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ანგარიშია ნებადროშა შექსრია მხრივ დაამატებით შექსრები არ შეიწინაღა.
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IMPROPER PERFORMANCE OF PROFESSIONAL DUTIES BY A MEDICAL PROFESSIONAL: CURRENT ISSUES OF RESPONSE AND INVESTIGATION UNDER CRIMINAL LAW

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Introduction.

Ukraine, just like many countries worldwide, is concerned about law-based measures to protect human life and health from unprofessional actions of medical staff. Liability for breach of healthcare laws is also mentioned in the Fundamentals of the Ukrainian Laws on Healthcare (hereinafter referred to as the Fundamentals). It is this legislative act (clause d, part 1, Article 6 of the Fundamentals) that establishes the right of every citizen of Ukraine to a quality medical care, including the right to choose a doctor at own discretion, to choose treatment methods according to his/her recommendations and to choose a healthcare institution. Persons guilty of breaching the health protection laws are made liable under the procedure established by civil, administrative, or criminal laws (Article 80 of the Fundamentals) [1].

Over the years of our sovereignty, much has already been done in Ukraine to ensure appropriate delivery of medical care. A significant contribution to this has been made by scholars via their academic research for thesis papers focused on the issues of criminal liability for failure to perform or improper performance by a medical professional of his or her professional duties due to a negligent or dishonest attitude towards them. Scientists analyzed the means and methods for preventing criminal offenses in healthcare; highlighted the correlation of signs of medical and pharmaceutical professionals as the subjects of improper performance of their professional duties; proposed to use the concept of “patient” instead of the term “sick person” used in the Criminal Code (hereinafter referred to as the CC) of Ukraine; and recommended to toughen the punishment.

The works mentioned above mostly analyzed objective and subjective signs of elements of criminal offenses, differentiated them from related criminal offenses and from administrative offenses in this field. However, very insignificant attention was paid to the social reasons of criminalization of the mentioned act and the punishment which would be appropriate where such acts are committed. It is also worth noting that discussions are ongoing in respect of the need to set an autonomous provision to be applied to cases where harm is caused to health and life as a result of improper performance by a medical professional of his or her functional duties. Despite the available academic papers, the issues of responsibility of medical care institutions whose employees caused harm to patient’s health are still a blind spot. The need to investigate into this problem is particularly urgent given that Ukraine has introduced other measures under criminal law applicable to legal entities in cases their employee commits a corruption criminal offense.

It is worth mentioning that the branch-specific literature has focused not only on the criminal-law characterization of improper performance of professional duties by medical or pharmaceutical professionals, but also on certain aspects of investigation of such criminal offenses.

Scientific research was done to improve the methodology of investigation of these criminal offenses. So, M.V. Kapustina studied the criminalistic characteristics of such criminal offenses and the tactical aspects inherent in individual investigative (search) actions and determined the fact to be proven [2]. Furthermore, criminalists explored the tasks of a forensic medical examination and gave recommendations on how to assess conclusions made by experts and mentioned the reasons for commissioning repeated examinations [3,4].

However, the study of the research literature and the materials of investigatory and court practice shows that not all of the aspects have a profound scientific understanding. Further scientific research is needed into the issues of effective response under criminal law to improper performance of duties by medical professionals and the tactical aspects of getting prepared for forensic medical examinations as part of investigation of iatrogenic criminal offenses.

Objective of the study.

Based on the analysis of court practice materials, research theses, and current laws of Ukraine, to propose the ways of improving the criminal law-based measures of response to non-performance or improper performance by a medical professional of his or her professional duties, and also to determine the specific aspects of getting prepared for commissioning of forensic medical examinations as part of investigation of these criminal offenses.

