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Problems of regulating liability for criminal offences against the life and health of a person committed in the sphere of healthcare

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Abstract. The Criminal Code of Ukraine provides for several special provisions on liability for violations against human life and health committed in the healthcare sphere, the application of which gives rise to many difficulties and law enforcement errors. However, the lack of consistency of such provisions establishes risks of non-compliance with the principle of fairness in bringing a person to criminal liability and imposing punishment. The purpose of the research is to identify the most optimal solution to the problem of legislative regulation of liability for causing harm or establishing a threat of harm in the healthcare sphere. The key research method is a logical and legal study of the Ukrainian criminal law provisions related to liability for healthcare offences. Based on the results of the study, it is proposed to construct Articles 134, 139, 140, 142 and 143 of the Criminal Code of Ukraine according to the same scheme: in the third part of Article 134 and the first parts of the rest of these provisions, criminal liability for the acts provided for therein should be linked to the establishment of a danger to the patient's life or the threat of causing serious bodily harm; in the following parts of these provisions, to provide for the rules on qualified criminal offences under the scheme "the same act if it caused moderate or serious bodily harm", and the rules on particularly qualified criminal offences under the scheme "the same act if it caused the death of the patient". Based on the current sanctions of these provisions, and the sanctions of the general provisions on criminal liability for negligent infliction of bodily harm, the author proposes typical penalty limits for the proposed provisions. The author substantiates the expediency of excluding Articles 132, 141 and 145 of the Criminal Code of Ukraine. The conclusions drawn within the framework of this research can be used in lawmaking activities to develop amendments to the Criminal Code of Ukraine, and in law enforcement activities to qualify criminal offences committed in the healthcare sphere

Keywords: failure to perform duties, violations by medical professionals, violation of patient rights, transplantation procedure, disclosure of medical secrets, bodily harm, causing death

Introduction

The Criminal Code of Ukraine (hereinafter – the CC of Ukraine) contains several special provisions that provide for liability for various violations in the healthcare sphere that cause harm or endanger the life or health of a person (Criminal Code of Ukraine, 2001). In general, this approach is approved in academic circles, not only in Ukraine (Gafurova, 2020). However, its implementation in the Criminal Code of Ukraine has established many law-making and law-enforcement problems. In recent years, several substantial works on this subject have appeared, in particular, the dissertations by I. Fil (2018) and E. Chernikov (2020) on liability for non-performance or improper performance of professional duties by a medical or pharmaceutical worker, the dissertation by Y. Shopina (2020) "Criminal liability of a medical or pharmaceutical worker for committing a crime related to the performance of professional duties"; scientific research article by S. Lykhova, I. Ustinova, O. Husar and I. Tolkachova (2019) on the issue of criminal liability of medical and pharmaceutical workers, a scientific research article by N. Antoniuk (2020), which considers the issues of differentiation of liability of medical workers, etc. Therewith, these issues are far from being fully resolved. This research emphasises three issues that still require scientific discussion.

The first one is related to the regulation of criminal liability for non-performance or improper performance of duties by medical or pharmaceutical professionals, which is implemented in Articles 139 and 140 of the CC of Ukraine. Despite the difficulties in establishing the fact of non-performance or improper performance of duties noted in the scientific literature (Chernikov, 2020), there are issues of legislative regulation. According to Article 139 of the CC of Ukraine, liability for failure to provide care to a patient without valid reasons occurs regardless of the consequences, provided that the perpetrator was aware of the possibility of serious consequences for the victim. Instead, failure to perform or improper performance of other duties (Article 140 of the CC of Ukraine) entails criminal liability only in case of serious consequences. There is still no consensus on the content of the concept of "serious consequences". Y.G. Lyzogub (2005) considers serious consequences in Article 140 of the CC of Ukraine to be a human health disorder that: requires long and painful treatment; poses a danger to life; results in

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the development of an incurable or difficult-to-treat disease; causes severe adverse reactions on the part of the victim against themselves. As an example, the author cites the infliction of grievous or moderate bodily harm, suicide, and serious illnesses described by the above signs (Lyzogub, 2005). Causing death, in his opinion, should be qualified additionally under Article 119 of the CC of Ukraine, considering that the repressive power of this provision is much greater than Article 140 of the CC of Ukraine (Lyzogub, 2005). The same opinion is expressed by L.P. Brych (2013), who believes that serious consequences and the death of a person in such criminal offences are not common features. In turn, O.O. Dudorov believes that death is covered by the concept of "serious consequences", however, the author does not include the infliction of moderate bodily harm to its scope (Melnyk & Khavroniuk, 2018). Such a different interpretation of this concept among respected authors indicates the seriousness of the problem.

