



3. Kuznetsova N. F. *Social dependence of criminal law and scientific provision of creation of regulatory acts*. N. F. Kuznetsova, G. A. Zlobin. In: Soviet state and law, 1976, № 8, p. 76-83.

4. Zlobin G. A. *Grounds and principles of penal prohibition*. In: Soviet state and law, 1980, № 1, p. 70-76.

5. Grischuk V. K. *Problems of codification of criminal legislation*. Lvov: University of Lvov, 1993, 137 p.

6. Belyaev N. A. *Criminal and law policy and ways of its implementation*. Leningrad: Publishing House of University of Leningrad, 1986, 176 p.

7. Fefelov P. A. *Criteria of establishment of criminal penalty for actions*. In: Soviet state and law, 1970, № 11, p. 101-103.

8. Osadchyy V. I. *Criminal and law protection of law enforcement activities: Monographic*. K.: Atika, 2004, 336 p.

9. Korobiev A. I. *Criminal penalty of socially-dangerous acts (basics of establishment, nature and implementation in activity of law enforcement agencies): [Teaching aid]*. Khabarovsk: USSR Ministry of the Interior's High grade school of Khabarovsk, 1986, 80 p.

10. *Reading book of state and law history of Ukraine*. Teaching aid for higher educational establishments in 2 volumes, V.1. K.: Publishing House «In Yure», 1997, 576 p.

11. *Criminal code for of criminal penalties and corrections*. Code of Russian Imperia. V. 15, Sankt-Petersburg, 1912, 373 p.

12. *Criminal code*. Code of Russian Imperia. V. 15, Sankt-Petersburg, 1909, 148 p.

13. Kisilyuk E. M. *Criminal legislation during formation of Ukrainian state (1917-1921 pp.)*. Monography. Publishing House of European University, 2011, 232 p.

14. See.: *Criminal Code of USSR from 1922*. In book: Fighting with criminality in USSR. V. 1, K., 1966, p. 450-480; *Criminal Code of USSR 1927*. In book: Fighting with criminality in USSR. V. 2, K., 1967, p. 311-369; *Ukrainian SSR. Laws and directives. Criminal Code of Ukrainian SSR*: Accepted at 28.12.1960, K.: Goskomizdat, 1961, 134 p.

15. Gotin O. *Basics of actions` criminalization*. In: Ukrainian Right, 2005, № 2, p. 95-98.

16. *Criminality in Ukraine. Basic factors of state and structure of criminality during 2008-2011 years*: [articles. col.]. K., VPC of Ministry of Internal Affairs of Ukraine, 2011, 201 p.

17. *For the local government in Ukraine* [Text]: Law of Ukraine: as of 15 of February 2008. Supreme Soviet of Ukraine. Official edition. K.: Parliament publishing, 2008, 72 p.

18. *For the service arm in local government bodies* [Text]: Law of Ukraine: as of 21st of February 2011. Supreme Soviet of Ukraine. Official edition. K.: Parliament publishing, 2011, 20 p.

19. *For the bodies of self-organization of population* [Text]: Law of Ukraine Supreme Soviet of Ukraine. Official edition. K.: Parliament publishing, 2009, 28 p.

20. *For the All-Ukrainian and local referendums* [Text]: Law of Ukraine: active legislation amended and revised as of 1<sup>st</sup> of November 2008: corr. off. text. K.: Publishing House PALIVODA A. V., 2008, 27 p.

21. *European Charter of Local Self-Government as of 15 of October 1985* [Electronic resource]. Mode of access to the Charter: [http://zakon.rada.gov.ua/laws/show/994\\_036](http://zakon.rada.gov.ua/laws/show/994_036)

22. Melnik M. *Criminalization by mistake: types, reasons and results*. In: Enterprising, law and economy, 2004, № 5, p. 94-99.

## PECULIARITIES OF DETERMINATION OF THE FEATURES OF OBJECTIVE ASPECTS OF CRIME „IMPROPER PERFORMANCE OF PROFESSIONAL DUTIES WHICH CAUSED INFECTION WITH HUMAN IMMUNODEFICIENCY VIRUS OR ANY OTHER INCURABLE DISEASE”

Oksana GRYN,

Associate Professor of General Legal Disciplines and International Law of Odessa I. I. Mechnykov National University

### SUMMARY

This paper analyzes the objective of establishing evidence of crime “improper performance of professional duties, which resulted in infection with human immunodeficiency virus or other incurable disease.”

