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**LEGAL ASPECTS OF INAPPROPRIATE PROVISION OF  
MEDICAL CARE**

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**Abstract**

The article deals with the problem of human health in the focus of criminal liability. Special attention is paid to related crimes in the field of inappropriate provision of medical care to a patient. The existing law enforcement practice in investigation of crimes in the field of inappropriate provision of medical care faces certain problems. The authors point to this provision, give examples of existing law enforcement practice, analyze them, draw their conclusions based on the analysis, comparing these conclusions with theoretical provisions. Authors believe that in order to resolve the issue of inadequate medical care to a patient in a detailed way, it is necessary to introduce into the Criminal Law of the Russian Federation a norm that establishes criminal liability for improper provision of medical care to a patient resulting in the infliction of serious bodily harm, death of the patient or other consequences. According to the authors, the introduction of a single standard fixing the responsibility of the guilty persons for improper provision of medical care to the patient will increase the effectiveness of the investigation of crimes of this category, as well as solve the problem of delimiting related elements. The correct identification of the signs of a crime is fundamental and it is not only for those who carry out the investigation, but even probably of greater importance for those who will be brought to justice.

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*Keywords:* Criminal liability, crimes investigation, serious bodily harm, inadequate medical care



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## 1. Introduction

Millions of patients are injured or dying every year due to unsafe and poor-quality medical care. Many medical practices and health-related risks become serious concerns of patient safety and greatly increase the burden of harm from unsafe care.

“Errare humanum est”: it is unrealistic to expect flawless performance from people working in difficult conditions with high levels of stress. The assumption that individual excellence is possible will not improve safety. People are protected from error when placed in an error-free environment where the systems, tasks, and processes in which they operate are well-designed. Therefore, focusing on a system that allows harm is the beginning of improvement, and this can only happen in an open and transparent environment where a safety culture prevails. It is a culture that places a high value on safety beliefs, values and attitudes and is shared by most people in the workplace.

The problem of bringing medical workers to criminal liability for improper care is one of the most difficult medical and legal problems (Sergeev et al., 2014. p. 135). The number of complaints to the Investigative Committee of the Russian Federation about the actions of doctors in recent years has a tendency to increase (in 2019, the number of such appeals doubled compared to 2018) (The number of complaints..., 2019).

When medical workers are brought to criminal responsibility, the overwhelming majority of criminal cases are reasonably initiated on the basis of *corpus delicti* under Part 2 of Article 109 of the Criminal Code of the Russian Federation. At the same time, in recent years, there has been a tendency of sometimes unreasonable use of crimes against medical workers of more serious articles of the Criminal Code of the Russian Federation.

## 2. Problem Statement

At present, the current criminal legislation does not have a single standard fixing the responsibility of medical workers for the improper provision of medical care, and therefore, in law enforcement practice, arising problems are associated with the delimitation of related elements of criminal offenses.

Law enforcement agencies of all constituent entities of the Russian Federation are dealing with the issue of delimiting these aspects. In particular, they are interested in the issue of delimiting Part 2 of Article 109, Part 2 of Article 118 and Article 238 of the Criminal Code of the Russian Federation.

Analysis of the published practice of the Supreme Court of the Russian Federation and courts of other regions of the Russian Federation indicates that the infliction of death or serious bodily, as a result of improper professional performance of a medical worker, in many cases qualifies under the articles of the Criminal Code of the Russian Federation. These articles provide for liability for crimes against human life and health - under Part 2 of Article 109, Part 2 of Article 118 of the Criminal Code of the Russian Federation. However, there are separate court decisions (in particular, in the courts of St. Petersburg and the Leningrad region), where such an act is qualified under Article 238 of the Criminal Code of the Russian Federation, which provides for liability for the provision of services that do not meet the requirements of the safety of life or health of consumers. In this case, the courts believe that since the provision of medical care, as a rule, is carried out on the basis of an agreement (compulsory or additional medical insurance;

specific paid medical services), the patient has the right to ensure that this service is safe for life and health. Therefore, the deed should be qualified according to Article 238 of the Criminal Code of the Russian Federation, even in case of gross violations in the field of health care, but not in cases where death or serious bodily harm are caused as a result of single inappropriate actions of a particular doctor.

In our opinion, and these situations attract attention (Danilov, 2021; Khromova, 2019; Pospelova, 2020) and require a more detailed study in order to differentiate related crimes in the field of inappropriate medical care.

### **3. Research Questions**

The issues of law enforcement practice, due to the differentiation of related elements of criminal acts and arising problems in the investigation of crimes in the field of inappropriate provision of medical care, have attracted the attention of the legal and medical community for many years.

At different times, the following scientists devoted their work to the consideration of these issues: E.O. Danilov, S.I. Pospelova, A.V. Kovalev, S.V. Kuznetsov, Yu.D. Sergeev, T.N. Petrova, E.K. Senokosova, N.M. Khromova, and others. On the basis of the works of these scientists, a general conclusion follows, indicating the lack of unity of approaches to determining the signs of a crime in the field of inappropriate medical care.

