THE THEORY OF MEDICAL DELINQUENCY:

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Brief: There is a clear discrepancy between the formalization of the phenomenon of medical offense and its essence in reality. Not the freedom of professional activity needs to be formalized by legislative imperatives, but harmful deviations from professional technologies. A medical offense is caused by unacceptable deviations from the conventional professional technologies in medicine. The unavailability of foreseeing and preventing and/or eliminating the consequences of the abnormal development of pathology and/or abnormal reactivity of the bodily harmful to the patient's health excludes the violation. In relation to medical activity, the law ought to prescribe not what should be done, but what should not be done; assess a medical offense as the measure of real deviation from professional medical technologies, and not from any regulation; hold the doctor responsible solely for his actions, and not for the degree of compliance with the level of development of medicine or the authoritative opinions of scientists.

Key words: medical offense, medical error, iatrogenia

Medical offense remains an unexplored phenomenon to date.

The current Russian legislation attaches no independent meaning to a medical offense, referring it to the number of different universal compositions of the open list.

There is no understanding of medical offenses in law enforcement practice, both in judicial and investigative, and in administrative.

Medical offenses have not been institutionalized, and therefore are not the subject of study.

Instead of investigating the specifics of medical offenses, doctors and lawyers have written numerous publications at the artificial for Russia category of "medical error".

There are substantive and procedural reasons for using the term "medical error" in the precedent legal system: a single court (criminal and civil), the test for negligence in assessing the defendant's actions, the priority of judicial discretion as a result of the application (or non-application) of law, etc.

The absence of legal norms in domestic legislation applicable to the qualification of namely medical offenses has stimulated an unjustified interest in the category of medical error.

At the same time, the understanding of medical error turned out to be far from the origin, due to the interpretation of Academician I.V. Davydovsky[1] as "a consequence of a conscientious error of a doctor in the performance of his professional duties. The main difference between an error and other defects in medical practice is the exclusion of intentional criminal acts - negligence, negligence, and ignorance".

The interest in the topic of medical errors has reached lawyers (primarily law enforcement officers) and doctors (clinicians and organizers), scientists and practitioners, teachers and students.

Attempts to give legal significance to a medical error in the clinical sense have not been successful.

Medical error remained a *nomination without definition* [19].

The screening of thematic publications demonstrated the complete disunity of the authors' ideas about the subject of their publications: a medical error turned out to be a *nomination without content* [18].

The productivity of approaches and the positive logic of bringing disparate views to a common denominator of legal protection of the patient's health (rather than punishing the doctor in providing medical care) have not been revealed in the studied publications on medical errors.

The applicable provisions of the Criminal Code are of little use for qualifying medical offenses.

Despite the understanding by some authors of the studied publications of the incorrectness of existing approaches to the definition of medical offenses, there has been no understanding of what the guidelines of correctness are.

The determining part of the most appropriate legal norm ("in the performance of professional duties") turned out to be no more informative than "medical error", "medical care defect" or "iatrogenia".

A medical offense has remained a definition without content [20].

What is a medical offense?

Is it a characteristic of a result or a process?

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[1] Davydovskij I.V. Vrachebnye oshibki. Sovetskaya medicina. 1941. № 3. S. 3-10.

Is this disregard for prohibitions or prescriptions?

Is it a deviation from the rules of law or the rules of medicine?

The thematic publications studied in the above studies – and this is a subtotal sample of recent times – do not provide answers to these questions.

The current legislation does not provide answers to these questions either.

Moreover, questions are not raised in this way.

However, the ambiguity of the grounds of responsibility does not prevent the qualification of the act and the administration of justice in "medical" cases, especially active recently.

There is a clear discrepancy between the formalization of the phenomenon of medical offense and its essence in reality.

This determined the need to study the current state of the problem in the context of the mentioned issues.

First of all, the boundaries of the problem field are to be determined.

This is not the sphere of economic relations.

Even if doctors were economic agents, there is no medical specificity in the relations of commodity exchange.

This is also not the scope of consumer legislation, since medical technologies cannot be based on an agreement, unlike medical services provided by virtue of a contract.

Consumer legislation does not apply to doctors, their professional activities and iatrogenic offenses, since the employer is responsible for the actions of doctors, and if the doctors themselves are responsible, then it is not in consumer relations.

