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Improper performance of professional duties by medical and pharmaceutical professionals: Current status and problems of counteraction

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Abstract

Protecting the lives of citizens and providing qualified medical care is of utmost importance in times of war. At the same time, statistics show that numerous cases of criminal offences committed by healthcare professionals do not result in them actually serving a criminal sentence. The purpose of this study was to investigate the issues of non-performance or improper performance of professional duties by medical and pharmaceutical professionals and to outline the problematic aspects of combating these criminal offences and the ways to address them. The study employed a combination of both general scientific (general dialectical, analysis, synthesis, legal, induction, and deduction) and special (systemic-structural, statistical, critical) methods of knowledge to identify, analyse, and interpret data. The study made it possible to state that there are a range of problems impeding the effective prosecution of medical and pharmaceutical professionals for criminal offences, and to classify the identified complications into subjective and objective ones, related not only to the training of medical professionals, judicial, and law enforcement agencies, but also to legislative gaps and problems in medicine, which lead to a high level of latency of medical torts, ineffective pre-trial investigation of medical torts, as well as avoidance of criminal liability by medical professionals. Therefore, combating these crimes is largely reduced to recording them by law enforcement officials. The unsatisfactory performance of professional duties by doctors not only negatively affects the quality of services provided to patients, but also leads to serious consequences in the form of their death or considerable damage to the health of the victims. The findings of this study will be useful for practitioners of investigative bodies engaged in qualification and investigation of the torts under study, will contribute to the development of a strategy to improve the effectiveness of combating such criminal offences, and will also be useful for medical professionals to prevent mistakes leading to serious consequences for the life and health of patients, as well as in the context of motivation to perform their professional duties in good faith.

Keywords:

doctor; patient; life and health; criminal liability; pre-trial investigation and trial

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Introduction

Protecting the lives and health of Ukrainians is now of unprecedented importance, as both military and civilians are killed or injured and suffer moral distress during the war. Therefore, the state should focus its efforts on ensuring effective protection of these inalienable rights. In this context, it is important to create conditions for providing citizens with quality healthcare services. To protect human life and health, the Criminal Code of Ukraine¹ (CCU) prescribes a range of criminal prohibitions, among which attention should be paid primarily to the failure to perform or improper performance of professional duties by medical professionals (Article 140 of the CCU). This is one of the most widespread and dangerous acts in the system of criminal offences in the field of medicine, the degree of public danger of which is increasing in the context of the ongoing international armed conflict in Ukraine. At the same time, as practice shows, criminal prosecution for this criminal offence is associated with a set of problems that deserve attention.

The study of the problems of combating medical criminal offences has always aroused considerable interest among researchers. Since a considerable number of problems with bringing healthcare professionals to criminal liability for failure to perform or improper performance of their professional duties have not been resolved, the subject under study stays relevant. O.P. Horpyniuk & P.M. Lepisevych (2021) focus on the shortcomings of the legislative wording of the provisions of Article 140 of the CCU, difficulties in law enforcement and the need to consider international standards and ECHR practices in the context of combating the torts under study. Other researchers have also investigated the shortcomings of the legislative construction of Article 140 of the CCU, suggesting ways to improve this legislative construction. N.O. Hutorova & V.M. Pashkov (2019) suggest expanding the differentiation of criminal liability under Article 140 of the CCU by supplementing it with such qualifying features as death of a patient and death of a foetus. V.A. Kononenko & M.I. Demura (2021) substantiate the need for statutory regulation and detailing the forms of the objective side of this tort.

A considerable number of publications are devoted to identifying complications arising in the course of bringing healthcare professionals to criminal liability. N.O. Hutorova & V.M. Pashkov (2019) demonstrate the problems of criminal prosecution under Article 140 of the CCU using evidence from criminal offences committed by obstetricians and gynaecologists during childbirth. K.M. Danchenko & Kh.V. Hereliuk (2020) identified certain problems and gaps in the legislation related to the commission of the torts under study and identified the factors of these criminal offences. The

researchers also addressed the problems that complicate the investigation of the criminal offences under study. O.V. Baulin (2020) attributes isolated cases of criminal prosecution for improper performance of professional duties by a healthcare professional against the background of numerous complaints from victims to the problems of proving these torts. K.D. Yanishevskaya (2020) thoroughly describes the problems of “corporate” healthcare workers and their negative impact on the investigation of medical crimes. R. Stepaniuk *et al.* (2022) identify the key determinants of ineffective investigation of medical crimes in Ukraine based on the review of 78 court decisions on medical negligence.