**Key-words:** act, omission, professional duty, improper performance of professional duties, infection with HIV or any other incurable disease, the causal relationship.

### REZUMAT

În articol sînt analizate problemele caracteristicii de drept a victimei infracțiunii „Executarea necorespunzătoare a atribuțiilor de serviciu care au dus la infectarea cu virusul imunodeficienței umane (HIV) sau cu altă maladie incurabilă”.

**Cuvinte-cheie:** victimă, virusul imunodeficienței umane (HIV), altă maladie infecțioasă incurabilă, periculoasă pentru viața omului, compensarea pagubei.

**Problem statement.** The objective need of current practices of prevention of crimes in the sphere of the professional activity of medical workers associated with causing specific kinds of personal injuries causes the necessity of a detailed study of such elements, their qualifying features, criteria, distinguishing them from other elements of crimes from the perspective of current conditions and scientific achievements. At that it should be noted that the problems of criminal responsibility for improper performance of professional duties, which caused infection with HIV or any other incurable contagious disease have not yet been profoundly studied.

**Relevance.** Based on the content of disposition of legal rule of part 1, Article 131 of the Criminal Code of Ukraine, the objective aspect of this crime lies in improper performance of professional duties by the medical, pharmaceutical or other workers resulted from negligent or careless attitude to such duties, which caused infection of a person with HIV or any other incurable contagious disease, being dangerous for human's life. To ensure proper understanding of the crime's disposition, determined by legislator, first of all it is necessary to study the content of the definitions according to each separate element

of conceptual framework, used in the criminal law for statement of objective aspect of crime.

Issues connected with the characteristic of the features of objective aspects of the examined crime were not shown in separate scientific works. However, some features were studied and revealed in the works of P.P. Andrushko, M.I. Bazhanov, O.F. Bantyshev, V.O. Glushkov, O.O. Dudorov, M.Y. Korzhansky, V.V. Stashys, O.Y. Svetlova.

In particular, the definition of improper performance of professional duties was shown in detail in the scientific literature. For example, P.P. Andrushko gives the following definition of improper performance of professional duties – it's either inaction of the person, when he/she doesn't perform the actions, being within his/her professional duties at all or performs such actions not in their full scope or not observing the rules, governing such actions [1, p. 324]. M. Y. Korzhansky understood improper performance of professional duties as their negligent or careless performance [2, p. 171-172]. O.F. Bantyshev, V.O. Glushkov define improper performance of professional duties as their careless, that is negligent performance or even person's direct omission concerning performance of his/her professional duties [3, p. 68].



O.O. Dudorov states that improper performance of professional duties means that a medical or pharmaceutical worker does not make the actions, which he/she was obliged to make in connection with performance of his/her work, at that he mentions: improper performance of professional duties takes place if a medical or pharmaceutical worker performs his duties not in full scope, carelessly, inattentively, not as required for the interests of his professional activity [4, p. 302].

In this context, V.O. Glushkov specifies that criminally negligent breach of professional duties by a medical worker is a careless socially dangerous act, combined with violation of the rules of legal and (or) deontological nature (content) in provision of medical aid, which causes serious consequences for the patient [5, p. 6, 91, 97].

So as we can see, the interpretations of the notion of "improper performance of professional duties" given by the leading scientists, don't have significant differences in their content, and clearly reflect the essence of the term. Under such conditions it is not necessary to give the author's own definition.

The case is somewhat more complicated with the definition of the derivative notion of professional duties. In particular, domestic specialized scientific and scientific practical publications dive neither the definition of professional duty nor the definition of duty [4, p. 284; 7, p. 215].

Thus, the **objective of our study** is to determine the peculiarities of definition of the features of objective aspect of the crime provided by the Article 131 of the Criminal Code of Ukraine "Improper performance of professional duties which caused infection of a person with HIV or any other incurable disease" on the grounds of different scientific approaches

**Presentation of basic data of the study.** Considering the issue of analysis of the features of objective aspects of the crime provided by the Article 131 of the Criminal Code of Ukraine, first of all, we should mention the comment of V.O. Glushkov, who underlines that professional duties of medical workers are much wider than their work duties, but the law provides for responsibility only if the professional duties were performed in connection with work [5, p. 136].