The second problem concerns criminal liability for violation of special rules and procedures for conducting specific activities in the medical and pharmaceutical sphere (Articles 134, 141-143 of the CC of Ukraine). Despite the similarity of the respective corpus delicti of criminal offences in terms of the essence of the actions (as a violation of certain rules), the consequences as a mandatory feature of the corpus delicti and a condition of criminal liability are regulated differently: illegal abortion (Part 3 of Article 134 of the CC of Ukraine) is criminalised if it causes long-term health disorders, infertility or death of the victim; conducting clinical trials of medicinal products without the written consent of the patient or their legal representative, or concerning a minor or incapacitated person (Article 141 of the CC of Ukraine) entails criminal liability in case of causing the patient's death or other serious consequences; illegal conduct of biomedical, psychological or other experiments on humans (Part 1 of Article 142 of the CC of Ukraine) can be incriminated to a person in case of endangering life or health; and the condition of criminal liability for intentional violation of the procedure established by law for using transplantation of human anatomical materials (Part 1 of Article 143 of the CC of Ukraine) is causing significant harm to the victim's health. In addition, in some cases, liability is differentiated depending on the severity of the consequences (Article 142 of the CC of Ukraine), while in others it is not (Articles 134, 141, and 143 of the CC of Ukraine). In addition, the inconsistency of sanctions in these legal provisions is evident.

The third problem is related to different approaches to the regulation of criminal liability for the disclosure of confidential information about a person in the healthcare sphere. If Article 145 of the CC of Ukraine "Illegal Disclosure of Medical Secrets" provides for liability only in case of grave consequences, Article 132 of the CC of Ukraine "Disclosure of Information on Medical Examination for Detection of Infection with Human Immunodeficiency Virus or Other Incurable Infectious Disease" regulates the formal elements of the criminal offence. The sanction of the second article is even more severe. In addition, the very need for the existence of both genders is doubtful.

The problems described above impede fair sentencing and sometimes raise doubts about the existence of criminal liability for particular actions.

The purpose of this research is to find a scientific solution to these problems and to develop proposals for improving the relevant legal provisions.

Regarding the provisions on the improper performance of duties by medical or pharmaceutical professionals

Some authors' positions on the content of the concept of grave consequences are based on the ratio of the severity of sanctions. On the one hand, such a ratio should in no way affect the meaning of the concept. Since the provision that the elements of a criminal offence should be determined exclusively by the disposition can be considered generally accepted. A systematic analysis of the provisions of the CC of Ukraine demonstrates that death is unambiguously defined as serious consequences. It is evidenced by the frequently used phrases "loss of life or other serious consequences" and "death or other serious consequences". This type of wording is present in Part 2 of Article 139 of the CC of Ukraine. In particular articles (for example, Article 258 of the CC of Ukraine), serious consequences and the death of a person are provided for in separate parts of the article (as signs of specifically qualified corpus delicti of criminal offences). However, this technique does not mean that they do not include each other. Finally, the so-called especially qualifying features are frequently encompassed by the scope of the qualifying features (e.g., a particularly large size is covered by the concept of large size and is a specification of it).