Considering that a noticeable role in determining medical torts is played by the legal regulation of the rights and obligations of a doctor and a patient, Y. Baulin *et al.* (2019; 2020) and O. Knyzhenko *et al.* (2022) investigate the system of legal regulation of professional duties of a doctor, emphasising the need to improve it, while O. Lisnych (2020) emphasises the need to reform legislation in the field of patient protection. However, even though various aspects of the liability of medical or pharmaceutical professionals for failure to perform or improper performance of their duties have been investigated by a considerable number of researchers, this topic stays relevant, as many problems are still unresolved.

The purpose of this study was to establish the current state of the criminal offence of non-performance or improper performance of professional duties by medical and pharmaceutical professionals, to identify the problems of countering these torts, and to formulate proposals for their solution.

Materials and Methods

The purpose of this study required the use of a set of both general scientific and special methods. The methodological framework of this study was formed by a general dialectical approach, which helped to analyse a range of problematic aspects of combating improper performance of professional duties by medical and pharmaceutical professionals. The use of the methods of analysis, synthesis, induction, and deduction, in addition to building the logical structure of the scientific article, enabled a thorough analysis of the source base of the study. The following special research methods were employed: systemic and structural – helped to systematise the problems that complicate the counteraction to the criminal offences under study; legal method helped to analyse the criminal law provision that prescribes the liability of medical and pharmaceutical professionals; statistical method – helped to comprehensively investigate empirical sources of research; critical method was used by applying a critical approach to interpret

¹Criminal Code of Ukraine. (2001, April). Retrieved from https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini.htm.

data on problematic aspects of the issue under study and helped to predict how the effectiveness of bringing medical and pharmaceutical professionals to criminal liability for crimes committed by them could be improved in the future.

The scientific findings were based on a comparative analysis of the statistical data of the Prosecutor General's Office (2024) (on the number of registered criminal offences under Article 140 of the CCU and the results of their pre-trial investigation) and the State Judicial Administration of Ukraine (on the results of consideration of criminal proceedings under Article 140 of CCU in the court of first instance, consideration of appeals in criminal proceedings, persons brought to criminal responsibility, and types of criminal punishment) (Judicial statistics, 2024). The analysed state statistics helped to establish the existence of a substantial difference between the number of registered criminal offences and those in which persons were served with notices of suspicion and proceedings were sent to court, which suggested the presence of substantial complications in the process of bringing to criminal responsibility those guilty of committing the torts under study. The study also included elements of the analysis of Articles 119 and 140 of the CCU¹, as well as Articles 4.1.2., 4.1.6., 4.1.4. of the draft Criminal Code of Ukraine², which made it possible to establish what complications in the qualification of the torts under study are related to the imperfection of the legislative construction of the current criminal provision and whether the draft CCU

makes provision for their elimination. The scientific developments of Ukrainian (Hutorova & Pashkov, 2019; Horpyniuk & Lepisevych, 2021) and foreign (Bernain *et al.*, 2019) researchers on the specific features and problems of criminal prosecution of healthcare professionals for improper performance of professional duties helped to further explain the empirical data obtained and formulate the necessary conclusions.

Results and Discussion

The study of criminal offences involving the failure to perform or improper performance of professional duties by medical and pharmaceutical professionals should begin with the analysis of statistical data on the number of detected torts under Article 140 of the CCU³, the results of pre-trial investigation and court consideration of relevant criminal proceedings.

According to the Prosecutor General's Office (2024) (Table 1), 654 criminal offences under Article 140 of the CCU were registered in 2020, while in only 4 cases (0.6%) were persons served with a notice of suspicion, in 313 cases (47.9%) proceedings were closed, and in 651 cases (99.5%) no decision was made (on termination or suspension) at the end of the reporting period. In 2021, these figures were 566.2 (0.4%), 310 (54.8%), 566 (100%); in 2022 – 327.2 (0.6%), 183 (56%), 325 (99.4%); in 2023 – 436.2 (0.5%), 192 (44%), 434 (99.5%), respectively. No criminal proceedings under Article 140 of the CCU were brought to court during the above periods.

