

## **THE SUBJECT OF THE CRIME COMMITTED THROUGH NON-FULFILLMENT OF ONE'S PROFESSIONAL DUTIES**

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**Abstract:** The main objective of this scientific article is to elaborate a crime, which is committed through lack of professional skills. Moreover, in this article, the results of the chosen issue are carefully analyzed and related suggestions are developed. Also, this scientific article presents evidence-based opinions and comments aimed at analyzing crimes committed by responsible employees of the medical field and identifying signs of criminal subjects.

**Keywords:** subject, special subject, criminal liability, professional liability, act, special rule, medical personnel, first aid, negligence, law or special rules, person who should help the patient, acquittal, doctor, nurses, midwives, pharmacists, criminal acts, severe consequences.

The criminals who violates the norms that is protected by the article 116 of the Criminal Code of the Republic of Uzbekistan, is considered as special subjects. In this case, legislators defined the subjects by considering only their professions. However, they did not show the characteristics, which describes special subjects. Moreover, such special subjects and their characteristics have yet to be thoroughly studied theoretically in a criminal law of the Republic of Uzbekistan. The need to properly address this issue is determined by the fact that correct definition of the features that constitutes the concept of a special subject (certain specialist) provides us with a possibility of separating the type of subjects who would potentially commit a crime in the field of professional activity.

According to M. Rustamboev, any person who has reached the age of 16 with certain professional obligations may be a subject of such crime[1]. In order to qualify the actor as a subject to the Article 116 of the Criminal Code, he/she must have professional obligations in addition to the general requirements imposed on them. Moreover, the criminal act is required to be caused through none-fulfillment of one's professional duties.

For qualifying the crime, which is committed through none-fulfillment of one's professional duties, it is necessary to correctly identify which professional responsibilities have been violated. At the same time, the difference between a professional duty and official's duty should be taken into account. Additionally, the

difference between professional obligation and official's obligation should be taken into account. In this case, it is important to bear in mind that if the crime is committed by officials through improper performance of their professional duties, then the act should be qualified by Article 116 of the Criminal Code.

It should be noted that the criminal law does not provide a clear indication of the subject of a criminal offense that is committed through none-fulfillment of one's professional duties and the sphere. This, in turn, allows this item to be applied for any subject who has not properly performed his or her professional obligations. Given the fact that criminal law does not allow analogies, the presence of such a general article is certainly desirable and it ensures inevitability of punishment for crime.

The second part of Article 116 of the Criminal Code refers to a doctor, a nurse, and a person who, as a criminal, is obliged to render assistance to the patient in accordance with the law or special rules, and so on. "In medical history, there were cases of doctors being in serious trouble and even committing suicide because of mistakes they made during treatment or surgery. However, most health care professionals love their work, conscientiously perform their duties and serve the interests of the patient over their own ones. But, like all occupations, there are still medical professionals who do not love their work, do not serve the people conscientiously, treat their patients harshly, and neglect their duties"[2].

This matter needs to be analyzed in more detailed way though. In practice, most medical professional are being the subject to this article, however. At the same time, it should be noted that "Relations arising in the sphere of human rights protection are regulated by many branches of law. The legislation of the Republic of Uzbekistan suggests that some medical and healthcare facilities' personnel might be charged for the administrative, disciplinary, criminal, and civilian (property) violations"[3].

In our view, the way some authors (F.Y. Berdichevsky, M.S. Grinberg, V.E. Kvashis, A.G. Korchagin, I.V. Okarkov and others) use the term "medical crimes" in their scientific works, not quite right. In most cases, the crimes that was committed by healthcare providers are implied to strengthen their liability as a special subject. Nonetheless, the idea of such acts may be committed by the general subject is also not excluded.

