

Separation Surgery of Adult Conjoined Twins in the Absence of the Consent of One of the Twins and the Grounds for Imposing Civil Liability on the Doctor

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Introduction

The introduction of new medical technologies has presented many problems that need to be solved from the perspective of both law and morality. One such problematic issue is the practicality of conducting a separation surgery of adult conjoined twins capable of conscious decision-making when one of the twins refuses to have such an operation and the other - agrees.

When it comes to the health of conjoined twins, the issue requires a complex study and in-depth analysis, as the health status of twins is individual and radically different from each other depending on the type and location of fusion.¹

Naturally, having conjoined bodies is a great inconvenience to each conjoined twin. There is no doubt that an inseparable connection with another twin prevents each twin from living an independent, fulfilling life. Perhaps such a union can make life unbearable for them. Given the type and complexity of fusion of Siamese twins, it is common for a separation surgery to be more beneficial to them than to the other. It is not uncommon for a relatively weakly developed twin to die during surgery or immediately in the postoperative period or remain in a critical health condition that leads to inevitable death in the short term. In such an event, it may be the case that one of the conjoined twins consents to the separation surgery and the other, taking into account the risks involved, is unwilling to do so. In such a case, it is interesting what must the doctor do?! Must the doctor agree with one of

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¹ Based on the localization of the fusion, development of the brain, limbs, and internal organs, the following types of conjoined twins are distinguished: Inopagus twins - joined at the occiput; Ischiopagus twins - joined at the pelvis; Craniopagus, cephalopagus twins - joined at the head; Thoracopagus twins - joined at the chest; Omphalopagus twins - joined near the bellybutton; Opodidymus twins - two heads on one body; Pygopagus twins - having a fusion of the coccyx; Prosopothoracopagus twins - fused from the face to the thorax; Parapagus twins - joined back-to-back. See, *Tumanishvili, G.*, Law and World, International Scientific Peer-reviewed Journal of the European University Scientific Research Institute of Law №4, Tbilisi, 2016, 163-164.

the twins on performing the surgery, or must s/he refuse to perform such an operation?

Such a situation may become a dilemma for the medical personnel, so the paper aims to analyze the described case based on the legal and ethical norms applicable in medical law and determine what would be the best solution to such a problematic situation. The paper will also briefly review the legal grounds for claiming damages from medical personnel in Georgian law and the existing case law.

1. Case of the *Bijani* Sisters

The world's first separation surgery is associated with the names of Iranian conjoined twin sisters *Laleh* and *Ladan Bijani*. On July 6, 2003, the operation was performed at Raffles Hospital in Singapore and lasted 52 hours.²

Lale and *Ladan* Bijani were conjoined (Craniopagus) twins raised together. Because of the complex type of fusion and the high risk of death, doctors excluded the possibility of their separation surgery at the birth of the twins. Consequently, the girls also did not hope ever to be able to be separated, but the situation changed in 2001 when the separation surgery of the 10-month-old Nepalese twins *Ganga* and *Jamuna Shreshta* was completed in Singapore.³

On November 20, 2002, *Lale* and *Ladan* at the age of 27, decided to travel to Singapore for separation surgery. The twins hoped that neurosurgeon *Keith Goh* would be able to separate them.⁴ He was the specialist who successfully separated the Nepalese twins from each other. The chance of success of the *Bijani* separation surgery in Singapore was estimated at 50%. The operation was also planned to be performed at a private hospital established by Raffles Hospital. The hospital consented to the risky operation for several reasons: I. The hospital wanted to fulfill the twins' desire to be separated, II. The operation would help Singapore become a regional medical center, while the

² See, *Wilkinson, S.*, Separating Conjoined Twins: The Case of Ladan and Laleh Bijani, Ethics, Law and Society, 1st Edition, Routledge, 2005.

³ *Sharma, G.*, Separated Nepali Twin Dies of Chest Infection, Reuters, 2008, <https://www.reuters.com/article/idINIndia-34731520080729>.

⁴ World's First separation of adult Siamese twins in Singapore., https://eresources.nlb.gov.sg/infopedia/articles/SIP_411_2005-01-27.html.

Raffles Hospital physicians would gain experience and raise recognition, III. This would promote friendship between the Singaporean and Iranian peoples.⁵

The doctors immediately informed the twins that the separation surgery was a very risky decision, which may have resulted in their death, but the twins had a dream of living as two independent people, two individuals because they were persons radically different from each other; They had different personalities, desires, interests and, therefore, Spending the rest of their lives in this state was unimaginable for them.⁶

The girls were graduates of the Faculty of Law of Tehran University. *Lale* wanted to live and work in Tehran, while *Ladan* dreamed of returning to her native Shiraz to continue her studies in journalism.⁷

For seven months before the operation, the twins had to undergo lengthy and complex medical examinations, the clinic doctors held extensive consultations with international experts and, only then, decided to schedule the operation. It was decided that the separation surgery would be performed by a team of 28 doctors from Singapore and invited from different countries (United States, France, Japan, and Switzerland). About 100 medical assistants were involved in the operation. Moreover, the doctors refused to accept the payment because the sisters could not pay for the operation. The medical team at Raffles Hospital set up a medical charity fund to help the sisters cover the costs of postoperative medication and treatment. (The number of expenses to be incurred in the future was 500,000 dollars according to preliminary estimates). Later, the Iranian government announced that it would cover the cost of the twins' surgery.⁸

In the early morning of July 6, 2003, the surgery of *Lale* and *Ladan Bijani* began. The separation included 12 operations to be performed in three stages. In the first stage, blood vessels would be formed, in the second stage, the

⁵ *Kessler, M.*, Trennung um jeden Preis, Süddeutsche Zeitung, <https://www.sueddeutsche.de/panorama/siamesische-zwillinge-trennung-um-jeden-preis-1.854775>.