Table 1. General information on the number of registered criminal offences and the results of their pre-trial investigation

		2020	2021	2022	2023
Number of recorded criminal offences under Article 140 of the CCU		654	566	327	436
Criminal offences in which persons were served with a notice of suspicion		4 (0.6%)	2 (0.4%)	2 (0.6%)	2 (0.5%)
Criminal offences for which proceedings have been referred to court (Items 2, 3 of Article 283 of the CPCU) with an indictment	Total	2 (0.3%)	0	2 (0.6%)	2 (0.5%)
	2 (0.3%)	0	2 (0.6%)	2 (0.5%)	
Criminal offences for which proceedings were sent to court with a motion to close under Item 3-1, Part 1, Article 284 of the CPCU		0	0	0	0
Criminal offences in which proceedings were closed	Total	313 (47.9%)	310 (54.8%)	183 (56%)	192 (44%)
	under Items 1. 2. 4. 6. 9-1 of Part 1 of Article 284 of the CPC of Ukraine	312 (47.7%)	310 (54.8%)	183 (56%)	192 (44%)
Criminal offences in which no decision was made at the end of the reporting period		651 (99.5%)	566 (100%)	325 (99.4%)	434 (99.5%)

Source: Prosecutor General's Office (2024)

¹Criminal Code of Ukraine. (2001, April). Retrieved from https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini.htm.

²Draft of the Criminal Code of Ukraine. (2024, February). Retrieved from <https://newcriminalcode.org.ua/upload/media/2024/02/26/kontrolnyj-tekst-proyektu-kk-25-02-2024.pdf>.

³Criminal Code of Ukraine. (2001, April). Retrieved from https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini.htm.

The analysis of statistical data shows, firstly, that there are numerous cases of citizens reporting non-performance or improper performance of professional duties by medical professionals. In 2020-2023, an average of almost 500 reports of non-performance or improper performance of professional duties by medical and pharmaceutical professionals were registered annually. At the same time, this figure may be much higher considering the level of latency of crimes under Article 140 of the CCU, due, specifically, to the reluctance of victims to report to law enforcement and the refusal to register relevant criminal proceedings. However, the misclassification of the act should not be excluded, specifically in circumstances that exclude criminal unlawfulness of the act. On the one hand, considering the level of latency, the rate of registered criminal offences under Article 140 of the CCU may be much higher, while on the other hand, the harm to the victim may be caused as a result of lawful behaviour of a healthcare professional, i.e., in circumstances that exclude criminal unlawfulness of the act.

According to K.M. Danchenko & Kh.V. Hereliuk (2020), the latency of these torts committed by medical or pharmaceutical professionals is conditioned by the victims' (both patients and their relatives) lack of faith in fair justice, as well as fear of condemnation in connection with the receipt of medical services that they do not wish to disclose (e.g., abortion). N.O. Hutorova & V.M. Pashkov (2019) are right that in many cases there is no necessary causal link between a doctor's professional activity and harm to the patient's life or health. This is the reason for the closure of criminal proceedings during the pre-trial investigation due to the lack of appropriate grounds for criminal liability of the doctor. In furtherance of this thesis, I.A. Vyshnevskaya (2021b) rightly notes that even the conscientious performance of professional medical duties in certain situations can lead to negative consequences in the form of harm to the patient's life or health. This is conditioned by factors beyond the control of the healthcare professional, including other concomitant diseases, their exacerbation, improper treatment, etc. In such circumstances, there are no grounds for bringing medical professionals to criminal liability for the negative consequences that have occurred for the patient.

Researchers, including O.V. Baulin (2020), have repeatedly pointed out that cases of criminal prosecution for these crimes are quite rare, although there are many complaints from citizens. The practice of applying Article 140 of the CCU without an active position of the victim is practically absent in Ukraine (Hutorova & Pashkov, 2019). According to K.D. Yanishevskaya (2020), the relevant proceedings are most often carried out at the request of patients or their relatives.

This brings us to the key point: the performance of healthcare workers in many cases is unsatisfactory and leads to serious consequences for the lives and health of patients. Secondly, we cannot but pay attention to the negligible number of criminal offences in which persons were served with notices of suspicion: on average, this is 0.5% of the torts recorded in 2020-2023 under Article 140 of the CCU. This may be caused by either insufficient evidence to suspect a person of committing a criminal offence under this article or incorrect qualification of the offence. Thirdly, about half of criminal proceedings under Article 140 of the CCU (50.7% on average) are closed at the pre-trial investigation stage (primarily due to the establishment of the absence of an event or *corpus delicti*). Fourthly, most criminal proceedings are stuck in pre-trial investigation bodies. In 2020, criminal offences for which proceedings were sent to court with an indictment amounted to 0.3% (half of the offences for which suspicion was served). In 2021, no criminal proceedings were sent to court with an indictment, while in 2022 and 2023, there were two such proceedings each, which accounted for 0.6% and 0.5% of recorded torts and 100% of crimes in which persons were served with a notice of suspicion. Thus, most criminal offences in which persons were served with a notice of suspicion were sent to court with an indictment (50% in 2020, and 100% in 2022 and 2023) (Prosecutor General's Office, 2024).

