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TÍTULO: Importancia legal penal de la negligencia médica.

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RESUMEN. Este artículo está dedicado al análisis teórico de la negligencia médica como un concepto del derecho penal. Este artículo hace una crítica constante de este último enfoque y confirma la posición de que una negligencia médica en el derecho penal debe entenderse como un tipo especial de circunstancia que impide la criminalidad, causando daños a una persona en el curso de una actividad médica, donde existía una posibilidad objetiva de evitarla, pero que se debió a las características fisiológicas del paciente, a métodos imperfectos de brindar atención médica, así como a la inconsistencia del estado psicofisiológico del trabajador médico en la situación actual.

PALABRAS CLAVES: Negligencia Médica, circunstancias que excluyen la criminalidad de un acto, derecho penal, derecho médico, delitos iatrogénicos, causar daño por negligencia.

TITLE: Criminal legal significance of medical malpractice.

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ABSTRACT: This article is devoted to the theoretical analysis of medical malpractice as a concept of criminal law. This article makes a constant criticism of this last approach and confirms the position that medical malpractice in criminal law should be understood as a special type of circumstance that prevents criminality, causing harm to a person in the course of a medical activity, where there was an objective possibility of avoiding it, but that was due to the physiological characteristics of the patient, to imperfect methods of providing medical attention, as well as to the inconsistency of the psychophysiological state of the medical worker in the current situation.

KEY WORDS: medical malpractice, circumstances precluding criminality of an act, criminal law, medical law, iatrogenic crimes, cause harm through negligence.

INTRODUCTION.

Currently in Russia, the issue of the criminal responsibility of medical workers for the so-called “medical malpractice” - causing harm to the patient in the course of providing medical care -, is of particular relevance. If in the year 2012, the number of citizens appealing to the investigating authorities of the Investigative Committee of Russia in cases of “medical malpractices” reached 2,100 of which 311 appeals served as a basis for initiating criminal cases, and 60 cases were later sent to the court, in 2017 the number of citizens' appeals increased to 6,050, more than one-third of all appeals (311) were initiated and 175 were sent to the court. (Application of the Investigative Committee of the Russian Federation, 2018).

As an adequate response to such an increase in “iatrogenic crimes”, the chairman of the Investigative Committee of the Russian Federation, Aleksandr Bastrykin, proposes to make amendments to the Criminal Code of the Russian Federation and to supplement the special part with a special rule establishing responsibility for the commission of “medical malpractice” and improper

provision of medical assistance (The Investigative Committee of Russia held a meeting on the investigation of crimes related to medical malpractices, 2018).

DEVELOPMENT.

The social danger of crimes connected with causing harm during inadequate medical care is obvious and hardly needs additional articulation. It should be noted; for example, in the United States, according to The Independent, referring to the studies conducted by the foreign experts of the American School of Medicine at Johns Hopkins University, medical malpractices are the third leading cause of death among the population (The third highest cause of death in the United States is mistakes by medical staff// The independent (Electronic resource), 2018).

The arthroplasty specialists reported that more than 70% of respondents were prosecuted at least once for medical negligence during their careers (Upadhyay A, York S, Macaulay W, McGrory B, Robbennolt J, Bal BS., 2007).

The concern of the Investigative Committee of the Russian Federation does not arise from scratch, but already today, many representatives of the medical community have expressed their concern about the accusatory bias that emerges during the consideration of cases related to “medical malpractice” and indicate that this will only worsen the level of overall medical care (Reserve for Prisoners: How the Investigative Committee Strengthens the Legal Framework for Dealing with Medical Malpractices. Vademecum (Electronic resource). (access date: 30.05.2018).

https://vademec.ru/article/zapas_pod_uznikov_kak_sledstvennyy_komitet_kreplit_zakonodatelnuyu_bazu_dlya_borby_s_vrachebnymi_osh/

In our opinion, many of the problems associated with the criminal responsibility of doctors for causing harm in the course of providing medical care arise from some ambiguity of one of the central concepts of medical law - “medical malpractice”, differently interpreted by the medical community; as a result, there is entanglement causing heavy consequences in practice.

Our article is devoted to the attempt to offer a single legal and medical understanding of the "medical malpractice".

Methods.

The methodological basis of the study consists of general philosophical research methods, such as: analysis and synthesis, deduction and induction, method of building hypotheses. The specific nature of the material under study predetermines the use of private research methods: formal legal, system structural, historical legal - in that part of the study, which concerns the consideration of temporal changes in the understanding of medical malpractice.

A comparative method that makes it possible to carry out the correlation of approaches to the definition of medical malpractice, on the one hand, as well as the correlation of approaches to medical malpractice in Russian and foreign science, is widely used in medical and legal circles.

Results and Discussion.

The problem of "medical malpractice" in the domestic scientific literature has a long and rather interesting history, a separate feature of which is a high degree of ideology, as well as a high degree of influence of economic, political and social factors, which in aggregate, hinder the impartial consideration of this issue.

