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Wiadomości Lekarskie

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Pamięci
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TOM LXXII, 2019, Nr 12 cz. II, grudzień

Rok założenia 1928



Ministry of Science
and Higher Education

Republic of Poland

The journal Wiadomości Lekarskie is financed under Contract No. 888/P-DUN/2019 by the funds of the Minister of Science and Higher Education.

The Journal has been included in the register of journals published by The Polish Ministry of Science and Higher Education on July 31st, 2019 with 20 points awarded.

Wiadomości Lekarskie is abstracted and indexed in: PubMed/Medline, EBSCO, SCOPUS, Index Copernicus, Polish Medical Library (GBL), Polish Ministry of Science and Higher Education.

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ALUNA Publishing

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REVIEW ARTICLE
PRACA POGLĄDOWA**ON MEDICAL PROFESSIONALS AND CRIMINAL LIABILITY:
A DARK SIDE OF GOOD INTENTIONS**

DOI: 10.36740/WLek201912230

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ABSTRACT

Introduction: The study is devoted to the complex legal analysis of the crucial issues of criminal liability of medical professionals, including the problem of the definition of the so-called 'medical crimes' and liability for such acts.

The aim: The objective of the study is to examine unlawful acts of medical professionals, their legal estimation and regulation, ways for improvement.

Materials and methods: The study is based on the analysis of scholarly researches, legislation, judicial practice and statistics. Philosophical, general scientific, theoretical and legal methods provided the methodological basis of this research.

Conclusions: An attempt is made to identify the essence of the so-called 'medical crimes' content, alongside with the liability for them. Making reference to overseas experience, the recommendations to improve the criminal legislation are developed.

KEY WORDS: medical professionals, medical crimes, medical offences, criminal liability, criminal liability of medical staff

Wiad Lek 2019, 72, 12 cz. II, 2573-2578

INTRODUCTION

Current practice proves the fact that there is obvious complex interconnection between medicine and law. Having long-lasting history of their establishment along with the contemporary high-profile sensitive cases, as well as the significant amount of various scientific researches clearly reflects that the issue of their correlation certainly remains a focus of public attention, especially when it comes to medical professionals, their actions and liability. The existence of a large number of such notions and concepts as 'medical errors', 'clinical errors', 'medical accidents', alongside with 'medical negligence' and 'medical malpractice' in the information space invariably leads to the issue of their legal assessment, especially when it comes to criminal law. But even then a lack of common vision on terminology and essence of medical professionals' offences, as well as the imperfections of criminal legislation leads directly to the issue of the necessity of the conceptualization of the unified notion of the so-called 'medical crimes' and their proper enshrinement in legislation, resulting in certain need for its improvement, while considering foreign experience. However, despite the fact that the major part of the abovementioned issues is being widely discussed, still the very most of the scholarly researches are fragmental and mostly focused on specific narrow and limited scope so further study is obviously relevant.

considering the acts committed, as well as to establish the nature and types of such acts, to define an appropriate terminology concerning the so-called 'medical crimes' and the range of such category of offences, along with the making of an attempt to its conceptualization, exploring the ways of legal regulation of criminal liability, alongside with the outline of ways to refine and improve the legislation through the prism of foreign experience.

MATERIALS AND METHODS

The study is based on the researches of scholars and leading experts in the field of medicine and law, legal acts (including Criminal Code of Ukraine, Georgia and the Republic of Kazakhstan, as well as the criminal legislation of the Republic of Austria, the United States of America, Canada, the Kingdom of Spain, the Federal Republic of Germany and the Republic of Poland), judicial practice (in particular, the decisions of Ukrainian courts, namely, 84 (all) judgements that were available through the Unified State Register of Court Judgments at the time of this research) and statistics. It is based on the principles of concreteness, objectivity and methodological pluralism, including philosophical, general scientific, theoretical other general and special legal methods.