On average, during 2020-2023, criminal offences under Article 140 of the CCU, in which no decision was made at the end of the reporting period, amounted to 99.6% or 500 criminal offences annually. This number of crimes is almost equal to the number of recorded torts in this category (Prosecutor General's Office, 2024). Confirmation of the existence of problems in terms of bringing to criminal responsibility the perpetrators of the above-mentioned criminal offences is found not only in the low level of efficiency of pre-trial investigation of these delinquencies, but also in the analysis of statistical indicators of the State Judicial Administration of Ukraine.

An analysis of the Report of the courts of first instance on the consideration of criminal proceedings (Judicial statistics, 2024) (Table 2) shows that there is a considerable number of proceedings in the courts. About a quarter of the proceedings are considered during the reporting period. However, most of the proceedings were still pending at the end of the reporting period. Of the proceedings that are being considered in court, most cases end up being dismissed. In a small number of cases, proceedings are returned to the prosecutor. At the same time, sentencing took place in 10 proceedings in 2020, 12 proceedings in 2021, 9 proceedings in 2022, and 15 proceedings in 2023 (Judicial statistics, 2024).

Table 2. Report of first instance courts on consideration of criminal proceedings (No. 1-k)

		2020	2021	2022	2023
Number of pending proceedings		143	152	134	129
Number of proceedings reviewed	Total	33 (23.1%)	37 (24.3%)	34 (25.3%)	38 (29.5%)
	with the passing of a sentence	10 (6.9%) (30.3%)	12 (7.8%) (32.4%)	9 (6.7%) (26.4%)	15 (11.6%) (39.4%)
	returned to the prosecutor	4 (2.8%) (12.1%)	3 (1.9%) (8.1%)	2 (1.5%) (5.9%)	0
	closure of the proceedings	17 (11.8%) (51.5%)	21 (13.8%) (56.7%)	22 (16.4%) (64.7%)	23 (17.8%) (60.5%)
Number of pending proceedings at the end of the reporting period		110 (76.9%)	115 (75.6%)	100 (74.6%)	91 (70.5%)

Source: Judicial statistics (2024)

Thus, on average, 35 proceedings are being considered in 2020-2023. They accounted for 25.5% of those under consideration. As a result of the review of criminal proceedings in the courts of first instance, the proceedings are usually dismissed (on average, 14.9% of the cases under consideration or 58.4% of the cases reviewed in the period under study), less often a verdict is passed (8.3% and 32.1% respectively), and the case is returned to the prosecutor (2.1% and 6.5%, respectively). At the end of the reporting period, the number of pending proceedings was considerable (74.4% on average for the period).

The above indicates a slow pace of court consideration of criminal proceedings under Article 140 of the

CCU and significant backlogs of proceedings in this category at the end of the reporting period. Following the trial, most criminal proceedings are closed, some are returned to the prosecutor, and only about a third of cases result in a verdict.

The statistics on the activity of the courts of appeal regarding the review of sentences under Article 140 of the CCU (Table 3) (No. 2-k) is also worthy of attention. On average, 9 verdicts were reviewed annually in 2021-2023. In 63.5% of cases, verdicts stay unchanged, in 14.1% they are changed, and in 22.4% they are cancelled on various grounds, including acquittal, a new trial, closure of criminal proceedings due to exemption from criminal liability, and a new verdict.