Thus, on the basis of the above mentioned, and considering specific features of corresponding rules of criminal law, in our opinion it seems necessary to suggest author's definition of the no-

tion of professional duties of medical, pharmaceutical and other workers.

We believe that in the context of the rules of Article 131 of the Criminal Code of Ukraine, *the professional duties of medical, pharmaceutical and other workers should be understood as a directly defined in the relevant regulatory acts general sequential procedure (algorithm) of obligatory professional actions, conditioned by specific circumstances, which ensure proper, individually or (and) socially useful and safe performance of legal activity, involving potential or actual, direct or indirect contact with biological materials of human or animal and their derivatives.*

A textbook on medical jurisprudence prepared by leading national medicolegists divides improper performance of professional duties by a medical worker into the following forms: reckless, careless patient interviewing, identifying his history, an inattentive examination of patient, leading to wrong diagnosis of the disease misdiagnosis and improper treatment with severe consequences [8, p. 620].

It is worth mentioning that it is hardly possible to agree with this definition of honorable medical scientists, because in this case they identify professional duties of medical worker only with the professional duties of the physician, while this category also includes medical assistants, medical nurses and birth attendants.

V.A. Kolesnyk understands improper performance of duties by a medical worker as: insufficient examination of the patient, nonperformance of special diagnostic tests, incorrect or untimely prescription of medicaments, unacceptable substitute of one medicament with another, violation of sequential scheme of their prescription, wrong way of administration of medicaments, delayed hospitalization, negligent preparation for the operation, etc. [9, p. 90].

At the same time, in the context of the rule of Article 131 of the Criminal Code of Ukraine special monographic legal literature states that improper performance of professional duties can have different forms in practice: violation of the rules of aseptics and antisepsis, hospitalization, transportation of patients, nonperformance or improper performance of obligatory laboratory tests, violation of the procedure of informing the relevant authorities of detected cases of infection etc. [3, p. 68].

So, in general, accepting the above-mentioned definitions examining the content of the objective aspect of the elements of crime provided by the rules

of Article 131 of the Criminal Code of Ukraine, we consider it appropriate to analyze the improper performance of professional duties by the medical workers directly in the context of potential sources of infection and specific ways of transmission of HIV-infection or other incurable infectious diseases which are dangerous to human life.

However, as it is indicated in the medical sources, any infectious process includes three obligatory basic components: the source of infectious agents, the way of transmission and the sensibility of the organism to this agent, at that, in case of absence of at least one chain of this infection process the disease is impossible [10, p. 21].

Regarding the source of infection, the medical sources resolve the issue enough explicitly and clearly. The source of infection – is a contaminated person or animal, whose body is a natural habitat and environment accumulating pathogenic microorganisms, from where they can access the body of another person and infect it [11, p. 215].

Thus, in the context of the rule of Article 131 of the Criminal Code of Ukraine, *the source of infection is a person or an animal, infected with human immunodeficiency virus or with agent of any other incurable contagious disease, which is dangerous to human life.*

Specialized medical sources determine three ways of AIDS infection transmission: interlabial, perenteral and from mother to the child [12, p. 23-26].

In this case the interlabial way of transmission of AIDS, on condition of legislative prohibition of prostitution in Ukraine, can scarcely be connected with undue performance of professional duties by medical, pharmaceutical or any other workers.

The only possible case that, besides, is peculiar for other ways of transmission of infection is undue performance of examinations by medical worker and of laboratory diagnostics of a person for discovering of infection fact, in particular. Under those conditions the unfair negative conclusion can be made as for person about carrying of causative agent and therefore, in fact, the infected person fraternizing with no protection can be real source of infection for his/her intercourse partner. However, it is should be mentioned that in case of so-called „antibody-negative window”, when the fact of infection contamination could not be discovered because of still low concentration of causative agent in human body, there are no any responsibility.



