

Forensic examination in cases on the protection of human rights in the sphere of healthcare in Ukraine: legal issues

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Abstract

The article analyzes the features of the appointment and conduct of forensic examinations carried out in the process of protecting human rights in the healthcare sector. In this work, a system of general scientific and special methods was used to achieve the goal of the study. The content of such categories as "medical care", "forensic examination", "expert", "medical error", "defect in the provision of medical care" is disclosed, their place in the general classification of offenses in medical activity is indicated, types of legal liability for professional offenses in the healthcare sector. The tasks, object and stages of conducting forensic examinations carried out in the process of protecting human rights in the field of healthcare have been established, problematic legal issues related to these examinations have been identified, and directions for their solution have been proposed. The stages of conducting forensic examinations carried out in the process of protecting human rights in the healthcare sector are identified, namely: (1) preparatory; (2) organizational; (3) main; (4) the final. It is concluded that the forensic examination carried out in the process of protecting human rights in the healthcare sector is an effective procedural technique for proving professional offenses of medical workers.

Keywords: protection of human rights, healthcare, forensic medical examinations, forensic medical expert, expert opinion, special knowledge, legal regulation.

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1. Introduction

The right to health care is one of the fundamental human rights guaranteed by the Constitution of Ukraine⁶ therefore, the examinations carried out regarding the protection of human rights in the field of healthcare are an extremely acute problem of legal science⁷. Also, among the problems of the healthcare sector, there remains an unsatisfactory epidemiological situation related to Covid-19 in respect of human rights and freedoms⁸, corruption offenses in the field of drug circulation⁹, as well as the progressive aging of the population in Ukraine, an increase in the social burden of chronic non-epidemic diseases, tuberculosis and HIV infection¹⁰ and other diseases. James J. T. (2017)¹¹, Kachalia A., Bates D. W. (2014)¹², Kessler D. P. (2011)¹³ note that various shortcomings in the provision of medical care are among the main causes of death of patients, resulting in a large number of lawsuits against doctors and lead to astronomical insurance payments. As a result, the provision of poor-quality medical services harms the health and sometimes life of people, which can lead to injury or even death of a person. So, for example, among 74 commission forensic medical examinations of "drug cases" conducted during 2015-2019 in Ukraine, defects in the provision of medical care were identified in 39 cases (which is 52.7%), of which 30 cases (40.5%) had diagnostic errors, 8 (10.8%) - medical errors, and in one case (1.4%) - organizational errors and shortcomings in the maintenance of medical records¹⁴. Based on the foregoing, the study of the legal aspects of conducting forensic examinations carried out regarding the protection of human rights in the field of healthcare, as one of the most difficult types of examinations, is an acute problem in legal science, indicating the relevance of this work and its practical significance.

⁶ *Constitution of Ukraine*: Law of Ukraine No 254к/96 of 28 June, 1996. Information of the Verkhovna Rada of Ukraine. № 30. Art. 141.

⁷ Buletsa S, Drozd O, Yunin O, Mohilevskiy L. *Medical error: civil and legal aspect*. Georgian Med News. 2018. (276):161-166.

⁸ Shulha M. G., Mazur A.V., Georgiievskiy I. V. *Impact of epidemiological situation on respect for human rights and freedoms: informational aspect*. Wiadomosci lekarskie. 2021. Vol. 74, Iss. 11, cz. 2. pp. 2992-2998.

⁹ Latysh K. V., Demidova Y. E. *Corruption offences in medications circulation: investigation problems*. Wiadomosci lekarskie. 2021. Vol. 74, Iss. 11. cz. 2. pp. 2896-2900.

¹⁰ Shevchuk, O. Realization of the human right to palliative care in Ukraine: problems and legal issues (review) O. Shevchuk, V. Trofymenko, V. Martynovskiy, G. Goncharenko, D. Zatenatskiy. Georgian medical news. 2019. Iss.: 289, p. 168; pp. 168-173.

¹¹ James J. T. *Deaths from preventable adverse events originating in hospitals*. BMJ Qual Saf. 2017. Vol. 26. pp. 692–693. DOI: 10.1136/bmjqs-2016-006340.