Table 3. Report of the courts of appeal on consideration of appeals in criminal proceedings (No. 2-k)

		2020	2021	2022	2023
Number of verdicts reviewed in total		7	12	9	9
Number of verdicts upheld without change		3 (42.8%)	8 (66.6%)	9 (100%)	4 (44.4%)
Number of sentences changed		2 (28.6%)	2 (16.6%)	–	1 (11.1%)
Number of sentences cancelled	Total	2 (28.6%)	2 (16.6%)	–	4 (44.4%)
	of which acquittals	–	–	–	1
	with the appointment of a new trial	1	–	–	2
	with the closure of criminal proceedings in connection with the release of a person from criminal liability	–	2	–	1
	with the passing of a new verdict	1	–	–	1

Source: Judicial statistics (2024)

According to the Report on Persons Brought to Criminal Responsibility and Types of Criminal Punishment (No. 6) (Table 4), court decisions came into force in 2020 against 19 persons, in 2021 – against 24 persons, in 2021 – against 30 persons, in 2022 – against 27 persons. Two people were acquitted

in 2021 and 2012, while none in 2020 and 2023. The above suggests that on average, 3 persons were convicted annually in 2020-2023 (11.9% of the persons whose decisions came into force in the reporting period). The proportion of acquittals is also insignificant – on average, 1 person (3.9%) over the period

under study. The majority of proceedings against persons brought to criminal responsibility are closed (on

average, 21 persons or 86.3% in this period) (Judicial statistics, 2024).

Table 4. Report on persons brought to criminal responsibility and types of criminal punishment (No. 6)

		2020	2021	2022	2023
Number of persons whose decisions came into force in the reporting period	Total:	19	24	30	27
	convicted	2 (10.5%)	3 (12.5%)	4 (13.3%)	3 (11.1%)
	the criminal proceedings were closed	17 (89.5%)	20 (83.3%)	25 (83.3%)	24 (88.9%)
	vindicated	–	2 (8.3%)	–	2 (7.4%)

Source: Judicial statistics (2024)

The above data allow hypothesising that there are a range of problems which hinder the prosecution of persons guilty of the medical torts under study. To confirm or refute this hypothesis, it is necessary to refer to the scientific literature and court practice. Based on the analysis of statistical data for 2017–2019, O.P. Horpyniuk & P.M. Lepisevych (2021) conclude that the low percentage of convictions under Article 140 of the CCU is conditioned by problems in establishing and proving a causal link, unsatisfactory provision of medical needs, miscalculations during medical reforms, unsatisfactory quality of criminal law provisions, and other difficulties faced by law enforcement agencies.

N.O. Hutorova & V.M. Pashkov (2019) showed that medical crimes are often committed in the field of obstetrics and gynaecology. Often, the reasons for the latency of improper performance of professional duties by obstetricians and gynaecologists during childbirth are the passive behaviour of victims, “successful” falsification of medical documents, which leads to the acquittal of doctors, “medical solidarity” and difficulties in conducting forensic examinations. V.V. Franchuk *et al.* (2023) also concluded that adverse medical outcomes in obstetrics are in all cases associated with deficiencies in medical records. While investigating the problems of medical negligence in the decisions of the Supreme Court of Chile, G.R. Bernain *et al.* (2019) also found that gynaecologists committed such violations most often.

O.V. Baulin (2020) believes that the rare cases of criminal prosecution of medical professionals can be explained by the lack of interest of the staff and management of medical institutions where harm to the patient’s life or health has been caused in establishing the objective truth, as well as the low level of qualification of pre-trial investigation and prosecution bodies.

An effective procedural means of proving professional misconduct by healthcare professionals is a forensic medical examination conducted in protecting human rights in the healthcare sector. To establish the correctness of the provision and quality of medical care in cases where medical professionals are held legally liable for professional offences, a commission

forensic medical examination is mandatory. However, O. Shevchuk *et al.* (2022) emphasise that the implementation of this procedural tool must be of high quality and follow the principles of forensic science, otherwise the implementation of human rights mechanisms in the healthcare sector is ineffective. At the same time, in the context of the issues under study, K.D. Yanishevskaya (2020) addresses the problems of “corporate” healthcare professionals, which are clearly visible during forensic medical examination, as the relevant experts and suspected or accused healthcare professionals are subordinated to the relevant territorial healthcare authorities. In certain cases, this affects the quality of forensic examinations and may cast doubt on their results.

R. Stepaniuk *et al.* (2022) argue that the problems of investigating medical crimes in Ukraine are conditioned by the following reasons: the specifics of the mechanism of offences committed in the field of professional activity of medical professionals aimed at helping people with various diseases, injuries, and physiological processes; the secrecy of the results of pathological examination of a corpse with a possible medical error for the relatives and friends of the deceased; lack of proper knowledge of the mechanism of medical crimes by investigators, which leads to low efficiency of evidence collection and evaluation; denial of guilt by medical professionals and shifting it to unforeseen reactions of the body, symptoms, violation of the prescribed regime by the patient, imperfect equipment, violations by other medical professionals, etc.; corporate confrontation between doctors involved in the case as forensic experts or witnesses; absence of independent forensic medical examination institutions in Ukraine and the ineffective system of protecting medical documents from unlawful access.