⁶ Ibid.

⁷ Ibid.

⁸ See, Surgeons' Sorrow at Death of Twins, <http://news.bbc.co.uk/2/hi/asia-pacific/3055016.stm>.

skull and brain would be separated, followed by the third stage - individual reconstruction of the skin and soft tissues.⁹

On the first day of surgery, five neurosurgeons were working under the leadership of *Goh*. Upon completing the procedure, nurses and technicians moved the unconscious twins, lying on their backs, to a special chair in a sitting position. At 8:15 PM, the critical, second stage of the surgery began, however, on the afternoon of July 8, 2003, the twins died due to the loss of a large amount of blood.¹⁰

In the case of the *Bijanís*, the separation surgery was their conscious choice. Both of them were persons with the ability of conscious decision-making and were fully aware of the risks of unsuccessful completion of the operation. For the twins, living together was associated with great mental suffering; Therefore, although their congenital pathology was not life-threatening, the twins preferred death to life in a long, albeit conjoined state; Yet there are numerous instances in the world where adult twins, able of conscious decision-making, have refused to undergo separation surgery and preferred death together over separation.

For example, *Ronnie* and *Donnie Galyon*, who turned 60 in 2012, did not want to separate. Ronnie said: "Let God decide our separation. God made us and let God separate us, not using surgical knives."¹¹ Also, the sisters - *Mary* and *Eliza Chulkhurst* - refused the separation surgery, and one of them said before her death: "As we came together, we will go together."¹² In 1967, *Mary* and *Margaret Gibb* refused separation even when one of them was dying of cancer.¹³ In the case of *Rosa* and *Joseph Blažek*, *Rosa*, even when her sister was dying of a serious illness, refused to separate and said that if *Joseph* had died,

⁹ *Davis, J.*, Till Death Do Us Part, https://www.wired.com/2003/10/twins/?pg=1&to pic=&topic_set.

¹⁰ *Ibid.*

¹¹ *Colleen, D.*, The Spectre of Court-sanctioned Sacrificial Separation of Teenage Conjoined Twins Against their Will, (2014) 21 JLM 979; https://research-repository.griffith.edu.au/bitstream/handle/10072/65240/98882_1.pdf;jsessionid=2D850391B13C3C833ED219EB9B5E9D8A?sequence=1.

¹² *Ibid.*

¹³ *Ibid.*

she would have wanted to die, too.¹⁴ The same thing happened with *Violet* and *Daisy Hilton*. It is known that they were joined at the pelvic area, and had a common blood circulation, though they did not have common vital organs. Thus, their separation did not constitute an obstacle to the life or health of any of them, but *Daisy* and *Violet Hilton* never attempted separation. On the contrary, they turned their congenital anomaly into a means of gaining universal publicity. They had their theatrical show, which they ran until old age. Documentary films were made about them. In 1969, *Daisy* died of a complication of the flu, while *Violet* died a few days after *Daisy's* death.¹⁵

The world-famous conjoined twins, *Abby* and *Brittany Hensel* refrain from undergoing separation surgery because of the high risk of death. Although they have completely different aspirations from each other, both feel completely comfortable in the conditions of their bodily unity. In an interview with *The Mirror*, *Abby* said, “We never wish we were separated because we would never be able to do all the things that we do now, like play softball, run, and do sports”¹⁶.

2. A General Overview of the Acts Regulating the Physician-Patient Relationship

The oldest moral code of the medical profession is the Hippocratic Oath,¹⁷ which, for centuries, has been taken by physicians as a guarantee to protect the rights of a patient; The *Hippocratic* oath was intact for a long time until it became morally obsolete. The call of *Hippocrates* was to observe the real world. He preached paternalism and argued that kind and sensible physicians should do what they consider best in a given situation and not what the patient desires. The text of the *Hippocratic* Oath is as follows:

“I swear by Apollo the physician, and Aesculapius, and Health, and All-heal, and all the gods and goddesses, that, according to my ability and judgment, I will keep this Oath and this stipulation—to reckon him who taught me this art

¹⁴ See <https://galeriaufa.ru/ka/lyubopytnye-i-pugayushchie-istorii-o-znamenityh-siamskih-bliznecah/>.

¹⁵ The Tragic Life of Story of the Conjoined Hilton Sisters, <https://medium.com/lessons-from-history/the-tragic-life-story-of-the-conjoined-hilton-sisters-472a9f99f2d2>.

¹⁶ *Mills, K. A.*, World's Most Famous Conjoined Twins on Dating, Learning to Drive and Playing Sports, *Mirror*, 2020. <https://www.mirror.co.uk/news/us-news/worlds-most-famousconjoined-twins-dating-21034118>.

¹⁷ See English translation of the text, <https://www.britannica.com/topic/Hippocratic-oath>.

equally dear to me as my parents, to share my substance with him, and relieve his necessities if required; to look upon his offspring in the same footing as my brothers, and to teach them this Art, if they shall wish to learn it, without fee or stipulation; and that by precept, lecture, and every other mode of instruction, I will impart a knowledge of the Art to my sons, and those of my teachers, and to disciples bound by a stipulation and oath according to the law of medicine, but to none others.

I will follow that system of regimen which, according to my ability and judgment, I consider for my patients' benefit and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked, nor suggest any such counsel, and in like manner I will not give a woman a pessary to produce abortion. With purity and holiness, I will pass my life and practice my Art. I will not cut persons laboring under the stone but leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick, abstain from every voluntary act of mischief and corruption; and further from the seduction of females or males, of freemen and enslaved people. Whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.