¹² Kachalia A., Bates D. W. *Disclosing medical errors: the view from the USA*. Surgeon. 2014. Vol. 12. pp. 64-67. doi: 10.1016/j.surge.2013.12.002

¹³ Kessler D. P. *Evaluating the medical malpractice system and options for reform*. J. Econ. Perspect. 2011. Vol. 25, № 2. pp. 93-110. DOI: 10.1257/jep.25.2.93.

¹⁴ Khovpei, L.M., Fentsik V.L., Bodnar S.S., & Kostenko Ye.Ya. *The results of the analysis of commission forensic medical examinations in cases of improper performance of professional duties by medical workers, conducted in the Transcarpathian Regional Bureau of Forensic Medical Examination, were conducted in 2015–2019*. Scientific Bulletin of Uzhgorod University, Series "Medicine". 2020. Issue 2 (62). 40-43.

2. Literature review

Legal scholars and forensic doctors have already studied some of the features of forensic medical examinations, namely: Kozan, N., et. all. (2020) studied the specifics of conducting a commission of forensic medical examinations in cases of professional offenses of medical workers of a surgical profile¹⁵, Borysenko I. V., et. all. (2021) studied the development of new promising areas of forensic science¹⁶, Steblyuk V.V., & Pletenetskaya A.A. (2015) considered the specifics of forensic and legal aspects of proceedings related to the professional activities of medical workers¹⁷, Kachalia A., & Bates D. W. (2014) established some aspects of the disclosure of medical errors in the United States¹⁸, Kessler D. P. (2011) assessed the medical malpractice system and proposed options for reforming it¹⁹, Senyuta I. Ya. (2017) examined the concept and types of defects in the provision of medical care²⁰, Steblyuk V.V. (2013) studied the legal and moral aspects of the disclosure of criminal offenses in the field of professional activity of medical workers²¹, Khyzhniak, V. V., et. all. (2018) turned their attention to the study of forensic support of "Medical Affairs"²², Knaak J., & Parzeller M. (2014) studied the types of court decisions on medical error²³, Franchuk V. (2017) studied the types and specifics of medical errors in Ukraine in modern conditions²⁴, Synytsya V. (2012) studied some of the medico-legal aspects of the harm caused by treatment²⁵, Yurchyshyn V. D. (2021) drew attention to certain issues of the theory and practice of forensic examination in the activities of the European Court of Human Rights²⁶ and others.

¹⁵ Kozan, N., Voloshynovych, V., Kotsyubynska, Y., Zelenchuk, H., & Tsikhivskiy, A. *Analysis of Commission Forensic-medical Examinations performed in Cases Concerning the Responsibility of Surgical Professional Doctors*. *Galician Medical Journal*, 2020. 27(2), E2020210. <https://doi.org/10.21802/gmj.2020.2.10>

¹⁶ Borysenko I. V., Bululukov O. Y., Pcholkin V. D., Baranchuk V. V., Prykhodko V. O. *The modern development of new promising fields in forensic examinations*. *Journal of Forensic Science and Medicine*. 2021. Vol. 7, Iss. 4.: 137-144.

¹⁷ Steblyuk V.V., & Pletenetskaya A. A. *Forensic medical and legal aspects of proceedings related to the professional activities of medical workers*. *Customs business*. 2015. No. 1 (97) :129-137.

¹⁸ Kachalia A., Bates D. W. *Disclosing medical errors: the view from the USA*. *Surgeon*. 2014. Vol. 12. pp. 64-67. doi: 10.1016/j.surge.2013.12.002.

¹⁹ Kessler D. P. *Evaluating the medical malpractice system and options for reform*. *J. Econ. Perspect.* 2011. Vol. 25, № 2. pp. 93-110. DOI: 10.1257/jep.25.2.93.

²⁰ Senyuta I.Ya. *Defects in medical care: concepts and types*. *Medical law*. 2017. 1. 55-66.

²¹ Steblyuk V.V. *Legal and moral and ethical aspects of criminal offenses in the field of professional activity of medical workers*. *Forensic examination*. 2013. № 2. S. 45-48.

²² Khyzhniak, V. V., Olkhovskyi V. O., Morgun A. O., Kutsenko, K. V., & Morgun O. O. *Forensic and medical support of "Medical Cases". Theory and Practice of Forensic Science and Criminalistics*. 2018. 18, 558-567. <https://doi.org/10.32353/khrife.2018.65>.

