



## KEY THEME<sup>1</sup>

### Article 2

### Medical negligence

(Last updated: 29/02/2024)

#### Introduction

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The right to health is not, as such, recognised under the Convention (*Lopes de Sousa Fernandes v. Portugal* [GC], 2017, § 165). However, the Court has considered that the State's obligation to take appropriate steps to safeguard the lives of those within its jurisdiction applies in the public-health sphere too (*Calvelli and Ciglio v. Italy* [GC], 2002, § 49).

#### State obligations in brief

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##### **Article 2 substantive limb:**

- to provide a regulatory framework for the protection of patients' lives (*Vo v. France* [GC], 2004, § 89 and *Lopes de Sousa Fernandes v. Portugal* [GC], 2017, § 186).

##### **Article 2 procedural limb:**

- to set up an effective independent judicial system where cause of death can be established and those responsible made accountable (*Šilih v. Slovenia* [GC], 2009, § 192 and *Lopes de Sousa Fernandes v. Portugal* [GC], 2017, § 214).

#### Noteworthy examples

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- *Lopes de Sousa Fernandes v. Portugal* [GC], 2017 – the latest Grand Chamber case on medical negligence which sets out the scope of the substantive positive obligations of States (relevant also for denial of access to medical treatment cases) and consolidates the general principles regarding procedural obligations of States;
- *Eugenia Lazăr v. Romania*, 2010 – the Court found a violation of the procedural limb of Article 2 on account of a lack of cooperation between the forensic medical experts and the investigating bodies and of the lack of reasons given in the experts' opinions (§§ 81-85);
- *Oyal v. Turkey*, 2010 – the Court awarded, under Article 41, lifetime medical cover to a teenager infected with HIV (§ 102);
- *Bajić v. Croatia*, 2012 – the Court underlined the importance of the requirement of independence of medical experts in respect of procedural obligations (§§ 95-102). See also *Karpisiewicz v. Poland* (dec.), 2012;
- *Arskaya v. Ukraine*, 2013 – the first case where the Court found a substantive violation under Article 2 (§§ 84-91);

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<sup>1</sup> Prepared by the Registry. It does not bind the Court.

- *Altuğ and Others v. Turkey*, 2015 – the Court found a violation of Article 2 due to the failure of the expert medical reports and judicial authorities to address the issue of the alleged medical negligence, and failure by the medical team to observe the relevant legislative framework (§§ 78-86). See also *Tülay Yıldız v. Turkey*, 2018, §§ 66-69 and 72, concerning a procedural violation;
- *Sarishvili-Bolkvadze v. Georgia*, 2018 – the Court, applying the test laid down in *Lopes de Sousa Fernandes v. Portugal* [GC], 2017, found a substantive violation of Article 2 because the State had failed to comply with its regulatory duties (§§ 70-77). The hospital, where the applicant’s son had been treated, had carried out unlicensed medical acts on him, and the doctors treating him had lacked either the necessary licences or qualifications, in violation of domestic law;
- *Aftanache v. Romania*, 2020 – the Court found a violation of the procedural limb of Article 2 on account of the authorities’ omission to gather key witness evidence and failure to request expert medical evidence regarding the applicant’s condition (§§ 68-72);
- *Scripnic v. the Republic of Moldova*, 2021 - the Court found a violation of the procedural limb of Article 2 on account of the inadequate sum awarded for non-pecuniary damage in civil proceedings for medical negligence (§§ 43-48).

## Medical negligence under other Articles of the Convention

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There is a natural interplay between Articles 2 and 8 of the Convention in the context of medical treatment since both provisions aim to protect an individual from infringement of his/her physical and psychological integrity, and the Court has transposed to Article 8 almost identical obligations as those required under the substantive and procedural limbs of Article 2 (*Mehmet Ulusoy and Others v. Turkey*, 2019, extension of principles developed under Article 2 in *Lopes de Sousa Fernandes v. Portugal* [GC], 2017, to Article 8 (§§ 82-86 and §§ 90-93).

### See for example:

- *Trocellier v. France* (dec.), 2006, unforeseeable harmful effects of surgery;
- *Gecekuşu v. Turkey* (dec.), 2010, complications following surgery;
- *Codarcea v. Romania*, 2009, complications following plastic surgery;
- *Spyra and Kranczkowski v. Poland*, 2012, disability of a child as a result of medical negligence during birth;
- *V.V.G. v. the former Yugoslav Republic of Macedonia* (dec.), 2015, health complications related to childbirth;
- *Erdinç Kurt and Others v. Turkey*, 2017, shortcomings in expert medical report and inadequate judicial response to consequences of surgery;
- *Mehmet Ulusoy and Others v. Turkey*, 2019, inadequate investigation into causes of medical condition of a new-born baby suffering from a permanent disability.

## Recap of general principles

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- For a recapitulation of general principles under Article 2, see *Vo v. France* [GC], 2004, §§ 88-90, and *Lopes de Sousa Fernandes v. Portugal* [GC], 2017, §§ 185-189 (substantive) and §§ 214-221 (procedural);
- For a recapitulation of general principles under Article 8, see *Vasileva v. Bulgaria*, 2016, §§ 63-69, and *Jurica v. Croatia*, 2017, §§ 84-88. The above-referenced general principles developed under Article 2 also apply under Article 8 as regards medical negligence

affecting bodily integrity (see, for example *Mehmet Ulusoy and Others v. Turkey*, 2019, §§ 82-86 and §§ 90-93).

