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"FIRST, DO NO HARM": A REGULATORY AND EXPERT ASSESSMENT OF THE CONSEQUENCES OF FAILURE TO PROVIDE OR IMPROPER PROVISION OF MEDICAL CARE

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The subject of research are regulatory acts which in their comprehensive interrelation define the characteristics of harm inflicted on human health, including its description as publicly dangerous consequence of failure to provide medical care, or improper provision thereof. The study was conducted with regard to criminal and healthcare legislation provisions, as well as regulation of particularities of forensic medical expert examination. The paper aims to test the hypothesis on the regulatory amendments' to medical legal acts influence on the understanding of iatrogenic crimes, and the practice of their qualification by criminal courts.

Historical-legal methodology is deployed to show preconditions, grounds and directions of development of legislation defining criteria of infliction of harm on human health. Systemic analysis methodology allowed the author to disclose the particularities of interconnections between criminal and forensic-medical legislation, to prove the blanket nature of the characteristics of crimes against human life and health. The comparative-legal methodology of research allowed identification of the constant part of legal framework related to provision of medical care, and the definitions extensively transformed by the legislator (harm to human health, shortcomings of medical care provision, consequences of improper provision of medical care). Methods of philosophy and logic allowed for disclosure of particularities of the causation connection to publicly dangerous consequences, and the specificity of causation in criminal cases on medical workers' omission (including with regard to failure to provide medical care to a patient).

Main results. It was established that infliction of harm in the course of, or as the result of provision of medical care cannot be considered an intentional crime, but rather is either innocent or negligent. Inaction of a doctor, as seen from the forensics point of view, is not a harmful external factor, and therefore the feature of infliction of harm on the health of a patient must be established legally (juridically) rather than through expert examination. New normative regulations are aimed at clarifying the features of shortcomings of medical care and their harmful consequences, thus seeking to eliminate some matters of argument and ensure the unified law-enforcement practice. When considering criminal cases related to harm inflicted by medical workers the courts must not only base themselves upon the results of forensic medical expert examinations, but also separately apply the normative regulatory provisions to which there is a blanket reference in the criminal legislation, and which themselves define the criteria of properly qualified medical care as well as the assessment of harm inflicted where said care was improper.

Conclusions. The scientific analysis carried out by the author has confirmed the hypothesis of the research, and proved direct application of medical legal acts by courts considering criminal cases on failure to provide medical care to patients or improper provision thereof.

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1. Introduction

2025 is marked by several regulatory changes the significantly affect assessment of circumstances occurring in the course of, or upon completion of medical help provision. Firstly, on 8 January the amendments to Article 238 of the Criminal Code of the Russian Federation (hereinafter – the CC RF) came into force, that have excluded the medical workers from the possible perpetrators of the crime foreseen by Article 238 of the CC RF [1]. The legislator has imperatively ceased any discussions on the qualification of infliction of harm on human life or health in the course of performance of professional obligations by medical workers [1, p. 152; 2, p. 127; 3, p. 25]. Even if previously the Constitutional Court of Russia has found no ambiguity in this Article[2], the introduction of explanatory note thereto has eliminated doubts and drastically reduced any possibility of contradictory practice in the relevant cases. Secondly, as of 1 September, the Government Decree of 17 August 2007 № 522 "On Approval of the Rules of Determining the Gravity of Harm Inflicted on Human Health"[3] has lost its force; thereby *de facto* the definition of "harm inflicted on human health" established therein was also excluded, increasing the importance of forensic medical experts findings on this matter. Thirdly, the Order of Determination of the Gravity of Harm Inflicted on Human Health (hereinafter – Order of determination of gravity of harm to health, the Order)[4], which has replaced the Order of the Ministry of Healthcare and Social Development of Russia of 24 April 2008 №194n "On Approval of Medical Criteria for Determination of Harm Inflicted upon Human Health" (hereinafter – Medical Criteria 2008) and has substantially revised the provisions on infliction of harm on health conditioned by shortcomings of medical care provision[5]. All this transforms also the qualification of such actions, which still was not appropriately analysed by legal science.

The author compares normative changes and analyses how they would affect the law-enforcement assessment of the consequences of failure to provide medical care, or improper provision of medical care.

2. Impact of terminology on the application of criminal legislation

Introduction of an explanatory note to Article 238 of the CC RF according to which medical care is excluded from the notion of unsafe services was conditioned by the fact that the crime foreseen in this Article can only be committed intentionally[6]. At the same time Article 2 of the Federal Law of 21 November 2011 № 323-FZ "On the Basics of Health Protection of Citizens in the Russian Federation" defines medical care as a set of measures aimed to supporting and (or) recuperating health that include provision of medical services (item 2 of part 1). This subjective aim describes publicly useful purpose of any medical services (which is the part of medical care); therefore, in provision thereof the intention of public danger is excluded, and even if any harmful consequences occur they can only be result of negligent or innocent acts.

