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SUBJECT MATTER OF PROVING IN CRIMINAL OFFENCES COMMITTED BY MEDICAL PROFESSIONALS

Abstract. Purpose. The purpose of the article is to establish the circumstances to be established in criminal offences committed by medical professionals. **Results.** The article focuses on the circumstances to be proved in the course of investigation of criminal offences committed by medical professionals. It is indicated that the process of investigation in criminal proceedings is inextricably linked to the process of proving, which is actually its basis. This is due to the fact that the criminal process is aimed at identifying and investigating both material and ideal traces of a criminal offence, which is the essence of proving. The concept of proving, as a rule, does not cause significant debate and is interpreted as a set of actions aimed at identifying, collecting, securing, examining, verifying and evaluating evidence and its procedural sources to substantiate conclusions. It is found that the concept of the subject matter of proving, although it has different formal definitions, retains unity in content. Some scholars interpret the subject matter of proving as a set of circumstances stipulated by the criminal procedure law, the establishment of which is necessary to resolve applications or reports of a criminal offence, proceedings in general or a court case at the stage of execution of a sentence, as well as to apply preventive measures during pre-trial investigation or trial. Other scholars define the subject matter of proving as a system of circumstances that reflect the characteristics and connections of the event that are essential for the proper investigation of criminal proceedings and the implementation of the tasks of criminal proceedings in each case. **Conclusions.** It is concluded that the circumstances to be established as an integral element of the forensic methodology for investigating criminal offences, in particular those committed by medical professionals, allow for a more efficient and targeted determination of the amount of information required, and for examining the relevant materials, assessing their legality and sufficiency. This contributes to determining the focus of further investigation and making procedural decisions at various stages of the criminal process with the least amount of time and effort.

Key words: subject matter of proving, medical professionals, investigation, criminal offences, circumstances to be established.

1. Introduction

The process of investigation in criminal proceedings is inextricably linked to the process of proving, which is actually its basis. This is due to the fact that the criminal process is aimed at identifying and investigating both material and ideal traces of a criminal offence, which is the essence of proving. The concept of proving, as a rule, does not cause significant debate and is interpreted as a set of actions aimed at identifying, collecting, securing, examining, verifying and evaluating evidence and its procedural sources to substantiate conclusions. The purpose of this process is to establish the objective truth and to make a lawful, justified and fair decision on its basis (Kovalenko, 2006).

The main purpose of criminal procedural proving is to establish the circumstances relevant to criminal proceedings. This task is

achieved if the pre-trial investigation identifies all the facts and circumstances relevant to the determination of the truth with sufficient completeness and reliability. The totality of such facts and circumstances constitutes the subject matter of proving in criminal proceedings (Stakhivskyi, 2005).

The subject matter of proving and the content of the circumstances to be established in criminal proceedings have been widely studied by both Ukrainian and foreign scholars in the field of criminal procedure and forensics, including Yu.P. Alenin, V.P. Bakhin, V.I. Halagan, V. H. Honcharenko, Yu.M. Hroshevyi, V.K. Lysychenko, H.A. Matusovskiy, V.T. Nor, V.A. Pohoretskyi, M.V. Salteviskyi, S.S. Cherniavskiy, V.Yu. Shepitko and others. In general, modern research is aimed at improving the process of proving in proceedings related to

the professional activities of medical professionals, in particular by clarifying concepts, analysing the specifics of the evidence base and developing recommendations for practice.

The purpose of the article is to establish the circumstances to be established in criminal offences committed by medical professionals.

2. Determination of the range of circumstances to be established during the investigation of criminal proceedings

Scholars have analysed the categories of circumstances that need to be clarified, calling them circumstances to be proved or established. In order to clarify these concepts, it is advisable to analyse the concepts set out in a modern explanatory dictionary of the Ukrainian language. It defines the term "to establish" as "to discover or assert something by substantiating it" (Busel, 2003), and "to clarify" as "to investigate, make something clear; to determine or establish something on the basis of certain data, signs, etc." (Busel, 2003).

We believe that the concept of 'establishment' is broader. In our scientific article, we will use the term 'circumstances to be established', covering not only the circumstances provided for by the criminal procedure law, but also those which should be investigated depending on the specific situation in the course of investigation of certain categories of criminal proceedings.

Determination of the range of circumstances to be established during the investigation of criminal proceedings is an important point. As noted by the prominent criminalist O.N. Kolesnichenko, before considering the use of means, techniques and methods of investigation, it is necessary to clearly define the range of tasks and circumstances that need to be established (Kolesnychenko, 1967).