THE AIM

The aim of the study is to identify the place of criminal liability in the system of liability of medical professionals,

REVIEW AND DISCUSSION

The world literature classic A. P. Chekhov, being a doctor himself, once mentioned that medical profession is a

feat, it requires self-sacrifice, purity of soul and purity of thoughts, and we believe that it truly is. As for now, it is considered as one of the most noble calling, a very special and significant craft that demands a lot of dedication and passion, knowledge and skills and imposes the tremendous responsibilities [1, p. 93]. But what if the intentions are not pure or pretty much close to it? This moment might probably be a starting point of the imposition of a liability. But what kind of liability, what type, on what grounds, conditions and obstacles it is based on?

The analysis of the major variety of scientific sources on this matter indicates that liability in the most general understanding is socio-legal regulator or, figuratively speaking, a certain measure of freedom [2, p. 18]. In the light of this, different its types such as moral, ethical and legal liability (which is also typically differentiating between disciplinary, material, civil, administrative and criminal) are traditionally distinguished. Apart from that, the idea of such subtypes of legal liability as medical and/or medical professional liability are becoming increasingly popular in science.

In general without going into too much detail it is necessary to mention that moral and ethical liability are appear to be a certain reaction of a society, while the legal one seems to be a reaction of a state. With regard to the distinction of different types of liability within the legal one it is noteworthy that criminal liability is considered as the most extreme form connected with the most severe punishment. In this regard the prominent ophthalmologist and diligent student of a well-known academician V. P. Filatov, who was working with him for a very long time, V. N. Streltsova (ed. – at the same time, the mother of I. L. Streltsov, the co-author of this article), very often recalls the metaphoric expressions of the famous ophthalmologist and surgeon in her memories. These were the certain reflection concerning the liability of medical professionals, namely, a though that civil and administrative liability can be considered as ‘pharmacological therapy’, but the criminal liability definitely has to be perceived as ‘surgical treatment’ or ‘surgical intervention’; ... it has to be viewed as the ‘last resort’ [3, p. 153].

And if the disciplinary liability (as well as material) usually is triggered with a ‘labour offence’, which is a violation of the requirements of labour legislation, labour discipline and internal labour regulations, there has to be a ‘civil wrongdoing’ or a violation of civil legislation, aimed to protect personal property and non-property rights in case of civil liability (as well as material, by a way of situation); administrative liability generally is caused by an ‘administrative offence’, or a violation of administrative legislation, for instance, in our particular case, largely in the field of the labour safety and public health.

Unlike that, criminal liability in fact is imposed for a violation of criminal law and traditionally ‘starts’ with the commitment of a ‘crime’, as it is stated, for instance, in Part 1 of Article 2 of the current Criminal Code of Ukraine (hereinafter – CC of Ukraine), the ground for criminal liability is the commission by a person of a socially dangerous

act that has such elements of crime as stated by this Code [4]. But to be more precise, – with the commitment of a ‘criminal offense’, which might take the shape of ‘criminal misdemeanour’ or a ‘crime’, considering the most recent amendments to CC [5, p. 162]. However, there is still no single consensus opinion regarding the issue of what exactly constitutes a ‘criminal offense’ when it comes to the matter of the interface between medicine and law (criminal one, in particular). Indeed, in our view, this is not much a question about which act has to be considered criminal as it is mostly about the range of particular acts that have to be deemed criminal in the field of medicine as well as more or less of ensuring and developing an appropriate terminology.

In this regard, the scientific discourse is full of variety of different concepts and dimensions for identifying such ‘criminal unlawful acts’: starting with a more ‘traditional’ standpoint of ‘crimes in the medical field’ (in their diversity, like ‘crimes in the medical sphere’, ‘crimes in the field of medicine’, ‘crimes in the sphere of medicine’ and etc.) [6, p. 90], continuing with the ‘professional crimes’ [7, p. 283] (ed. – of medical professionals) and/or ‘occupational crimes’ [8, p. 1] (ed. – of medical professionals), ending with an idea of the so-called ‘medical crimes’ [9, p. 2] (less frequently, ‘healthcare crimes’ [10] or ‘crimes, which take place during the provision of health care’ [11, p. 464]) and so on. In contrast, such terms and notions like ‘liability issues in clinical practice’ [12, p. 32] or ‘legal issues in medical practice’ [13, p. 335], ‘liability for medical malpractice’ [14, p. 51], criminal liability for ‘medical negligence’ [15, p. 372], ‘clinical errors’ [16, p. 323] and/or ‘medical errors’ [17, p. 256], ‘medical accidents’ [18, p. 51] and others are also widely being in use nowadays. Therefore, it should be noted that such plurality of different terms certainly leads to the issues of the comprehensive reflection and understanding of their essence, along with the specificity of their correlation. Moreover, another equally pertinent and remarkable issue is that of the existence of such diversity. In order to address this concern, the most common explanation is usually the comprehensive nature of medicine and, therefore, the complexity of the legal constructions. However, without prejudice to this statement, it can be hardly considered exhaustive to the fullest extent, some points are worth noting in this regard.