²³ Knaak J., Parzeller M. *Court decisions on medical malpractice*. *Int. J. Legal. Med.* 2014. Vol. 128, № 6. 1049-1057. DOI: 10.1007/s00414-014-0976-2.

²⁴ Franchuk V. *Medical malpractice in contemporary Ukraine: Forensic-medical retrospective review*. *Folia Societatis Medicinae Legalis Slovacae*. 2017.Vol. 2. P. 94-97.

²⁵ Synytsya V. *Damage, caused by the medical treatment: health care and legal issues*. *Lawyer*. 2012. 3 (138). 24-26.

²⁶ Yurchyshyn V. D. (2021) *Forensic examination in the activities of the European Court of Human Rights: issues of theory and practice*. *Law and society*. 2021. 2. 240-245.

3. Materials and methods

In the course of the study, a system of general scientific and special methods was used to achieve the goal of a scientific article. The methodological basis of the study is the dialectical method of scientific knowledge, which allowed the authors to consider certain issues of theoretical, scientific and practical foundations for conducting forensic examinations regarding the protection of human rights in the field of healthcare. The authors analyzed the content of the definitions "medical care", "forensic examination", "expert", "medical error", "defects in the provision of medical care" and determined their place in the general classification of medical offenses, revealed the types of legal liability in this area. With the help of the system-functional method, the goal, objectives, object and stages of conducting forensic examinations regarding the protection of human rights in the field of healthcare are established. The comparative methodological method made it possible to identify general patterns in the disclosure of the procedure for conducting such forensic medical examinations, to identify the problematic issues related to this, and to suggest directions for their solution.

4. Theoretical and legal foundations of forensic examinations carried out in cases on the protection of human rights in the field of healthcare

Article 6 of the Convention states that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will decide a dispute concerning his civil rights and obligations or establish the validity of any criminal charge brought against him²⁷, including in the health sector. Among certain types of forensic examination carried out in the process of protecting human rights in the healthcare sector, one can distinguish (1) forensic; (2) forensic psychiatry; (3) forensic psychological. Forensic psychological examination is not often used but is important for establishing the amount of non-pecuniary damage. The most commonly used are forensic medical examination and forensic psychiatric examination. Note that forensic examinations are classified in the legal literature for various reasons. According to the originality of the subject of special knowledge, they are divided into several classes: (1) forensic, (2) forensic, (3) forensic psychiatric, (4) forensic psychological, (5) forensic pharmaceutical and (6) pharmacological, (7) physical and technical, (8) chemical, (9) commodity, (10) environmental and some others²⁸.

The Constitution of Ukraine provides that the principles of forensic examination are determined exclusively by the laws of Ukraine (clause 14 article

²⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*. International document dated 04.11.1950 № 995_004. Available at: https://zakon.rada.gov.ua/laws/show/995_004

²⁸ Paladiichuk Y. *The sense of legal expertise in solving tasks of criminal proceedings*. Scientific Bulletin of Uzhhorod National University. Series "Law". 2015.34.3.87-89.

92)²⁹. The organizational and legal framework for conducting forensic examinations carried out in the process of protecting human rights in the field of healthcare at the legislative level is covered by the Law of Ukraine "On Forensic Examination"³⁰, provisions of the Criminal Procedure Code of Ukraine³¹, the Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care", international treaties and agreements on mutual legal assistance and cooperation governing legal relations in the field of forensic activities and other legislative acts are regulated by the main by-laws of the Ministry of Health of Ukraine such as: "Instruction on conducting a forensic medical examination"³², and "Rules for conducting commission forensic medical examinations in the bureau of forensic medical examinations", approved by order of the Ministry of Health of Ukraine dated January 17, 1995 No. 6.

It is forbidden to conduct a forensic medical examination to clarify issues of law (part 1 of article 242 of the Code of Criminal Procedure, part 1 of article 71 of the Fundamentals of Ukrainian legislation on healthcare). Examination can only be carried out by an expert. According to the Law of Ukraine "On Forensic Examination" dated February 25, 1994, the main task of forensic examination is to establish the circumstances of the case, which is in the proceedings of the pre-trial investigation bodies or the court³³. According to Article 80 of the Law of Ukraine "Fundamentals of Ukrainian Legislation on Healthcare", persons guilty of violating health care legislation bear civil, administrative or criminal liability. At the same time, it should be noted that, according to part three of Article 34 of this Law, the doctor is not responsible for the health of the patient in the event that the latter refuses medical prescriptions, or the patient violates the regimen established for him³⁴.