While I continue to keep this Oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, at all times! But should I trespass and violate this Oath, may the reverse be my lot!"¹⁸

Paracelsus clearly articulates the principles of paternalism in the 16th century.¹⁹ Paternalistically oriented physicians act based on their values. Therefore, the well-known principle - no nocere ("do no harm") has not lost its popularity for centuries. The patient's interests have always been at the forefront of medical ethics. In recent decades, there have been significant changes in the "doctor-patient"²⁰ relationship. The advent of new

¹⁸ The Georgian translation is cited from *Shengelia, M.*, History of Medicine, Education, Tbilisi, 1988.

¹⁹ *Shavdia, M., Gvamichava, R., Bakradze, I.*, Ethics in Oncology, http://www.modernpublishing.ge/view_post.php?id=2&pub=16&year=2010.

²⁰ Ibid.

technologies in diagnosis and treatment has limited the importance of the medical worker's personality in deciding the patient's fate.²¹

All of the above had an impact on the moral code of doctors as well. No one disputed that the oath of Hippocrates no longer corresponded to the modern medical era and trends. That is why the General Assembly of the World Medical Association in Geneva in 1948 developed a new pledge of physicians:

“As a member of the medical profession:

I solemnly pledge to consecrate my life to the service of humanity;

I will give my teachers the respect and gratitude that is due; I will practice my profession with conscience and dignity; I will respect the secrets that are confided in me, even after the patient has died; I will maintain by all the means in my power, the honor and the noble traditions of the medical profession;

My colleagues will be my sisters and brothers;

I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing, or any other factor to intervene between my duty and my patient;

I will maintain the utmost respect for human life; I will not use my medical knowledge to violate human rights and civil liberties, even under threat;

I make these promises solemnly, freely, and upon my honor!”²²

This text was refined, as a result of a few amendments, first at the 22nd Assembly in Sydney in 1968, secondly at the 35th Assembly in Venice in 1983, and the final version was formed at the 46th General Assembly of the World Medical Association in Stockholm²³ in 1994; It should be noted that taking an oath by a doctor is enshrined in the law in Georgia: “Graduates of higher medical education institutions with state accreditation shall take an oath publicly and in the official language, before receiving a diploma. The Declaration of Geneva of the 2nd General Assembly of the World Medical Association of 1948 shall be used as the oath text”. That is why the physician's oath is of special importance in medical practice, it should be

²¹ Ibid.

²² Ibid.

²³ World Medical Association Declaration, <https://www.wma.net/policies-post/wma-declaration-of-geneva/>.

noted that some of its provisions are directly, or with some modifications, reflected in both Georgian and international legal norms.²⁴

It is noteworthy that the Second General Assembly of the World Medical Association (Geneva, Switzerland, 1948) also adopted the International Code of Medical Ethics.²⁵ Associations of doctors from different countries participated in the adoption of these norms. In some countries, medical associations set their standards, however, it should be emphasized that in any particular situation, the doctor himself/herself decides what is ethical and what is not; At the same time, it is important and necessary for him/her to know what is legally correct, or what his/her colleague would have done in a similar situation.

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3. Basic Principles of Medical Ethics

The International Code of Ethics establish six valuable principles:

- Beneficence – The practicing physician must act, solely and exclusively, in the best interests of the patient (*Salus aegroti suprema lex*);
- Non-maleficence – “Do no harm” principle (*primum non nocere*);
- Autonomy – The patient has the right to refuse treatment, or to choose the doctor himself/herself (*voluntas aegroti suprema lex*);
- Justice – The right to distribute health resources in case of their deficiency and to decide to whom and what kind of treatment should be provided;

²⁴ *Gachechiladze, G.*, Medical Personnel as a Subject of Civil Liability (Comparative Legal Analysis), Master's Thesis, defended at TSU Faculty of Law, Tbilisi, 2019, 27, <https://openscience.ge/bitstream/1/1130/1/samagistro%20gachechiladze.pdf>.

²⁵ <https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/>.

- Dignity – The patient (as well as his/her physician) has the right to only behave with dignity;
- Integrity and honesty – The patient has the right not to be deceived and properly provided with information about the disease and treatment. Nevertheless, there are some exceptions, such as the use of a placebo, and so on.²⁶

These ethical principles have been developed for the physician to find a solution for any medical situation.²⁷ Norms of medical ethics are part of medical care, so just observing the law is not enough to provide appropriate service to the patient.²⁸ Consequently, adhering to a doctor's oath and other norms of medical ethics is important to ensure that medical personnel is not imposed to civil liability.

The Council of Europe Convention on Human Rights and Biomedicine and its Additional Protocols²⁹ are a binding legal framework for the countries that have ratified it, including Georgia.³⁰ This Convention recognizes the four fundamental principles of modern medical ethics:

- Autonomy;
- Beneficence;
- Nonmaleficence (“do no harm”);
- Justice.³¹

They were established based on the six basic principles of the Code of Medical Ethics, combined in these four main titles.³² The basis of these

²⁶ See, *supra* note 19.

²⁷ *Gachechiladze, G.*, *supra* note 24, 29-30.

²⁸ *Gzirishvili, D.*, Independent Georgia - Social and Health Protection Systems, Analytical Review, Tbilisi, 2012, 2, http://osgf.ge/files/2012/Book_GEO.pdf.

²⁹ The official text, <https://www.coe.int/en/web/bioethics/oviedo-convention>. For Georgian translation, <https://matsne.gov.ge/ka/document/view/1204413>.

