this view (Council of State, 2015). Because a small action or inaction in the healthcare service can lead to serious consequences, it is a correct approach for the Council of State to accept the service fault as sufficient for the compensation liability of the Administration in full-judgment lawsuits filed due to the defective execution of the healthcare service related to the treatment services (Akgül, 2016).

### 3. Compensation Liability of the Administration in Health Services

Liability for compensation of the Administration in health services can start from concrete issues such as the ambulance, which is not overhauled, being stranded on the road, the fact that some materials to be used in the immediate treatment are locked, and the key cannot be used because the doctor on duty has not been left, and can exceed to the physician to care for more patients than he can perform the necessary examination, that he cannot spend the required time for a patient, inability to adapt to new technologies as a result of not being able to allocate the necessary and sufficient in-service training and that they cannot reach a good honour to live humanely (Gülan, 2006). Every medical intervention poses a certain degree of risk to the patient. The legal system has ensured the situation that the patient is harmed due to the negativities that may arise as a result of the intervention to the patient. The patient's right to be protected is the right to live (Guloglu, 2020). With an approach based on avoidance of responsibility in practice, "consent letters" are obtained from patients in very different ways. The burden of the Administration falls within the field of administrative law in the Turkish legal system due to the administrative law enforcement activities on health and public service activities. Physicians may be legally liable for compensation in proportion to their faults due to medical malpractice, and in criminal terms, within the framework of the principles specified in the Turkish Penal Code.

The opinion of the Supreme Court about the type of relationship between the patient and the physician and the dominant view in the doctrine (Özkan & Akyıldız, 2008) is the "management contract" if the patient applies directly to the physician for health care (Supreme Court, 2014). If the patient goes to a hospital or a similar health institution instead of using now to the physician, and if there is no physician in the hospital they have chosen and agreed with beforehand, examination and treatment will be performed by the physician appointed by the hospital management. In this case, the direct relationship will be established not between the patient and the physician but between the patient and the hospital. Here, it is necessary to make a distinction according to the type of hospital, and if the hospital is a private health institution, a "patient admission contract" will be established between the patient and the hospital when the patient is admitted for treatment. In such a case, since the physician undertakes the treatment on behalf of the hospital, not on their behalf, they are in the position of "assistant person" according to the Turkish Law of Obligations.

On the other hand, if the place where the patient goes is a public hospital, a contractual relationship is not established between the patient and the hospital.

There is no direct relationship between the doctor who undertakes the treatment as a public officer and the patient, and there is a "use of public service" for the patient. Therefore, if the patient suffers from the treatment, he/she cannot directly sue the physician and health personnel. Still, they can file a lawsuit against the state institution the public hospital is affiliated with due to service (duty) fault. It is because the responsibilities of public hospitals and health personnel are considered a service defect, as a rule, and since those working in these hospitals are public officials, only a lawsuit can be filed against the relevant public institution according to article 129/5 of the Constitution. However, despite being a public official, if the physician or any hospital personnel has a "personal defect of dismissal" as a wrongful act, other than service defect, a lawsuit can be filed against them directly in the "judicial jurisdiction" (Supreme Court Assembly of Civil Chambers, 2006).

**a. Service Defect Specific to Health Care and Administration's Liability for Compensation**

It can be stated that public service should have the principles of continuity, regularity, equality, and freedom of charge in general (Özay, 2011). Healthcare is also a public service (Kaplan, 2004). In Turkey, besides the health institutions operated by the central government, there are also universities and public economic institutions, and health institutions used by the private sector (Karaege, 2001). Healthcare services are without monopoly since the private sector can also provide them. They are national since it is performed at the country level, and our administrative and social functions directly benefit individuals (Atay, 2009). Health services are defined as semi-public activities in the decisions of the Council of State. The distinction to be made by determining the types of health services will be beneficial in determining the responsibility arising from this service. Health services are divided into preventive, diagnostic and therapeutic, and rehabilitative health services.

First: Preventive Health Services. Preventive health services are measures to protect the health of society, prevent diseases, eliminate substances that harm the health of the community, and reduce child mortality, which should be provided ahead of other health services, control the health of mothers before and after birth, prevention of epidemics, struggle with all toxic and narcotic substances, all kinds of serums and vaccines (Karaege, 2001). For example, suppose the screen tests are not performed on newborn babies, which can prevent possible

damages that may occur in the future. In that case, the damages should be compensated by the Administration.