To achieve this goal, the following tasks should be solved:
- to analyze the practice of pre-trial investigation and court trial of improper performance by medical professionals of their professional duties.
- to develop tactical techniques of getting prepared for commissioning of forensic medical examinations as part of investigation of these criminal offenses.
one percent. If criminal proceedings do reach the court trial stage, they often end with acquittal of the person concerned or termination of the proceedings by amnesty or due to expiration of the statutory limitation period for criminal liability. Thus, in 2020, 653 criminal proceedings were registered of which only 4 confirmed the status of a suspect [8] and 2 persons were convicted. A similar situation was in 2019 as well as in earlier years. Thus, in 2019, 669 criminal proceedings were registered, with only 2 of them confirming the status of a suspect, 4 persons convicted, and 1 person acquitted. In 2018, 655 criminal proceedings were registered, of which 3 confirmed the status of a suspect and 2 persons were convicted. In 2017, 725 criminal proceedings were registered, of which 2 confirmed the status of a suspect and 4 persons were convicted. In 2016, 643 criminal proceedings were recorded, of which 2 confirmed the status of a suspect and 5 persons were acquitted [9]. Here it should be noted that according to the court practice, the persons charged with a crime were medical professionals, not pharmacists. This peculiarity of the court practice has been repeatedly highlighted in academic literature [6,7].

- to propose the ways of improving the criminal law-based measures of response to improper performance by medical professionals of their professional duties.

**Materials and methods.**

The materials explored in this study were statutory regulations; research literature; court verdicts; criminal proceedings which reached the court trial stage, and also statistical information.

The set goal has been implemented using general scientific and special methods, and also by the analysis of investigator’s actions in the course of investigating these criminal offenses. Dogmatic, historical-legal and logical methods were used in the study of scientific works, the views of scientists on certain problematic issues of iatrogenic crimes.

The functional method was used in formulating the features of the appointment of forensic medical examinations. The statistical method was used to analyze the results of investigative and judicial practice, to collect and process data obtained from statistical reporting.

The structural-criminalistics method was applied in the development of tactical recommendations for the preparation and conduct of forensic medical examinations.

**Results and discussion.**

Current criminal law, namely, Article 140 of the Ukrainian CC, establishes liability for failure to perform or improper performance by a medical profession of his or her professional duties due to a negligent or dishonest attitude towards them, where this causes harm to health. This provision also criminalizes the actions of a pharmaceutical professional in case of improper performance of his or her duties. As an alternative punishment, the law provides for correctional labor, deprivation of the right to hold certain positions or engage in a certain type of activity, and also for restriction of freedom up to five years and imprisonment up to three years [5].

It should be noted that recorded criminal offenses reach the court trial stage in an insignificant number of cases. Researchers have repeatedly emphasized this fact and given their opinion of this situation [6,7].

Thus, the statistical data analysis shows that there is too large a gap between the number of persons charged with a crime and the number of recorded criminal proceedings under Article 140 of the Ukrainian CC. According to the data of the Prosecutor General’s Office about the situation with investigation of criminal offenses under Article 140 of the Ukrainian CC, a significant number of reports about such criminal offenses is recorded, but the prospects for their trial at court is less than one percent. If criminal proceedings do reach the court trial stage, they often end with acquittal of the person concerned or termination of the proceedings by amnesty or due to expiration of the statutory limitation period for criminal liability. Thus, in 2020, 653 criminal proceedings were registered of which only 4 confirmed the status of a suspect [8] and 2 persons were convicted. A similar situation was in 2019 as well as in earlier years. Thus, in 2019, 669 criminal proceedings were registered, with only 2 of them confirming the status of a suspect, 4 persons convicted, and 1 person acquitted. In 2018, 655 criminal proceedings were registered, of which 3 confirmed the status of a suspect and 2 persons were convicted. In 2017, 725 criminal proceedings were registered, of which 2 confirmed the status of a suspect and 4 persons were convicted. In 2016, 643 criminal proceedings were recorded, of which 2 confirmed the status of a suspect and 5 persons were acquitted [9]. Here it should be noted that according to the court practice, the persons charged with a crime were medical professionals, not pharmacists. This peculiarity of the court practice has been repeatedly highlighted in academic literature [6,7].

