

MEDICAL ERROR AND LIABILITY FOR IT IN SOME POST-SOVIET COUNTRIES (BELARUS, KAZAKHSTAN, MOLDOVA, UKRAINE)

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ABSTRACT

Introduction: Infliction of harm to life and health due to medical errors is common for the whole world and post-Soviet countries, in particular. The problem of these errors is one of the most important in medical law, although there is no unified concept of it. A small number of sentences in cases of criminal negligence of medical professionals indicates a high latency and often unprovability of this crime in a number of post-Soviet countries.

The aim: To disclose the objective and subjective prerequisites of a medical error, reasons for its occurrence, to establish the grounds for criminal liability of medical professionals in case they commit an error and to examine the judicial practice in this regard. Also, to define the concept and types of circumstances exempting criminal liability and their impact on criminal liability issues concerning medical professionals.

Materials and methods: The study is based on the Belarusian, Kazakh, Moldavian and Ukrainian statutory acts as well as international acts, the European Convention for the Protection of Human Rights and Fundamental Freedoms, case law of the European Court of Human Rights (ECHR), national court judgments. Such methods as dialectical, comparative, analytic, synthetic and comprehensive have been used in the paper.

Review: On the basis of the study, it has been established that there is no unified concept of a medical error, medical personnel are fairly brought to criminal liability only if they commit an unjustifiable error in the presence of all the mandatory elements of a crime provided for in the relevant article of the Criminal Code. At the same time, it is extremely difficult to prove existence of such an error. Besides, at the state levels, causes and mechanisms of occurring errors have not been revealed, they are not even discussed, which makes it impossible to outline measures to prevent them or reduce their frequency and degree of danger.

Conclusions: The struggle against medical errors should encompass a number of such activities as standardization of clinical treatment protocols, further education of medical professionals and lawyers in regard to patient safety, thorough investigation of each incident in order to exclude a justifiable error or circumstances exempting criminal liability. Equitable, severe and uncompromising punishments for perpetrators should be an effective means preventing commission of crimes in medicine.

KEY WORDS: medical malpractice, medical crime, criminal liability, impunity

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INTRODUCTION

Causing harm to life and health due to medical errors is quite common. Medical errors lead to such negative consequences as deterioration of patient health, loss of time for faster and more effective treatment or death. On the other hand, even when there is no error or there is a justifiable one, quite often patients or their relatives accuse a doctor and/or junior medical personnel of negligence. Therefore, it is very important for both parties, as well as

for society, to have a clear, unified mechanism that would help to establish presence or absence of a medical error in actions of a doctor and/or junior medical personnel.

The right to life and health is among the universally recognized, fundamental, inalienable human rights and freedoms that are subject to state protection both internationally¹ and domestically². At the same time, a number of international conventions have not been signed by the countries considered. In particular, these are: the European Convention on Social and Medical Assistance,

¹ At the international level, the right to health is protected by the Universal Declaration of Human Rights, 1948 (Art. 25), the International Covenant on Economic, Social and Cultural Rights, 1966 (Art. 12), the Convention on the Rights of Child, 1989 (Art. 24), the Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Art. 5), the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (Art. 12 and 14), the Convention on the Rights of Persons with Disabilities, 2007 (Art. 25).

² The Constitutions of Belarus (Art. 2), Kazakhstan (Art. 1), Moldova (Art. 1) and Ukraine (Art. 3) stipulate that a person, his life and health are recognized as the highest value. They also provide that citizens of the Republic (Art. 45 of the Constitution of Belarus, Art. 29 of the Constitution of Kazakhstan) or each person (Art. 24, 36, 47 of the Constitution of Moldova, Art. 49 of the Constitution of Ukraine) are guaranteed the right to health protection and medical care.

1953, the Agreement on the Exchange of War Cripples between Member Countries of the Council of Europe with a view to Medical Treatment, 1956, the Agreement on the Temporary Importation, free of duty, of Medical, Surgical and Laboratory Equipment for use on free loan in Hospitals and other Medical Institutions for purposes of Diagnosis or Treatment, 1960, the European Agreement on Mutual Assistance in the matter of Special Medical Treatments and Climatic Facilities, 1962, the European Agreement on the Exchanges of Blood-Grouping Reagents, 1962 and others.