It's quite logical that the attitude to the "medical malpractice" sometimes diametrically differs depending on people, in whose focus of cognitive interest it falls: medical workers, who usually talk about medical malpractice (and this is a fundamental point) as an excuse and non-criminal, albeit annoying incident; or lawyers and especially non-medical journalists and ordinary people, who tend to view medical malpractice as a type of unlawful or even criminal behavior.

Thus, according to a sociological study of E.V. Chervonykh, conducted in 2008–2009 among patients, medical workers and law enforcement officers (Chervonnykh Elena Valerievna. 2010), only 19% of doctors agreed that they should be criminally liable for a medical malpractice, while 94.5% of respondents among patients were sure that the medical malpractice should entail criminal liability.

It seems that we should not underestimate the influence of public opinion, even if it is profane in its essence, on the legal reality, the legislator often goes on about it, in pursuit of populist, but legally ineffective laws.

In the post-revolutionary socially and economically unstable time, some scholars noted an increased number of criminal cases where the doctors were treated as defendants compared to the practice before the revolution. As far back as in 1928, such experts as I.V. Markovin, N.I. Izhevsky wrote thereof. (Akopov V.I. 2002).

It is curious that a similar surge in judicial activity regarding medical malpractices in the United States occurred only in the 60s, (Sloan FA, Bovbjerg RR, Githens PB., 1991), although separate cases of medical negligence began to appear regularly in the judicial practice from the 1800s, (DeVille KA. 1990) and the Institute of Medical Error in the United States genetically originated in English law of the 19th century (Speiser SM. 1987).

We think that such a surge is associated with the socio-economic changes in the life of American society, a fall in the trust of ordinary members of society to the traditional state and public institutions, including the health care system.

It should be recognized that the view of the medical malpractices as something apologetic and impregnable was confirmed in the scientific literature of the Soviet time. It seems that the concept of I.V. Davydovsky, cited in the Big Medical Encyclopedia in 1928, may be specified in this respect: "Medical malpractices are a consequence of the doctor's conscientious delusion in the

performance of his/her professional duties" (Davydovsky I.V. 1928). This approach is shared by a number of modern specialists (Elstein N.V. 2005).

We agree with this traditional approach to understanding medical malpractice; however, the understanding of medical malpractice as not fundamentally criminal is criticized by both the medical and the legal scientific communities.

The understanding of medical malpractice in the criminal law of foreign countries is very interesting. Thus, in the United States, the term "medical malpractice" is an adequate concept of medical error, understood in a negative way. According to this concept, it is understood a crime consisting in any doctor's action or omission during the patient's treatment, which deviates from the accepted norms of practice in the medical community and causes trauma to the patient.

The composition of medical malpractice includes four main elements in the American law: (1) a legal obligation on the part of the doctor to assist or treat the patient; (2) violation of this duty due to the inability of attending physician to adhere to the professional standards; (3) a causal relationship between such a breach of duty and the patient's trauma; and (4) the occurrence of damage that results from injury, so that the legal system can provide compensation (An Introduction to Medical Malpractice in the United States, 2009).

A.S. Dimov, speaking on the part of medical community, has consistently criticized the traditional understanding of medical error inherent in the Soviet and Russian science as an inevitable and not criminal phenomenon of concomitant medical activity. On his example, we will try to show the inconsistency of such an approach.

Firstly, it seems that A.S. Dimov does not agree that medical errors are inevitable. Appealing to the laws of dialectics, the author concludes that the truth in each case is one and always concrete, but there are many erroneous ideas. Thus, we can make a conclusion that this does not mean that it is impossible to establish a sufficiently accurate (true) diagnosis for a particular patient at any given

time and space meeting the requirements of practice (reality) (Gittler GJ, 1996). However, the very concept of possibility carries in its content a probabilistic nature; at the same time, carrying the possibility of not occurring of a possible event. In each case, it is possible to establish the correct diagnosis, but from the point of view of medical practice as a whole, the malpractices are a natural and inevitable phenomenon.

Secondly, A.S. Dimov clearly articulates that, in his opinion, "The objective reasons for diagnostic malpractices made by a doctor cannot exist" (Gittler G.J., 1996). This conclusion is made on the basis of the following inference: malpractice is the product of human brain, therefore, the malpractice is subjective. If we consistently adhere to this point of view, then we should conclude that any of our actions, any of our statements, any judgment, including that made by A.S. Dimov, is subjective. In the end, a person deals only with a subjectively fractured reality, and pure objectivity may exist only in the noumenal world, following the example of Kantovsky. The whole totality of objectively existing circumstances accompanying the commission of a medical malpractice and, ultimately, determining its commission should not be completely eliminated: imperfections of diagnostic methods, physiological features of a particular patient, non-typical nature of the pathological process, etc.