## KEY CASE-LAW REFERENCES

### Leading cases:

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- *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, ECHR 2002-I (no violation of Article 2);
- *Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII, (no violation of Article 2);
- *Šilih v. Slovenia* [GC], no. 71463/01, 9 April 2009, (violation of Article 2 (procedural));
- *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, ECHR 2017 (no violation of Article 2 (substantive), violation of Article 2 (procedural)).

### Other cases under Article 2:

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- *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V (Articles 2 and 8: inadmissible – incompatible *ratione personae* for lack of victim);
- *Ursu v. Romania* (dec.), no. 58670/00, 3 May 2005 (Articles 2 and 3: inadmissible - manifestly ill-founded);
- *Byrzykowski v. Poland*, no. 11562/05, 27 June 2006 (violation of Article 2 (procedural));
- *Colak and Tsakiridis v. Germany*, nos. 77144/01 and 35493/05, 5 March 2009 (no violation of Articles 2 and 8);
- *Sevim Güngör v. Turkey* (dec.), no. 75173/01, 14 April 2009 (Article 2: inadmissible - manifestly ill-founded);
- *Rinkūnienė v. Lithuania* (dec.), no. 55779/08, 1 December 2009 (Article 2: inadmissible - manifestly ill-founded);
- *G.N. and Others v. Italy*, no. 43134/05, 1 December 2009 (no violation of Article 2 (substantive), violation of Article 2 (procedural));
- *Eugenia Lazăr v. Romania*, no. 32146/05, 16 February 2010 (violation of Article 2 (procedural));
- *Oyal v. Turkey*, no. 4864/05, 23 March 2010 (violation of Article 2);
- *Bajić v. Croatia*, no. 41108/10, 13 November 2012 (violation of Article 2 (procedural));
- *Arskaya v. Ukraine*, no. 45076/05, 5 December 2013 (violation of Article 2 (substantive and procedural));
- *Altuğ and Others v. Turkey*, no. 32086/07, 30 June 2015 (violation of Article 2 (procedural));
- *Bilbija and Blažević v. Croatia*, no. 62870/13, 12 January 2016 (violation of Article 2 (procedural));
- *Movsesyan v. Armenia*, no. 27524/09, 16 November 2017 (violation of Article 2 (procedural));
- *Sarishvili-Bolkvadze v. Georgia*, no. 58240/08, 19 July 2018 (violation of Article 2 (substantive and procedural));
- *Tülay Yıldız v. Turkey*, no. 61772/12, 11 December 2018 (violation of Article 2 (procedural));
- *Aftanache v. Romania*, no. 999/19, 26 May 2020 (violation of Article 2 (procedural));
- *Mehmood v. Greece*, no. 77238/16, 25 March 2021 (no violation of Article 2 (substantive), violation of Article 2 (procedural));
- *Scripnic v. the Republic of Moldova*, no. 63789/13, 13 April 2021 (violation of Article 2 (procedural));

- *Hubert Nowak v. Poland*, no. 57916/16, 16 February 2023 (no violation of Article 2 (substantive), violation of Article 2 (procedural));
- *Volintiru v. Italy* (dec.), no. 8530/08, 12 December 2023 (Article 2: inadmissible - manifestly ill-founded).

### Medical negligence under other Articles of the Convention:

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- *Trocellier v. France* (dec.), no. 75725/01, ECHR 2006-XIV (Article 8: inadmissible - manifestly ill-founded);
- *Codarcea v. Romania*, no. 31675/04, 2 June 2009 (violation of Articles 6 § 1 and 8);
- *Yardımcı v. Turkey*, no. 25266/05, 5 January 2010 (Article 8: inadmissible - manifestly ill-founded, violation of Article 6 § 1);
- *Gecekuşu v. Turkey* (dec.), no. 28870/05, 25 May 2010 (Article 8: inadmissible - manifestly ill founded);
- *Dossi and Others v. Italy* (dec.), no. 26053/07, 12 October 2010 (Articles 6 § 1 and 8: inadmissible - manifestly ill-founded);
- *Spyra and Kranczkowski v. Poland*, no. 19764/07, 25 September 2012 (no violation of Article 8);
- *V.V.G. v. the former Yugoslav Republic of Macedonia* (dec.), no. 55569/08, 20 January 2015 (Articles 3 and 8: inadmissible – manifestly ill-founded);
- *Vasileva v. Bulgaria*, no. 23796/10, 17 March 2016 (no violation of Articles 6 § 1 and 8);
- *Jurica v. Croatia*, no. 30376/13, 2 May 2017 (violation of Article 6 § 1, no violation of Article 8);
- *Erdinç Kurt and Others v. Turkey*, no. 50772/11, 6 June 2017 (violation of Article 8);
- *Mehmet Ulusoy and Others v. Turkey*, no. 54969/09, 25 June 2019 (no violation of Article 8 (substantive), violation of Article 8 (procedural));
- *Vilela and Others v. Portugal*, no. 63687/14, 23 February 2021 (no violation of Article 8 (substantive), violation of Article 8 (procedural));
- *Botoyan v. Armenia*, no. 5766/17, 8 February 2022 (no violation of Article 8 (substantive), violation of Article 8 (procedural));
- *Tusă v. Romania*, no. 21854/18, 30 August 2022 (violation of Article 8 (procedural)).