It should be noted that Art. 140 of the CC of Ukraine, the legislator pointed to two subjects - medical and pharmaceutical workers, dividing them. This indicates that Art. 140 of the CC of Ukraine describes the composition of criminal offenses, which differ from each other in terms of the subject of their commission. Judicial practice says that people who were held accountable were medical workers, not pharmaceutical workers. This feature of judicial practice has been repeatedly mentioned in the scientific literature [6,7].

Bringing criminal charges against pharmaceutical professionals is even more difficult than against medical professionals. This situation can be attributed to several factors, among which we should mention the imperfection of criminal law standards as such and the insufficiently elaborated methods for investigation of these criminal offenses.

It is noteworthy that committed acts cannot be prevented merely by the criminal law-based measures of response to such acts. Prevention requires a set of measures for regulation of activities involving delivery of medical services.

Criminal law-based measures, if applied to medical institutions, could become one of the levers capable of having an impact on appropriate delivery of their medical services. The national criminal law currently in force excludes this.

Without getting involved in the discussion which has flared up around the applicability of criminal law-based measures to legal entities, we would like to point out that the countries which have introduced a similar form of response to a committed criminal offense do not abandon it but further improve its application rules [10].

### Table 1. Number of registered criminal offenses, as well as persons prosecuted.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total registered criminal offenses</th>
<th>Registered under Art. 140 of the Criminal Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>2021</td>
<td>332 443</td>
<td>565</td>
</tr>
<tr>
<td>2020</td>
<td>360 622</td>
<td>653</td>
</tr>
<tr>
<td>2019</td>
<td>444 130</td>
<td>669</td>
</tr>
<tr>
<td>2018</td>
<td>485 133</td>
<td>655</td>
</tr>
<tr>
<td>2017</td>
<td>523 911</td>
<td>725</td>
</tr>
<tr>
<td>2016</td>
<td>592 604</td>
<td>643</td>
</tr>
<tr>
<td></td>
<td>Charged</td>
<td>Convicted</td>
</tr>
<tr>
<td>2021</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>2020</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>2019</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>2018</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>2017</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>2016</td>
<td>2</td>
<td>5</td>
</tr>
</tbody>
</table>
It is interesting to study the provisions of the Criminal Code of Georgia on criminal liability of legal entities. Unlike Ukraine, the range of crimes which may entail the applicability of measures under criminal law to a legal entity is much wider then in Ukraine.

The experience acquired by foreign countries in this area should be used for improving the legal framework of healthcare in Ukraine. This issue becomes especially critical when in criminal proceedings a lengthy investigation ends with dismissal of charges previously brought against a person because the statutory limitation period for criminal liability has expired. In such cases, the perpetrator keeps on working either at the same medical institution or at another one, and in fact the burden of criminal law measures has no impact either on this person or on the institution where he or she works as a medical professional.

To prevent such situations, some countries, for example, the USA, the UK, Canada, New Zealand, South Africa, prefer the methods under civil law for settlement of claims pertaining to the harm inflicted on patient’s life and health by professionals of healthcare institutions while performing their professional duties. At the same time, in exceptional cases, the use of criminal law measures is still an option. The European experience regarding legal regulation of this issue includes a combination of civil- and criminal-law approaches [6].

This approach is more justified, since, as noted above, along with criminal liability of an individual, it will make possible the criminal law-based response to actions of enterprises, institutions and organizations. This, in turn, will have a strong preventive effect. For example, today we have lots of various kinds of medical content broadcast on TV and on the Internet. The wide reach of such programs highlights the need for discussing the responsibility of program organizers (creators) in the event of adverse consequences [11,12].

It is worth noting that criminal charges may be brought against the perpetrator only following a high-quality investigation of a criminal offense. A forensic medical examination gains particular significance in the investigation of improper performance of professional duties by medical professionals and Article 242 of the Criminal Procedure Code of Ukraine establishes that such examination is mandatory.