³⁰ *Akhiladze, V.*, (Archimandrite Adam), Bioethics: Genesis, Essence, Futurity. St. King Tamar University of Patriarchate of Georgia, Konrad Adenauer Foundation, Tbilisi, 2012, 81-82, https://www.kas.de/c/document_library/get_file?uuid=d6303fe8-45a8-6f92-d2e2-0631bd3124e2&groupId=269781.

³¹ Steering Committee on Bioethics (CBDI), Guide for Research Ethics Committee Members, Council of Europe, 2020, 10, <https://rm.coe.int/1680307ebe>.

³² The Convention on Human Rights and Biomedicine enshrine the principle of importance of the patient's autonomy, including an obligation to respect the patient's dignity and treat him/her in good faith and with honesty. The physician's duty of care

ethical considerations is the need to respect and protect human dignity, which means recognizing the importance of the human being.

3.1 Principle of Autonomy

Respect for autonomy means the recognition of the human's ability to choose,³³ according to which the interests and well-being of the human must be placed above the interests of society and science. In conflict with other principles, preference should always be given to it.³⁴

“Autonomy means the right of the patient to independently determine all matters of providing medical care to him/her. No one may be subjected to coercive intervention without his/her consent. A person must have the opportunity to issue and revoke consent freely. This rule emphasizes the patient's autonomy [...] in dealing with medical workers and limits paternalistic approaches, under which, based on the principles of beneficence and 'do good, the patient's requests may be ignored by the physician’.”³⁵

In his fundamental work on utilitarian liberalism, John Stuart Mill argued that autonomy is one of the elements of human well-being. The core value of autonomy is human leads his/her own life himself/herself, and not be led by another [instead of him/her], which creates the possibility of self-determination. If fundamental freedoms are not protected, no society, let alone the government, can be free.³⁶ “According to Kant's deontological ethics, respect for autonomy is based on the fact that each person is an unquestionable value and, consequently, the individual can decide his/her

established under the Code of Medical Ethics is reflected in the principle of beneficence under this Convention.

³³ *Akhaladze, V.*, supra note 30, 304-305.

³⁴ supra note 31, 10.

³⁵ *Gelashvili I.*, Principles of Medical Law, Justice and Law, No.2(70), 2021, 38-39.

³⁶ *Lipartia, N., Metreveli, O.*, Informed Consent of Patient as an Element of the Right to Autonomy, Protection of Human Rights and Democratic Transformation of the State, *Korkelia, K.*, ed., with the assistance of the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United States Agency for International Development (USAID), 2020, 155.

fate. Whoever imagines a particular person as a means to an end, violates the autonomy of that person without considering his/her goals”³⁷.

The action of the patient will be considered autonomous only if s/he acts: a) purposefully (intentionally), or according to any scheme, plan; b) understands what exactly s/he is doing; c) without external influences that determine the outcome and course of the actions.³⁸

Informed consent is considered to be the main tool for respecting “patient autonomy”³⁹ “The concept of informed consent provides a common, interactive decision-making process”.⁴⁰ “Informed consent must meet the following prerequisites: a) it must precede any interference when providing medical services and conducting the biomedical examination; b) Consent must be conscious, for which the patient or the subject of the study must be informed of the intervention in advance. In addition, the information to be provided before consent must be comprehensible, easily understandable to the patient and/or his/her legal representative, and clear, simple language should be used when providing the information. (c) The consent shall be given voluntarily, by the free expression of will, without coercion.”⁴¹

“Medical intervention without the consent of a legally competent patient of full age is incompatible with the requirements of the protection of human freedom and dignity;” ⁴² However, the issue of giving consent in case of emergency care is specific, because of failure to provide timely medical care may cause a serious threat to human health and life. Suppose the patient cannot consent and his or her legal representative is not present there cannot be found. In that case, all necessary medical measures must be taken

³⁷ *Bichia, M.*, Features of Protecting the Patient's Personal Autonomy and Giving Informed Consent (Georgian and European approaches), Law and World No.12, Tbilisi, 2019, 52.

³⁸ *Chachibaia, T.*, Realization of Citizens' Constitutional Rights in the Field of Health Care, Tbilisi, 2006, 46, http://www.gnni.com.ge/Module_1.2_Human_Development.pdf.

³⁹ Ibid 54;

⁴⁰ *Lipartia, N., Metreveli, O.*, supra note 36, 156.

⁴¹ *Bichia, M.*, supra note 37, 54.

⁴² Ibid, 56. Case of V.C. v. Slovakia, No. 18968/07, November 8 of 2011, <https://www.globalhealthrights.org/wp-content/uploads/2013/10/VC-Slovakia-2011.pdf>; No. 2b/2951-18 Ruling of the Chamber of Civil Cases of the Tbilisi Court of Appeal of February 28, 2019.

immediately concerning the patient. Here, without informed consent, the physician's actions are dictated by the patient's interests and cannot be considered as neglecting the patient's personality or autonomy.⁴³

3.2 Beneficence and “Do No Harm” Principle

Beneficence and the “do no harm” principle mean to maximize the potential benefit of the medical measure and minimize the potential harm.⁴⁴ It should be noted that some medical interventions may involve some risk, but consent to this harm must be given by the patient himself/herself. In all cases, the balance between the benefits and harms of medical intervention is vital. If there is a negative disproportion, the medical intervention must not be performed.⁴⁵

Before the procedure, all possible risks by the medical personnel must be minimized as much as possible. The risk of impact on personal life must be taken into account. The risk may be not only physical but also psychological harm. Even when the benefits of medical intervention unequivocally outweigh the potential risks, but the latter implies a very high probability of serious harm, the intervention cannot be justified.⁴⁶

The principle of beneficence also implies professional training and professional development of the medical field members. The qualifications of the medical personnel have not so much technical importance, but a moral one. Every member of the medical field should have a constant aspiration to not lag in time in terms of qualifications and can practice following the achievements of modern medicine.⁴⁷

Regarding the principle of “do no harm”, it should be said that it must not be taken literally, because such an understanding forces the doctor to refuse the performance of any kind of intervention. The principle of “do no harm” has to be understood so that the harm that comes from the doctor must be only

⁴³ Ibid 56; *Aslanishvili, K., Djibouti, M., Imedashvili, A., Javakhishvili, G., Kiknadze, N., Meishvili, Z., Mirzikashvili, N.*, Human rights in Patient Care, A Practitioner Guide, Tbilisi, 2011, 229-230.