Second: Diagnostic and Therapeutic Health Care. Medical intervention is any activity performed by a person authorized to practice the medical profession for direct or indirect treatment, ranging from the most straightforward diagnosis and treatment methods to the most severe surgical interventions, to prevent, eliminate or minimize the adverse effects of a disease, abnormality or deficiency (Ayan, 1991). Activities aimed at meeting this need of the patient who needs help for their health are evaluated within the scope of diagnostic and curative health services. Damages resulting from diagnostic and curative health services require the liability of the Administration. Medical practice errors of health personnel are also seen in this area. Since most disputes arise from this title, settled judicial decisions are expected.

Third: Rehabilitative Health Services. The health service is provided to prevent permanent disorders and disabilities due to diseases and accidents from affecting daily life or to minimize these effects (Karaege, 2001).

Fourth: Other Health Services. Laboratory services, operating room services, ambulance services, medicine and pharmacy services, keeping and preserving patient records, and illuminating patients, which are for the organization of health services, can be included in the other health services class. Disclosure of the patient's secret, causing death and injury by falling from the hospital ladder and window, lead to service defect of the Administration, and it is a correct approach to include even the disruption caused by the organization of the health service provided in the scope of the health service. The Council of State decides that it is not necessary to look for the fault of severe service to be able to talk about the responsibility of the Administration for the damages caused by the lack of or not performing some care, surveillance, and side interventions that cannot be included in the scope of the medical operation (The Council of State, 2007). It decided that the non-pecuniary damage suffered by the plaintiff should be compensated in the event of the death of the person with heart disease in regular service instead of being observed closer and under intensive care conditions (Council of State, 2014).

**b. Types of Defects in Health Care**

Defects in health care may cause because of the establishment, arrangement or organization of the service, its employees, or malfunction, disorder, deficiency or disability in its operation. A defect in health care is an

objective defect that cannot be attributed to the attitudes and behaviours of just health personnel and cannot be directed to them. Still, it has some features entirely according to the principles of administrative law (Polat, 2019). However, even if the physician or other health personnel cannot be directly blamed for the damages that may occur due to the lack of care, supervision and other ancillary obligations that cannot be included within the scope of medical surgery, the responsibility of the health administration, which does not operate the health service properly due to the lack of organization, may be taken.

The Administration's lack of tools/equipment/devices, the insufficient establishment of the organization or the failure of the medical operation to disrupt the treatment are also considered as a kind of error, and it means that the health service provided by the Administration does not function properly (Council of State, 2016).

First: Malfunction in the Establishment and Operation of the Health Service. With the Regulation in Article 56 of the Constitution, the duty of providing health services to its citizens is imposed on the state. The task of performing health service, in general, was given to the Administration, especially to the Ministry of Health, which was organized on this subject. The Ministry of Health is the Administration responsible for planning, establishing, coordinating, operating, and supervising the public health service.

Employment of a sufficient number and quality of health personnel to provide the necessary treatment to the patients, having the required medical equipment, supplying the hospitals with medical equipment, and taking the necessary measures within the framework of the hospital care (complying with the hygiene rules, having the tools, elevator, building maintained and repaired, having the essential sign, warning, and lighting, taking occupational safety precautions, not leaving the floors slippery or making the slope of the stairs properly, etc.), an inspection of health institutions and organizations can be expressed as the establishment and operation of health services. The Council of State draws attention to the fact that if treatment is not possible due to the lack of a device, the patient should be referred to a health centre with advanced examination and treatment facilities. At the same time, failure to do so may lead to the responsibility of the Administration (Council of State, 2015). For example, in the death of a patient as a result of falling out of bed, who was treated in the intensive care unit, was in agitation and was at risk of losing (Council of State, 2006), the midwife, who noticed a perineal tear during delivery, intervened in the situation herself without reporting it to the doctor on duty (Council of State, 2009), re-operation to remove the forgotten gauze patch (Council of State, 2009),

cutting the right arm of a healthy baby due to arm fracture caused by trauma are examples of service defect.

Violation of the organizational obligations of the Ministry of Health, such as performing the health services as required, constantly checking the functioning of the health services, taking the necessary precautions during the execution of the health services, showing essential care and diligence in the selection of the personnel to provide the service and the tools specific to the service, and making inspections are service defect. Therefore, the Administration is responsible for compensating for the damages caused by it. Considering that in a case that can be considered an organizational defect, the patient applied to the hospital on Friday, and the outpatient clinic examination could be done on Monday at the earliest, due to the weekend interruption, the necessary orthopaedic consultation should be made for the patient. It would not be sufficient only if he were referred to the orthopaedic outpatient clinic, and it has been accepted that the lack of orthopaedic consultation of the patient will not eliminate the responsibility of the Administration for non-pecuniary compensation since the health service provided within the Administration is an organizational error (Council of State, 2012).