To ensure that the said examination is successful, an investigator should master the tactical techniques of getting prepared for it. Determining the circle of experts is one of the major stages of such preparation. The legal literature has repeatedly emphasized the need to engage several experts for forensic medical examinations relating to the criminal offenses under study. The team of experts should include clinical physicians of various profiles: surgeons, obstetricians-gynecologists, neuropathologists, anesthesiologists, infectious disease specialists, others (depending on the type of improper performance of duties by medical professionals) [3]. We share the position expressed by V.V. Franchuk that the comprehensive arrangement of such examinations results from them multitask nature [13].

The Guidance for Conducting a Forensic Medical Examination establishes that such an examination may be conducted exclusively by specialists of state-owned institutions of forensic medical examinations subordinated to the Ministry of Health of Ukraine [14]. It is worth noting that this may have an adverse impact on investigation of such criminal offenses.

Specialists also note that there is actually no independent forensic medical examination in Ukraine and experts who do not compromise on their principles and conduct honest examinations can be called heroes [15].

We believe that one of the ways to solve this problem is to establish the competitiveness of forensic experts. In our opinion, the competitiveness of experts will be possible if it is allowed to conduct forensic medical examinations outside the system of state-owned institutions. We share the position of A.N. Taranova that in this context the primary focus of attention should be on whether an expert has special competency needed for the criminal proceedings rather than on his or her departmental affiliation. The author encourages benefiting from the positive experience of the EU countries which have introduced the institution of private expert examination. We also agree with the author that along with guaranteeing the rights and freedoms of citizens and society, such a model will also allow cutting the budget expenditure for maintenance of state-owned specialized institutions [16].

Furthermore, we believe that the competitiveness of forensic experts will curtail the timing and costs of examinations and will generally improve the quality of examinations.

It should be pointed out that the timing and completeness of these examinations also depends on how many items should be examined. In the context of the mentioned criminal offenses, medical documentation is always the subject matter of forensic medical examinations. It is noteworthy that reliability and good quality of the items provided for examination is one of the prerequisites for a reliable expert opinion [17]. Therefore, collection of medical documentation is one of the major stages in getting prepared for the examination. An investigator should pay attention whether there are signs of forgery, since such documentation, as B.V. Stetsik rightly notes, can be falsified by interested persons [18]. In this regard, such documentation should be seized as quickly as possible to prevent any possible falsification. Furthermore, experts must be provided with the originals of the seized medical documentation.

Mind that today a significant part of medical documentation can be in electronic form. Further digitalization will lead to more medical documents in electronic form. Accordingly, an investigator is faced with the question of how to detect the signs of falsification of digital documents.

Along with the documents, the examination should also be conducted in respect of the individuals (or their corpses) who received improper medical care. If a corpse is buried, it must be exhumed. Only in exceptional cases, after considerable time has passed and the body tissues have completely decomposed (in 1-3 years, complete skeletonization occurs), a forensic medical examination can be made using medical records.

The examination may also be requested in respect of medicines, medical instruments and other items, depending on the type of improper performance of duties by medical professionals.

Another important point in getting prepared for a forensic medical examination as part of the criminal proceedings...
referred to in this study is to formulate the questions to experts. The content of such questions will depend on the case under investigation. It should be noted that such questions should be specific, clear, unequivocal, and clarifying, and not suggestive (i.e., those which already imply the answer). Besides, all questions should be interrelated and asked in a logical sequence according to the procedure of delivery of medical care and its consequences. Legal literature divides the questions put to experts in the criminal proceedings of this type into the following groups:

- about the cause of death or another adverse outcome.
- about the presence or absence of deficiencies in the delivery of medical care.
- about the severity of the harm caused to patient's health.
- about the presence and nature of a causal relationship between the deficiencies and the adverse outcome [19].