⁴⁴ *Gelashvili, I.*, supra note 35, 40.

⁴⁵ See, supra note 31. pp. 11-12

⁴⁶ Ibid, 12.

⁴⁷ *Chachibaia, T.*, supra note 38, 23.

inevitable and minimal.⁴⁸ In addition, “it must be distinguished between, on the one hand, only harmful manipulation, but the patient demands it within [his/her] autonomy, and, on the other hand, permitting the patient to be harmed. In the first case, even at the request and consent of the patient, without proper indication and justification, serious damage to health will result in the doctor's liability.”⁴⁹

3.3 Principle of Justice

The principle of justice implies equality and impartiality [towards patients]. In particular, any benefits must be distributed fairly by health care providers. Adherence to the principle of justice is particularly important to countries with limited resources and vulnerable groups.

All the described ethical principles are to protect patients' dignity, rights, safety, and well-being.⁵⁰

4. Standards and Interpretation of Patient Rights

Several important international acts and the Constitution of Georgia⁵¹ The right to inviolability of the human body derives from respect for human dignity, freedom, and the right to personal development. Reinforce the human right to own one's own body and protect it from encroachment by others. In particular, according to Article 5 of the Convention on Human Rights and Biomedicine, an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall be given appropriate information about the purpose and nature of the intervention and its consequences and risks. The person concerned may freely withdraw consent at any time.

According to the preamble to the Declaration on the Patient's Rights, a physician should always act according to his/her conscience and always in the patient's best interests; Equal effort must be made to guarantee patient autonomy and justice.

⁴⁸ Ibid, 29.

⁴⁹ *Gelashvili, I.*, supra note 35, 39.

⁵⁰ Ibid, 12.

⁵¹ No. 786 Constitutional Law of the Republic of Georgia of 1995, <https://matsne.gov.ge/document/view/30346?publication=36>.

Under Article 10 (2) of the Constitution, the physical integrity of a person shall be protected. According to Article 28 (1), a citizen's right to affordable and quality health care services shall be guaranteed by law.

According to the Law on Patient Rights,⁵² every citizen of Georgia shall have the right to receive from any medical care provider medical care that complies with professional and service standards recognized and practiced in the country.

The Law on Health Care⁵³ guarantees the protection of human rights and freedoms in health care and acknowledges the honor, dignity, and autonomy of the patient.

It should be noted that the European Convention on Human Rights does not recognize the right to physical integrity/inviolability. Still, as interpreted, it protects the security of a person (Article 5), as well as a part of the prohibition of torture, cruel, inhuman, or degrading treatment (Article 3), and the norms protecting the right to private life (Article 8).⁵⁴

The European Court of Human Rights in the case of *Pleso v. Hungary*⁵⁵ considered the refusal of forensic medical intervention to be part of an individual's "absolute right to self-determination": based on the inalienable right to self-determination, the patient has the right to refusal of hospitalization or medical treatment, that is, his or her "right to be ill"...

In the case of *V.C. v. Slovakia*, the European Court of Human Rights found a violation of Articles 3 and 8 of the Convention in the event of a sterilization procedure without the patient's consent. According to the court, this action grossly interfered with the patient's physical integrity, as the plaintiff lost the function of reproduction – "The obligation to obtain the informed consent of the applicant did not change with the medical personnel assuming that the applicant would have neglected her health in the future. The paternalistic

⁵² No. 283 Law of 2000, Article 5, <https://matsne.gov.ge/ka/document/view/16978?publication=11>.

⁵³ No. 1139 Law of 1997, Article 4, <https://matsne.gov.ge/ka/document/view/29980?publication=46>.

⁵⁴ Human rights in Patient Care, A Practitioner Guide, Open Society Georgia Foundation, Tbilisi, 2012, 87.

⁵⁵ [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-113293%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-113293%22]}).

manner in which the hospital staff had acted had left the applicant with no option but to agree to the procedure the doctors considered appropriate.”

In the case of *Jehovah's Witnesses of Moscow and others v. Russia*,⁵⁶ The European Court of Human Rights discussed the right of Jehovah's Witnesses to refuse transfusions of blood and blood components, noting: even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her rights protected under Article 8 of the Convention... The freedom to accept or refuse specific medical treatment or select an alternative form of treatment is vital to the principles of self-determination and personal autonomy. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment or to have a blood transfusion. For this freedom to be meaningful, patients must have the right to make choices that accord with their views and values, regardless of how irrational, unwise, or imprudent such choices may appear to others. Thus, free choice and self-determination are themselves fundamental constituents of life. Absent any indication of the need to protect third parties, for example, mandatory vaccination during an epidemic, the State must abstain from interfering with the individual freedom of choice in health care, for such interference can only lessen and not enhance the value of life.

In the case of *Y.F. v. Turkey*,⁵⁷ the European Court of Human Rights has ruled that forced gynecological examination violates Article 8 of the Convention.

Given the acts mentioned above, case law, and ethical principles in medicine, it is indisputable that no one can be provided with medical care without consent. The European Court of Human Rights equates forced treatment with harm to the human body and protects the right to refuse unwanted treatment.