One of the points of debate among the scientific community is the specification of the place and role of the circumstances to be established in the system of criminological methodology, namely their comparison with criminological description. Most of the authors support the perspective that the circumstances to be established in criminal proceedings and the criminological description should be distinguished, since these are different but interrelated elements. In the study of improving the methodology of investigation of various types of criminal offences, V.I. Halagan argues that the criminological description of criminal offences and the circumstances to be established are two separate but interdependent components of the methodology (Halahan, 2003).

However, alternative perspectives of scholars are also distinguished, who do not support the separation of circumstances to be established from criminological characteristics, saying that these circumstances are a form of criminalistic information of a reference nature that is

necessary for the investigator and prosecutor to organise criminal prosecution.

We are convinced that the criminological description and the circumstances to be established in the course of criminal proceedings are significantly different categories. Following the perspective on the need to identify the circumstances to be established in criminal proceedings, it can be stated that these are systematic factual data based on the rules of criminal and criminal procedure law. They are part of the subject matter of proving, but also go beyond it, and their failure to establish prevents a comprehensive and complete investigation of the subject matter of proving, which is necessary for an effective investigation and trial of the case.

We support V.V. Tishchenko's view that within the methodology of investigation of certain types of criminal offences, the circumstances to be established have a criminalistic aspect. It consists in the fact that these circumstances are components of the work related to the commission of a criminal offence, which, in turn, have a close relationship with each other. Thanks to these connections, the investigator can, having established one or more circumstances of a criminal offence, draw conclusions about other still unknown details of the event, perpetrators, their goals, motives and form of guilt (Tishchenko, 2003).

We believe that the specific determination of the scope of these circumstances in each particular criminal proceeding will contribute to the completeness, purposefulness and objectivity of the resolution of the circumstances of a criminal offence. Intentional expansion of the scope of the subject matter of proving may cause unjustified delays in the pre-trial investigation and trial. However, excessive narrowing of the scope of the circumstances to be proved inevitably causes incompleteness and even one-sidedness of the investigation (Kobernyk, Sehai, Stryzha, Tsymbal, 1986).

According to part 1 of Article 91 of the CPC of Ukraine, the following aspects are subject to proving in criminal proceedings:

- 1) The event of the criminal offence (time, place, manner and other circumstances of its commission);
- 2) The guilt of the accused, the form of guilt, the motive and purpose of the criminal offence;
- 3) The type and amount of damage caused, as well as procedural costs;
- 4) Circumstances that affect the severity of the criminal offence, characterise the defendant, mitigate or aggravate the punishment, exclude criminal liability or serve as grounds for closing the proceedings;
- 5) Circumstances that may be grounds for exemption from criminal liability or punishment;
- 6) Facts confirming that money, valuables or other property obtained as a result of a criminal

offence or used to commit it are subject to special confiscation;

7) Circumstances that are grounds for applying criminal law measures to legal entities (Criminal Procedure Code of Ukraine, 2012).

In scientific sources, the concept of the subject matter of proving, although it has different formal definitions, retains unity in content. Some scholars interpret the subject matter of proving as a set of circumstances stipulated by the criminal procedure law, the establishment of which is necessary to resolve applications or reports of a criminal offence, proceedings in general or a court case at the stage of execution of a sentence, as well as to apply preventive measures during pre-trial investigation or trial.

Other scholars define the subject matter of proving as a system of circumstances that reflect the characteristics and connections of the event that are essential for the proper investigation of criminal proceedings and the implementation of the tasks of criminal proceedings in each case.

3. Key elements of criminal offences committed by medical professionals

In order to determine a clear scope of circumstances to be established in the investigation of a particular criminal offence, it is necessary to determine detailed facts, with due regard to the provisions of the Criminal Code of Ukraine, the specifics of the criminal offence, the investigative situation and other factors. According to the authors of scientific papers, such facts serve as a method of determining the unknown parts of the subject of proof, which are characterised by a natural relationship with the already known ones. Their existence is established by analysing a criminal offence from a forensic perspective, and depending on the situation, each circumstance is either subject to establishment or performs a heuristic function. Therefore, the subject matter of proving is an integral system that reflects a socially dangerous act as a complex social phenomenon. The connection within the elements of the subject matter of proving is established by the nature of the criminal offence, the characteristics of the perpetrator, and is manifested in the integrity of the system.