If the malfunction in the operation of the service arises from a reason that cannot be attributed to the Administration, in this case, the responsibility of the Administration will not occur. For example, suppose a medicine developed for treating the disease is not kept in hospitals during the current covid-19 epidemic. In that case, this situation constitutes a service defect of the Administration as a disruption in the health service organization. However, suppose the drug could not be supplied because the company producing this drug stopped its production and shipment. In that case, the Administration will not be held responsible for the damages that occur in this case. For example, having to give birth alone because of the absence of a doctor, midwife or nurse to accompany the patient in the ambulance, who is transferred to a more equipped place due to birth, emerges as a service defect in the organization and operation of the health service. Likewise, when solving the problem of which medical devices, instruments, and other medical supplies will be considered a deficiency or defect, the state of the medical facilities in the country and the financial possibilities of the Administration providing this service should be considered. The Council of State decided that the Administration had a service defect in the death of the patient because the necessary measures were not taken in advance by foreseeing the need for blood that may arise during an operation in the hospital belonging to the Administration, thus causing a delay in blood insertion during the process, and also the death of a patient reasoning from a delay in his admission to the intensive

care unit due to the lack of a place in the intensive care unit after the operation (Council of State, 2012).

Second: Medical Practice Defects. The most common form of fault in health services, which is generally accepted as unlawful, appears as medical practice defects. Medical malpractice as a type of service maloperation, the most common service defect, is defined as harming a patient due to ignorance, inexperience, or indifference. While the measure was previously used as the criterion of "the latest state of science and technique", the obligation of care and therefore the benchmark for medical malpractice, the concept of "medical standard" is used today in determining whether the negativity arising due to medical practice is a medical error (Hızal & Çınarlı, 2015). The concept of the medical standard refers to the generally recognized and accepted professional rules of medical science. Physicians, dentists, midwives, health officials, circumcisers, and nurses are the people who can provide medical intervention (Degdaş, 2018).

It is considered a medical error that the doctor or other health personnel provide a service that is below the current medical service standards, contrary to the requirements of medical science. Medical standards can be violated in different ways; diagnosis, treatment (lack of indication, selection of wrong treatment method), and post-intervention care management are some of them.

In the 13th article of the Turkish Medical Association's Code of Ethics of Medicine, medical error is understood as "any kind of physician intervention error (malpractice) that does not seem appropriate for the case, due to the lack of due diligence according to the standards of medical science and experience". In other words, not performing standard practice during the diagnosis and treatment of the patient, lack of knowledge and skills, and not applying appropriate treatment to the patient are defined as medical errors. At this point, the responsibility to arise due to malpractice is "general liability based on defect". The measure in terms of the legal responsibility of the physician is the standard of an experienced specialist physician. The physician should be able to foresee harm to the patient's health objectively according to the normal development of events and subjectively according to his personal experience, personal ability, individual professional knowledge, quality, and degree of education. In this case, the duty of care appears. Violation of the physician's duty of care is concentrated in three areas. The first one is in the patient's treatment, namely diagnosis, indication, selection of the medical measure, implementation of this measure,

treatment, or post-surgical care. The second is the clarification of the patient and medical history taking. The third one is in the field of clinical organization (qualification of personnel, availability of a sufficient number of personnel, cooperation of physicians with each other (consultation). It is possible to evaluate the defect in these three areas as application defect (error in treatment), lighting defect, and organizational defect, respectively. These three defects are called "Medical Practice Errors" (Malpractice). Although there is no general regulation regarding the legal responsibility of the physician, if the physician does not comply with the rules required by the medical profession, acts deliberately and negligently, and, as a result, causes damage to the patient's bodily integrity, the physician will have to be held responsible for their fault (Yalçın & Şahin, 2017). Although the intervention to the patient was wrong, if the intervention were not done, it would be necessary to determine the defect according to the current situation, not according to the possibility of an opposing position 3-5 years later (Council of State, 2002). While detecting the defect, it should be determined whether the diagnosis and treatment methods following the requirements and rules of medicine are applied, whether the necessary care is taken in this regard, whether what needs to be done and what is done comply with the requirements and rules of medicine (Council of State, 2001).

According to Article 8 of Law No. 5947, all physicians working in public and private health institutions and private practice must have Compulsory Professional Liability Insurance. Professional liability insurance for professional medical malpractice applied in Turkey is based on compensation based on a defect, the private insurance company compensates for the damage, and the financing source of the insurance is physicians and health institutions (Çapraz & etc., 2012).