⁵⁶ No. As-1124-1044-2017 Decision of the Supreme Court of Georgia.

⁵⁷<https://hudoc.echr.coe.int/geo/%7B%22appno%22:%5B%2224209/94%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-61247%22%5D%7D>.

Therefore, it is not permissible that a person with a conscious decision-making ability be provided any kind of medical care against his or her own will, even if it is good for his or her health (except for women in childbirth). Still, it is interesting whether the same principle applies to the separation of conjoined twins.

5. Assessment of the Issue in Question

According to the World Health Organization, “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, but also the ability to live a socially and economically productive life.”⁵⁸

As mentioned, every human being, like every conjoined twin, has a right to physical, mental, and social well-being. When it comes to the separation of conjoined adult twins with the ability of conscious decision-making, the personal autonomy of each twin and his/her right to self-determination must be taken into account. In the case of conjoined twins the decision made by each twin, within the framework of personal autonomy and self-determination, due to inborn physical unity, affects not only the health and life of this particular twin but also of the other twin. In the case of the Bijani sisters, mentioned above, the intent of the girls to become separated coincided, but in the case of adult twins having the ability of conscious decision-making, the dilemma arises as to which twins self-determination and personal autonomy should be given preference by the doctor.

In cases where separation surgery of Siamese twins is highly likely to not have a bad outcome for patients and no significant damage to the life and health of any twin, despite the opposition of the other twin, medical personnel must consider the will of the twin willing the operation and perform separation surgery. Our view is based on the premise that, in such a case, the benevolence of the medical intervention unequivocally outweighs the potential risk. It does not involve the likelihood of serious harm.

⁵⁸ See, *Kvachadze, M., Gvenetadze, N.*, Book for Patients “Human Rights and Healthcare” (Guide), Open Society Georgia Foundation, Tbilisi, 2011, 24, <http://www.osgf.ge/files/publications/2010/book.pdf>.

Inseparable bodily unity and causing problems in all aspects of public and private life lower human life quality and cause great mental pain. Physical unity is especially unbearable and painful for the twin who wants a separation when s/he knows that without the likelihood of causing serious harm to them, there is a possibility for separation and s/he cannot use this chance because of the opposition of his/her twin. In such a case, there is no objective and reasonable justification for protecting the interests of the twin who opposes the operation, because of emotional attachment, fear of independent living, the motive of turning anomaly in commerce, or any other motive by which the latter twin may be guided, cannot overweight the interest in the health, well-being and being free from the suffering of the twin, who wants to be separated.

As already mentioned, several international instruments, including the International Code of Medical Ethics, the Convention on Human Rights and Biomedicine, the Declaration on the Rights of the Patient, and, at the national level, the Lawson Patient Rights and Health Care, manifest the duty of healthcare professionals to be committed to protecting the health of the individual, the family and the community as a whole. Medical activities aim to protect, maintain, and restore human health and alleviate suffering. Therefore, in such a case, when we give preference to the will of the twin who wants a separation, our action is dictated by the interests of humanity, freeing from suffering, respect for human dignity, and the well-being of the patient. Of course, no one can be held responsible for the psychological pain they suffer because of a congenital medical anomaly and an inseparable connection. Still, when there is a chance to end a person's psychological suffering, relieve the medical, legal, ethical, or moral dilemma caused by the anomaly, and bring both twins to a normal anatomical state without causing them significant harm, it must be surely realized. Such a solution fully complies with the ethical principles of medical law and can not be considered a violation of the patient's rights.

As for cases where adult twin with the ability of conscious decision-making has different views regarding separation and there is a risk of significant damage to one or both twins as a result of surgery during the operation, or shortly after the operation, if the life of the twin is not in danger in case of non-performance of the surgery, even if one of the twins disagrees, the operation must not be performed. The reason for making such a conclusion is to consider benevolence and the principle of “do no harm”.

The life of every human being is a priceless value, the protection, and preservation of which are of special importance. Thus, it is inadmissible to create a threat to life, even regarding the autonomy and protection of the right to self-determination of the twin. The twin, who opposes the operation, the desire to live fused with another and not to risk life, is completely natural and stems from a human's self-preservation instinct. Consequently, preference should be given to the will of the latter twin. The key point for medical personnel is to protect the patient's best interests. Significant harm to a person and even death, in no case, can be considered to be in the best interest of the patient. No matter whether it may be a low degree, life is superior to death. In such a case, refusing separation is the best solution for patients. Undoubtedly, the twin's life will be preserved by not performing a separation surgery, which, given the pace of modern scientific advances, creates a chance that what is considered an unresolved medical problem today will become easily overcome tomorrow. The way of recovering the conjoined twins, which does not exist at a particular moment, may emerge in the future.⁵⁹

In all other cases, when there is a difference of opinions between the conjoined adult twins with the ability to make conscious decisions, and the proportion between the benefits received and the expected harm cannot be determined, or the balance between them is equal, it would be preferable a decision on the expediency of separation to be made by a court. We believe that resolving such a dispute by the court will maximally ensure the protection of the fair balance of conflicting interests, finding the best solution to the situation, relieving the doctor of ethical and legal dilemmas, releasing the doctor from liability, and excluding the possibility of violation of the rights of the patient.

6. Grounds for Compensation of Damages

The grounds for compensation for damage caused by a medical institution are defined by Article 1007 of the Civil Code of Georgia.⁶⁰ According to this article, the harm caused to a person's health during his/her treatment at a medical institution (outcome of surgical operation or incorrect diagnosis,

⁵⁹ *Todua, N.*, Criminal Law, Special Part I, Meridiani Publishing, Tbilisi, 2011, 54.