It is also necessary to take into account in these cases the provisions of Part 6 of Article 10 of the Law of Ukraine "On Protection of Consumer Rights"³⁵, according to which the contractor is not liable for non-performance, delay in performance or other improper performance of obligations and shortcomings in the services provided, if he proves that they arose through the fault of the consumer himself or as a result of force majeure. In addition, regarding civil liability for adverse outcomes of medical care, one should proceed from Article 614 of the Civil

²⁹ *Constitution of Ukraine*: Law of Ukraine No 254к/96 of 28 June, 1996. Information of the Verkhovna Rada of Ukraine. № 30. Art. 141.

³⁰ *On forensic examination*: Law of Ukraine of 25.02.1994 № 4038-XII. Information of the Verkhovna Rada of Ukraine. 1994. № 28. Art.232.

³¹ *Criminal Procedure Code of Ukraine*: Law of Ukraine of April 13, 2012 № 4651-VI. Information of the Verkhovna Rada of Ukraine. 2013. № 9-10. № 11-12. № 13. Art. 88.

³² *Instruction on forensic examination*: order of the Ministry of Health of Ukraine dated 17.01.95 № 6. Available at: <https://zakon.rada.gov.ua/laws/show/z0254-95>.

³³ Lozovyy A.I., Simakova-Yefremyan E. *Problematic issues of appointment and conduct of forensic examination in the draft of the new Criminal Procedure Code of Ukraine*. Theory and practice of forensic science and criminology. 2011; 11: 190-200.

³⁴ *Fundamentals of Ukrainian legislation on health care*: Law of Ukraine №. 2801-XII of 19 November, 1992. Information of the Verkhovna Rada of Ukraine. 1993. № 4. Art. 19.

³⁵ *On Consumer Rights Protection*: Law of Ukraine № 1023-XII of 12 May, 1991. Information of the Verkhovna Rada of Ukraine. 1991. № 30. p. 379.

Code of Ukraine³⁶, according to which a person who has violated obligations is liable in the presence of his fault (intent or negligence), unless otherwise provided by the contract or law. And according to Article 1166 of the Civil Code of Ukraine the person who caused the harm is exempted from his compensation if he proves that this damage was caused through no fault of his. Damage resulting in injury, other damage to health or death of an individual due to force majeure shall be compensated in cases established by law.

According to article 71 of the Law of Ukraine "Fundamentals of Ukrainian legislation on healthcare"³⁷, forensic medical examination is appointed by the person conducting the inquiry, the investigator, the prosecutor or the court in the manner prescribed by Articles 143-150 of the Civil Procedure Code of Ukraine, Articles 75-77 of the Criminal Procedure Code of Ukraine³⁸ and articles 81-85 of the Code of Administrative Procedure of Ukraine. Forensic examinations carried out in the process of protecting human rights in the healthcare sector are carried out mainly by state expert institutions (part 2 of article 7), non-state expert institutions are actually deprived of the right to conduct independent forensic medical examinations, given the provisions of article 7 of the Law of Ukraine "On forensic examination"³⁹. Thus, the grounds and procedure for appointing an examination carried out in the process of protecting human rights in the field of healthcare is carried out according to the rules of the Civil Procedure Code of Ukraine, the Criminal Procedure Code of Ukraine and the Code of Administrative Procedure of Ukraine and have certain similarities.

In the legal regulation of the procedure for conducting forensic examinations regarding the protection of human rights in the field of healthcare, it is important to understand such categories as "medical care", "forensic examination", "specialist", "expert", "medical error", "medical error" and "defect in the provision of medical care" and others. Article 3 of the Law of Ukraine "Fundamentals of Ukrainian Legislation on Health Care" No. 2801-XII dated November 19, 1992 states that the term "medical care" is the activity of professionally trained medical workers aimed at prevention, diagnosis, treatment and rehabilitation in connection with diseases, injuries, poisoning and pathological conditions, as well as in connection with pregnancy and childbirth⁴⁰.