The group of people entitled with performing medical activity is strictly regulated by the legislation of the Republic of Uzbekistan. According to the Article 41 of the Law of the Republic of Uzbekistan "On Citizens' Health" which was adopted on 29 august in 1996 under the number of 265-I-, the list of people who have received diplomas of higher or secondary specialized medical education in the Republic of Uzbekistan can carry out medical and pharmaceutical activities. As well as, there are certain types of people who are entitled with a diploma or a license by

the Ministry of Healthcare of the Republic of Uzbekistan, can also have a right to perform such activities[4].

However, the Criminal Code, based on some legislative acts or other special provisions, refers to a much wider range of individuals who are entitled with the right to perform medical activities. There may be individuals who do not have a special medical education but who is required to give some compulsory care. In particular, according to Article 16 of the Law of the Republic of Uzbekistan "On the protection of citizens' health", medical and social care is provided by medical personnel and other specialists.

This issue is also covered by paragraph 4 of the Regulation "On the procedure for the organization of protection of life and health of children in preschool institutions", approved by the resolution of Ministry of Public Education and the Ministry of Health No. 17/2, 6/3 on April 21, 2009. According to the report, "Preschool staff should be ready to provide first medical aid in the event of illness or adverse circumstances"[5]. It is evident that the staff of the preschool educational institution can also be the subject of such crime, which is indicated in the second part of the article 116 of the Criminal Code[6].

For example, on August 29, 2008, the Criminal Court of Chilanzar District of Tashkent found citizen B. as guilty in the criminal case against him/her. B. was working as a sports teacher at school # 62 in Chilanzar district. In November 2007, a student of the 9th grade, citizen U. broke his hand and the Polyclinic of Sergeli district had exempted him from training on this subject during the academic year. In accordance with the methodological recommendations of the Republican Education Center dated 25.02.2008, the student should not be subjected to final attestation. Despite all these facts, citizen B. did not inform the school authorities of the student U's exemption from the final exam on the subject. Moreover, on 12.01.2008, citizen B. unscrupulously treated his professional duties, and violated the rule by conducting the physical examination without the presence of a physician. He knew that in accordance with the methodological recommendations, the participation of a physician in examinations on this subject is compulsory. As a result, the student U. begun to take all physical standards and loose his conscious, therefore died due to the lack of physicians and emergency medical care. Accordingly, the actions of citizen B. were qualified under the third part of Article 116 of the Criminal Code and a relevant penalty was imposed[7].

If possible, medical personnel are obliged to provide first medical aid in any case. Some literature[8] extensively describes this obligation and stresses that wherever and whenever possible, healthcare providers are obliged to deliver first aid. Article 30 of the Law of the Republic of Uzbekistan "On health protection of citizens" states that medical and pharmaceutical workers must provide emergency

medical care to citizens. However, there are some, who deny this view. In particular, Y.A. Vlasev, who believes that this crime should not be applied to any healthcare personnel who has been with a patient for some reasons other than his or her duty[9]. Consequently, it is clear from the author's opinion that unless a doctor provides care for a patient other than his / her duties, it is not possible to apply the second part of Article 116 of the Criminal Code to such people. In our view, based on the content of the existing legislation and the experiences gained in the investigation practices, we can say that it does not matter whether medical care is officially included in the duties of the medical personnel. That is, in any case the medical officer is obliged to provide a medical aid to the patient, whether or not he is officially on duty, and the failure to comply with this obligation refers to a criminal offense under the Article 116 of the Criminal Code.

Medical worker can be attributed as a special subject for crimes they have committed related to their professional activity, when the relevant article of the Special Part of the Criminal Code of the Republic of Uzbekistan specifies the detailed features of the subject. In other words, a special subject of a crime is a person who, in addition to the common features of the subject, has special additional features that limit the ability to prosecute other people for a specific crime.

In the criminal law, medical worker is considered as a subject to a criminal offense of non-fulfillment performance of a professional duty, when he/she fails to perform or improperly perform his or her professional duties due to negligence or disregard to their profession. Additionally, as stated by law and other specific regulations, if the person who is in charge of aiding the patient fails to provide such a help without an excuse, and his/her action results in a serious bodily injury or death then the person can be qualified as subject of the crime.