The first one is basically lying in the fact that the essence of this specific group of criminal offenses, the so-called ‘medical crimes’ is largely determined by the presence of a ‘special subject of a crime’ (particular offenders, who are medical professionals, even without taking into consideration the lively discussion on who should be considered as medical professionals, and, particularly is there any difference between a medical and pharmaceutical personnel, for instance [19]). However, even in such case this is not a ‘panacea’ due to the fact that medical professionals can simply commit ordinary and/or common criminal offences, and be criminally prosecuted on a general basis, for instance, for the commitment of a simple theft (Article 185), an intended minor bodily injury (Article 125)

or a simple murder (according to Part 1 of Article 115), foreseen by the current CC of Ukraine [4] and etc. As to bodily injury, although, it is necessary to mention that, for instance, in the Republic of Austria, the classic list of crimes against bodily integrity, including involuntary manslaughter and negligent bodily injury, equally applies to the medical profession [20, p. 1031].

The second idea is trying to be justified with the existence of the category of acts of medical professionals, related directly to their professional activity. Basically, it is assumed that the so-called 'medical crimes' can be considered as such only in case of the commitment of criminally punishable acts, related precisely to the medical profession. Hence, they are often referred to as the 'professional medical crimes'. For instance, in Ukraine, the vast majority of such criminal offences are enshrined in Chapter II of the current CC of Ukraine, entitled 'Criminal Offenses against Life and Health of a Person' [4]. Basically they include professional misconduct causing infection of a person with human immunodeficiency virus or any other incurable contagious disease (Article 131); disclosure of information on medical examination for human immunodeficiency virus or any other incurable contagious disease (Article 132); illegal abortion or sterilization (Article 134); illegal medical practice (Article 138); failure of a member of medical profession to provide aid to a patient (Article 139); improper performance of professional duty by a member of medical or pharmaceutical profession (Article 140); violation of patient's rights (Article 141); illegal experimentation on a human being (Article 142); violation of procedures prescribed by law with regard to human organs or tissue (Article 143); forcible donation of blood (Article 144) and unlawful disclosure of confidential medical information (Article 145) [4].

In addition, it is also worth noting that there is one more ground for shaping the understanding of the notion of the so-called 'medical crimes'. This is the frequently expressed idea of the inclusion of criminally punishable acts that arise out of medical occupation to the abovementioned category. They are traditionally considered as the so-called 'criminal offenses in office', stipulated in Chapter XVII of the current CC of Ukraine, entitled 'Criminal Offenses in the Area of Official Activity and Professional Activity Relating to the Provision of Public Services' [4]. Commonly they include improper performance of duty with regard to children's life safety and health care (Article 137); violation of the right to free medical assistance (Article 184); abuse of authority or office (Article 364); forgery in office (Article 366); neglect of official duty (Article 367); acceptance of a proposal, promise or receipt of an unlawful benefit by an official (Article 368) [4] and etc.

Nevertheless, it is fair to say that there are much more ways of classifying the so-called 'medical crimes' depending on the approach used. Indeed, based on the understanding of these crimes' definition, it is possible to emphasize that there are much more criminal offences enshrined in the current CC of Ukraine in the broadest sense, except those, that are stipulated in Chapter II ('Criminal Offenses against