An investigator must also mind that law-related questions may not be resolved based on the examination, namely, questions about the presence of elements of a crime, guilt / innocence, or the form of guilt of a certain person.

It is noteworthy that tactically correct preparation for the conduct of a forensic medical examination will not only contribute to the establishment of facts to be proven but will also reduce the number of repeated examinations.

It should also be noted that in Ukraine proposals have been made to adopt the Medical Code which would comprehensively regulate various issues [20]. Concurring with the arguments of the authors that its adoption is requisite, we propose its more precise title - the Medical Code of Ukraine.

Conclusions.

With a view to preventing criminal offenses involving improper performance of professional duties by medical professionals, their duties should be formalized at the legislative level. In the future, the Medical Code of Ukraine may become such a normative act which will comprehensively regulate the rights and obligations of patients as well as of medical professionals.

It would be appropriate to formalize the duties of a medical professional in detail at the legislative level.

It necessary to ensure that current criminal laws of Ukraine provide for the possibility of applying criminal law-based measures to medical institutions in case of improper performance of professional duties by their medical professionals. We believe that it would be appropriate to enshrine at the regulatory level the application of criminal law-based measures to medical institutions in case of improper performance by a medical professional of his or her duties entailing the death of an individual or other grave consequences.

There are some peculiarities in the tactical techniques of getting prepared for forensic medical examinations as part of investigation of the criminal offenses under study that must be taken into account. They are expressed as follows:

- it is necessary to promptly seize medical documentation in order to prevent its falsification.
- medical records should be inspected for the presence/absence of signs of forgery.
- clinical physicians of various profiles should be commissioned for the expert examination.
- it is inadmissible to conduct a forensic medical examination based only on medical documents, except for cases of complete skeletonization of a human corpse.
- questions put to experts should meet the criteria of specificity, clarity, and unambiguousness.

The forensic medical examination in these criminal proceedings should be comprehensive. At the legislative level, allow for a forensic medical examination on an adversarial basis. This will reduce the time and cost of examinations and generally improve the quality of research.

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SUMMARY
IMPROPER PERFORMANCE OF PROFESSIONAL DUTIES BY A MEDICAL PROFESSIONAL: CURRENT ISSUES OF CRIMINAL-LAW RESPONSE AND INVESTIGATION

The purpose of the study - based on the analysis of judicial practice, scientific regulations, and current laws of Ukraine to suggest the ways of improving the criminal-law response measures to failed or improper performance of professional duties by a medical professional, and to determine the specific preparations for appointment of forensic medical examinations in the course of investigation of the criminal offenses concerned.

The materials of the study were statutory regulations; scientific research literature; court verdicts; criminal proceedings which were considered by court, and also statistical information.

The set purpose has been implemented by using the historical, dogmatic, system structural and logical methods for the research and also for the analysis of investigator’s activities while investigating the criminal offenses concerned.

In this paper the author concludes that criminal offenses related to improper professional duties performance by a medical professional may be prevented by formalizing such duties at the legislative level. In the future, such a statutory instrument may be a Medical Code of Ukraine which will comprehensively regulate the rights and duties of patients as well as of medical staff.

The current criminal laws of Ukraine should provide for the possibility of applying criminal-law measures to medical institutions in case someone of their medical professionals improperly performs his/her professional duties.

It is expedient to make detailed formalization of the duties which a medical professional has at the level of separate legislative acts. For this purpose, it is necessary to adopt a number of legislative acts, rather than departmental ones, which would consolidate these duties with due regard for the development level of the healthcare branch.

Statutory enshrinement is needed in respect of the application of criminal-law measures to medical institutions in case someone of their medical professionals improperly performs his/her professional duties and this results in death of a person or other serious consequences.