Y. Baulin *et al.* (2019; 2020) state that there is an ineffective system of legal regulation of the professional duties of a doctor, which not only worsens the quality of medical services but also leads to unjustified prosecution of a doctor; and therefore O. Knyzhenko *et al.* (2022) propose to detail the duties of a healthcare professional at the level of separate national-level

legislative acts, rather than departmental ones, which would consolidate these duties considering the level of development of the healthcare sector. O. Lisnych (2020) substantiates the need to reform legislation in the field of patient protection by unifying and systematising the legislative provisions governing patient rights in a single regulation.

Many researchers focus on the imperfection of the grounds for criminal liability of healthcare professionals for failure to perform or improper performance of their professional duties. O.P. Horpyniuk & P.M. Lepisevych (2021) conclude that this leads to frequent errors in law enforcement. N.O. Hutorova & V.M. Pashkov (2019) argue that the current construction of Article 140 of the CCU does not correspond to the degree of public danger of certain types of these acts.

There are tangible shortcomings related to the quality of the criminal law prohibition under Article 140 of the CCU¹. Part of the difficulty of bringing medical and pharmaceutical professionals to criminal liability for failure to perform or improper performance of their professional duties is related to the imperfection of criminal law. Thus, K.M. Danchenko & Kh.V. Hereliuk (2020) and I.A. Vyshnevskaya (2021a) have repeatedly addressed the inconsistency of the title of Article 140 of the CCU with its disposition, since the title does not mention anything about the failure to perform professional duties by a medical or pharmaceutical worker, which is also criminalised in this provision. V.A. Kononenko & M.I. Demura (2021), based on a generalisation of judicial practice, conclude that there is no single approach to determining the objective side of this type of crime. Yu. Leheza (2022) substantiates the expediency of concretising the norms of current legislation governing the liability of medical professionals in the context of applying circumstances that exclude the criminality of an act.

The draft CCU does not contain such a crime as improper performance of professional duties by a medical or pharmaceutical worker, although I.A. Vyshnevskaya (2021a) made relevant proposals. The researcher proposed to establish a special corpus delicti in the new Criminal Code of Ukraine, which would prescribe criminal liability of medical and pharmaceutical workers for failure to perform or improper performance of professional duties. However, Article 4.1.2 of the draft CCU recognises the commission of an offence under Articles 4.1.6 (Causing death by negligence) or 4.1.14 (Causing death of a human foetus by negligence) as a two-degree mitigating factor if the death of a person or the death of a human foetus is caused by improper performance of an urgent professional duty by a healthcare

professional due to their physical, mental, or emotional overload². Clearly, it is correct to refuse to refer in this provision to the failure to perform such an obligation, since such an act is more dangerous than improper performance. In other words, in case of failure to perform a healthcare professional's duty, liability should be more severe, as opposed to improper performance.

The sanctions of Article 140 of the CCU raised many questions. Since the improper performance of professional duties by a medical or pharmaceutical professional in some cases results in the death of the victim or even several victims (e.g., if a mother and an infant die during or after childbirth), there are grounds to compare the sanctions of Article 140 of the CCU with those of Article 119 of the CCU³. In fact, there is a competition between general and special rules.

Negligent homicide under Part 1 of Article 119 of the CCU is punishable by alternative punishments: restriction of liberty (3-5 years) or imprisonment (3-5 years), while under Part 2 of Article 119 of the CCU – imprisonment (3-5 years)⁴. For a criminal offence under Part 1 of Article 140 of the CCU, alternative punishments may be applied in the form of deprivation of the right to hold certain positions or engage in certain activities (up to 5 years) or correctional labour (up to 2 years), or restriction of liberty (up to 2 years), or imprisonment (up to 2 years), and for a criminal offence under Part 1 of Article 140 of the CCU – restriction of liberty (up to 5 years) or imprisonment (up to 3 years), with deprivation of the right to hold certain positions or engage in certain activities for up to three years (Part 2 of Article 140 of the CCU)⁵.

