ORIGINAL ARTICLE

CONTENTS

The specifics of the interpretation of non-performance or improper performance by medical or pharmaceutical employees of their professional duties, taking into account the practice of the ECHR

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ABSTRACT

Aim: To find out the specifics of the interpretation of non-performance or improper performance by medical or pharmaceutical employees of their professional duties, taking into account the practice of the ECHR.

Materials and Methods: This article is based on the analysis of the international legal acts, the practice of the ECHR, national judicial practice, court statistics, criminal and medical law legal doctrine, official statistics of the Office of the Prosecutor General of Ukraine, analytical data based on the results of cooperation with the "Main Bureau of Forensic Medical Examination of the Ministry of Health of Ukraine". Dialectical, comparative, analytical, synthetic and system analysis research, hermeneutic methods were used.

Results: In each specific case it is necessary to establish whether there is non-performance or improper performance of professional duties by medical or pharmaceutical employees, the result of which is the failure to fulfil his direct professional duties, provided for by regulatory and legal acts, job instructions, qualification requirements and standards of treatment. The patient's right to health care is not ensured by the guarantees provided for by national legislation, so patients file complaints with the ECHR.

Conclusions: A single approach to the interpretation of such terms as "non-performance or improper performance by a medical or pharmaceutical employee his professional duties" is a guarantee of the uniformity of their enforcement and the formation of stable judicial practice in this category of criminal cases.

KEY WORDS: patient rights, criminal offences, ECHR practice, criminal proceedings

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INTRODUCTION

Every person has a natural, inalienable and inviolable right to health care. The priority of health care is a basic guideline both at the level of international legal regulation and at the national level. However, if the patient did not receive an adequate level of medical care or was faced with the inaction of medical or pharmaceutical employees, he or his relatives, other persons to whom this right is granted by law has the possibility of applying to the court for the protection of the violated right. In case of impossibility of achieving such protection at the national level, there is a mechanism of appeal to the European Court of Human Rights (hereinafter – ECHR).

Ukraine, having ratified [1] the European Convention on Human Rights and Fundamental Freedoms (hereinafter – the Convention) [2], undertook the obligation to implement the decisions of the ECHR, to introduce European standards of human rights into the Ukrainian judiciary and administrative practice. The ECHR's decision is binding for Ukraine to implement, in accordance with Article 46 of the Convention. The legal positions of the ECHR are mandatory not only for the legislation of Ukraine, but also for most EU countries. Systematic interpretations of non-performance or improper performance of professional duties by medical or pharmaceutical employees in the decisions of the ECHR are aimed, among others, at clarifying the importance and relevance of which measures of state influence should be taken at the national level to reduce the number of violations by medical and pharmaceutical employees.

AIM

The aim of the article is to find out the specifics of the interpretation of non-performance or improper per-

formance by medical or pharmaceutical employees of their professional duties, taking into account the practice of the ECHR.

MATERIALS AND METHODS

This article is based on the analysis of the international legal acts, in particular, the European Convention on Human Rights and Fundamental Freedoms, as well as the practice of the ECHR, national judicial practice, statistics on the number of criminal proceedings in the courts of Ukraine, criminal and medical law legal doctrine (41 normative legal acts and 57 court judgments), official statistical data of the Office of the Prosecutor General of Ukraine, analytical data based on the results of cooperation with the "Main Bureau of Forensic Medical Examination of the Ministry of Health of Ukraine". Dialectical, hermeneutic, comparative, analytical, synthetic and system analysis research methods were used.