The Law of Ukraine "On Forensic Examination" defines the concept of "forensic examination" - as a study based on special knowledge in the field of science, technology, art, craft, etc. objects, phenomena and processes in order to

³⁶ *The Civil Code of Ukraine*: Law of Ukraine № 435-IV of 16 January, 2003. Information of the Verkhovna Rada of Ukraine. 2003. №. 40-44. Art. 356.

³⁷ *Fundamentals of Ukrainian legislation on health care*: Law of Ukraine №. 2801-XII of 19 November, 1992. Information of the Verkhovna Rada of Ukraine. 1993. № 4. Art. 19.

³⁸ *Criminal Procedure Code of Ukraine*: Law of Ukraine № 4651-VI. of 13 April, 2012. Information of the Verkhovna Rada of Ukraine. 2013. № 9-10, № 11-12, № 13, Art.88.

³⁹ *On forensic examination*: Law of Ukraine of 25.02.1994 № 4038-XII. Information of the Verkhovna Rada of Ukraine. 1994. № 28. Art. 232.

⁴⁰ *Fundamentals of Ukrainian legislation on health care*: Law of Ukraine №. 2801-XII of 19 November, 1992. Information of the Verkhovna Rada of Ukraine. 1993. № 4. Art. 19.

provide an opinion on issues that are or are the subject of legal proceedings (Art.1). So, according to Art. 71 of the Code of Criminal Procedure of Ukraine, a specialist is a person who has special knowledge and skills in the use of technical or other means that can cope during the previous investigation and trial on issues requiring relevant special knowledge and skills, participates in the production of investigative actions on pre-trial investigation and in legal proceedings⁴¹. An expert is a person who is entrusted with conducting research on material objects, phenomena and processes, containing information about the circumstances of the case, and giving an opinion on issues that arise during the consideration of the case and concerning the scope of his special knowledge (article 69 Criminal Procedure Code of Ukraine)⁴².

The main task of conducting forensic examinations regarding the protection of human rights in the field of health care is to study the adverse results of the provision of medical care. Recall that the key factor is the obligation to conduct it, in connection with this, such a forensic medical examination is carried out in all cases of this category of "medical cases". It should also be taken into account that in Article 140 of the Criminal Code of Ukraine⁴³ provides for liability for improper performance of professional duties by a medical or pharmaceutical worker due to negligent or dishonest attitude towards them, there is reason to distinguish between medical error and the corresponding crime. This is due to the fact that Art. 11 of the Criminal Code of Ukraine states that a "crime" is a socially dangerous act (action or inaction), and when assessing the actions of medical workers, exactly two directions should be considered - either causing harm to life and health when performing certain actions - for example, (1) when performing surgical intervention, or other treatment, or (2) inaction (failure to provide timely medical care, failure to properly comply with drug prescriptions). For example, Pletenetskaya A. A proposes to divide all crimes in the field of medical activity into the following groups: (1) professional medical crimes; (2) official medical crimes; (3) malfeasance in the field of medical activities of a non-medical nature; (4) other crimes in the field of medical activities of a non-medical nature⁴⁴.

In the legislation of Ukraine there is no concept of "medical error". In the scientific literature there is no common understanding of the terms "medical error", "medical error", "defect in the provision of medical care". Some authors consider the terms "medical error" and "medical error" to be equivalent, while others consider them to be different. So, Antonov S. V considers the term "medical error" as the actions or inaction of a medical worker that led to negative consequences for the health or life of the patient and are caused by objective or subjective factors⁴⁵. From

⁴¹ *Criminal Procedure Code of Ukraine*. Law of Ukraine № 4651-VI. of 13 April, 2012. Information of the Verkhovna Rada of Ukraine. 2013. № 9-10, № 11-12, № 13, Art.88.

⁴² *Criminal Procedure Code of Ukraine*. Law of Ukraine № 4651-VI. of 13 April, 2012. Information of the Verkhovna Rada of Ukraine. 2013. № 9-10, № 11-12, № 13, Art.88.

⁴³ *Criminal Code of Ukraine*: Law of Ukraine № 2341-III of 05 April, 2001. Information of the Verkhovna Rada of Ukraine. 2001. № 25-26. Ст.13.

⁴⁴ Pletenetska A. *Forensic medical and legal aspects of issues, related to the professional activity of medical workers*. Problems of clinical pediatrics, 2016. 1-2 (31-32) :126-131.