Consequently, the research questions of this article are:

3.1. certain theoretical and practical problems caused by the delimitation of related elements of criminal offenses in the field of inappropriate medical care;

3.2. theoretical and practical materials that allow to form an opinion on the criteria for distinguishing between related elements of criminal offenses in the field of inappropriate medical care.

### **4. Purpose of the Study**

The purpose of the study is to study legal relations caused by the differentiation of related elements of criminal offenses in the sphere of inappropriate provision of medical care as well as arising problems during their investigation.

### **5. Research Methods**

The methodological basis of the study is dialectical knowledge of the surrounding reality, therefore, the following scientific methods are applied: formal logic, induction, deduction, analysis, synthesis, analogy, hypothesis, and others.

### **6. Findings**

At the beginning of the work, we already mentioned that causing death or serious bodily harm, due to improper professional performance of a medical worker, in many cases, is qualified under the articles of the Criminal Code of the Russian Federation, which provide for liability for crimes against human life and

health - under Part No. 2 article 109, part 2 article 118 of the Criminal Code of the Russian Federation. However, there are separate court decisions (in particular, in the courts of St. Petersburg and the Leningrad region), where such an act is qualified under Article 238 of the Criminal Code of the Russian Federation, which provides for liability for the provision of services that do not meet the requirements of the safety of life or health of consumers. Separate observations on this score are also found in scientific works (as cited in Petrova, 2017, p. 148; Senokosova, 2017, p. 105).

When death / serious bodily harm is caused by negligence, the object of a criminal act is the life and health of an individual. In turn, according to Article 238 of the Criminal Code of the Russian Federation, the object is broader – it is the health of the population. In other words, the health of an indefinite number of persons, the group to which medical services are provided, and not the life and health of one particular person who suffered as a result of a medical error (as cited in Petrova, 2017, p. 151).

The objective side of this crime is expressed in the form of an act of providing medical services that do not meet safety requirements. These actions, provided by the guilty person, initially endanger the life and health of the patient. At the same time, the socially dangerous and unlawful nature of the actions is obvious to the perpetrator. According to Article 238 of the Criminal Code of the Russian Federation, the deed can be qualified, for example, when obstetric services are provided in conditions of gross violation of sanitary requirements; when X-ray fluorography is performed using deliberately faulty equipment, with a significant excess of the patient's permissible radiation dose; when vaccination services for children are provided outside a medical institution, which is prohibited (there is such an example in judicial practice). In each of these cases the life and health of the patient is a priori endangered, regardless of the actions of the particular medical worker providing assistance (as cited in Kuznetsov, 2018, p. 61). In the same cases when death or serious bodily harm are caused due to improper performance of their professional duties by a specific medical worker - due to carelessness (for example, from judicial practice - a doctor confused containers with blood of different groups during blood transfusion, did not pay attention to significant for diagnosing and prescribing the correct treatment of symptoms), or due to non-compliance with the relevant medical standards of examination and treatment (for example, from judicial practice - the doctor did not perform the required diagnostic procedures, did not involve a specialist of the appropriate profile, did not find out information about the patient's allergic reaction for a certain group of drugs, did not make a timely decision on surgery). The deed in this case must be qualified accordingly under Part 2 of Article 109 or Part 2 of Article 118 of the Criminal Code of the Russian Federation.

At the same time, in contrast to the crime provided for in Article 238 of the Criminal Code of the Russian Federation, the socially dangerous and illegal nature of the actions of medical workers in most cases is not obvious to them.

It should also be noted that the crimes provided for by Part 2 of Article 109 / Part 2 of Article 118 of the Criminal Code of the Russian Federation differ from the crimes provided for by Article 238 of the Criminal Code of the Russian Federation in terms of the design of the compositions. In the first case, the compositions under consideration are material by design, i.e. there are consequences (death, serious bodily harm) and a causal link. In the second case, the composition under consideration is formal, that is, the act itself is punishable, regardless of the consequences that have occurred.

The next related compositions we are considering are Part 2 of Art. 109 / Part 2 of Art. 118 of the Criminal Code of the Russian Federation and Part 1.2 of Article 235 of the Criminal Code of the Russian Federation.

In this case, in contrast to the careless infliction of death or serious bodily harm, due to the improper professional performance by the medical, the person provides certain medical services, knowing that for their legal provision it is necessary to have an appropriate license, and he or she do not have one. Therefore, if the provision of such illegal medical services entailed by negligence results in serious bodily harm, or the death of a person, the deed must be qualified under Part 1 or 2 of Article 235 of the Criminal Code of the Russian Federation, and does not form the *corpus delicti* under Part 2 of Article 109, Part 2 Article 118 of the Criminal Code of the Russian Federation, establishing liability for careless infliction of harm in the implementation of legal medical activities associated with improper performance of their professional duties.