RESULTS

Non-performance of professional duties means that medical or pharmaceutical employees does not perform a set of actions, the performance of which is mandatory for them. Non-performance of professional duties should be distinguished from improper performance of professional duties; here we are talking about situations when employees still perform their duties, but not fully, carelessly, both once and systematically. For example, untimely and/or incorrect doctor's diagnosis; violation by the pharmacist of the temperature regime for the storage of medicinal products; leaving foreign objects in the patient's body, etc. It is necessary to take into account that the choice of treatment methods, which are preceded by the establishment of a diagnosis or work with medicinal products, prescriptions, also depends on other factors, such as the individual characteristics of the patient's body, the medical equipment available or absent in the hospital, etc. Therefore, in each specific case, it is necessary to establish whether there is improper performance of professional duties, that is such actions of medical or pharmaceutical employees, the result of which is the failure to fulfil their direct professional duties, provided for by regulatory and legal acts, job instructions, qualification requirements and standards of treatment, excluding randomness and cases. As for non-performance of professional duties by medical or pharmaceutical employees, this should be understood as the inactivity of these categories of persons. When investigating such criminal proceedings, the competent authorities must understand the correctness or falsity of the actions or existing inactivity of medical or pharmaceutical employees, using special medical knowledge, involving experts, removing medical documentation in order to determine the compliance of the actual actions of these categories of employees with the requirements of regulatory acts (orders, instructions, recommendations, etc.).

We submitted a request to the Prosecutor's General Office of Ukraine to obtain official statistical data on the number of criminal proceedings sent to court under Article 140 of the Criminal Code of Ukraine for the period from 2013 to 2022 (Table 1).

The analysis of this data gives reason to claim that there is a clearly disproportionate number of victims' statements for investigation of the facts of non-performance or improper performance of professional duties by medical or pharmaceutical employees with the number of criminal offenses that are sent to court. In most cases, the pre-trial investigation is carried out inefficiently or too slowly. The more time elapses from the moment of registration of a crime report, the less likely it is that the victim will have a positive outcome of the investigation, at least in the form of the transfer of criminal proceedings materials to the court. As a result, the patients' request for protection of their right to health care is not satisfied, and the guarantees provided by the national legislation for a quick, complete and impartial investigation of the criminal offense are not provided.

Taking into account the statistical indicators for the previous 5 years regarding the number of considerations by courts of first instance in Ukraine of materials of criminal proceedings under Article 140 of the Criminal Code of Ukraine, we note to a greater extent the similarity of the indicators of the number of criminal proceedings with some decrease over the last few years (Table 2).

It is interesting that the number of criminal proceedings that are closed in Ukraine is almost twice as high as the number of verdicts passed in these categories of cases. Such statistical indicators are caused primarily by the difficulty of collecting the evidence base, proving a causal connection between a specific action by medical or pharmaceutical employees and the consequences that have occurred. The medical reform that has been ongoing in Ukraine since 2014 unfortunately has done little to improve the situation with the protection of violated rights and freedoms of patients. Many regions of the state are not provided with diagnostic tools and medical equipment to the same extent, there are systematic staff reductions, which leads to an increase in the burden on other

Table 1. Data on criminal offenses registered during 2013-2022 (proceedings) according to Art. 140 of the Criminal Code of Ukraine "Improper performance of professional duty by a member of medical or pharmaceutical profession" and the results of their pre-trial investigation

Year	Registered criminal offenses in the reporting period	Criminal offenses in which proceedings are closed	Criminal offenses accounted for in the reporting period	Criminal offenses for which proceedings are referred to the court
2013	1333	677	656	14
2014	692	256	436	5
2015	758	209	549	3
2016	850	208	642	1
2017	959	234	725	2
2018	906	251	655	3
2019	965	296	669	1
2020	966	313	654	2
2021	876	310	566	0
2022	510	183	327	2

Table 2. Statistics of consideration by courts of the first instance in Ukraine of materials of criminal proceedings under Art. 140 of the Criminal Code of Ukraine "Improper performance of professional duty by a member of medical or pharmaceutical profession"