Recently, the media has been paid increased attention to occurring medical errors which, in some cases, lead to extremely unfavourable consequences for patients. The number of legal actions on this subject has also significantly increased. However, not a single newspaper article or television program has revealed the causes and mechanisms of the errors that have occurred, but they have not even been discussed, which does not allow for planning measures to prevent them or reduce their frequency and degree of danger. As a rule, both journalists, legislators and individual politicians advocate the increasing administrative and criminal accountability for errors by means of tightening current legislation. Still, the problem under consideration is so specific that it cannot be solved by only prohibitive or punitive measures. In their works, well-known scientists point out other ways to solve it [1, 2]. This is shown by fairly extensive legislation providing for a different degree of liability for medical errors, but not affecting a reduction of their frequency. The ECHR also arrives at the same conclusions pointing out that legal system should provide victims with an opportunity to receive an appropriate redress using exclusively remedies in the civil courts or in combination with remedies in the criminal courts. Disciplinary measures may also be envisaged [3, 4].

THE AIM

The paper is aimed at identifying types of medical errors, reasons for committing them in post-Soviet countries, studying the legislation according to which medical personnel may or may not be held criminally liable as well as judicial practice on this issue, and also proposing ways to solve the identified problems.

MATERIALS AND METHODS

The paper is based on the Belarusian, Kazakh, Moldavian and Ukrainian statutory instruments, decisions of the ECHR, scientific articles. Additionally, statistical data, conclusions of experts, judicial practice, doctrinal ideas and views on this issue have been used. In addition, the paper is based on dialectical, comparative, analytic, synthetic and comprehensive research methods.

REVIEW AND DISCUSSION

Such a branch as medical law regulates the relations developing between the state, a medical institution and a

medical professional performing his professional (services) duties at the institution, between medical professionals, as well as the relationship between a patient and a medical professional and/or a medical institution and the state. The problem of medical errors is one of the most important in medical law.

There is no single concept of medical error. At the same time, there is a number of its scientific definitions. In this way, on the website of the World Health Organization (hereinafter, the WHO), it is noted that a medical error is “a medical intervention the intended consequences of which do not occur. They are preventable defects in the health delivery system” [5]. In science, there is a significant number of versions of this concept, from a version of professional error to which a medical professional has the right up to a medical violation, an unlawful deviation from implementation of medical standards [6, 7].

It is equally important to understand that the classification of all medical errors into justifiable (a good faith error) and unjustifiable is of legal importance since the former have no consequences in the form of criminal prosecution, unlike the latter, as there is no sign of culpability. That is, there is an unguilty wrongdoing.

Thus, the occurrence of medical errors has both objective and subjective prerequisites. Objective ones are related to factors that are independent of a medical professional's personality: poor-quality medicines, a breakdown or lack of medical equipment, physiological characteristics of a patient's body, a selected approved (officially recommended) option of medical care which did not result in an expected positive effect in a particular case, etc. Subjective prerequisites include experience or lack thereof, a doctor's professional skills, failure to comply with instructions and standards, personal doctor-patient relationships, that is, the degree of their mutual trust. For instance, in 2002-2016, the Commission on study of lethal consequences of the National Military Medical Clinical Center (Ukraine) has identified 288 defects and their causes in 2,300 patient medical records made at the hospital stage. The causes of medical errors were both objective (46.8%) and subjective (53.2%). At the same time, there were 14.41% of defects that affected the lethal outcome. Among the objective reasons, there were delays in seeking medical care, objective difficulties in providing assistance (lack of medicines, impossibility of carrying out certain procedures, etc.). Among the subjective reasons, there were as follows: incomplete patient examination, incorrect assessment of clinical data, insufficient professional skills of medical personnel [8, p. 117]. The researchers also attribute to subjective reasons inadequate attention of medical professionals to patients. They believe that social factors contributing to the indifference are as follows: underfunding of medical institutions, lack of decent wages and shortage of qualified personnel, equipment and medicines as well as complexity of work caused by the above factors [9, p. 166]. The need for a high level of education has also been indicated [10, p. 860; 11, p. 133] with which we absolutely agree. Therefore, it is necessary to introduce separate tutorials and practical courses on patient safety for training both young medical professionals and experienced

personnel as long as according to the data surgeons leave foreign objects (tampons, instruments) in patient body after a surgical intervention up to 39 times and incorrectly perform surgical interventions up to 20 times every week. It is also known that such “errors” are more often committed by experienced surgeons aged 40-49 years [9, p. 167].