As an example of bringing a person to criminal liability under Part 2 of Article 235 of the Criminal Code of the Russian Federation, it is necessary to cite the following situation: "...a gynecologist T., working in a private medical clinic "Rulain Med" (which provides gynecological services of a limited range) performed abortion to a victim D. As a result of the procedure the victim died. The preliminary investigation authorities found that in the list of medical services, in accordance with the license issued by the Moscow Department, there is no abortion service license for this clinic. Based on the foregoing, the actions of doctor T. were reasonably qualified under Part 2 of Article 235 of the Criminal Code of the Russian Federation...".

At the same time, in the theory of criminal law, there is a position according to which it is necessary to clearly distinguish between non-provision of assistance to a patient and inappropriate provision of medical assistance. The delimitation of these provisions is of great importance and is as follows:

1) in case of improper provision of medical care, there is a violation of the norms of federal, regional and international legislation in the field of medical care;

2) in case of improper provision of medical care, a violation of the norms of medical ethics and bioethics occurs. In other words, medical help to the patient is still provided by medical organizations, but in violation of the established requirements and rules.

In addition to the aforementioned related elements of criminal offenses in the sphere of inappropriate provision of medical care, Part 2 of Article 109 / Part 2 of Article 118 of the Criminal Code of the Russian Federation and Part 2.3 of Article 293 of the Criminal Code of the Russian Federation are also related.

When differentiating these crimes, one should proceed from the signs of a special subject and a direct object of criminal law protection: for Part 2 of Article 109 and Part 2 of Article 118 of the Criminal Code of the Russian Federation, the subject is a person who is entrusted with the corresponding professional duties (in our case, a medical worker), and the main direct object is the life and health of a specific person; for Part 2 of Article 293 of the Criminal Code of the Russian Federation there is a special subject - an official, and the main direct object here will be relations in the field of state power, public service and service in local governments, and human life and health are only an additional direct object.

Accordingly, in order to distinguish these crimes, it is necessary in each specific case of law enforcement to find out what duties the guilty person performed and in what capacity he acted - as a doctor or as an official (a leading employee of a medical institution).

And if it is established that the person, although he is an official within the meaning of the note to Article 285 of the Criminal Code of the Russian Federation, but in this particular situation acted as a doctor who directly provides medical assistance, then what he has done cannot be qualified as an official crime, it is negligence.

As an example from the judicial practice of the Supreme Court of the Russian Federation, one can cite the criminal case against S.V. Vekker, who was convicted by the Perovskiy District Court of Moscow initially under Part 2 of Article 293 of the Criminal Code of the Russian Federation, then his actions were re-qualified to Part 2 of Art. 2 article 118 of the Criminal Code of the Russian Federation.

So, Vekker S.V., being the head of the department of anesthesiology, resuscitation and intensive care, in the course of gynecological operations performed by surgeons, performed blood transfusions to victims B. and T. without checking the blood group, hoping for the correctness of the labels on the containers. Having mixed up the blood of the patients, Vekker S.V. by his actions caused B. hemorrhagic shock of II-III degree, that is, caused her serious bodily harm; in turn, Vekker S.V. caused slight bodily harm to patient T. The judicial board noted that during the operation Mr. Vekker performed the functions of a doctor, and not a head of a department, and therefore his actions must be retrained to Part 2 of Article 118 of the Criminal Code of the Russian Federation.

## **7. Conclusion**

An analysis of law enforcement practice and scientific sources allows us to come to an unambiguous conclusion that the problems caused by the differentiation of related elements of criminal acts in the field of inappropriate medical care exist and require their solution. At the current time, it remains for law enforcers to more thoroughly approach the issue related to the establishment of all mandatory signs of a crime. But in our opinion, in addition to the above, it should be proposed to the legislator to introduce a unified standard securing the responsibility of the guilty persons for the improper provision of medical care to the patient. This is what will increase the effectiveness of the investigation of criminal cases in this category, as well as solve the problem of differentiating related elements of criminal offenses.

Back in 1988, Corresponding Member of the Russian Academy of Sciences, professor, founder of medical law in the Russian Federation Yu. D. Sergeev made research on this problem. He suggested that all issues of this nature could be removed by introducing a separate standard in the Criminal Law of the Russian Federation, where the subject would be special. The name of this regulation was proposed - "Inadequate provision of medical care (medical service)". The legislator is determined with the need to introduce a separate standard stipulating the responsibility of the guilty persons for the improper provision of medical care to the patient. Meanwhile, the main task for the Plenum of the Supreme Court of the Russian Federation, for an adequate legal assessment of medical cases, is to prepare clear explanations on the qualification of crimes in the health sector. It is a comprehensive solution to the problem indicated in the article that will contribute to improving the quality of qualifications, disclosing and investigating criminal acts in the field of improper provision of medical care and the implementation of the basic principles of criminal law - the legality of prosecution and the fairness of sentencing.

In addition, these measures will make it possible to develop the right strategy in organizing work on the prevention of criminal acts in the field of inappropriate medical care.

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