Year	The number of proceedings under consideration	The number of proceedings received for consideration in the reporting year	The number of considered proceedings	Number of proceedings with a verdict	The number of closed proceedings in the case
2023	129	31	38	**15**	23
2022	134	25	34	**9**	22
2021	152	41	37	**12**	21
2020	143	52	33	**10**	17
2019	124	43	30	**11**	17

employees, etc. For example, the Criminal Cassation Court of Ukraine as part of the Supreme Court pointed out (Case No. 369/3248/17 from 14.12.2021) that in the case when serious consequences for the patient are not related to non-performance or improper performance by a medical employee of his professional duties, and occurred as a result of other circumstances, for example, a late request for medical help or a patient's refusal to follow the doctor's medical prescriptions, a patient's violation of the regime established for him, as well as cases when serious consequences for the patient occurred as a result of other circumstances, responsibility for Art. 140 of the Criminal Code is excluded [3]. The lack of an opportunity to analyse a significant number of verdicts under Article 140 of the Criminal Code of Ukraine also affects the ability to generalize the practice of the ECHR. However, we have examples when, in their complaints to the ECHR against Ukraine, the applicants claimed that they were not properly provided with medical care as one of several violations committed against them as part of criminal proceedings. We are talking about the improper performance of professional duties by medical employees in relation to patients who are kept in custody or in penal institutions. In the Case "Kushnir v. Ukraine" [4], the applicant, among other things, complained about his health and inadequate medical care during his detention, stating that "he was not provided with adequate medical care". The applicant also "stated that he "as a result of unsuccessful treatment [at the place of serving his sentence] ... was sent for treatment at [his] place of residence ...". Having studied the materials of the complaint, medical documentation and arguments of the applicant, the ECHR recognized a violation of Art. 3 of the Convention (in connection with the improper performance adequate medical care and treatment).

It should be noted that the majority of Ukrainians' applications to the ECHR regarding the receipt of poor-quality, inappropriate medical care are appeals against the decisions of national courts in civil cases. An example is the case "Tsmokalov v. Ukraine" [5]. This case "essentially concerns the failure of the state authorities to provide the applicant with adequate compensation for the improper performance of professional duties by medical employees during treatment in state hospitals". In the statement, the applicant complained that "he was falsely diagnosed with Behçet's syndrome", although in fact he had tuberculosis, and for about three months he received inappropriate