In connection with the above, first of all, it is necessary to establish whether a committed error is justifiable or not. A *justifiable error* means that with careful and conscientious attitude, a medical professional could not avoid this error due to certain objective and/or subjective reasons. In particular, a surgeon on duty was acquitted by the court because at the time of the examination of a 13-year-old patient after a car accident, he did not find any indications for emergency surgery. Data of analysis and research were without pathological findings, an ultrasound scan showed no damage to internal organs or free fluid. In the morning, the patient was discharged from hospital. In the evening, being impaired, she was re-admitted to hospital and died a month later. The doctor was charged with criminal medical negligence, although the court reasoned that, for objective reasons, he could not immediately determine a diagnosis, namely, a pancreatic contusion within 12 hours after receiving the injury by the patient due to the car accident. According to research in practice, diagnosing such injuries only on the basis of clinical evidence is rather difficult. A correct diagnosis can be determined only in single observations [13].

So, if a medical error is justifiable, it excludes liability of a medical professional. Having established its absence, it is also necessary to exclude a possibility of presence of circumstances exempting criminal liability, namely, extreme necessity and a risk related act.

Extreme necessity means causing harm to lawful interests in order to eliminate a danger directly threatening a person or a person's or other persons' rights protected by law, as well as public or national interests if this danger could not be eliminated by other means in these settings and if there was no exceeding the limits of extreme necessity herewith. There is legislative consolidation of this circumstance in Art. 36 of the Criminal Code (hereinafter, the CC) of Belarus, Art. 34 of the CC of Kazakhstan, Art. 38 of the CC of Moldova, Art. 39 of the CC of Ukraine which emphasize that an act committed in such a state is not wrongful.

In general, what is meant here is that medical profession, its specific features connected with providing urgent (emergency) medical assistance (anesthesiology, surgery, emergency cardiology etc.) is often related to the concept of extreme necessity since medical professionals' actions are aimed at eliminating a danger to human life. In such cases, to exempt criminal liability of a medical professional for his actions, it is necessary to indicate the criteria for eligibility of the act in regard of extreme necessity in medical activities [14]. A danger has been determined as real if a patient's pathological conditions requiring urgent medical care related to doing harm to his health as an injury or trauma directly threatens his life and health. This applies only to those medical interventions that are urgent

since what is meant here is human life, and any delay can lead to death. All other forms of providing medical care, which are not of extreme necessity, cannot be regarded as those excluding criminal liability [14].

A *risk related act* is an act that does not cause harm to lawful interests if such an act was committed under conditions of justifiable risk to achieve a goal beneficial to society which is not wrongful. This is another reason exempting criminal liability of a medical professional which is enshrined in Art. 39 of the CC of Belarus, Art. 36 of the CC of Kazakhstan, Art. 40 of the CC of Moldova, Art. 42 of the CC of Ukraine. Medical profession is connected with the need for experimentation in certain situations. It is necessary both for the development of medical science and saving a person's life and health [14].

A risk related act in the medical sphere will be legally acceptable under the following conditions. Harm to health is done to achieve a goal beneficial to society. The risk is directed towards the development of medical science or saving a person's life and health. This goal cannot be achieved by conventional means bearing no risk. If the person could be provided with some assistance in an ordinary, traditional way, bearing no risk, then, in this case, the medical professional's acts while causing harm to the person's health would be considered criminal. The medical professional considers the measures he has taken to be sufficient to prevent causing harm to the patient's life and health.

The risk will be justified under all these conditions; this will become a circumstance exempting criminal liability. It should be singled out that for a medical professional, providing for a possibility to use new methods of treatment without any fear of being prosecuted is a big advantage in the criminal law regulating medical activity and, as a result, it is a key factor for the development of medical law and medicine itself [14].

It is also necessary to exclude a *casus* (fortuitous event) characterized by the absence of culpability of a medical professional. After all, in the provision of medical care, even with the most conscientious attitude of medical professionals to their professional duties, it is sometimes impossible to avoid fortuitous events. In medical practice, fortuitous events are most commonly caused by the fact that a patient has an atypical progression of a disease associated with individual characteristics of his body, an unusual anatomical structure or congenital anomalies, allergic reactions to diagnostic manipulations or medicines [6, p. 83].

Only having excluding a justifiable error, *casus* and circumstances exempting criminal liability, it is necessary to determine elements of such a crime as non-performance or improper performance of professional duties by a medical professional (Art. 162 of the CC of Belarus, Art. 317 of the CC of Kazakhstan, Art. 213 of the CC of Moldova, Art. 140 of the CC of Ukraine). These are the elements of a crime that constitute grounds for criminal liability for committing an unjustifiable medical error. In this case, there have to be serious consequences for a patient.

Thus, an *unjustifiable medical error* is an egregious error associated with negligence, carelessness of a medical professional which has resulted in serious consequences.