A medical service, being a commodity shell of medical help, covers everything that is provided for a free and has a market price, no matter who pays for it.

This is not the field of labor relations.

Despite doctors are in a relationship with an employer as employees, they carry out their activities in relation to patients who are in no way involved in the sale of medical labor.

This is not the sphere of administrative relations, since the management of a patient by a doctor is determined not by administrative prescriptions, but by the needs of the patient's health.

The relationship between doctors and patients is not formalized.

Therefore, for lack of grounds, this is not the scope of any duties (in particular, "professional" ones).

This is the area of professional responsibility of a doctor, more precisely: his moral and legal responsibility for professional actions, for deviations from accepted medical professional technologies that are subject to such responsibility.

The problem field of medical offenses is limited to the framework of informal relations between doctors and patients.

The purpose of this work is to clarify the content and boundaries of the phenomenon of medical offense.

The objectives of the study include substantiation of the signs of a medical offense.

The subject of the study is the characteristic of harmful actions of a doctor at the heart of a medical offense.

The object of this work is a set of factors that adversely affect the patient's health against the background of the doctor's actions.

In the most general form, a medical offense is a harmful deviation from the professional technologies accepted in medicine that contradicts the law.

The target of harm is the patient's health.

But what is health in its essential meaning, i.e. what is being harmed?

Health is an abstraction, a legal fiction.

Abstraction cannot be harmed, and therefore the real object of possible offense is not health.

In reality, such a physical object is a ***body*** (morphological characteristic) with the functional of an ***organism*** (physiological characteristic).

Damage to such an object is expressed by bodily injuries, which can be defined, measured and evaluated, in contrast to the abstraction of the concept of "health".

Harm to health is a ***legal*** expression of the ***medical*** category of bodily injury[2].

[2] In Russia, the concept of bodily injury was abolished, which is why forensic experts are, in fact, charged with the legal qualification of harm.

Существенно, что никакая деятельность, кроме медицинской, не осуществляется в отношении здоровья (тела как морфологической его основы и организма как основы функциональной).

No other activity than medical one is carried out in relation to health (the body as its morphological basis and the organism as its functional basis).

The point of application of medical activity is precisely health: without health effects, there is no medical activity.

Such an impact on health for the benefit may turn out to be an impact to the harm.

And understanding this requires differentiating what is ***good*** from what is ***harmful***.

Medical activity is one that is always accompanied by the infliction of bodily harm, which is not always harm.

Access to a pathological focus during surgery, removal of such a focus, often with complete or partial loss of organ function, are bodily injuries that are ***inevitable***.

Without such injuries, health effects are impossible in principle.

Prescribed medications that exhibit side effects, ranked in the instructions for medical use, are accompanied by ***acceptable*** bodily injuries.

Without such injuries, it is impossible to achieve the desired effect, and without this, other effects for the benefit of health are meaningless.

There are many of them, including the use of means of choice (for example, trial laparotomy for lack of an alternative), and situational expansion of the scope of surgical intervention, etc.

And only the remaining part of the injuries is caused by ***unacceptable*** actions of the doctor, the result of which is harm.

Harmful actions of a doctor become harmful when deviations from professional technologies customarily used in medicine go beyond the acceptable limits.

This does not mean that unacceptable actions of a doctor that have not resulted in harm are justified.

Up to the limit of harm formation, the actions of a doctor constitute a medical error subject to ***clinical deliberation***, and beyond this limit is an offense subject to ***legal qualification***.

What does this mean?

The actions of a doctor, accompanied by unavoidable, acceptable and unacceptable bodily injuries, become available for definition, measurement and evaluation according to professional and legal criteria – equally for the purposes of clinical deliberation and legal qualification, but above all for lawmaking.

Herewith the doctor's actions are determined by profession, but limited by opportunities and circumstances:

- The doctor is competent in medicine to the best of his knowledge and skills.

This knowledge and skills extend to the limits of his awareness in medicine, and not to the limits achieved by medicine.

A competent doctor always has room to grow.

- The doctor's proficiency in the profession is assessed by a measure of compliance with the level of colleagues.

And this is a level acceptable in medical practice, and not just possible in theory or established from outside medicine.

- A doctor is responsible within the limits of his competence and is responsible for his actions, not for the state of medical development.

Even the most advanced knowledge and skills of a doctor cannot keep up with the achievements of medical science.

