

# Professional Negligence When Providing Medical Care: Criminal and Procedural Aspects

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## Abstract

**Introduction.** Reform in the medical field is getting especially topical in the context of the Covid-19 pandemic, which has exposed the areas of concern that existed before. Professional negligence of health workers is an issue that needs to be improved in terms of statutory regulation

**The aim.** Research of criminal and procedural aspects of professional negligence when providing medical care.

**Materials and Methods.** Modern literature sources and normative legal documents; method of theoretical analysis and conclusions systematization; comparative law and system-analytical method.

**Findings and Discussion.** The main issues arising during “medical crimes” investigation: the need to quickly obtain the decision of the investigating judge on temporary access to the stuff and documents; corrupt schemes, destruction of evidence; the difficulty of distinguishing negligence from medical error, accident and justified medical risk.

**Conclusions.** Areas of improvement of normative and legal regulation of cases of medical workers negligence are the following: development of unified methodical recommendations concerning medical crimes qualification, which can help to give a correct criminal and legal assessment of medical workers’ illegal activity.

**Keywords:** *Professional negligence, criminal liability, medical worker, legal regulation, criminal case.*

## Introduction

The modern sector of medical services has changed significantly in the context of the Covid-19 pandemic. Many countries implement reforms in the health sector, provide medical care and legal support to health professionals. The issue of medical services quality is extremely important in today’s world, as the coronavirus

pandemic has exposed the acute and topical problems existing before the pandemic. Different countries around the world have different approaches to the legal regulation of disputes arising as a result of inflicting harm to health and negligence of health professionals. For example, the United States, New Zealand, Canada, and the United Kingdom resolve such disputes mostly through civil law methods. Other countries, such as Japan, Saudi Arabia, Ukraine, Russia, and Belarus, in most cases deal with medical negligence disputes within criminal law. European countries combine the application of civil and criminal law in resolving health professionals’ negligence cases. Existing shortcomings in the system of legal regulation of inflicting harm to

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health and negligence of medical workers require improvement of criminal law, which determines the significance of the research topic.

**The aim.** Research of criminal and procedural aspects of professional negligence when providing medical care.

**Materials and methods.** To write the article, modern literature sources and normative-legal documents regulating the sector of medical services provision, detection of professional negligence of medical workers and establishment of criminal liability for professional negligence of medical workers were used. To achieve the set goal, comparative law and system-analytical methods are used; method of theoretical analysis and systematization of conclusions.

**Findings and discussion.** Right to life is a fundamental right of every person, which is complemented by the rights to health, honor, dignity and freedom. One of the guarantees of the above rights is the establishment of responsibility in the field of health care for the doings threatening public values, including life and health of the patient.

The type of legal regulation mechanism depends on the specifics of the health care systems of a particular state, its legal traditions and the purpose of bringing to a particular type of legal liability. There are different approaches to resolve the issue concerning institution of criminal proceedings against medical workers for professional crimes. Thus, in the vast majority of states, the liability of such entities arises according to the general rule providing liability for inflicting harm to life and health. At the same time, the criminal legislation of other states includes special provisions, the subjects of which are exclusively medical workers<sup>1</sup>.

Initiating criminal proceedings against health professionals is common in some countries. Thus, in the United Kingdom between 1990 and 2003, twenty-three criminal cases were instituted against doctors for gross negligence that caused a patient's death. There are also cases of doctors being prosecuted for similar crimes in Canada, New Zealand and France<sup>2</sup>.

According to the General Prosecutor's Office of Ukraine, the most common crime is a crime specified

in Art. 140 of the Criminal Code of Ukraine, in respect of which only in February 2019, 130 criminal offenses were registered, but in 23 cases criminal proceedings were ceased. Last year, 99 criminal offenses were registered under this article, and 3 criminal proceedings were ceased in the case<sup>3</sup>.

It stands to mention that according to the data of the Unified State Register of Court Decisions, over the past 10 years, the largest number of charges were brought against obstetricians-gynecologists (about 30%), surgeons (about 23%), physicians (12%), anesthesiologists (11%)<sup>4</sup>.

Examining the outcome of open criminal cases concerning improper performance of professional duties by medical workers, V. Franchuk notes that courts in Ukraine have proved the guilt of medical workers in 109 (80.8%) cases. Acquittals were delivered by the courts in 8 (5.9%) cases, the other 18 (13.3%) cases were returned for further investigation due to inconsistency of the evidence collected during the pre-trial investigation or due to lack of established facts in this case. Such decisions were recorded as a result of the trial of 14 (10.4%) criminal cases. In another 3 (2.2%) cases, doctors were released from criminal liability due to the admitting to bail of the workforce, and in 2 (1.5%) cases - due to changes in the circumstances of the case.

There is a similar situation in civil proceedings: about 70% of lawsuits against doctors for medical negligence were rejected in Italy, and in the Federal Republic of Germany 2/3 of such lawsuits were rejected<sup>5</sup>.

The analysis of medical and legal practice gives grounds to claim that the causes of defects are: low level of medical workers qualification; negligent and unconscientious performance of professional duties by medical workers, improper organization of medical care; non-compliance with health standards; formal attitude to the patient<sup>6</sup>.

Assessing the statistics of medical errors, which differ from the cases of deliberate negligence of health professionals in foreign countries, it should be noted that in the leading countries of the world these concepts are distinguished. This is the main difference between the health care system of Ukraine and the leading countries

of the world. This is the difference in attitude towards a common person. Errors in the provision of health care in leading countries can also occur, but cases of systemic and deliberate negligence, if any, are rare.