Thirdly, A.S. Dimov criticizes such a sign of medical malpractice as the impossibility to foresee its consequences. The author believes that the doctor's professional duties fundamentally include the ability to predict the onset of the result of his/her actions, to know the consequences and complications of all manipulations made and drugs prescribed. Further, A.S. Dimov formulates his concept of medical malpractice, which includes a diagnostic error - "the doctor's conclusion about the nature of disease, which is inconsistent with truth, reality, practice, that is, is false"; as well as a curative malpractice, determined in a similar way, through the inconsistency of the doctor's actions with the actual pathological processes (Gittler G.J., 1996).

In the framework of this paper, we try to propose the concept of medical malpractice relevant to the criminal law. The definition, given by A.S. Dimov, is in no way such, since it provides only for an objective discrepancy between the doctor's actions and the pathological processes as the only criterion of irregularity, which, in combination with the position of A.S. Dimov, according to which the doctor is obliged to know the consequences of all his/her actions, regardless of any circumstances that are beyond his/her control, prevents us from objective imputation, which is unacceptable in the modern criminal law.

Approaching the legal understanding of medical malpractice, the authors of the collective work "Origins and Modern Content of Criminal Policy in the Field of Health Care: Relevant Issues of Theory and Practice" come to the conclusion that in the legal sphere, medical malpractice should be understood as "the guilty behavior of a medical worker expressed in the non-compliance with the established standards of behavior in a particular professional situation, caused either by their ignorance (professional negligence) or by their self-confident ignoring" (Dimov A.S. 2016, p. 396). In fact, it is a question of committing a crime with an imprudent form of guilt, the objective side of which would be harm to health or death.

In order to bring the medical worker to criminal liability for the careless infliction of harm, we do not need to use the concept of a medical malpractice, or to supplement the Criminal Code of the Russian Federation with new compositions. Careless guilty behavior of medical workers, if it entails the infliction of grievous bodily harm or death, is subject to qualification under Part 2 of Art. 118 of the Criminal Code of the Russian Federation "causing grievous bodily harm through negligence, as a result of improper performance by a person of his/her professional duties", or under Part 2 of Art. 109 of the Criminal Code of the Russian Federation "causing death by negligence, as a result of improper performance by a person of his/her professional duties", respectively.

We can talk about a medical error as a special kind of crime in the framework of domestic criminal law only if we find the fundamental grounds for isolating it from the framework of Art. 118 and Art. 109 of the Criminal Code of the Russian Federation, for which, in our opinion, there are no sufficient grounds.

The supporters of the allocation of "medical malpractice" from the general compositions of careless injury should answer the question: why should a harm caused by negligence by a medical worker entail a heavier liability? It seems that there is no reason for this, since there is no visible difference between the level of public danger of causing harm by negligence by a medical worker, due to improper performance of professional duties, and causing harm, for example, by a kindergarten worker or a conveyor belt worker in a factory. Rather, on the contrary, given that the human body is not complex than the conveyor belt, the doctor's malpractice is more likely and, as a result, somewhat more excusable.

In summary, we see no reason to recognize the careless infliction of harm by a health worker as a more dangerous type of harm, compared to the same harm caused by the representatives of other professions under similar circumstances, nor to give to the concept of a medical malpractice in the criminal law any meaning other than it is attributed by the representatives of medical community. Therefore, if we talk about the criminal understanding of a medical malpractice, it should be defined not as a crime, but rather as a circumstance precluding criminality of the act, in order to reduce the repressive criminal law impact on the medical community.

It is very interesting that our American colleagues are also concerned about the problem of removing ordinary medical workers from excessive legal repression. As a solution, it is proposed to completely exclude the doctor's responsibility and replace it with a corporate responsibility in which the health care organization is responsible for the medical malpractice (The Origins and

Current Content of Criminal Policy in the Field of Health: Current Issues of Theory and Practice, 2013)

It should be recognized that the atypical occurrence of certain pathological processes, the imperfection of the current state of medicine, the physiological features of the individual patients, the unpredictable randomness factor arising from the above listed conscientious delusions can often lead to causing harm to the patient's health and even death of a patient. But if a medical worker performed his/her professional duties in good faith in general, then he/she made a medical malpractice of an excusable nature and his/her actions in this case should not be subject to qualification as criminal. Therefore, in criminal law, the medical error should be defined as a circumstance precluding criminality of the act (defense), which will lead to a decrease in the repressive impact on the medical community members and will have a positive effect on the medical care level (Mello MM, Brennan TA. 2002).

CONCLUSIONS.

In this article, we tried to offer our own understanding of medical malpractice under Russian criminal law. Such work was complicated by the diversity of this concept, the fact that it has been initially alien to the legal field, has been formulated within the framework of medical science and is only beginning to be implemented in the legal conceptual apparatus.

At the moment, we are at the very initial stage of understanding medical malpractice as a legal category; therefore, it is important for us to work out a correct, principled approach to understanding medical malpractice within the framework of criminal law, and in our opinion, a medical malpractice should be understood as an undesirable, but legitimate harm caused by a medical worker to a patient in the course of medical activities.

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