On the other hand, it is illogical to have a much more lenient liability for negligent death by medical or pharmaceutical professionals as a result of failure to perform or improper performance of professional duties, since it is the preservation of human life and health that is the main purpose of their activities (while Article 140 of the CC of Ukraine provides for the possibility of applying such penalties as deprivation of the right to hold specific positions or engage in specific activities, correctional labour, restriction of liberty and imprisonment for a defined period, the latter – for a period not exceeding two years, Article 119 of the CC of Ukraine defines only the latter two, with imprisonment possible for up to five years, and in case of causing death to two or more persons – up to eight years). In particular, the scientific literature notes that the presence of special education and professional duty increases public danger (Antoniuk, 2020). Evidently, understanding this caused scholars to justify the need for additional qualification of causing death under Article 119 of the CC of Ukraine. However, legislative mistakes should be corrected through amendments to the relevant regulations rather than through using some other, atypical approaches to the interpretation of criminal law provisions. In addition, the qualification of causing death as a result of non-performance or improper performance of professional duties as a set of criminal offences (under Articles 140 and 119 of the CC of Ukraine) contradicts the principle of the inadmissibility of double incrimination. It should be emphasised that failure to perform or improper performance of duties by a medical or pharmaceutical worker entails criminal liability only in case of serious physical harm to the victim. Thus, such damage is the factor that determines the seriousness (social danger) of the relevant actions and, thus, the limits of punishment. The same factor, to Article 119 of the CC of Ukraine, is the consequence in the form of death. By charging both provisions at once, two sanctions are intended to be applied at once, covering the severity of both consequences – grave consequences and death – when only one consequence is caused. Therefore, such an aggregate would be artificial and unjustified and would undoubtedly

contradict the above principle.

Scholars' studies of case law under Article 140 of the CC of Ukraine demonstrates that courts when qualifying the failure to perform or improper performance of professional duties by medical and pharmaceutical workers, cover the relevant corpus delicti of causing death (Chernikov, 2020). Therewith, according to the results of the research by I.M. Fil (2018), 95.5% of the verdicts delivered under Article 140 of the CC of Ukraine are about cases causing death.

Considering the above, the limits of punishment outlined in Article 140 of the CC of Ukraine require urgent adjustment to align them with the sanction of Article 119 of the CC of Ukraine. The same applies to the sanction of Part 2 of Article 139 of the CC of Ukraine, which, by its content, defines a special rule on liability for failure to perform professional duties by a medical or pharmaceutical worker.

The question of whether the concept of serious consequences of causing moderate bodily harm is encompassed by the concept of serious consequences is resolved differently for different types of criminal offences. For example, in the scientific and practical commentary of the Criminal Code of Ukraine edited by M.I. Melnyk and M.I. Khavroniuk (2018), when describing serious consequences in Articles 133, 135, 139, 140, 146, 147, 151, 152, 161, 194, 258, 260, 265, 271, 297, 321-1, 347, 371, 402 of the CC of Ukraine, they only indicate the infliction of serious bodily harm. Instead, Articles 137, 240, 321-2, 347-1 refer to the infliction of bodily harm of moderate severity to one or at least two persons. The analysis of court practice under Article 140 of the CC of Ukraine demonstrates that most of the cases considered by the court concern cases of causing death or serious bodily harm. Therewith, there are some cases where the consequences are bodily injuries of moderate severity, for example, the decision of the Konotop City District Court of Sumy Region in case No. 577/3411/20 (2020).

Can the concept of "serious consequences" have different meanings within the CC of Ukraine? Hypothetically, yes. This concept is evaluative, and therefore its scope can depend on the seriousness of the criminal offence itself. If a criminal offence is a serious or especially serious crime even without such consequences, then more harmful consequences should be considered serious, while in the case of a criminal offence or a minor crime, a wider range of consequences, including less harmful ones, can be considered serious. Thus, it is true that in some cases only death can be considered, in others – death and serious bodily harm, and in others – moderate bodily harm.

This conclusion is confirmed by the provisions of Articles 36 and 38 of the CC of Ukraine. Part 3 of Article 36 of the CC of Ukraine states that "exceeding the limits of necessary defence is considered to be the intentional infliction of serious harm to the attacker that does not correspond to the danger of the attack or the situation of defence. Exceeding the limits of necessary defence entails criminal liability only in cases specifically provided for in Articles 118 and 124 of this Code." Considering that these provisions provide for liability for causing death and serious bodily harm, the quoted wording allows stating that less serious harm, which may include moderate bodily harm, can be considered serious harm.

In addition to the above, the coverage of the consequence of causing moderate bodily harm by Articles 139 and 140 of the CC of Ukraine is advisable due to the necessity to ensure the consistency of criminal legislation. However, the negligent infliction of such consequences is criminalised under the general provisions of Section II of the Special Part of the CC of Ukraine (Article 128 of the CC of Ukraine). The doctrine justified the necessity of coordinating the ways of differentiating criminal liability for criminal offences provided for by the so-called general and special rules (Marmura, 2019).