Thus, the sanction of a special rule provides for a milder punishment than the sanction of a general rule. Scientists rightly disagree with this. In this regard, Ya.H. Lyzohub (2005) notes that medical and pharmaceutical workers should be subject to increased requirements for the treatment of a person undergoing treatment, as they have a direct state duty to treat patients and protect their health. Therefore, these special subjects must be subject to adequate, i.e., at least equivalent, state repression to that which exists for ordinary forms of negligent death. O.O. Dudorov (2017) is also right, arguing that the sanctions of the articles under study are inconsistent and substantiating the strengthening of criminal liability for medical torts by appealing to patients' reliance on the professionalism and integrity of doctors. O.P. Horpyniuk & P.M. Lepisevych (2021) propose the establishment of more severe punishment for the actions of medical or pharmaceutical workers that led to the death of a patient and are also supported.

¹Criminal Code of Ukraine. (2001, April). Retrieved from https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini.htm.

²Draft of the Criminal Code of Ukraine. (2024, February). Retrieved from <https://newcriminalcode.org.ua/upload/media/2024/02/26/kontrolnyj-tekst-proyektu-kk-25-02-2024.pdf>.

³Criminal Code of Ukraine. (2001, April). Retrieved from https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini.htm.

⁴Ibidem, 2001.

⁵Ibidem, 2001.

The overly lenient sanction of Article 140 of the CCU allows for the application of probation, and in certain cases, release from punishment on the grounds prescribed in Article 49 of the CCU¹. Even in the case of grave consequences caused to a minor by a medical or pharmaceutical professional's failure to perform or improper performance of their professional duties due to negligence or dishonesty (Part 2 of Article 140 of the CCU), dismissal due to the expiration of the statute of limitations prescribed in Item 3 of Part 1 of Article 49 of the CCU² is possible after 5 years.

In some way related to the previous problem is the debatable issue of determining the consequences and their concretisation in the provision on non-performance or improper performance of professional duties by a medical and pharmaceutical worker, which directly affects the qualification of this crime. The question is whether the grave consequences in the disposition of Article 140 of the CCU include the death of the victim. M.I. Melnyk & M.I. Khavroniuk (2018) and O.O. Dudorov (2017) believe that the consequences in the form of death of the victim are covered by grave consequences specified in Article 140 of the CCU. Ya.H. Lyzohub (2005) and L.P. Brych (2009) deny this conclusion. This issue is of fundamental importance, as it affects the rules for qualifying improper performance of professional duties by a medical and pharmaceutical professional, which resulted in the death of the victim. Several options are possible here: 1) under Article 140 of the CCU; 2) under Article 119 of the CCU; 3) under the combination of Articles 119 and 140 of the CCU³.

A qualitative solution to these and other problems of qualification of improper performance of professional duties by a medical and pharmaceutical professional is possible in the context of comprehensive reform of criminal law. At the same time, the analysis of the relevant provisions of the draft CC of Ukraine showed that its researchers chose a conceptually different approach. On the one hand, it is clear that the improper performance of professional duties by a medical and pharmaceutical worker that caused death is proposed to be qualified as causing death by negligence (Article 4.1.6 of the draft CCU) or causing the death of a human foetus by negligence (Article 4.1.14 of the draft CCU⁴), i.e., in fact, manslaughter. On the other hand, improper performance of an urgent professional duty by a healthcare worker due to physical, mental, or emotional overload is recognised as a mitigating factor that reduces the severity of these crimes by two degrees. The identified shortcomings of the legislative construction of Article 140 of the CCU clearly need to be eliminated by introducing relevant amendments to this criminal law provision.

Criminal law instruments are undoubtedly an integral part of the mechanism for ensuring the effective performance of professional duties by healthcare professionals, but it should be noted that in some countries civil law instruments are also used in this process. S. Bortnik *et al.* (2020) found that the relationship between patients and healthcare professionals in the United States, France, and Germany is private, governed predominantly by civil law, and liability for violations in the provision of healthcare services by healthcare professionals is limited to compensation for material and moral damage to the patient.

Conclusions

The study of statistics for 2020-2023 on the improper performance of professional duties by healthcare professionals revealed a massive difference between the number of recorded facts of crimes under Article 140 of the CCU. Thus, during this period, an average of almost 500 reports of non-performance or improper performance of professional duties by medical and pharmaceutical professionals were registered annually, but only 3 people were convicted, which is 0.6%. There are grounds to assume that official statistics do not reflect the real state of affairs in this area due to a certain degree of latency of these criminal offences, and to state that a certain number of persons committing these torts avoid criminal liability. It can also be predicted that a considerable number of perpetrators of the crime under Article 140 of the CCU will be released from criminal liability or punishment due to the expiry of the statute of limitations. In any case, the performance of professional duties by healthcare workers is unsatisfactory in many cases and leads to serious consequences for the lives and health of patients. The foregoing confirms the hypothesis that there are a range of problems which hinder the prosecution of persons guilty of the medical torts under study.