It is impossible to establish the entire volume of errors committed worldwide, therefore lawyers, researchers and civil organizations focus their attention on unjustifiable errors. Studies have shown that a lethality risk due to a medical error or medical negligence is dozens and sometimes hundreds of times higher than a risk of dying in a car accident. The experience of medical lawyers and organizations dealing with protection of patient rights, analysis of a significant number of medical records in the course of judicial proceedings has shown that up to 50-70% of official information documented in medical records is completely or partially false [15]. The WHO notes that “medical errors occur right across the spectrum, and can be attributed to both system and human factors. The most common adverse safety incidents are related to surgical procedures (27%), medication errors (18.3%) and health care-associated infections (12.2%). Yet, in many places, fear around the reporting of errors is manifested within health care cultures, impeding progress and learning for improvement and error prevention” [16]. The Institute of Medicine (US) points out that about 100,000 people die in hospitals each year as a result of medical errors [7]. Other sources say that in the United States, medical errors are ranked number three among the main causes of death after cardiovascular and oncology diseases [17]. In Belarus, the Department of Complex Examinations of the State Forensic Examination Committee annually examines more than 100 cases of medical errors, mainly related to claims concerning surgeons, obstetricians-gynecologists, anesthesiologists-resuscitators, emergency medical specialists [18, p. 2]. About 6,000 inconsistencies of pathoanatomical and clinical diagnoses are also recorded annually, and there are only 60-65 validated complaints in regard of them. But, in this case, there should be at least 100 times more validated complaints than official statistics fix [19]. In 2017-2018, in Kazakhstan, there were 24 judicial proceedings under Art. 317 of the CC of Kazakhstan, and the charge was brought against 39 persons. 5 acquittals and 34 convictions were issued [20]. In 2018, in Moldova, there were 8 judicial proceedings under Art. 213 of the CC, the charge was brought against 9 persons. No acquittal was issued [21]. Official statistics of medical errors in Ukraine is missing. And only isolated cases become known to the public mainly through the media. At the same time, Ukrainian medical professionals are confident that every second case is launched against them without any grounds [22]. Unlike them, there is a common belief that the probability of bringing a medical professional to justice is extremely small. In 2017-2018, in Ukraine, the courts issued 17 sentences under Art. 140 of the CC, of which 2 are acquittals and 15 are convictions [23].

As a result, bringing medical professionals to criminal liability for unjustifiable errors is possible only under the following conditions: 1) an action (act or omission) was clearly erroneous, contrary to generally accepted rules for the provision of medical care and services; 2) a medical professional could and should have understood and predicted that his action was wrong and could cause harm to health

(life) of a patient; 3) an action caused serious consequences, from harm to health of medium gravity (Part 1 of Art. 317 of the CC of Kazakhstan), serious bodily harm/serious injury to health (Art. 162 of the CC of Belarus, Part 2 of Art. 317 of the CC of Kazakhstan, Art. 213 of the CC of Moldova, Part 1 of Art. 140 of the CC of Ukraine) to introduction of HIV infection (Part 2 of Art. 162 of the CC of Belarus, Part 5 of Art. 317 of the CC of Kazakhstan) or death of a patient (Part 2 of Art. 162 of the CC of Belarus, Part 3 of Art. 317 of the CC of Kazakhstan, Art. 213 of the CC of Moldova, Part 1 of Art. 140 of the CC of Ukraine).

In this case, it is of top priority to establish a medical professional's duties to act in a certain way and a viable possibility of its implementation. The duties are detected by identifying compliance/non-compliance with clinical protocols. A clinical protocol is an instruction for diagnosing and treating a patient. But nowadays in Ukraine, international, national and local clinical protocols are in force at the same time [24]. In practice, their application is complicated by lack of official translation of international protocols, politicization and ideological bias of national ones and primitivism of local ones.

In the meantime, in the case of *Lopes De Sousa Fernandes v. Portugal* dated 19 December, 2017, the ECHR “has consistently emphasised that, where a Contracting State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, matters such as an error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient are not sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life” [25]. However, in some countries, for instance, in Ukraine, the majority of criminal proceedings in regard of medical errors do not reach the trial stage due to lack of a clear distinction between criminal and lawful actions of a medical professional. Primarily, it indicates gaps in the legislative techniques and a low level of professional skills of law enforcement officials as they allow erroneous or deliberately incorrect legal treatment of actions committed by medical personnel. All this may indicate the deficiencies in the regulatory framework meant by the ECHR.