In such cases, when we deal with so-called medical malpractice, i.e. mistake of physician during performance of his/her professional duties that does not contain the component elements of a crime or signs of guilty, or accident, i.e. unfavorable result of treatment of patient in accordance with result of random coincidence of circumstances and objective impossibility of forecasting of medical staff's actions consequences in the absence of negligence or medical malpractice from their part.

However, the hazard having highest priority exactly in the context of performing of professional activity concerned the contact and recirculation of biological substances is just the perenteral way (through the blood and other biological fluids) of transmission of above mentioned causative agents.

In the context of perenteral transmission of causative agents for infectious diseases together with implementation of infected drugs of blood, the specialized medical sources determine such factors as violation of medical tools, accessories, and devices bacterial purification and disinfection order, non-observance by staff of aseptics, anti-septics, personal hygiene rules, order of cleaning and disinfection.

Body susceptibility in the context of implementation of the rules of Article 131 of the Criminal Code of Ukraine, in our opinion, should also be considered in the context of perenteral way of inoculation, because as specified in the specialized medical sources the newborns belong to the contingent of increased risk, mostly those who are castling children, patients who have surgical aggression, undergo treating, and diagnostic procedures (injections, incubations, endoscopy, catheterization, taking samples of blood) [13, p. 285]. So, in comparison with other cases exactly this category of patients shall be potentially covered by additional care of medical staff.

In the context of the third way of transmission of AIDS – from mother to child, then in practical aspect, in fact, we can speak mostly about cases of undue examination to determine the fact of discovering of infection and, probably, about ignorance of direct instructions as for implementation of certain medicinal drugs and limitations (prohibition of breastfeeding etc.). At the same time the incrimination of just like these violations from the part of medical staff in context of rules of Article 131 of the Criminal Code of Ukraine is more than problematic because of the absence of real opportunity for determination of casual relation between fact of undue

performance of his duties by guilty and inoculation of a child from his/her infected biological mother.

The fact is that the situation with determination of casual relation is complicated by the absence of objective, even on condition of observance of all standards and rules and implementation of all reasonable preventive measures (highly active antiretroviral therapy, ceariv, rozitin etc.) the impossibility of child inoculation cannot be provided. The means that are at disposal of medical staff allow just partially to reduce possibility of inoculation, at this, only 25-30% of newborn are inoculated from non-treated mothers by AIDS [14, p. 70]. Therefore, under the practical application of the rules of such conditions a doubt appears reasonably in key question for determination of casual relation: if exactly the undue actions of medical staff caused the inoculation of a child by AIDS; if the latter could be infected with high degree of possibility by causative agent of this disease on any conditions, i.e. independently of any measures being taken by medical staff? There is no an unambiguous answer for this question priori. Consequently, according to sacred principle of criminal process, "all doubts are considered in behalf of accused" and incrimination of rules of Article 131 of the Criminal Code of Ukraine is actually impossible to the guilty person.

Mandatory element of objective side of formal element of a definition of a crime provided by part 1, Article 131 of the Criminal Code of Ukraine is an occurrence of socially dangerous consequences of undue performance of duties by medical, pharmaceutical or any other workers in form of inoculation of other person by immunodeficiency-associated virus from human or by other inextirpable infectious disease.

It should be mentioned here that the determination of result in context of material composition of the rule of the part 1, Article 131 of the Criminal Code of Ukraine as same as of the rule of the part 2, the same Article, is facilitated by a legislator because of its direct determination as "making inoculation for other person by immunodeficiency-associated virus of human or by other inextirpable infectious disease which is dangerous for human life".

We should undoubtedly accept the conclusion that a crime is considered to be completed starting from the moment of actual occurrence of socially dangerous consequences – determination by laboratory or clinical factors of fact of inoculation of person by immunodeficiency-associated virus of human or

by causative agent of other inextirpable infectious disease that is dangerous for human life [3, p. 69]. However, here we should pay our attention to the fact that, as mentioned above, well-time taking of active measures of post contact infection prevention that together with immediate measures include the preventive assignment of antiretroviral drugs in enough number of cases allows to localize the causative agent and to avoid inoculation. Here, analyzing the actions of medical staff, we should take into account that antiretroviral drugs must be assigned not later than 24-36 hours after contact, but most efficient is an assignment of corresponding drugs during 2 hours after contact [12, p. 471-472]. So, on the condition of well-time non-assignment or well-time non-execution by paraprofessional, nurse or maieutologist of assigned by physician preventive antiretroviral therapy the reasons can appear for initiation of initiate criminal proceedings against such worker in accordance with the rules of Article 131 of the Criminal Code of Ukraine.

