C. Responsibility for Negligence

I. Criminal Responsibility

Criminal law is relevant to the problem of medical responsibility only to the extent that medical malpractice falls under the punishable acts explicitly stated in the Dutch Penal Code or in other penal provisions. Which regulations are of importance for the possible penal consequences of harm caused by a doctor to a patient? We will limit ourselves to the most relevant provisions of the Penal Code:

- Exposing others to ionizing radiation or contaminating them with radioactive substances
- Selling merchandise harmful to life or health
- Abandoning a person in need of immediate help
- Violation of professional secrecy
- Unlawful deprivation of liberty
- Unlawful coercion to do or to omit something
- Murder and homicide
- Ill-treatment and infliction of bodily injury
- Negligent bodily injury or death
- Selling adulterated drugs
- Dereliction of duty to give assistance to a person in a state of immediate peril to his life

Most of these provisions are used against doctors only very seldom.

More frequent are penal cases regarding abortion, euthanasia and the abetting of suicide. The circumstances under which these acts, when committed by a doctor in the course of his work, are to be considered unlawful is still largely a controversial question. Only in the case of abortion has at least a temporary armistice been reached since the adoption of the Abortion Act some years ago. This act has not yet come into force, however, and it remains to be seen how it will function in practice, given the fact that it is in every respect a product of political compromise. As for euthanasia and assistance to suicide, the courts have decided that as long as special conditions are met, these acts are not punishable. A State Committee has been established to study the law concerning these acts.

In judging alleged criminal behaviour of doctors, the courts are inclined to restrict themselves to a 'marginal' review, which is to say, they refrain from giving a judgment on the justifiability of the doctor's decisions or acts as such, restricting themselves instead to the question of whether, all circumstances taken into account, he could reasonably arrive at his decision. For instance, if a doctor does not keep his professional secret after having noted that a child has been mistreated by its parents, the court will respect his professional autonomy as long as his behaviour seems to be defensible and he has been careful in making his decision. Especially in
cases of euthanasia and cooperation in suicide, carefulness in decision-making has been considered a very important (though not a sufficient) condition of impunity by the courts.

II. Criminal Procedure and Disciplinary Courts

In order to establish criminal liability, three conditions must be met: first of all, it must be proved that a punishable act that coming under a statutory penal regulation has been committed; this punishable act must be unlawful not only according to the wording of the regulation but in its very character; and thirdly, it is required that the doctor be subject to blame for his behaviour. The first condition means that the act corresponds to the description of the punishable act given in the penal provision; the different elements of this legal description must obtain. Punishable acts can be either crimes or contraventions. In general, the latter are of a less serious nature; very often, punishment of them is less severe than in the case of crimes.

The second condition has to do with the fact that an act which corresponds to the description given in a criminal regulation is not always punishable. For instance, it is unlawful to put a knife in somebody's back; nevertheless, this is a daily occurrence in a hospital operating room. In such cases, there is only a formal and not a substantive transgression of the law; there is no 'material unlawfulness'. The doctrine of 'lack of material unlawfulness' is based on the presupposition that the criminal regulation presumes the act in question is in itself contrary to the rules of law. But this need not be the case. For medical practice to remain lawful, even if contrary to the wording of a penal provision, the following conditions must be fulfilled:

- The act must rest on a medical indication and must be oriented towards a concrete purpose of medical treatment.
- The act must be performed according to the state of the art.
- The act must not be performed before the patient has given his 'informed consent'.

The third condition – that the doctor is at blame because of his behaviour – implies that the doctor could have avoided the unlawful act, had he so willed. To establish guilt in criminal cases, serious fault or negligence must be proved; a light form of negligence is not sufficient. This is one of the reasons why criminal law only plays a marginal role with respect to health care in general and in medical malpractice in particular.

It also explains the need for another form of jurisdiction by means of which the behaviour of medical professionals can be reviewed more effectively. In the Netherlands, judicial review of medical practice is regulated under the Medical Discipline Act of 1928. Because of the very important role played by medical disciplinary courts in formulating legal norms relating to the medical profession, we will pay more attention to this form of judicial review than to the subject of criminal proceedings discussed above.

The purpose of the Medical Discipline Act is to safeguard the quality of medical care and to maintain professional standards of skill and care with regard to the patient. Most patients are unable to judge professional skills; those skills have to be reviewed by experts. This is why doctors as well as lawyers participate in disciplinary courts. In addition to physicians, dentists, midwives and pharmacists fall under the