⁴⁵ Antonov, S.V. *Medical error: legal aspect*. Medical law. 2008. № 10. Т. 56. p. 95, pp. 94-96.

the point of view of I. Ya. Senyuta, the definition of "medical error" should be understood as a certain type of defect in the provision of medical care, which is the improper performance (non-performance) of professional duties by a medical worker due to a subjective or objective error, not associated with a negligent and dishonest attitude, which caused harm patient health⁴⁶. Akopov V. I. defines "medical error" as a doctor's error in professional activity due to a conscientious error in the absence of negligence or ignorance⁴⁷. S. G. Stetsenko considers "medical error" as a defect in the provision of medical care associated with incorrect actions of medical personnel, which are characterized as a conscientious error in the absence of signs of malicious or negligent misconduct⁴⁸. The author bases the classification of "defects in the provision of medical care" on two main criteria, namely: (1) the cause of adverse results and (2) the responsibility of medical workers, and S. G. Stetsenko distinguishes the following types of defects in medical care: (1) medical errors; (2) accidents and (3) professional crimes.

There is a point of view in the literature that "a mistake in medical practice" is not so much a conscientious error of a doctor in the performance of his official duties. Rather, it is a consequence of the personal subjective choice of a doctor who directs all his efforts for the benefit of the patient. This is a consequence of a personal act and taking personal responsibility for a possible "miss"⁴⁹. In fact, one of the main signs of a medical error is a special subject, which is always an individual, and to which the legislation establishes special requirements in the field of healthcare, and incorrect actions of medical workers when providing medical services to him. Note that if other medical workers can make "mistakes" in the provision of medical services, then the term "medical error" is used.

In the legal literature, there are also separate types of "mistakes": (1) diagnostic (mistakes in recognizing diseases and their complications as an erroneous diagnosis of a disease or complication), (2) tactical (as a rule, they are the result of diagnostic miscalculations), (3) organizational (mistakes in organizing the provision of certain types of medical care, creating the necessary conditions for the functioning of a particular service), (4) technical (mistakes in diagnostic and therapeutic procedures, manipulations, methods of operations), (5) deontological medical errors (mistakes in the behavior of the doctor, his communication with patients and their relatives, colleagues, nurses, nurses), errors in filling medical records and other errors⁵⁰. For example, R. K. Rigelman, the concept of "medical care defect" refers to the adverse consequences of medical activity, which can be of two types: (1) "negative consequences" and (2) "medical error". The "negative consequences", according to this author, are those that cannot be prevented, and "medical error" can be avoided only under the condition of "other actions". The doctor is not responsible

⁴⁶ Senyuta I.Ya. *Defects in medical care: concepts and types*. Medical law. 2017. № 1. 55-66.

⁴⁷ Akopov V.I., Maslov E.N. *Law in medicine*. M.: Kniga-servis, 2002. p. 312, 352 p.

⁴⁸ Stetsenko S.G. *Medical law: a textbook*. SPb.: Publishing House "Legal Center Press", 2004, p. 458, 572 p.

⁴⁹ Chaldyshkina M. V. *Medical error: philosophical, ethical and cultural, legal aspects of the problem*. Bulletin of Omsk State Pedagogical University: humanitarian research. 2020. 2 (27): 51-54.

⁵⁰ Dialogue M.I. *Medical errors*. Radiological Bulletin. 2014. № 2 (51), p. 54, pp. 53-56.

for a negative consequence, while legal liability arises for a medical error, since this error, according to the scientist, can be prevented⁵¹. Thus, most often, scientists in the legal literature divide all the consequences of adverse medical activity into the following groups: (1) medical errors, (2) accidents in medical practice, and (3) or professional offenses or crimes in the medical field.