Life and Health of a Person') and Chapter XVII ('Criminal Offenses in the Area of Official Activity and Professional Activity Relating to the Provision of Public Services') of the current CC of Ukraine [4]. Special attention in such a case also needs to be paid to Chapter III ('Criminal Offenses against Liberty, Honor and Dignity of a Person'), in particular, for instance, to such crimes as substitution of a child (Article 148); illegal placement of a person in a mental institution (Article 151), as well as to Chapter XIII ('Criminal Offenses Related to the Circulation of Narcotics, Psychotropic Substances, Their Analogues or Precursors, and Other Offenses against Public Health'), – illegal issue of a prescription authorizing the purchase of narcotics or psychotropic substances (Article 319); illegal production, making, purchasing, transportation, sending, storage for selling purposes, or sale of poisonous and drastic substances (Article 321); counterfeiting of drugs or trafficking of counterfeit drugs (Article 321¹); violation of established procedure for preclinical study, clinical trials and state registration of drugs (Article 321²) [4] and so on. Although, even this list is far from being completely exhaustive.

It must be noted that other countries' experience shows using of pretty much similar approach, for instance, in Criminal Code of Georgia (hereinafter – CC of Georgia), in which the so-called 'medical crimes' mentioned in such different chapters, as Chapter XIX ('Crimes against Life'), Chapter XX ('Crimes against Health'), Chapter XXI ('Endangering Human Life and Health'), Chapter XXIII ('Crime against Human Rights and Freedoms'), Chapter XXXII ('Crime against Public Health and Public Morals') and others, including killing at the victim's request (Article 110); negligent manslaughter (Article 116); different degrees of bodily injuries (Articles 117, 118, 120, 124); refusal to help (Article 129); abandoning a sick person in distress (Article 130); infecting with AIDS (Article 131); infecting with particularly dangerous infectious disease (Article 132); illegal abortion (Article 133); coercion into removing a human organ, part or tissue of an organ (Article 134); illegal trade of blood or blood components (Article 135); trade of human organs (Article 135¹); genetic manipulations (Article 136); illegal placement or detention in a psychiatric hospital (Article 149); illegal medical or pharmaceutical practice (Article 246); breach of sanitary-epidemiological standards (Article 248); breach of the regulations for poison circulation (Article 249); unlawful appropriation or extortion of poison (Article 250) [21] and etc.

Nevertheless, Criminal Code of the Republic of Kazakhstan (hereinafter – CC of the Republic of Kazakhstan), for instance, is constructed differently, as it contains a separate specific chapter, 'Chapter 12. Medical Criminal Infractions', which is dedicated directly to medical criminal offenses, including improper performance of professional obligations by medical or pharmaceutical employee (Article 317); violation of procedure of conducting of the clinical researches and use of the new methods and means of prevention, diagnosis, treatment and medical rehabilitation (Article 318); illegal performance of abortion (Article 319); failure to assist sick person (Article 320); disclosure of medical

secret (Article 321), illegal medical and pharmaceutical activity and illegal issuance or forgery of prescriptions or other documents, granting the right to obtain the narcotic drugs or psychotropic substances (Article 322); handling with counterfeit drugs, medical products or medical equipment (Article 323) [22] and so on.

But despite an impressive number of criminal offences, stipulated by the current CC of Ukraine, which is commonly associated with the so-called 'medical crimes', the vast majority of them remains unexploited. In fact, it is suggested that a very large part of criminal proceedings in Ukraine has been very often initiated related only to failure to perform or improper performance of professional duty by a member of medical or pharmaceutical profession due to neglect to discharge this duty, which caused grave consequences for a patient (Article 140 'Improper performance of professional duty by a member of medical or pharmaceutical profession'). However, sometimes two more articles such as illegal medical practice (Article 138) and failure of a member of medical profession to provide aid to a patient (Article 139) are also applied [23]. This concern was likewise reflected in the judicial practice. Therefore, at the time of this writing, the analysis of the decisions of the courts of Ukraine indicates that among 84 court sentences under Articles 131, 132, 134, 138-145 of the current CC of Ukraine (the so-called 'medical crimes' in one of the narrowest senses of their understanding), 76 convictions were rendered under Article 140, 1 – under Article 132, 1 – under Article 134, 4 – under Article 138 and 2 – under Article 139. At the same time, the overwhelming majority of them was either exemption from serving a sentence [24], either compensation for material and moral damages [25], or the acquittal [26]. Thus, the resulting data is a 'perfect illustration' of the previous statement as well as the allegations concerning the fact that cases of criminal prosecution of medical professionals, and even more so the conviction in Ukraine are relatively infrequent still may be considered as absolutely fair nowadays.