Based on the above, to ensure uniform application of the relevant criminal law provisions, it can be concluded that it is necessary to enshrine in Articles 139 and 140 of the CC of Ukraine, instead of the concept of serious consequences, a specific list of harmful consequences. Such consequences should include death, serious and moderate bodily harm. As already noted, scientists include the development of serious diseases in the concept of "serious consequences". Therewith, there are difficulties in the criminal law classification of diseases. In turn, harm to human health in the CC of Ukraine is most frequently defined through the concept of bodily injury, and the latter is interpreted more broadly – as a violation of the anatomical integrity of organs and tissues, and as a violation of their functions while maintaining their integrity. Thus, causing any disease can be considered as causing bodily harm of one kind or another.

In addition, considering the specifics of medical and pharmaceutical activities, the main task of which is to preserve the life and health of a person, it is advisable to link liability to the establishment of a real threat of death or serious bodily harm (the danger of establishing a threat of moderate bodily harm by failure to perform or improper performance of professional duties seems insufficient for criminalisation). Otherwise, there is no point in developing special rules at all, since liability for causing bodily harm is provided for in other provisions, and, if necessary, it can be differentiated using a qualified criminal offence. As already noted, Article 139 of the CC of Ukraine implements such a proposal, however, not quite successful. The indication that the person must be aware of the possibility of serious consequences for the victim significantly complicates the process of proof and ignores cases where the subject, due to improper professional level, did not foresee the relevant consequences, although they should and could have foreseen them.

Considering the significant difference in the degree of harmfulness of these consequences and the existing concept of the CC of Ukraine, liability for non-performance or improper performance of professional duties by a medical or pharmaceutical worker should be differentiated using the so-called qualifying (especially qualifying) features. Such proposals have been repeatedly expressed in the scientific literature (Paramonova, 2011; Brych, 2013). Evidently, the opinions of those scholars who support the need to separate the consequences of causing death into a separate qualified composition and a separate part of Articles 139 and 140 of the Criminal Code of Ukraine should be agreed. This conclusion is consistent with the results of specific studies on the European experience of regulating criminal liability for similar actions (Gutorova *et al.*, 2019). Instead, the regulation in Part 2 of Article 140 of the CC of Ukraine of a qualified criminal offence on the grounds of harm to a minor presents a bad decision. Modern scientific publications frequently mention the necessity of strengthening the criminal legal protection of minors by constructing an appropriately qualified corpus delicti of criminal offences (Yevteyeva, 2018). Therewith, notably, such differentiation is most frequently justified about intentional criminal offences. For example,

M.I. Panov and V.V. Galtsova (2013) propose to provide for the relevant feature in Articles 121, 122, 125, 126, 127, 129 and 143 of the CC of Ukraine, Section II of the Special Part, which establishes liability for intentional criminal offences but leave out Articles 131, 133, 134, 139 of the CC of Ukraine, which deals with negligent infliction of harm to health. Evidently, recklessly causing harm to the life or health of a minor does not significantly affect the social danger of the act, compared to intentional assault, where the perpetrator is aware of the lower risks of resistance from the victim, understanding the greater traumatic impact on the psyche of minor victims of violence, and, finally, gross disregard for the moral provisions accepted in society, etc.

Therewith, the situation is different in cases of harm to two or more persons rather than one, as the severity of the harm is at least doubled. Qualifying such cases as a combination of criminal offences would violate the principle of non-double jeopardy. However, it will be difficult to differentiate liability depending on the seriousness of the damage to health, and even depending on the number of victims, in one article. Thus, the plurality of victims should be left to be considered when individualising punishment by determining an appropriate sanction.

Regarding the rules on violation of special rules and procedures for specific types of activities in the medical and pharmaceutical sector

First of all, consider the expediency of indicating in Articles 134, 141-143 of the CC of Ukraine various consequences as a condition of criminal liability (a mandatory feature of the main body of a criminal offence). Admittedly, the potential danger of violations committed in the course of conducting specific types of medical (pharmaceutical) activities is somewhat different. But the degree of such danger can vary within a particular type of activity (for example, transplantation of anatomical materials). In any case, these fluctuations do not seem to be that significant. Therewith, the author believes that the main factor determining the severity of these violations is their consequences in the form of causing some harm to the victim's health or establishing a real threat of such harm. Considering this, the same consequences should be a condition for criminal liability for violation of these rules. Such consequences, as in Articles 139 and 140 of the CC of Ukraine, should be the death of a person, or serious and moderate bodily injuries. As in Article 140 of the CC of Ukraine (referring to the same arguments), liability for the analysed criminal offences should be conditioned upon the establishment of a real threat of death or serious bodily injury.