The capabilities of doctors in advanced clinics in megacities are always wider than those available to colleagues in remote areas.

Hence, the competence of a doctor varies widely and always depends on many influencing factors.

And it is improperly to transfer the imperfection of medicine to the doctor.

Not everything depends on the doctor, and not everything is determined by the current level of medicine development.

Even the most impeccable actions of a doctor will not achieve the desired effect if its onset depends on other factors.

Moreover, the influence of these factors can not only prevent the beneficial effect of targeted actions by a doctor, but also cause adverse effects independent of them.

The essence of the doctor's actions is to:

- to manage the development of pathology under the influence of the applied means of treatment;

- predict possible body reactions to the applied means of treatments;

- to predict the probable variants of pathology development under the influence of the applied means of treatment.

But the development of pathology can get out of control and management by a doctor.

Medicine cannot yet also control and manage the reactivity of the patient's organism.

A doctor in such conditions is not always able to restore control of the situation, and therefore predict the development of events.

The nature and aggressiveness of pathology and reactivity of the organism in each specific case is not predictable as well.

В целом, источником происхождения неблагоприятных эффектов на здоровье являются не только ***действия врача***, но и ***поведение патологии*** и ***реактивность организма*** пациента.

In general, the source of adverse health effects is not only the ***actions of the doctor***, but also the ***behavior of pathology*** and the ***reactivity*** of the patient's organism.

This has been called the "triangle of harmfulness."

What does this mean?

First, understanding the objective limits of a doctor's abilities: they are not unlimited, but limited by what he can actually do.

Secondly, understanding the limits of requirements to the doctor: It's the matter of his professional capabilities, not imputation as a duty from outside.

Thirdly, understanding of what can and what cannot relate to the event and the composition of a medical offense.

It is critically important to understand that the actions of a doctor are determined by medicine.

Therefore, any deviations in the actions of the doctor have a medical assessment.

And it is the medical assessment that is the basis for the legal one, not the other way around.

And not because the medical assessment is the only correct one, but because an incorrect legal assessment leads to paralysis of medical activity in general.

Therefore, the task is to ensure that the legal definition of deviation from professional technology as an offense is based on a medical explanation.

The conditional norm and deviations from it have a clear medical boundary, which gives the relevant provision of the law the necessary formal certainty.

Formal certainty is needed precisely to understand the boundaries between actions for good and actions for harm, between what is possible and what is due, between the dispositive and the imperative in the relationship between a doctor and a patient.

The border between a doctor's actions aimed at the benefit of the patient's health and actions aimed at harm is not obvious, but harming the patient's health is equally dangerous in case of:

- unlimited freedom of action of the doctor;

- total directive of the doctor's actions;

- prescriptions and restrictions in the sphere of the doctor's dispositive actions;

- doctor's dispositive actions in the sphere of prescriptions and restrictions.

The fiduciary relationship between the doctor and the patient is not formalized because it cannot be formalized in a normative way – this is the sphere of the patient's trust and justifying his professional freedom of the doctor (medical art – lege artis).

The professional freedom of the doctor ends where the offense begins, i.e. actions to the detriment of the patient's health.

The dispositive use of professional technologies is well combined with the imperative of a normative assessment of deviations from them.

The imperative does not apply to the sphere of professional freedom of a doctor – only to harmful deviations[3].

There is no need to restrict the normal freedom of professional activity – it is necessary to prevent and terminate harmful deviations from the norm.

In relation to medical activity, the law ought to:

- prescribe not what should be done, but what should not be done;

[3] In Russia, the relevant law establishes administrative procedures, mandatory clinical recommendations, and other prescriptions, restrictions, and standards namely in the sphere of professional freedom of a doctor.

- assess a medical offense as the measure of real deviation from professional medical technologies, and not from any regulation;

- hold the doctor responsible solely for his actions, and not for the degree of compliance with the level of development of medicine or the authoritative opinions of scientists.

In general, the above allows to summarize the following results:

1. Not the freedom of professional activity needs to be formalized by legislative imperatives, but harmful deviations from professional technologies.

2. A medical offense is caused by unacceptable deviations from the conventional professional technologies in medicine.

3. The unavailability of foreseeing and preventing and/or eliminating the consequences of the abnormal development of pathology and/or abnormal reactivity of the bodily harmful to the patient's health excludes the violation.

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