⁶⁰ No. 786 Law of 1997, <https://www.matsne.gov.ge/ka/document/view/31702?publication=115>.

etc.) shall be compensated on a general basis. Therefore, in cases of damage to the life and health of a citizen due to medical error, for the occurrence of civil liability, as well as in all obligations arising from a tort, the following elements of damage are defined by Article 992 of the CCG must be established: act, damage, causal link between the wrongful act and the damage, and fault. Moreover, the specifics of each of these components are determined by the nature of the medical activity. The patient's claims for damages against the doctor or the medical institution may arise from the contract and the norms of tort law.⁶¹

Based on the purpose of Article 1007 of the Civil Code, damage that is caused by a wrongful act is subject to compensation. When qualifying the conduct of a medical worker to be wrongful, it is necessary to establish the fact of providing improper medical care. The wrongful act of the tortfeasor includes his/her active actions and omission.⁶²

According to Article 10 (a.a) and (a.b) of the Law of Georgia on Patient Rights, patients or their legal representatives may apply to a court and demand: a) compensation for property and non-property damages resulting from the violation of patient rights or medical malpractice. Violation of a patient's rights implies a violation of his or her autonomy. Ignoring, neglecting his/her interest before providing specific medical care.⁶³

Regarding medical malpractice, it should be said that according to Article 3 (n) of the Law on Health Care, such an act is defined as unintentional diagnostic and/or therapeutic measure inappropriate for the patient's condition, which is a direct cause of harm.⁶⁴

The harm to a patient must not be intentional, otherwise the physician's action will no longer be considered a professional error since such action is punishable under the Criminal Code. A physician's diagnostic or therapeutic measures have to be inappropriate, and unacceptable for the patient's health condition. The doctor is liable only for the medical malpractice and there is

⁶¹ See, No. As-1191-1151-2016 Decision of the Supreme Court of Georgia.

⁶² No. As-260-244-11 Decision of the Supreme Court of Georgia.

⁶³ Law of Georgia on Patient Rights, Article 10.

⁶⁴ Law of Georgia on Health Care, Article 3.

no presumption of fault in his/her activity. The improper actions of the doctor must cause damage to the patient.⁶⁵

For compensation for damage, the existence of a causal link between the wrongful act and the resulting consequence must be clear. The fact that the acts of the medical personnel caused the damage must be reliably established. Ineffective treatment or negative outcomes of the treatment do not themselves (without alternative) cause liability of medical personnel. The damage has to be caused by errors made in the treatment; i.e. in case of proper treatment, even if a negative outcome occurs, the action does not cause the doctor's liability.⁶⁶

Deviation by the physician from the standards established in the science of medicine is considered to be a medical error; violation of generally accepted medical and ethical standards or of the rules defined by legislation, which led to inappropriate diagnostic and/or therapeutic measures for the patient, which in turn became a direct cause of harm to the patient. The physician bears the burden of proof that the patient has been treated lawfully and without error, s/he shall be liable for the incorrect treatment and the negative outcomes of only such treatment.⁶⁷

Therefore, it will be considered a wrongful act if a medical institution makes a wrong diagnosis and provides a treatment that causes harm. The patient is entitled to compensation for damage if 1. the purpose of the medical activity is not achieved (recovery of human health and maintenance of life) and 2. the act of the medical worker does not comply with the medical indications.⁶⁸

According to the existing case law, the burden of an allegation of the facts is imposed on the party participating in the proceedings, who seeks compensation for the damage caused, thus, the aggrieved party. Moreover, the patient must allege and prove that the damage is based on a breach of the

⁶⁵ No. As-260-244-11 Decision of the Supreme Court of Georgia.

⁶⁶ Ibid.

⁶⁷ No. As-1268-1526-09 Decision of the Supreme Court of Georgia.

⁶⁸ No. As-874-1146-05 and No. As-260-244-11 Decisions of the Supreme Court of Georgia.

medical institution's obligation. If his/her explanations are not confirmed, then the medical error will not be proved against the claim.⁶⁹

When imposing civil liability on medical personnel, it is of the utmost importance to consider whether the aggrieved party's actions also contributed to the occurrence or increase of the damage. Under civil law, the harm-doer must be held liable only for his/her guilty act, i.e. his/her liability must be limited to the wrongful act committed by him/her. This follows from Article 415 (1) of the Civil Code, according to which, if the injured person's actions contributed to the occurrence of damage, then the duty to compensate and the amount of compensation shall depend on which party was more at fault for the damages. The patient's fault is precluded by performing the actions provided by law in thoroughly good faith. This primarily means providing information to the healthcare provider for diagnosis, treatment, prophylactic or medical rehabilitation, before any manipulation or procedure. The patient should provide the doctor with complete information about personal data and health status, submit medical documentation reflecting it, and perform all procedures prescribed for treatment.⁷⁰

In the event of bodily injury or damage to health, the victim may also seek compensation for non-pecuniary damage. The damage to a person due to a medical error can be both property and non-property. Pecuniary (property) damage may be manifested by damage to health, additional costs, etc. And moral (non-property) damage manifests in the moral suffering and mental anguish of a person which s/he suffers as a result of a wrongful act.

Under Article 413 of the Civil Code, monetary compensation for non-property damages may be claimed only in the cases precisely prescribed by law, in reasonable and fair compensation. In determining the amount of non-pecuniary damages, the court is guided by the criteria of reasonableness and fairness. Under the established practice of the Supreme Court, compensation for non-pecuniary damage caused by health damage must be determined in a fair and reasonable amount, as it is not impossible to determine the price of health or life of each individual. As the court of cassation noted, the purpose of compensation for moral damages is to alleviate the pain and discomfort

⁶⁹ No. As-111-111-2018 Decision of the Supreme Court of Georgia.