According to various studies, almost 100,000 patients in Germany become victims of medical errors each year. The condition of 11% of patients gets worse due to improper treatment, 8% of medical errors lead to death. In the United States, where the public information system is most open, the situation is not better: about 100,000 patients become the victims of medical errors. In the United Kingdom, errors in the doctors' activities kill about 70,000 people each year<sup>4</sup>.

From the point of view of criminal law, a medical worker is considered taking into account two features. The first one is the perception of a physician as the general subject of the crime. The second one is the perception of a medical worker as a special subject of the crime related to the fact of obtaining medical education. Guided by the following features, as well as the ability of the physician to perform certain duties, all crimes for which medical workers can be prosecuted are divided into three groups:

- professional medical crimes;
- official medical crimes;
- crimes for which medical workers are prosecuted on general grounds<sup>7</sup>.

Criminal liability is the most severe type of liability of medical workers. Criminal liability is a type of legal liability, which implies obligation of a person who has committed a socially dangerous act (crime) to be subject to restrictions of rights in the form of criminal punishment. The basis for bringing a medical worker to criminal responsibility is the commission of a crime<sup>8</sup>.

The issue of "professional medical crimes" is important and quite controversial today, because for their commission medical workers are prosecuted as special subjects of the crime. A detailed definition of this category, in our opinion, is provided by S.H. Stetsenko, who notes that a professional crime should be deemed to be an intentional or negligent doing committed by a medical worker during the performance of his or her

professional duties, prohibited by the criminal law under the threat of punishment<sup>9</sup>.

Having examined patients' complaints, B. Hladun points out that patients in Ukraine mostly complain about poor quality of treatment, including incomplete examination, incorrect or inaccurate diagnosis of the disease, incorrect treatment or its negative result; tactlessness, rudeness, and even offensive behavior of medical staff. In fact, patients have much more grounds for complaints<sup>10</sup>.

The main causes of medical errors in the focus of Ukraine are:

- imperfection of certain diseases treatment methods;
- insufficient level of a particular medical worker training;
- lack of proper conditions necessary for the qualified treatment;
- imperfect study by medical science of the causes of some diseases and their course;
- incorrect interpretation by a medical worker of the diagnostic procedures results;
- underestimation of colleagues' opinions or overestimation of own knowledge.

Despite the fact that the world medicine is confidently keeping abreast of the times and has found methods for treating many diseases, the human body remains incompletely studied, and therefore, medical errors will constantly take place, and the issue of medical errors nature will remain topical. In view of the above, the task of legal regulation of medical activity is to develop a single legal qualification of doctors' erroneous actions<sup>4</sup>.

According to American lawyers who prefer civil liability, criminal acts constitute an encroachment on public order, while civil liability occurs in the case of harm to an individual<sup>11</sup>. It is seen that the two main tasks of civil law regulation of so-called "medical disputes" are compensation for damage caused to a patient and control over the quality of medical care<sup>12</sup>.

According to H. Barkus, civil liability is a more convenient means of resolving legal relations in case of negligence of medical staff, which provides a patient with the opportunity to compensate for the damage to health and financial losses incurred due to the treatment. In addition, the existing mechanisms in the United States to bring the guilty persons to justice eliminate the need for imprisonment. When applying civil liability and sanctions to physicians, the main attention is devoted to the prevention of harm to patients by persons providing medical care, rather than their imprisonment for inflicting unintentional harm<sup>13</sup>.

However, some authors point to the imperfection of the system, according to which doctors are held solely liable for damage to the patient's health. Thus, K. Meshivits draws attention to the disproportionately small number of persons who seek legal assistance in these cases. That is, the number of civil lawsuits is much smaller than the number of persons objectively injured due to medical activities. Some people claim that even a successful plaintiff does not obtain the full indemnification for the financial costs incurred during the trial<sup>14</sup>.

The main issues in the process of "medical crimes" investigation are:

1. Lack of relevant special knowledge of the investigator (need for performing expert examination, involvement of subject matter experts to conduct investigative / search actions and unwillingness to investigate such crimes).

2. The need to obtain quickly the decision of the investigating judge on temporary access to the stuff and documents. As a matter of actual practice, there are often situations when, as a result of delays in obtaining such a decision, a medical institution manages to destroy evidence.

3. Collective responsibility, which implies the destruction of evidence (destruction of medical records, test results, etc.). The desire to attribute solely to medical error any unsuccessful manipulation or surgery that has led to serious consequences. Covering up by the heads of medical institutions of their subordinates. Active opposition to the investigation.

4. The fine line between distinguishing negligence from accident, medical error and justified medical risk<sup>4</sup>.

The application of criminal liability is the strongest mechanism by which the state can bring a person to justice for actions that are contrary to the interests of society. However, bringing the guilty persons to justice in real life is complicated by the specifics of the health care sector<sup>15</sup>.

## Conclusions and Recommendations

In modern states, there are changes in society caused by Covid-19 pandemic, which is the impetus for the distinguishing of medical crimes from all crimes against life and health of a person. This approach emphasizes the social significance of the medical sector in general, and thus the greater social danger of crimes related to medical negligence. In a number of countries, such as Belarus, Armenia, Kazakhstan and Latvia, special essential elements of offence have been identified, which provide for liability for improper performance of professional duties by a healthcare professional.

This legal drafting methodology contributes to the differentiation of criminal liability depending on the obviously different social dangers of crimes. The main directions of improving the regulatory and legal support in the medical services sector and legislative regulation of cases of medical workers' negligence are: development of unified methodological recommendations concerning qualification of medical crimes, which can help to give a correct criminal assessment of illegal activities of medical workers; making amendments to the legislation in terms of establishing a clear interpretation of the concept of "professional negligence of medical workers"; informing medical workers of the legal regulation of professional negligence cases and familiarization with the forms of liability for such negligence.

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