A Professional Responsibility Board was established in Turkey in 2022, which is authorized to issue permission for investigation and compensation for healthcare professionals, with the Regulation on the Procedures and Principles Regarding the Investigation of Healthcare Professionals Due to Medical Transactions and Practices and the Recourse of the Compensation Paid by the Administration, with the Regulation made with public or private health institutions and organizations, and physicians and dentists working in state and foundation universities along with the Regulation covering the work and transactions of other healthcare professionals in the investigation and recourse process. Furthermore, the board has been given the authority to make a justified decision within one year from the date of finalization of the decision in the case where it is determined by the finalized criminal court decision that the health professional's abuse of duty by acting contrary to the requirements of his

responsibility is specified in the Regulation, whether the health professional will be recourse according to the rate of fault in the event subject to compensation, and if so, the amount of payment. This arrangement will lead to a significant decrease in compensation cases and recourse lawsuits to be filed against healthcare professionals working in the public or private sector due to their faults. It is because from now on, the health personnel can be held responsible if they misuse their duty by acting against the requirements of their commitment, but the board will still decide whether or not they will be held accountable for the damage.

**1). Exceeding the Expertise Limit**

Health personnel with medical intervention authority are listed in Law No. 1219 on the Mode Execution of Medicine and Medical Sciences. Those who have completed education in a particular specialization following the conditions in the legislation can practice in this medical speciality. Accordingly, physicians who have the title of specialist can operate in their field. Personal faults of physicians who perform medical interventions in an area where they are not experts may come to the fore due to these actions. However, in terms of some diseases that are very complicated to understand in today's practices, if it is considered that the interventions are within the scope of excess of authority, then the fault liability of the Administration can be discussed. According to the Council of State, non-health personnel's attempt to remove the urinary catheter constitutes a service fault of the Administration in the damage caused by the intervention other than the health personnel. In Turkey, several health services are carried out by auxiliary personnel who are not health officials, especially in the health services provided in state-owned hospitals. Even this situation may lead the state to be held responsible for the damage that may occur.

**2). Lack of Information and Exceeding Consent Limit**

For the medical intervention to comply with the law, the informed consent of the person concerned must be obtained. A sufficiently informed patient can freely decide whether to consent to the proposed treatment. The patient, who agrees to the treatment without knowing its positive or negative aspects, cannot be deemed to have decided their own will. For the consent to be legally valid, the patient who consents to the medical intervention must be sufficiently enlightened by the physician and thus have comprehensive knowledge of the dangers and consequences of the medical intervention to be performed. According to Article 70 of the Law on the Mode Execution of Medicine and Medical Sciences, it has been accepted as a necessity to seek written consent in major surgical operations. Likewise, the Medical Deontology Regulation, the Patient Rights Regulation, and

the Turkish Medical Association's Code of Professional Ethics have regulated that "informing the patient and obtaining informed consent before medical intervention is a must".

The positive obligations imposed on the State by Article 2 of the European Convention on Human Rights require establishing a legal and regulatory framework that obliges private or public hospitals to take measures to protect patients' lives. This obligation is based on the need to protect patients as much as possible from the severe consequences that medical interventions may bring in this context. Thus, following this obligation, the contracting countries are obliged to take the necessary regulatory legal measures to ensure that the physicians are questioned about the foreseeable consequences of the planned medical intervention regarding the physical integrity of the patients and to inform their patients about this medical intervention in advance in a way that will enable them to give their consent.

In the decision of the Council of State on the subject, it was emphasized that although informed consent was obtained from the patient before the injection, informed consent should also be obtained for the injection to be made, and if the risks are explained and written authorization is not obtained from the aforementioned, the patient's right to be informed and consent will be taken away, and this obligation will not be fulfilled, the health service was not operated as it should, and that the claim of the plaintiffs for non-pecuniary damage should be evaluated. Furthermore, it was decided by the Council of State that there was a service defect in the case when the patient file, epicrisis, and death reports were not given to the plaintiff in due time, as the request for moral compensation stemming from the suspicion and mental depression created by the parents whose children were born dead, about the faulty operation of the health practices (Council of State, 2015).