Scholars propose to detail the circumstances to be established during the investigation by the elements of a criminal offence, grouping them into:

1) The object of the criminal offence.

2) Objective side of the criminal offence, which covers the place, time, causes of the criminal offence, nature and amount of damage, causal link between the criminal offence and damage, circumstances that contributed to the criminal offence.

3) The perpetrator of a criminal offence, that is, the description of the person who committed it.

4) The subjective side of a criminal offence, which includes the issue of guilt, its form

and motives (Tishchenko, 2003).

L. H. Dunaievska in her study of criminal offences committed by medical professionals suggests that the circumstances to be established should include:

1) Correctness and timeliness of medical measures in terms of their compliance with generally accepted rules.

2) The occurrence of socially dangerous consequences, such as death or harm to health.

3) The causal link between the actions of a medical professional and the negative consequences.

4) Professional, social and criminological descriptions of a medical professional.

5) Identification of the causes and conditions that contributed to the criminal offence and the necessary measures to eliminate them (Dunaievska, 2006).

Based on the above points of view, in the investigation of criminal offences committed by medical professionals, it is advisable to group the circumstances as follows:

1) Circumstances of the criminal offence: time, place, method of preparation, commission and concealment of the criminal offence, tools and traces of the criminal offence.

2) Circumstances related to the victim.

3) Circumstances related to the perpetrator.

4) Causal relationship: compliance of medical measures with the rules, causes of the criminal offence, relationship between actions and consequences, relationship between the victim and the perpetrator.

5) Other circumstances: the type and amount of damage, factors mitigating or aggravating the punishment, excluding liability or justifying the closure of proceedings.

The legal obligation to provide assistance by medical professionals is based primarily on the provisions of the Fundamentals of Legislation of Ukraine on Healthcare, which defines the right of a person to engage in medical activities, provided that this person has a certain special education and meets the qualification requirements established by the state. Further regulatory frameworks for medical activities are defined depending on the specific field of medicine through clinical protocols (e.g., protocols for the specialty of surgery approved by Order of the Ministry of Health of Ukraine No. 297 of 2 April 2010, or Clinical Protocol "Comprehensive care during unwanted pregnancy" approved by Order of the Ministry of Health of Ukraine No. 1177 of 31 December 2010), as well as regulations and job descriptions that govern the activities of medical professionals depending on their job responsibilities.

Therefore, medical activities can be considered lawful only if they comply with the rules set out in medical scientific practice, medical practice and specific regulations. Moreover, it shall be in accordance with the Constitution

of Ukraine, the Fundamentals of Legislation of Ukraine on Healthcare, applicable standards, protocols and instructions that outline the legal basis for the provision of medical care. According to scholars, not only the availability of specific knowledge is of legal significance, but also its insufficiency or non-application of the knowledge and skills that a medical professional is obliged to possess and use to assist the victim.

In order to assess the legitimacy of the actions of medical professionals, the investigator shall first collect information on the time of medical assistance, namely:

- a) the place and time of medical activities;
- b) the content and scope of medical care, including the history taken, assessment of the results of examination, laboratory tests, etc., as well as the course of treatment determined on the basis of these data;
- c) the number and positions of medical professionals involved in the treatment process.

The investigator shall investigate thoroughly the circumstances related to the time of the criminal offence, in particular, the moment of initial provision of medical care and the time when the person's health was harmed (before treatment began; after the start of general medical care, but before the application of measures determined by the diagnostic picture; or after the relevant set of medical actions). It is important to establish the moment of the beginning and end of a criminal offence, considering its characteristics and stages of implementation, as this will affect the qualification. Criminal offences committed by healthcare professionals are, from the objective perspective, criminal offences with material elements, which is the basis for determining the fact of serious consequences for the life or health of the victim.

After establishing the number and status of the entities that treated the victim, their job descriptions should be reviewed and attached to the criminal case file. Similarly, the investigator should analyse the collected factual data on the circumstances of the treatment, comparing it with the relevant standards and clinical protocols for the treatment of the diagnosis of the victim. At this stage, it is advisable to invite a specialist who will be able to assess the diagnostic and therapeutic measures used by the medical staff and compare them with the recommendations of medical theory and medical practice.

The determination of the causes of health damage is complicated by the fact that treatment is usually a multi-component process. Harm can arise from a combination of minor mistakes made by several healthcare professionals that together have caused negative consequences.