Moreover, according to the opinion of the national and foreign experts, a similar trend also applies to the judicial practices of the United States of America, where, among other things, such a situation is largely explained by the relatively high latency of the so-called 'medical crimes' [27, p. 36] and Canada, which had fairly limited number of cases and very small conviction rate that, in general, convey the idea that criminal law has quite restricted application in this area [28, p. 25]. In contrast, despite such a small number of cases, it is commonly believed that similar to other European countries, both Ukraine and, for instance, the French Republic have thus experienced a rise in the number of criminal proceedings relating to the liability of medical professionals [29, p. 46] and the Kingdom of Spain, where the number of claims has increased dramatically and so has the number of judicial decisions [30, p. 153].

However, it is worth noting that such a state of affairs substantially can be explained not only by the shortcomings of the criminal legislation, but due to the application of the law and procedural matter [6, p. 90]. There is no doubt that these issues are thorny and sensitive ones, which are provoking a public outcry. In this case, special attention should be given,

for instance, to the electronic petition on the official web-site of the President of Ukraine concerning the liability of medical professionals [31]. Despite the fact that the collection of signatures was closed and the petition hasn't been supported, its content hasn't lost its significance. This involves, in particular, the artificial delay both of the investigation of the so-called 'medical cases' and their trial due to the inadequacy of the legislation, as well as the 'conspiracy of silence' between medical professionals [31]. Significantly that such situation is not exclusive exists not only in Ukraine, but also in a number of other countries. Thus, for instance, the issues of the shortcomings in the law and the 'complicity of medical professionals' are very familiar and widely debated in the Republic of India and are expressed in the problem concerning the assessment of the acts of the medical professionals by other medical professionals, who usually hesitate to testify against each other' (ed. – are biased and tainted), which ultimately makes it exceptionally difficult to found them criminally liable [32, p. 9]. A similar situation can be also observed in Federal Republic of Germany, where approximately ninety-five percent of cases have been stayed for the lack of evidence or public interest, while in cases that proceed to trial, the medical professionals will usually secure an acquittal or generally pay a fine [33, p. 1142]. In the Republic of Poland the situation is made difficult by the fact that malpractice cases are long-term and expensive while their result is usually uncertain and not easily predicted [34, p. 1261].

CONCLUSIONS

Realities of the twenty-first century sharply demonstrate how highly complex public relations that arise in the field of the activity of medical professionals are, especially with regard to the issues of liability for their 'unconscionable' acts. Their complicated nature gives grounds for asserting the formation of distinct type of liability – 'medical liability', along with the establishment of such separate group of criminal offences as 'medical offences'. 'Medical liability' is suggested to be as one of the peculiar types of legal liability, including disciplinary, material, civil, administrative and criminal liability, where the last one 'occupies a special place' and considered as the very 'last frontier', while 'medical offences' include 'labour offences', 'civil wrongdoings', 'administrative offences' and 'criminal offences', that, in turn, gives rise to the existence of such unique category in criminal law as 'medical criminal offences', which, in turn, can be roughly divided into criminal offences against life and health of a patient; criminal offences against rights of a patient; criminal offences in the field of economic activity in medical practice; criminal offences in the field of trafficking in narcotic drugs, psychotropic substances, analogues or precursors and other criminal offences, committed by medical professionals due to their professional activities. Such an attempt towards the conceptualization of 'medical criminal liability', as a part of 'medical liability' and 'medical criminal offences' leads to an appropriate legal enshrinement. In order to do so, however, the changes to legislation are highly necessary. To that end with due regard for the knowledge and foreign experience acquired the establishment of a separate chapter of the current CC of

Ukraine, which, in view of the structure of the existing code, might be possibly entitled as 'Criminal offences in the field of medical activity' or 'Criminal offenses related to the medical activity' considered as a feasible option.

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Conflict of interest:

The Authors declare no conflict of interest.

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Received: 03.04.2019

Accepted: 25.11.2019