**3). Diagnostic Error**

There is no legal regulation on how the physician will fulfil their diagnostic obligation. The physician should perform all the necessary medical interventions and examinations for diagnosis and interpret the results correctly according to the rules of medical science (Hakeri, 2021). The responsibility placed on the physician here is not to be successful in making the diagnosis but to act as required by their expertise and the disease. It is seen in practice that many diagnostic errors cannot be attributed to the physician. Diagnostic error is not enough for the responsibility of the Administration alone. If the physician complies with the usual and known rules of medical science while diagnosing, spends all the necessary attention and time, and depends on records and files

while analyzing, it is impossible to talk about a diagnosis error (Council of State, 2015). An example of a diagnostic error can be given as the patient's death due to late intervention due to being erroneously diagnosed with a kidney stone even though they had gastric perforation (Council of State, 2008). In practice, the majority of diagnostic errors appear to be associated with the diagnosis of cancer. For example, as a result of the diagnosis made to a patient who was erroneously diagnosed with lymphoma, an unnecessary treatment is applied; however, courts may decide that there is no service fault due to an erroneous diagnosis knowing that even the most experienced physicians may experience difficulties in making the pathological diagnosis of the disease (lymphoma). It is expected that physicians take decisions to protect the patient in case of hesitation. In the lawsuit filed by the patient, who was operated on with the diagnosis of aortic dissection, but it was understood that he did not have aortic dissection during the operation, the Court concluded that the plaintiff's medical findings were compatible with aortic dissection and that emergency surgical intervention was required for the aortic dissection. Therefore, the health institution that took protective measures for the patient had no service fault. As the treatments applied in the emergency department did not comply with the medical rules, resulting in the death of the patient (State of Council, 2015) and the plaintiff's infection (MRSA) during and after the operation (State of Council, 2015) can be given as examples of situations that lead to the responsibility of the Administration.

**4). Treatment Error**

What should be understood from the treatment error is any medical intervention contrary to the specialist physician's standard. While the physician's failure to perform an application that should be done medically may be a treatment error, an intervention that should not be done may be a treatment error, too. Many different medical errors can occur as treatment errors. For example, some of them include not performing the necessary tests, forgetting foreign matter in the patient's body, choosing the wrong treatment method, mistakes made in using technical tools, and not noticing the complication. According to the 14th article of the Medical Deontology Regulation, the physician must save the individual's life, protect their health, and reduce or relieve suffering even when these are not possible. At this point, the expected behaviour from the physician is to apply treatments following generally accepted medical standards. In the decisions of the Council of State, death due to infection in open heart surgery, disability of the child without the necessary intervention during birth, death due to complications due to faulty rabies vaccination, death of the person who was sent home by stitching the wound without repairing the

vascular incision of the bleeding patient were accepted as treatment errors. Transferring the plaintiff, who was injured as a result of a traffic accident, before a thorax tube was inserted and stabilized, even though many rib fractures and pronotrax were detected in the lung graphs (State of Council, 2007), the delay in having a computed tomography after the small intestine rupture that occurred during tube ligation surgery performed to provide birth control, and operating the patient three days later despite a large fluid filling the left lateral part of the abdomen was detected according to the tomography (Council of State, 2007), the baby born with the diagnosis of brain death due to oxygen deficiency as a result of directing the patient to normal birth without examining the antenatal records and tests (State of Council, 2002) are some of the examples of treatment errors.

## D. CONCLUSION

The standards of activities related to medicine must be determined in a way that leaves no room for doubt. Since the nature, conditions and scope of liability and compensation arising from health care services are not regulated by favourable legal rules, the lack of Regulation in this area is tried to be filled with doctrines and jurisprudence. Judicial practices shaped by the jurisprudence of the Council of State and the Supreme Court will also guide the legal arrangements.

There is a need for a legal regulation that deals with all aspects of the problems, such as the liability conditions of the Administration, its scope and the damages to be compensated. It is necessary to create the environment and legal requirements to prevent any result that requires penal and financial sanctions. In addition, there is a need for a detailed "administrative procedure" that regulates these issues accurately before the regulations that impose criminal sanctions and responsibility on healthcare workers for their mistakes.

In hospitals, the patient should be equipped with the necessary and sufficient information and be allowed to choose between the physician and the treatment methods. If the works are organized effectively, both the number of criminal and legal liability cases of job descriptions of people working in the field of health and the requirements of the job, minimum standards, and procedures regarding what should be done in various situations will decrease. The determination and the degree of responsibility in cases that cause this type of responsibility will be more straightforward. It is necessary to prevent the uncertainty created by the threat arising from the regulations regarding the penal sanction based on the negative result. For the Administration to fulfil its responsibilities and to reduce the number of cases as much as possible where the

number of instances in which it is discussed what punishment will be given for the responsible consequences that may arise from medical practices and how to compensate for the damage, detailed and unhesitating administrative arrangements should be made regarding the functioning of the organizational activity. Arranging cases of heavy liability does not provide patients' rights on its own; on the contrary, it leads to an environment in which absolute patient rights and needs are damaged by seeking ways to escape from legal responsibility. There is a need for a legal perspective that makes hospital environments suitable for biological and human psychology, transforming patient rights, physician rights, and patient relationships into a procedure that does not require hesitation and personal determinations.

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