From the standpoint of consequences, the study raised doubts as to the expediency of regulating in the CC of Ukraine the liability for conducting clinical trials of medicines without the written consent of the patient or their legal representative, or to a minor or incapacitated person. In Article 141 of the CC of Ukraine, the legislator linked criminal liability to causing the death of a patient or other serious consequences. It is difficult to imagine a situation where the required causal link between the violation of the relevant requirements or prohibitions and the consequences would exist; if consequences do occur, they will not be caused by the failure to obtain written consent or the violation of the prohibition on researching specific categories of people. Therefore, if the legislator does not consider it appropriate to bring to criminal liability for the mere fact of conducting clinical trials of medicines without the written consent of the patient or their legal representative, or to a minor or incapacitated person, Article 141 of the CC of Ukraine should be excluded. The inappropriateness of criminal liability for such acts is justified in the scientific literature (Vallejo-Jiménez & Nanclares-Márquez, 2019).

Similarly to Articles 139 and 140 of the CC of Ukraine, it is advisable to differentiate liability in the analysed articles depending on the consequence is to provide for separate corpus delicti of criminal offences in cases of establishing a threat of death or serious bodily injury; causing serious or moderate bodily injury; causing death.

The limits of punishability of the analysed criminal offences should be determined based on the limits of punishability set by general rules. Considering the additional public danger posed by violation of the rules and procedures for specific types of medical and pharmaceutical activities, at least the minimum penalty for the relevant criminal offences should be higher than the general rules provided for in Articles 119 and 128 of the CC of Ukraine. In addition, it should be provided for the possibility of applying a fine in minor cases within a sufficiently wide range, as a punishment that has proven to be effective and is widely used in the legislation of European countries. Considering this, the author of this research proposes the following typical penalties: in case of endangering the patient's life or threatening to cause serious bodily harm, a fine of up to three thousand tax-free minimum incomes, community service and correctional labour; in case of causing moderate or serious bodily harm, a fine of more than three thousand tax-free minimum incomes, restriction of liberty and imprisonment within the scope of a minor crime (up to five years); in the event of the victim's death, imprisonment with a maximum term of at least eight years. It is advisable to provide for an additional penalty in all of the above cases in the form of deprivation of the right to hold specific positions or engage in specific activities for up to three years.

Regarding the rules on liability for disclosure of confidential information about a person in the medical field

The CC of Ukraine provides for two similar articles: "Unlawful disclosure of medical secrets" (Article 145) and "Disclosure of information on medical examination to detect infection with human immunodeficiency virus or other incurable infectious diseases" (Article 132). Article 40 of the Fundamentals of Legislation of Ukraine on Health Care states that medical secrecy is "information about an illness, medical examination or inspection and their results, and information about the intimate and family life of a person obtained in the course of professional or official duties by medical professionals or other persons" (Law of Ukraine No. 2801-XII…, 1992). It has been noted in academic circles (Shevchuk *et al.*, 2020; Tereshko, 2020; Slipchenko, 2021). Thus, information about the fact or results of a medical examination to detect infection with the human immunodeficiency virus, other incurable infectious diseases, or AIDS is a medical secret.

At first glance, the decision of the legislator to differentiate criminal liability for disclosure of such type of medical secret as information about medical examination for detection of infection with human immunodeficiency virus or other incurable infectious diseases can be reasonable, as it can result in serious social consequences for the victim.

However, a deeper logical analysis indicates the opposite. For example, disclosing the fact of a venereal disease test can cause no less harm to the victim than disclosing data on a test for human immunodeficiency virus, an incurable infectious disease, in particular, as suggested by some researchers of COVID-19 (Zabuga & Mykhailichenko, 2020). However, in the absence of grave consequences, in the first case, the actions are not criminalised, and in the second case, they entail criminal liability. This situation does not comply with the principle of justice.