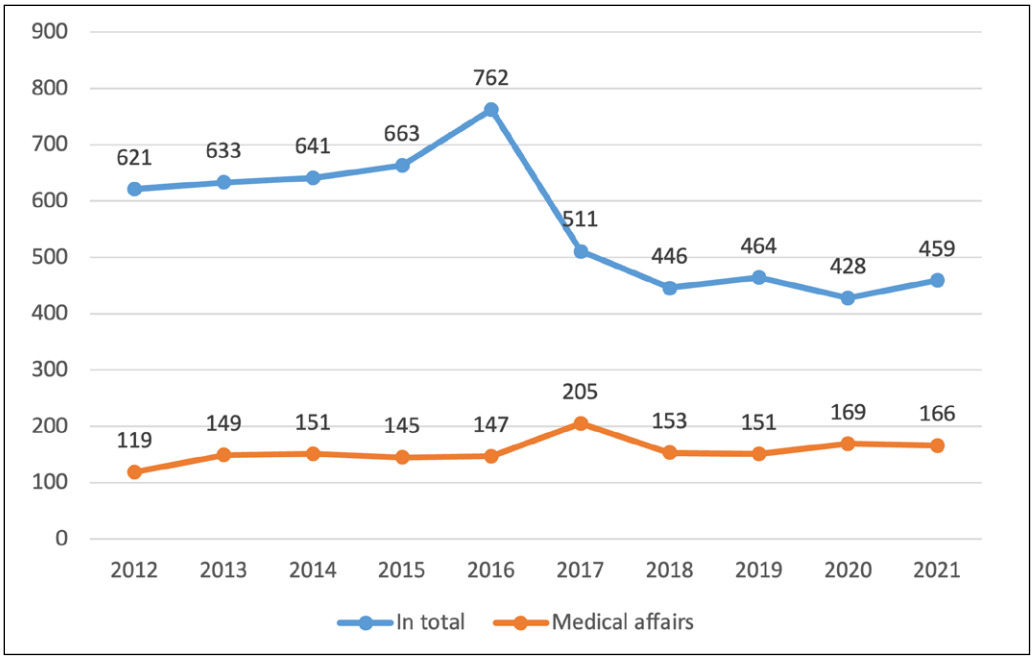

Fig. 1. Quantitative characteristics of commission forensic medical examinations conducted by the "Main Bureau of Forensic Medical Examination of the Ministry of Health of Ukraine" in 2012-2021.

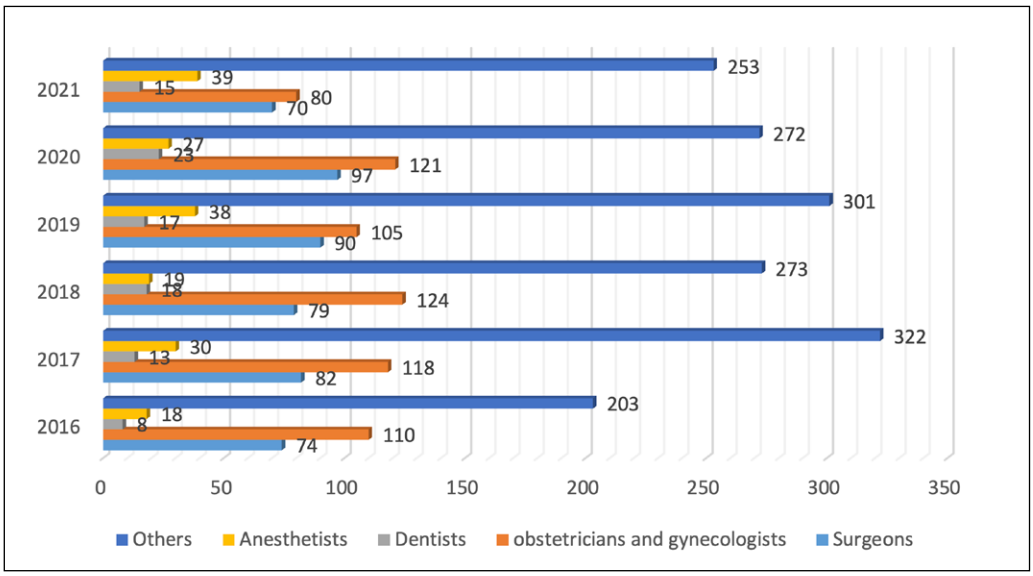

Fig. 2. Distribution of re-examinations conducted by the "Main Bureau of Forensic Medical Examination of the Ministry of Health of Ukraine" during 2016-2021, by medical affairs by doctors of various specialties.

treatment, including unregistered medicinal products, which caused a significant deterioration in his health and increased the progression of tuberculosis. During treatment at one of the hospitals, the applicant was undressed (as he claimed against his will) and shown to medical students and clinical residents as a "patient with a rare disease". Based on the results of the case review, ECHR ruled on the violation of Art. 8 of the Convention, paragraph 1 of Art. 6 of the Convention (in connection with the duration of the proceedings on compensation for damage).

Proving similar categories of cases in the framework of criminal proceedings, it is relevant to request to experts, as they are persons with special medical knowledge. Statistically we have calculated how many commission forensic medical examinations in general were conducted by the "Main Bureau of Forensic Medical Examination of the Ministry of Health of Ukraine" in 2012-2021, and how many of them related to medical affairs. And how many of them are sent for re-examination (Fig. 1, Fig. 2).

DISCUSSION

Negligence is the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, to decide

the treatment, and to administer that treatment [6]. Medical negligence is considered as «a very common negative social phenomenon in the world. Legal liability for medical negligence is a necessary part of this mechanism, but it should not be only criminal, but also civil or disciplinary» [7].