However, regard must be paid to that the direct assignment of certain measures of antiretroviral therapy, because of its objective threat to health of patient, needs the relevant competence of a physician (Infectious Disease Physician). So, the decision as for assignment of drugs of antiretroviral therapy by physicians of overall practice or by specialists with more narrow specialty or by paraprofessional will be made, if there is an acute necessity that occurs only because of impossibility of getting well-time advisory of narrow-specialized physicians. However, such kind of actions under any conditions shall be based on corresponding established recommendations as for post contact preventive measures of infection diseases in general and of AIDS, in particular.

The mentioned above gives us grounds to draw a conclusion that *inactivity of medical worker in case when a patient refers to him/her notifying about contact with biological material that can really contain or contain, for sure, causative agent of AIDS or other inextirpable infectious disease, or discovering of such fact by medical worker in personal, particularly, under the conditions of medical establishment, in case of further inoculation of such patient, can be considered as one of the reasons for incrimination to such medical worker of committing of criminal intention provided by the rules of Article 131 of the Criminal Code of Ukraine.*

In its turn, in particular, the cases will be considered as undue execution



by medical worker of his duties, when medical worker (physician, paraprofessional, maieutologist, nurse) avoids to provide immediate help including by the means of absence of well-time notification about this fact to the medical worker responsible for competence of others, if patient seeks for medical advice or there is disclosure of the mentioned fact of contact, in particular, professional one.

Besides, the same situation concerns the cases of emergency contacts of medical stuff with bio materials that contain causative agents of diseases mentioned in disposition. In particular, if there is a relevant consequence, that is the contamination of patient or medical worker (stuff), the actions that could contain the component elements of a crime provided by the rules of Article 131 of the Criminal Code of Ukraine, here will be actions or inactivity of medical stuff concerning hiding of fact of such emergencies, violations of aseptics, antiseptics use, disinfection order, ignoring of rules requirements concerning the presence of instructive and methodical documents and responsible basket for providing of emergency preventive measures in case of emergencies etc. at medical worker's work place.

Therefore, we should pay attention to the cases of so-called non-experience of medical stuff, i.e. inability to make right conclusion on the basis of existent scientific data in cases of typical disease and under usual circumstances, i.e. to make relevant diagnosis cannot be considered as circumstance that excludes a criminal action of medical worker. In specialized juridical literature there is a strict and complete definition of a fact that for negative consequences of treatment that were the results of non-experience of such person the criminal liability will occur [3, p. 23].

At the same time, if criminal proceedings under this category are exercised, determining professional duties improperly performed by a medical worker, the fact of present or absent ability for the medical worker to use appropriate preventive measures will be ascertained. In particular, in the case when the patient applies with a respective complaint to a duty medical officer of the district hospital, located in a remote village, or to an obstetrician of any rural health post, the latter, in most cases, will be objectively unable to provide to a victim proper emergency medical care due to lack of such drugs available. Under these conditions, the issue of medical worker's criminal responsibility can be discussed

only when the latter does not take any action to prevent potential infection, at least related to patient's notification of the need to apply urgently to another medical facility to get emergency medical care etc.

However, as professional literature specifies, valid reasons not to provide medical care to the patient may include: providing assistance at this time to another patient, a disease of medical workers, inability to arrive at the scene of the crime, in addition stating that lack of medical's special knowledge does not deprive him of the obligation to provide initial emergency medical care in difficult cases [9, p. 88], and, in our opinion, we should agree with such approach.

When creating the legal structure part 2 of Article 131 of the Criminal Code of Ukraine, the legislator took an exclusively quantitative material feature of two or more persons actually infected as a basis of aggravation.

In connection with definition of the boundaries of exactly such criminal consequences, the issue to be settled is questionable: when two or more persons are infected with the diseases specified in the disposition, it does not matter whether the victims were infected with the same or different incurable infectious diseases dangerous to human life, at the same time the way of being infected is also not important, and victims may be infected both simultaneously and at different times and in different ways, that does not affect the qualification [3, p. 69].