⁷⁰ No. As-260-244-11, 2011 Decision of the Supreme Court of Georgia.

experienced, to some extent. The amount of compensation is determined by the court taking into account the mental, and physical suffering of the victim and the fault of the harm-doer if the given type of redress for damages depends on the guilty act.⁷¹

The court of cassation, in one of the cases, assessed the moral damage caused to the parent by the death of the child and held: It is indisputable that with the death of a young child, the parent suffers significant moral pain related to persistent negative feelings and stress ... Compensation for damage (non-pecuniary damage) caused by moral suffering cannot restore the victims mental state that existed before inflicting damage, but its purpose is to alleviate the suffering caused by the violation of intangible interests, to reduce the severity and intensity of negative feelings.⁷²

In the case of *Sarishvili-Bolkvadze v. Georgia*,⁷³ the European Court of Human Rights considered the claim for moral damages granted to the surviving close relative of the person deceased as a result of medical error, as a form of remedy, and the absence of an enforcing mechanism for its claim deemed to be a violation of procedural part of article 2 of the European Convention on Human Rights concerning civil remedies.⁷⁴

In the cases discussed in the paper, the issue of civil liability of a physician may arise if there is a violation of the basic principles of medical law in providing medical services by him/her to adult conjoined twins capable of conscious decision-making; Neglect of their physical and moral autonomy; Provision of medical care inappropriate with recognized standards of medicine, which is characterized not only by the systematic and technical performance of diagnostic and therapeutic interventions but also by non-compliance with the mandatory volume of diagnostic and therapeutic measures set by medical prescription, that must have been provided in case of proper observance and care to the patient.⁷⁵ As mentioned, the burden of the

⁷¹ No. As-866-816-2015; No. As-95-90-2013; No. As-594- 562-2015; No. As-797-940-2015 Decisions of the Supreme Court of Georgia.

⁷² No. Bs-327-309 (2k-07) Decision of the Supreme Court of Georgia, 16.05.2019; No. As-38-2021 Decision of the Supreme Court of Georgia, 18.05.2021.

⁷³ <https://www.supremecourt.ge/files/upload-file/pdf/sarishvili-bolkvadze-saqartvelos-wi-naagmddeg.pdf>.

⁷⁴ No. As-38-2021 Decision of the Supreme Court of Georgia.

⁷⁵ No. As-260-244-11 Decision of the Supreme Court of Georgia.

allegation and proof of specific facts, under Georgian case law, is imposed on the aggrieved party. Moreover, depending on the harmful consequences caused by the action/inaction of the medical personnel, the patient/patients, their relatives, or their legal representative can claim compensation of damages for both moral and property damage caused to the patients.⁷⁶

7. Conclusion

From a scientific point of view, conjoined twins are one of the oldest and rarest medical anomalies formed due to the incomplete separation of the embryos in the embryonic stage. This medical anomaly has not yet been thoroughly studied from a medical point of view. As it turned out, there is no legislative regulation of issues related to the conjoined twin, not only in Georgia but also in the legal space of many countries around the world.

The case of the *Bijani* sisters is a good example to illustrate how much discomfort and suffering a bodily fusion can bring to an adult Siamese twin. The *Bijani* sisters, when they had their interests and aspired to a normal, independent life, decided to separate at the risk of their lives, even though the state of being not separated was posed no danger to their lives.

The paper discusses various cases where conjoined twins have refused separation because of a possible risk to their lives and various reasons. This shows that, despite their physical unity, the conjoined twins are independent persons with independent thinking aspirations, and interests. Thus, their different opinions on the matter of separation are completely realistic.

The paper assessed the issue of separation of adult conjoined twins capable of conscious decision-making, for cases where separation surgery is not an urgent necessity and each twin has conflicting views on separation. The conclusions presented in the paper derive from the correct understanding of the essence and purpose of the four basic principles (autonomy, justice, beneficence, “do no harm”) generally accepted in the field of medical law; From humanism, respect for the dignity of the patient and his/her fundamental rights.

⁷⁶ No. As-1124-1044-2017 Decision of the Supreme Court of Georgia.

Regarding the issue of damages, it should be noted that according to article 10 of the Law on Patient Rights, the patient or his/her legal representative has the right to apply to a court and demand compensation for property and non-property damages resulting from the violation of the patients rights or medical malpractice, etc. As already mentioned, medical malpractice involves the violation of the standards recognized in medicine by a physician, resulting in negative outcomes. Hence, properly performed treatment precludes breach of the physician's duties, his or her fault, and, consequently, liability, even if the negative outcome arises. As for the fault, in the present case, negligence is the only form of fault for tortious liability.⁷⁷

Violation of the patient's rights means ignoring the patient's will by the doctor, violating his/her autonomy. In the cases discussed in the paper, giving preference to the interests of one of the twins over the other twin is undoubtedly not considered a basis for imposing liability on the physician, since the specific nature of the case precludes the possibility of complying with the intent of both twins at the same time. In such peculiar cases, the physician's responsibility is to determine a fair balance of interests, in-depth assessment of risk, benefit, the volume of possible harm, and other essential circumstances, and find the best solution for both patients. Suppose the doctor fails to fulfill the obligation mentioned above properly, thereby unjustifiably harming the interests of the patients. In that case, it will be created a ground for imposition of civil liability on the doctor.

⁷⁷ *Bichia, M.*, Specificity of Compensation for Damage Caused by a Medical Institution: Theoretical and Practical Aspects, Justice and Law No.2(70), 2021, 102.