Based on the analysis of prosecutorial and judicial statistics and the study of scientific research, the subjective problems that are formed through the influence of participants in the event, criminal proceedings and stakeholders include the passive position of injured patients and their relatives, corruption of judicial and law enforcement agencies, "medical solidarity" or "corporate nature" of medical professionals, low qualifications of medical professionals, insufficient training of law enforcement officers to investigate these torts.

The objective factors that do not depend on the influence of concrete individuals include the need to use a wide range of specialised knowledge and to establish effective interaction between law enforcement

¹Criminal Code of Ukraine. (2001, April). Retrieved from https://kodeksy.com.ua/kriminal_nij_kodeks_ukraini.htm.

²Ibidem, 2001.

³Ibidem, 2001.

⁴Draft of the Criminal Code of Ukraine. (2024, February). Retrieved from <https://newcriminalcode.org.ua/upload/media/2024/02/26/kontrolnyj-tekst-proyektu-kk-25-02-2024.pdf>.

and representatives of medical and expert institutions, imperfect document flow that allows for the successful forgery of medical documents, low standardisation of medical professionals, and the difficulty of establishing guilt, specifically in the case of “collective” medical services (i.e., the involvement of several doctors in the treatment of a patient), the flaws in the legislative construction of Article 140 of the CCU, etc. The above list of negative factors is not exhaustive, and the difficulties encountered in bringing to criminal liability for the crimes under study are determined by the conditions of a concrete criminal event.

Future research should focus on developing strategies to prevent unprofessional performance of duties in the medical field, which will not only ensure the prevention of these crimes, but also contribute to improving the quality of medical services and preserving the lives and health of citizens.

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Conflict of Interest

The authors of this study declare no conflict of interest.

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Неналежне виконання професійних обов'язків медичними та фармацевтичними працівниками: сучасний стан і проблеми протидії

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Анотація

Захист життя громадян і надання кваліфікованої медичної допомоги набуває надважливого значення під час війни. Водночас статистичні дані засвідчують, що численні випадки вчинення кримінальних правопорушень медичними працівниками не завершуються реальним відбуттям останніми кримінального покарання. Метою статті є вивчення питань вчинення невиконання чи неналежного виконання професійних обов'язків медичними та фармацевтичними працівниками, а також окреслення проблемних аспектів протидії цим кримінальним правопорушенням та шляхів їх вирішення. У дослідженні використано сукупність як загальнонаукових (загальний діалектичний, аналізу, синтезу, юридичний, індукції та дедукції), так і спеціальних (системно-структурний, статистичний, критичний) методів пізнання для встановлення, аналізу й тлумачення даних. Здійснене дослідження надало можливість констатувати наявність низки проблем, які стоять на заваді ефективному притягненню до кримінальної відповідальності медичних і фармацевтичних працівників за вчинені кримінальні правопорушення, а також класифікувати виявлені ускладнення на суб'єктивні й об'єктивні, пов'язані не лише з підготовкою медичних працівників, судових і правоохоронних органів, а й із законодавчими прогалинами та проблемами в медицині, що призводять до високого рівня латентності медичних деліктів, неефективного їх досудового розслідування, а також уникнення кримінальної відповідальності медичними працівниками. Тому протидія цим злочинам здебільшого зводиться до їх обліку працівниками правоохоронних органів. Незадовільне виконання професійних обов'язків медиками не просто негативно позначається на якості одержання послуг пацієнтами, а й призводить до тяжких наслідків у вигляді їх смерті чи заподіяння значної шкоди здоров'ю потерпілих. Результати дослідження будуть корисними для практичних працівників слідчих органів, які здійснюють кваліфікацію та розслідування досліджуваних деліктів, сприятимуть розробленню стратегії підвищення ефективності протидії таким кримінальним правопорушенням, а також стануть у нагоді медичним працівникам для недопущення вчинення помилок, що призводять до тяжких наслідків для життя та здоров'я пацієнтів, а також у контексті мотивації до сумлінного виконання професійних обов'язків

Ключові слова:

лікар; пацієнт; життя та здоров'я; кримінальна відповідальність; досудове розслідування та судовий розгляд