In order for a person to be recognized as a health worker, it is necessary to determine whether he or she has professional medical education that defines the nature of his or her professional activity. The particularity of the work of medical personnel, and their complex and multifaceted activities are regulated by numerous normative documents, which determine the character medical worker implement while performing their duties. In addition to the medical education that medical personnel receive, it is necessary to take into account the vital social role of the workers of healthcare for identifying the subject of crimes in the field of professional medical activity more accurately. It would be more accurate to analyze the aforementioned attributes through applying them to specific crimes.

Legal literature does not have a clear understanding of the specific subject of crimes committed in a professional medical sphere. Some authors[10] argue that any doctor working in healthcare facilities should be attributed as a clerk. They try to facilitate this thesis with the assumption that, despite the fact that professional

activity is not related to organizational and managerial functions, it is inseparable with the status of the medical personnel.

The other authors claim that not only doctors but also other individuals who have special training in medicine such as nurses, midwives, pharmacists, etc. who can perform first medical aid should be considered as an official.

According to I.V. Serogogin, there is an objective basis for the inclusion of doctors and other people with specialized training into the subject of crimes committed by officials. For example, as being a part of the state apparatus, the main activity of the healthcare system, is a suitable implementation of medical activities. The quality of the service these institutions provide largely depends on the work of doctors and other individuals with specialized medical training[11]. Based on this assumption, the author concludes that all people with a higher medical education should be considered as officials.

In our view, this idea is contrary to the meaning of the official. An offense committed by officials is defined by the notion that if such a clerk carries the power of authority, any illegal action taken by them is considered as a deliberate and serious damage to the rights or legally protected interests of citizens, state or public interests. Crimes committed by officials include only socially dangerous offenses that undermine the proper functioning of public administration.

Taking all these into account, and understanding the medical practice are worthwhile, when designating the professional duties of healthcare workers. It does not only address specific tasks related to the treatment of patients - examination, diagnosis, appointment of appropriate treatment, surgical intervention, etc., but also cover the preparation of various medical documents (patient outpatient and inpatient care cards, prescriptions, referrals, etc.). In such cases, the medical personnel are not an official and perform their professional duties in none-treatment affairs., despite the fact that they execute certain actions that have legal consequences and are close to organizational and managerial actions, that are, similar to the official's affairs. According to Article 207 of the Criminal Code of the Republic of Uzbekistan, only those medical personnel who commits a crime through negligence, improper performance of their duties or dishonest attitudes towards their obligations and have a professional, managerial and administrative functions (the chief doctor of the hospital, the officials of any department, etc.) can be attributed as officials, when such activities effects the rights, lawful benefits of citizens, state or public interests.

In order to qualify the crime of none-fulfillment of one's duty by healthcare professionals, it is necessary to determine exactly which occupational or managerial obligations has been violated. For example, while carrying out a surgery on a patient, the head of a surgical department does not perform administrative, organizational or managerial duties as a professional instead, he only make surgery. He executes his

duties as professional surgeon, not as a head of a department. Consequently, this should be the main point whether to qualify for a criminal offense. Nevertheless, the idea of the recognition the healthcare personnel as an official have long been criticized by scientists. For example, G.N. Borzenkov believed that in accordance with the relevant articles of the Criminal Code, medical personnel should be held accountable for their actions, which had grave consequences for the victims[12]. V.S. Orlov argues, "As doctors are employees of certain institutions and hold specific positions, they can only be recognized as officials when they perform their service duties not for their professional duties[13]".

Based on the aforementioned statements, we can generate the conclusion as follows, medical staff do not have the organizational, managerial, administrative, as well as economic powers while performing their duties, therefore cannot be prosecuted for the negligence to the position they hold.

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