5. Commission forensic examinations carried out in cases of protection of human rights in the field of healthcare: procedure, stages, certain problems of legal regulation

In order to establish the presence or absence of objective or subjective circumstances, it is necessary to conduct forensic examinations of adverse results of medical intervention. At the same time, the requirements for the organization and conduct of such forensic medical examinations are also growing⁵² as one of the main sources of evidence in court in cases of offenses in the provision of medical care. Carrying out forensic medical examinations regarding defects in the provision of medical care have a certain algorithm of actions. Establishing the correctness of the provision of medical care in cases of criminal prosecution of medical workers for "professional offenses" (clause 3.) However, there are no other provisions or recommendations on the methodology for performing examinations regarding "drug cases" in this Instruction. The duties of the chairman of the expert commission are assigned to the head of the forensic medical expert institution, and the forensic medical expert is appointed as a speaker on the materials of the proceedings⁵³. A feature of this examination is that it is multi-level, complex and usually requires the involvement of specialists from various medical specialties in the expert commission. To date, the possibilities of such examination are quite wide. Often it is this type of forensic examination that becomes a means of proving or refuting the guilt of a suspect or accused of a crime⁵⁴. The object of the study of forensic medical examinations regarding defects in the provision of medical care are the materials of criminal proceedings, covering the originals of all medical documents related to the fact of the investigation, the medical card of an outpatient or inpatient patient (medical history), an act of a forensic medical examination or a protocol of a post-mortem autopsy, testimonies doctors, medical workers and other witnesses in proceedings containing medical data. The materials should contain a description of

⁵¹ Rigelman R.K. *How to avoid medical errors*. Moscow: Practice. 1994. 204 p.

⁵² Borysenko I. V., Bululukov O. Y., Pcholkin V. D., Baranchuk V. V., Prykhodko V. O. *The modern development of new promising fields in forensic examinations*. Journal of Forensic Science and Medicine. 2021. Vol. 7, Iss. 4. 137-144.

⁵³ Rules for conducting commission forensic medical examinations in the forensic medical examination bureau: order of the Ministry of Health of Ukraine of January 17, 1995, № 6. <https://zakon.rada.gov.ua/laws/show/z0256-95#Text>.

⁵⁴ Instruction on forensic examination: order of the Ministry of Health of Ukraine dated 17.01.95 № 6. <https://zakon.rada.gov.ua/laws/show/z0254-95>.

the doctor or medical worker who is held accountable⁵⁵. Also, the objects of forensic medical examinations are materially fixed carriers of information (medical documents, instruments, medicines, samples and other materials). The subject of forensic medical examination is also medical and biomedical issues that arise during the pre-trial investigation and trial⁵⁶.

A forensic medical examination in the course of investigating crimes against life and health committed by medical workers should give a conclusion on the presence or absence of a direct causal relationship between the action (inaction) of a medical worker and the consequences. The task of a forensic medical examination of the quality of medical care is to identify: (1) the mechanism of medical action associated with the provision of medical care to a particular patient regarding his illness or injury, (2) the nature and severity of the latter; (3) the sequence of actions of medical workers carrying out the medical process in the interests of the patient and their compliance with medical rules; (4) the stage of the medical process and (or) medical measures that caused the onset of an unfavorable result for the patient of the medical care provided to him; (5) the manner in which the lack of medical care is acknowledged; (6) the time of occurrence, development and detection of an adverse outcome, (7) its severity; (8) the nature and effectiveness of the actions of medical workers to eliminate the consequences; (9) impact on the quality of medical care provided, improper performance of their professional duties by medical workers; (10) the immediate cause of the adverse health outcome; (11) medical descriptions of the causal relationship between the adverse outcome and the actions of the healthcare professional; the severity of the patient's injury⁵⁷.

Article 10 of the Law of Ukraine "On Forensic Expertise" determines that forensic experts may be persons who have the necessary knowledge to provide a conclusion on the issues under investigation. Forensic experts of state specialized institutions may be specialists with the appropriate education, educational and qualification level not lower than a specialist, who have undergone appropriate training and qualified as a forensic expert in a particular specialty⁵⁸. Based on the foregoing, doctors of other specialties participating in the commission forensic medical examination, if they do not have special education and are not in the unified register of forensic experts of Ukraine, are not experts, and then they do not have the rights and obligations of an expert and cannot sign the above-mentioned legal documents.

Also, in these Rules it is stated that the protocol part should contain in detail the data of all available medical documents. In this case, depending on the nature of the case, the following must be written out from the medical history: (1) the patient's

⁵⁵ Sybirna R. Sybirnyj A. *Features of judicial-medical examination of medicinal errors*. *Jornal of Lviv Polytechnic National University: Series of legal Sciences*. 2017. Volume 4. № 884 (16). 259-264.