The tactics of preparations for the appointment of forensic medical examinations in the course of investigation of the criminal offenses concerned have certain specific features, in particular:
- medical documentation should be scrutinized for the presence/absence of signs of forgery.
- clinicians with different specializations should be engaged for expert examination.
- it is inadmissible to make forensic medical examination based only on medical documents, except for cases of complete skeletonization of a human corpse.
- the questions which experts are asked should meet certain criteria.

Keywords: Improper performance of professional duties by a medical professional, criminal liability, crime investigation, medical examination.

РЕЗЮМЕ
НИЕМЯЯЕ ИСПОЛНЕНИЕ ПРОФЕССИОНАЛЬНЫХ ОБЯЗАННОСТЕЙ МЕДИЦИНСКИМ РАБОТНИКОМ: АКТУАЛЬНЫЕ ВОПРОСЫ УГОЛОВНО-ПРАВОВОГО РЕАГИРОВАНИЯ И РАССЛЕДОВАНИЯ

Цель исследования - на основании анализа материалов судебной практики, научных положений, действующего законодательства Украины предложить пути усовершенствования мер уголовно-правового реагирования за неисполнение или ненадлежащее исполнение медицинским работником своих профессиональных обязанностей, а также определить особенности подготовки к назначению судебно-медицинских экспертиз при расследовании исследуемых уголовных правонарушений.

Материалами исследования стали нормативно-правовые акты; научная литература; приговоры суда; уголовные производства, рассмотренные судом, а также статистическая информация.

Реализация поставленной цели осуществлена с помощью исторического, догматического, системно-структурного и логического методов при исследовании, а также анализе деятельности следователя в процессе расследования указанных уголовных правонарушений.

В работе делается вывод о том, что для обеспечения предотвращения уголовных правонарушений, связанных с ненадлежащим исполнением профессиональных обязанностей медицинским работником следует формализовать их обязанности на законодательном уровне. Таким нормативным актом в будущем стать Медицинский кодекс Украины, в котором будут комплексно регламентированы права и обязанности как пациентов, так и медицинского персонала.

Необходимо в действующем уголовном законодательстве Украины предусмотреть возможность применения мер уголовно-правового характера к медицинским учреждениям в случае ненадлежащего исполнения профессиональных обязанностей его медицинским работником.

Целесообразно на уровне отдельных законодательных актов подробно формализовать обязанности медицинского
работника. Для этого необходимо принять ряд законодательных, а не ведомственных актов, которые бы с учетом уровня развития медицины, закрепили эти обязанности.

При подготовке к назначению судебно-медицинскских экспертиз при расследовании исследуемых уголовных правонарушений необходимо учитывать следующие особенности. Они выражаются в том, что:
- необходимо оперативно изымать медицинскую документацию с целью недопущения ее фальсификации;
- медицинская документация требует осмотра на наличие/отсутствие признаков подделки;
- экспертное исследование требует привлечения врачей-клиницистов с различной специализацией;
- недопустимо, кроме случаев полного скелетирования трупа человека, проведение судебно-медицинской экспертизы только по медицинским документам;
- вопросы, которые ставятся перед экспертами, должны соответствовать критериям конкретности, четкости, ясности.

Судебно-медицинскская экспертиза по уголовным производствам должна иметь комплексный характер. На законодательном уровне разрешить проведение судебно-медицинской экспертизы на состязательных началах. Это позволит сократить сроки, себестоимость проведения экспертиз и в целом повысить качество исследований.

Необходимо в действующем уголовном законодательстве Украины также предусмотреть возможность применения мер уголовно-правового характера к медицинским учреждениям в случае ненадлежащего исполнения профессиональных обязанностей их медицинским работником.

Следует, по нашему мнению, нормативно закрепить, применение мер уголовно-правового характера к медицинским учреждениям в случае ненадлежащего исполнения своих обязанностей, которое повлекло за собой смерть лица либо иные тяжкие последствия.

Ключевые слова: ненадлежащее исполнение профессиональных обязанностей; судмедэкспертиза; уголовная ответственность, расследование уголовных преступлений, судебно-медицинская экспертиза.