The established procedure for the performance of duties by medical and pharmaceutical workers does not mean that the patient is guaranteed to receive the appropriate level of medical and pharmaceutical care. Health risks are always relevant [8, 9]. The complexity and in many cases unpredictability, or low predictability of pathological processes of the human body cause a high level of risk of medical activity. At the same time, the death of a patient or causing significant harm to his health is the result of medical mistakes [7]. Investigating such categories of cases, there is a subjective factor [10], therefore "the non-performance or improper performance of professional duties by a medical or pharmaceutical worker is a consequence of a negligent or dishonest attitude towards them, which should be understood as bad, indifferent, without due diligence, careless, sloppy, negligent execution of them" [11].

According to the national legislation of Ukraine, the Criminal Code of Ukraine contains Article 140 – Non-performance of professional duties by a medical or pharmaceutical employee [12]. This article, like other articles of the Criminal Code of Ukraine, does not contain the concept of "medical error"; it is not fixed at the level of national legislation in Ukraine. When resolving the issue of medical errors, judges of national courts in Ukraine most often turn to experts, as persons with special medical knowledge [13]. It is very important for both parties, as well as for society, to have a clear, unified mechanism that would help to establish the presence or absence of a medical error in the actions of doctor and/or junior medical personnel [14]. A medical error is defined as a poor-quality provision of medical services, which was committed as a result of improper performance or non-performance of professional duties, which was committed due to certain objective or subjective reasons, and it is in no way related to negligent and dishonest attitude towards one's duties, which, as a result, caused harm to the patient's health [15]. In the decisions of the ECHR, medical error has repeatedly been the subject of consideration, for example, the Case "Gray v. Germany" [16] from May 22, 2014; "Altug and others v. Turkey" [17] of 30 June 2015, etc. Thus, in the ECHR Case "Altug and others v. Turkey" the court ruled that the authorities did not ensure proper implementation of the relevant legislative and regulatory procedure aimed at protecting patients' right to life (the obligation to interview patients or their families about their medical history to inform them of possible allergic reactions and obtain consent for the introduction of a medical device).

Both medical and legal sciences are still far from the unity of views on the concept of "medical error", differentiating it from other concepts, such as "accident", "conscientious misconception", "adverse outcome of treatment", as well as crimes involving medical professionals, such as "illicit medical activity", "improper performance of professional duties that have caused the person to contract the human immunodeficiency virus or other incurable disease", "failure to provide assistance to a person in a life-threatening condition", "failure to assist a patient by medical staff", "violation of the patient's rights", etc. [18].

CONCLUSIONS

1. A single approach to the interpretation of such terms as "non-performance or improper performance by a medical or pharmaceutical employee his professional duties" is a guarantee of the uniformity of their enforcement and the formation of stable judicial practice in this category of criminal cases. It provides an opportunity for the investigator, the prosecutor to better prepare for conducting investigative (search) actions, for example, for the questioning of witnesses, by formulating more precise and appropriate questions, etc. And also contributes to a better understanding by the prosecution of the content of the act of a criminal offense, which must be established in the process of proof at the stage of the pre-trial investigation of this category of crimes.
2. In Ukraine, the patient's civil legal protection of his right to quality and proper professional medical care remains a more effective and realistic way to obtain the appropriate satisfaction.
3. The problems of pre-trial investigation of non-performance or improper performance by a medical or pharmaceutical employees their professional duties remain urgent, they require more analysis and a comprehensive approach to their solution. The systematization and generalization of the practice of the ECHR in cases based on claims of injured patients as a result of non-performance or improper performance of professional duties by medical or pharmaceutical employees will also make it possible to better study the experience of foreign countries in the investigation of these violations and, if appropriate, to adopt it.

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CONFLICT OF INTEREST

The Authors declare no conflict of interest

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