In addition, the mere fact of disclosure of medical secrets of any content does not reach the public danger that a criminal offence should have. In turn, the database of the Unified State Register of Court Decisions contains only one verdict under Article 132 of the CC of Ukraine and none under Article 145 of the CC of Ukraine. Although such offences do occur, society does not attach much importance to them, which indicates that there is no social justification for criminal liability for them. Evidently, administrative and disciplinary liability for disclosure of such information would be quite sufficient.

Conclusions

As a result of the research, its purpose was accomplished. The author of the research substantiates the expediency of such amendments and additions to the CC of Ukraine:

1) the dispositions of part 3 of Article 134, part 1 of Article 139, part 1 of Article 140, part 1 of Article 142, and part 1 of Article 143 of the CC of Ukraine should be defined concerning the establishment of danger to the patient's life or the threat of causing serious bodily harm;

2) in the following parts of these articles, to provide for provisions on the qualified elements of criminal offences under the scheme "the same act if it caused moderate or serious bodily harm", and provisions on the specially qualified elements of criminal offences under the scheme "the same act if it caused the death of a patient";

3) for endangering a patient's life or threatening to cause serious bodily harm, provide for basic penalties in the form of a fine of up to three thousand tax-free minimum income, community service and correctional labour; in case of moderate or serious bodily harm, establish such penalties as a fine of more than three thousand tax-free minimum incomes, restriction of liberty and imprisonment within the scope of a minor crime; in the event of the victim's death, to provide for a penalty of imprisonment with a maximum term of at least eight years; in all cases, to provide for an additional penalty of deprivation of the right to hold certain positions or engage in certain activities for up to three years;

4) to exclude Articles 132, 141 and 145 of the CC of Ukraine.

Therewith, the proposed limits of punishment are typical. To specify them, it is desirable to conduct a separate special study based on determining the limits of gravity of each of the analysed criminal offences. A promising area for further research on this subject is the search for ways to unify criminal liability for violations in the healthcare sphere.

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Проблеми регламентації відповідальності за кримінальні правопорушення проти життя та здоров'я особи, учинені у сфері охорони здоров'я

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Анотація. У Кримінальному кодексі України передбачено низку спеціальних норм про відповідальність за порушення проти життя та здоров'я особи, учинені у сфері охорони здоров'я, застосування яких породжує чимало труднощів та правозастосовних помилок. Однак асистемність таких норм створює ризики недотримання принципу справедливості в притягненні особи до кримінальної відповідальності та призначення покарання. Мета статті – знайти найоптимальніше вирішення проблеми законодавчої регламентації відповідальності за заподіяння шкоди або створення загрози заподіяння шкоди у сфері охорони здоров'я. Ключовий метод дослідження – логіко-юридичне вивчення статей українського кримінального законодавства, пов'язаних з відповідальністю за правопорушення у сфері охорони здоров'я. За результатами дослідження запропоновано сконструювати статті 134, 139, 140, 142 та 143 Кримінального кодексу України за однаковою схемою: у третій частині ст. 134 та перших частинах решти вказаних статей, кримінальну відповідальність за передбачені там діяння пов'язати зі створенням небезпеки для життя пацієнта чи загрози заподіяння йому тяжкого тілесного ушкодження; в наступних частинах цих статей передбачити норми про кваліфікований склад кримінальних правопорушень за схемою «Те саме діяння, якщо воно спричинило середньої тяжкості чи тяжкі тілесні ушкодження», а також норми про особливо кваліфікований склад кримінальних правопорушень за схемою «Те саме діяння, якщо воно спричинило смерть хворого». Базуючись на чинних санкціях зазначених статей, а також санкціях загальних норм про кримінальну відповідальність за необережне заподіяння тілесних ушкоджень, запропоновано типові межі покарань для запропонованих норм. Обґрунтовано доцільність виключення статей 132, 141 та 145 Кримінального кодексу України. Висновки, зроблені в межах цієї статті, можуть бути використані в законотворчій діяльності для розробки змін до Кримінального кодексу України, а також у правозастосовній діяльності для кваліфікації кримінальних правопорушень, учинених у сфері охорони здоров'я

Ключові слова: невиконання обов'язків, порушення медичних працівників, порушення прав пацієнта, порядок трансплантації, розголошення лікарської таємниці, тілесні ушкодження, заподіяння смерті