Here, however, we believe it is necessary, considering importance of public danger features, to supplement aggravation of the crime, stipulated by provisions of Article 131 of the Criminal Code of Ukraine, with such qualified feature as infection of a juvenile or a pregnant woman. Indeed, infection of a juvenile and a pregnant women, in fact, by their objective consequences is equivalent to infection of two or more persons, since infection of a juvenile, which in most cases after being infected will have practically relatively little chances to have healthy offspring, and a pregnant women, who will not only meet demise, but also leave a child who also has a significant chances of being HIV infected, to be an orphan, is one that violates constitutional principles of fairness and integrity, the rights to life, health, safety, health care, maternity and childhood.

Thus, based on the foregoing, we consider it is necessary to recommend the aggravation legal structure to be supplemented under part 2 of Article

131 of the Criminal Code of Ukraine, with qualified feature, "which caused infection of a juvenile or a pregnant woman."

## Bibliographic references

1. Aleksandrov Yu. V. *Theoretical and practical comment to the Criminal Code of Ukraine* / Yu. V. Aleksandrov, P.P. Andrushko, G. V. Andrusiv [and others]; [under the editorship of Ya. Yu. Kondrateva, S.S. Yatsenko]. K.: Yurinkom, 1994, 798 p.
2. Korahnsky M. I. *Classification of crimes: [training manual]*. 2<sup>nd</sup> edition. K.: Atika, 2002, 640 p.
3. *Responsibility for provided by Section II of the Special part of the Criminal Code of Ukraine crimes in the sphere of professional activity of medical staff and special kinds of bodily injuries: monography*. O. F. Bantyshev, V. O. Glushkov, O. V. Kopan, S. A. Kuzmin [and others]. K.: MNDC of RNBO of Ukraine, 2011, 137 p.
4. *Theoretical and practical comment to the Criminal Code of Ukraine*. Boyko A. M., Brych L.P., Gryshchuk V. K., Dudorov O.O. [and others]; [under the editorship of M. I. Melnyk, M. I. Khavroniuk]. 3<sup>rd</sup> edition amended. K.: Atika, 2005, 1064 p.
5. Glushkov V. A. *Responsibility for crimes in sphere of health care: monography*. K.: Vyshcha Shkola, 1987, 200 p.
6. *Theoretical and practical comment to the Criminal Code of Ukraine*. Under the editorship of Potebenko M. O., Goncharenko V.G., two parts. Special Article. K.: Forum, 2001, 942 p.
7. *Comment to the Criminal Code of the Russian Federation*. Yu. V. Grachev, L.D. Erma-kova [and others]; executive editor A. I. Rarog. 6<sup>th</sup> edition amended. M.: Prospekt, 2009, 704 p.
8. Kontsevich I. O. *Legal medicine: text-book for students of medical higher education institution*. I. O. Kontsevich, B.V. Mykhaylichenko and others. K.: MP „Lesya”, 1997, 656 p.
9. Kolesnyk V. A. *Legal medicine and legal psychiatry: training manual*. V. A. Kolesnyk. K.: Scientific publishing department of NA SB of Ukraine, 2007, 195 p.
10. *Epidemiology*. A. A. Vasylychenko, O. M. Venner, V. M. Gyrin and others. [educational book] K.: Zdorovya, 1993, 464 p.
11. Chervyak P. I. *Medical book of reference*. K.: Publishing center «Prosvita», 2001, 716 p.
12. Zaporozhan V. M. *HIV infection and AIDS*. V. M. Zaporozhan, M. L. Aryaev. 2<sup>nd</sup> edition amended. K.: Zdorovya, 2004, 636 p.
13. Yushchuk N. D. *Epidemiology*. Yushchuk N.D., Zhogova M. A., Busheva V.V., Kolesova V.N. Training manual. M.: Medicine, 1993, 336 p.
14. Zaporozhan V. M. *Obstetrics and gynecology*. V. M. Zaporozhan, M. R. Tsegelsky, N. M. Rozhkovska. [educational book]: in two volumes. T. 2. Odessa: Odessa State Medical University, 2005, 402 p.