One of the key elements of any criminal offence is the existence of a causal link. In case of detection of criminal offences committed by healthcare professionals, it is necessary to estab-

lish a link between the actions of a particular healthcare professional and the damage caused. Criminal law distinguishes between direct and indirect causation. In the context of illegal medical activities, both types of connection may be present.

Additional difficulties arise if treatment and the onset of harm are separated in time or were carried out by several employees. The treatment process usually includes the following steps: collecting data about the patient, determining the diagnosis, selecting and implementing treatment activities, and establishing the place and time of care. In such cases, the existence of a causal link for each action and their complex as a whole should be separately checked, as well as how each action affected the outcome, which greatly complicates the investigation process.

In order to establish causation, it is important to develop investigative versions of the source of the patient's pathological condition that led to an unfavourable treatment outcome. In this process, it is advisable to involve medical experts, as the investigator cannot make assumptions about such cases on his or her own.

In order to determine the degree of guilt of the suspect and the motives for his or her actions, it is necessary to establish who directly performed the medical procedures and who is obliged by law to provide medical care: a medical professional or another entity. If the treatment was carried out by a person who is not a medical professional, data should be collected on the person's identity, education, marital status, educational institution or place of employment, position held, characteristics from the company or place of residence, health status, etc.

If the guilty person is a medical professional, it is necessary to find out: the level of education and specialisation; whether the person is entitled to engage in medical activities; whether he or she acted within the scope of his or her authority or exceeded it; length of service; whether his or her actions are governed by the relevant regulations; whether there have been previous cases of improper performance of duties and what measures were taken as a result of such cases; the presence of guilt in the form of criminal arrogance or negligence.

4. Conclusions

Therefore, the circumstances to be established as an integral element of the forensic methodology for investigating criminal offences, in particular those committed by medical professionals, allow for a more efficient and targeted determination of the amount of information required, and for examining the relevant materials, assessing their legality and sufficiency. This contributes to determining the focus of further investigation and making procedural decisions at various stages of the criminal process with the least amount of time and effort.

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ПРЕДМЕТ ДОКАЗУВАННЯ У КРИМІНАЛЬНИХ ПРАВОПОРУШЕННЯХ, ВЧИНЕНИХ МЕДИЧНИМИ ПРАЦІВНИКАМИ

Abstract. Purpose. Метою статті є встановлення обставин, що підлягають встановленню у кримінальних правопорушеннях, вчинених медичними працівниками. **Results.** Стаття присвячена обставинам, що підлягають доказуванню при розслідуванні кримінальних правопорушень, що вчинені медичними працівниками. Вказано, що процес розслідування кримінального провадження нерозривно пов'язаний із процесом доказування, який фактично є його основою. Це зумовлено тим, що кримінальний процес спрямований на виявлення та дослідження як матеріальних, так і ідеальних слідів кримінального правопорушення, що й складає суть доказування. Поняття доказування, як правило, не викликає значних дискусій і трактується як сукупність дій із виявлення, збирання, закріплення, дослідження, перевірки та оцінки доказів і їхніх процесуальних джерел для обґрунтування висновків. З'ясовано, що поняття предмета доказування хоча й має різні формальні визначення, однак зберігає єдність за змістом. Одні науковці трактують предмет доказування як сукупність обставин, передбачених кримінальним процесуальним законом, встановлення яких є необхідним для вирішення заяв чи повідомлень про кримінальне правопорушення, провадження в цілому або судової справи на стадії виконання вироку, а також для застосування профілактичних заходів у ході досудового розслідування чи судового розгляду. Інші науковці дають визначення предмета доказування, називаючи його системою обставин, що віддзеркалюють характеристики та зв'язки події, що є суттєвими для належного розслідування кримінального провадження та реалізації завдань кримінального провадження у кожному визначеному випадку. **Conclusions.** Зроблено висновок, що обставини, що підлягають встановленню, як складовий елемент криміналістичної методики розслідування кримінальних правопорушень, зокрема тих, що вчиняються медичними працівниками, дозволяють більш ефективно й цілеспрямовано визначати обсяг необхідної інформації, досліджувати відповідні матеріали, оцінюючи їхню законність і достатність. Це сприяє визначенню напрямів подальшого розслідування та прийняттю рішень процесуального характеру на різних стадіях кримінального процесу з найменшими витратами часу й зусиль.

Ключові слова: предмет доказування, медичні працівники, розслідування, кримінальні правопорушення, обставини, що підлягають встановленню.