Moreover, experts (lawyers) emphasize the extreme complexity of investigating criminal cases against medical professionals which is primarily due to the need to clarify a significant number of specific medical issues. This is especially true for collection and examination of medical records since they contain specific terms and are a source of medical confidentiality (they require a special procedure for accessing them). This is separate difficulty in conducting a forensic medical examination since far too often experts temporize with its conduct, sometimes for several years, abusing their exceptional powers: as evidenced in practice, experts rarely adhere to the established deadline. According to the researchers, the period of pre-trial investigation of such cases is quite long (it takes from 1-2 to 4-7 years from the moment when a crime is committed to delivery

of a judgment) [26, p. 89]. Among other things, in the case of *Yirdem and Others v. Turkey* (No. 72781/12), the ECHR has recently noted that incomplete investigation of a patient's death due to a forensic medical examination is in violation of the Convention [27].

In case of inflicted injury, the issue of damages is raised. The ECHR adheres to the position that a prompt examination of cases concerning death in a hospital setting is necessary. In the decision of in the case of *Byrzykowski v. Poland* dated 26 June 2006, the Court pointed out that "the knowledge of facts and possible errors committed in the course of medical care should be established promptly in order to be disseminated to the medical staff of the institution concerned so as to prevent the repetition of similar errors and thereby contribute to the safety of users of all health services" [28].

Apparently, the criminal legislation of the post-Soviet countries contains a possibility of bringing to account a medical professional who has made an unjustifiable, egregious error. And yet nowadays, in medical law, there are many contradictions and gaps. It is rather difficult to prove the guilt of a doctor, medical personnel or medical institution since it requires special knowledge and professional skills. Unfortunately, laws and statutory acts that should provide a citizen with the right to life and ensure his health are interpreted differently and often, according to the experience, not in favour of patients. It is significant that under Art. 317 of the CC of Kazakhstan, 15 of 34 persons found guilty were exempted from criminal liability due to the expiration of the statute of limitations, 10 persons were amnestied and a suspended sentence was imposed on 5 convicts, which is an example of the ineffectiveness of current legislation and activities conducted by law enforcement agencies and the court. In other words, only 4 medical professionals received a real punishment, 2 of which received a suspension for 5 years and 1 was put on probation [20]. In 2018, in Moldova, under Art. 213 of the CC, the courts heard 8 cases of which 2 were dismissed due to the expiration of the statute of limitations, 2 - in connection with amnesty. 4 convicts were put on probation as there was a conditional sentence. No medical professional received real punishment [21]. In 2017-2018, in Ukraine, under Art. 140 of the CC, courts issued 15 convictions, although 6 convicts were exempted from criminal liability due to the expiration of the statute of limitations, 3 persons were amnestied and 3 persons were put on probation. Only 3 medical professionals received real punishment [23]. In this regard, there is also public opinion on the impunity of medical professionals [29]. We believe that there should be a harsh and uncompromising punishment for an unjustifiable medical error. It should be expressed in real facts of convicting and sentencing persons guilty of committing the errors to real prison terms. Furthermore, criminal punishment should necessarily provide for termination (cessation) of the employment in medicine of convicted persons. In addition, enhancement of the forensic examinations should be the key to the effectiveness of punishment for such errors. Actually, the

forensic examination has become a crucial element on which it depends whether there is a conclusion on evidence of elements of a crime committed by a medical professional or not, which is unacceptable since an influence of such an adverse factor as the corporate solidarity of medical professionals on the results of the examination cannot be ignored. In case of an unjustifiable medical error, positive characteristics should not be taken as the basis for making a decision on exemption of criminal liability. In this matter, the severity of a crime committed, reasons for committing an error, a convict's professional skills, his actions aimed at minimizing the harm done to patient health, etc. should be the crucial factors.

CONCLUSIONS

Thus, it should be noted that the problem of crime and criminal liability of medical professionals is one of the most controversial topics. It should be pointed out that the active criminalization of medical activities, introduction of new elements of a crime related to medicine and tightening sanctions in criminal law are not effective ways to combat medical errors. The issue of struggle against them is rather difficult, therefore we believe that a complex of measures should be taken which are as follows: 1) a clear legal and regulatory framework, uniform harmonized and adjusted clinical treatment protocols; 2) harsh and uncompromising punishments for both immediate subjects of a crime and persons found to conceal the facts within the framework of the vicious system of conspiracy of silence existing among hospital personnel (adherence to the principle of un-avoidability of punishment); 3) compensation for damage through civil remedies; 4) solving the problem of forensic medical examination and 5) additional consideration of the education of medical professionals and lawyers in the field of patient safety.

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