⁵⁶ Topchiy V.V. *Features of the investigation of crimes committed by a medical worker*. *South Ukrainian Law Journal*. 2018. 3. 117-121.

⁵⁷ Yamnenko T.M. & Litvinova I.F. *Certain aspects of pre-trial investigation in the field of medicine (medical case)*. *Legal scientific electronic journal*. 2021. 4. 563-566.

⁵⁸ On forensic examination: Law of Ukraine of 25.02.1994 № 4038-XII. Information of the Verkhovna Rada of Ukraine. 1994. № 28. Art.232.

condition upon admission to the hospital, diaries recording his condition during the entire period of treatment, (2) protocols of operations, (3) clinical diagnoses, (4) prescribed drug therapy regimens, the volume and frequency of drug administration, (5) results of laboratory tests, (6) the nature and extent of resuscitation, (7) data from the autopsy protocol with the results of a histological examination or data from the primary forensic examination, (8) the results of clinical and anatomical conferences with a review of medical documentation, as well as the conclusions of the commission⁵⁹. It should be noted that in the work of the expert commission of defects in the provision of medical care, in the legislation there are no clear questions that are mandatory to clarify all the circumstances of a medical incident, with an explanation of the necessary actions at each stage of the examination of defects in the provision of medical care, which leads to the subjectivity of such examinations without the necessary consistency and in fact, at the discretion of the expert commission when considering defects in the provision of medical care. According to Part 2, Art. 84 of the Criminal Procedure Code of Ukraine, "Expert Conclusion" is a procedural source of evidence, therefore, the court and pre-trial investigation authorities mainly refer to the data of the "Expert Conclusion", and not to other documents⁶⁰. Thus, it is possible to determine four stages of conducting commission forensic examinations of the protection of human rights in the healthcare sector in cases of examinations of defects in the provision of medical care, namely: (1) preparatory (the body that appointed the forensic medical examination must send the relevant documents for examination to the appropriate institution); (2) organizational (the commission considers the sufficiency and quality of the submitted materials and issues subject to expert study, and also at this stage an expert study plan is drawn up); (3) the main one (conducting a direct forensic medical examination); (4) the final stage (summarizing and drawing up the conclusion of a forensic expert).

6. Conclusion

In order to establish the correctness of the provision and quality of medical care in cases of bringing medical workers to legal responsibility for professional offenses, a commission forensic medical examination is mandatory. Forensic examination carried out in the process of protecting human rights in the healthcare sector is an effective procedural technique for proving professional offenses of medical workers. Its implementation must be of high quality and comply with the principles of forensic activity, otherwise the implementation of human rights protection mechanisms in the healthcare sector is ineffective. In order to improve the quality of the forensic examination carried out in the process of protecting human rights in the healthcare sector, it can be proposed, as an option, to create a special

⁵⁹ Rules for conducting commission forensic medical examinations in the forensic medical examination bureau: order of the Ministry of Health of Ukraine of January 17, 1995, № 6. Available at: <https://zakon.rada.gov.ua/laws/show/z0256-95#Text>.

⁶⁰ Criminal Procedure Code of Ukraine. Law of Ukraine № 4651-VI. of 13 April, 2012. Information of the Verkhovna Rada of Ukraine. 2013. № 9-10, № 11-12, № 13, Art.88

central executive body that would select all institutions related to forensic examination, including forensic medical examination. This is due to the fact that, in modern conditions, the Ministry of Health of Ukraine is subordinate to a forensic medical examination, and if a doctor makes a medical mistake due to which the patient dies, then an expert opinion on this case is prepared by an institution with the same vertical of leadership as the doctor. In this situation, a conflict of interest may arise, which must be resolved.

Given the complexity of conducting forensic examinations carried out in the process of protecting human rights in the healthcare sector, the expert's opinion plays a key role. A forensic scientist must perform his duties in accordance with the basic principles of forensic science such as (1) legality, (2) independence, (3) objectivity and (4) completeness of the study, (5) rule of law. The conclusion of the forensic expert regarding the forensic examinations carried out in the process of protecting human rights in the field of healthcare is a weighty argument for the court, since it allows to establish the factual circumstances of the case with the help of special knowledge that the judge does not have and cannot make an informed decision without them.

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