Supposedly the legislator's will was based on this precise logic: medical services, being a part of medical care, cannot be provided with the intention to cause harmful consequences. Where a person has such intentions, his actions would not qualify as medical care, but rather as a manifestation of an intentional crime against life or health (it is no

[1] See: Federal Law of 28 December 2024 № 514-FZ «On Amendments to the Criminal Code of the Russian Federation". Collection of Legislation of the Russian Federation. 2024. № 53 (Part I). Art. 8524.

[2] Decision of the Constitutional Court of the Russian Federation of 25 June 2024 № 1476-O.

Here and elsewhere, references to normative legal acts are cited following the Legal Reference System "ConsultantPlus", unless specifically indicated.

[3] Decree of the Government of the Russian Federation of 26 July 2025 № 1110 «On Annulling of Certain Acts of Government of the Russian Federation».

[4] Order of the Ministry of Healthcare of Russia of 8 April 2025 № 172n «On Approval of the Order of Assessment of Gravity of Harm Inflicted on Human Health».

[5] According to item 25 of the Medical Criteria 2005 "the aggravation of health condition of a human conditioned by the shortcoming of provision of medical care shall be regarded as infliction of harm on health".

[6] Item 6 of the Ruling of the Plenum of the Supreme Court of the Russian Federation of 25 June 2019 № 18 "On the Court Practice in the Cases Related to Crimes Foreseen by Article 238 of the Criminal Code of the Russian Federation".

coincidence that Chapter 16 of the CC RF includes articles on crimes on non-provision of medical care to a patient and on leaving a person in harm's way, i.e. the intentional actions).

Therefore, the explanatory note to Article 238 of the CC RF prevents possible law-enforcement mistakes rather than excludes referring to this Article for prosecution for negative consequences of medical care itself (systemic interpretation did not allow for it even previously).

The earlier normative definition of the wording "harm inflicted on human health" referred to impact of "physical, chemical, biological and psychogenic factors of the environment" (item 5 of the Medical Criteria 2008). Such damaging factors were exhaustively listed which did not take into account their variety, and illnesses and pathological conditions were not listed among them at all. In essence, this definition did not encompass harm inflicted on health as the result of defective provision of medical care. Certain scholars believed that this definition totally disregarded the particularities of the effect of medical care as a special factor [4, p. 170–172]. Many shortcomings of the criteria flowed from the essentially erroneous definition of the term "harm to health" [5, p. 37]. This was repeatedly pointed out by representatives of forensic medical and criminal sciences [6, p. 17–18; 7, p. 33], testifying to the necessity of further developing and correcting the terminology.

The new Order of determination of gravity of harm to health has cut the Gordian knot, altogether discarding the notion of the term "harm to health" and limiting itself to indicating in its item 4 that harm inflicted on human health shall be qualified depending on its gravity (severe, moderately severe, or light).

While discussion of terminology is a type of scientific discussion in itself, the legislator's discard of definition of the term "harm to health" is perfectly explainable. The literal meaning of the normative definition did not correspond to law-enforcement practice, primarily with regard to cases in respect of medical professionals. In refusing to define the term "harm to health" the new Order includes thereto all the harm or damages that it lists.

Thus, instead of definition via generic notion covering specific features the inductive method was used, and as the result the harm to health can be established by comparing certain consequences to a specific item in the list.

3. Consequences of medical care shortcomings as "inflicted harm"

Regarding Medical Criteria 2008 the characteristic of "inflicted" has attracted significant criticism. Such wording does not include medical care accompanied by failure of performing necessary diagnostic and healing actions, i.e. omission, and the finding of harm infliction based on a medical worker's omission is regarded as an experts' mistake since "the legislator has clearly defined that the essence of harm inflicted on human health is always external impact" [8, p. 75]. This understanding has long history.

Already I.G.Vermel has argued that the cause of, particularly, death is either presence of certain illnesses, or impact of certain factors of environment, and thus failure to provide medical help or its' inadequate provision cannot be seen as such a cause [9, p. 67]. Following his logic, in the event of failure to provide medical care the reason of consequences described in Article 124 of the CC RF is not the doctor's omission, but rather pathological conditions, illnesses or traumas of the victim. But such understanding would actually exclude the very possibility of criminal prosecution under this article.

Refusal to accept partially performed action or omission as the reason of harm to health inevitably lead to discrepancy between medical and criminal law. As the result, some forensic medicine scholars tried to justify the inflicting effect of omission – as a reason in an orderly process [10, p. 97], while others pointed to the necessity of criminal legislation reform in order to develop a unified approach [11, p. 7], and yet another group attempted reconciliation of criminal law practice and medical terminology through interpretation [12].

Therefore, there was an observed difference between recognition of omission in Article 124 of the CC RF as resulting in harmful consequences, and its medical assessment as lacking the "inflicting" nature. Since the very title of the new Order of Determination of Gravity of Harm Inflicted on Human Health contains the word "inflicted", this aspect of discussion still survives.

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The previous attempt to eliminate the accumulating practical discrepancies may be seen in the 2017 development of the recommendations on establishing causation links with regard to the fact of failure to provide medical care or inadequate provision of medical care[7]. Still, these were also criticized as: «potentially causing terminological confusion » [13, p. 88]; operating medical legal rather than medical terms [4, p. 171]; categorically and without adequate justification postulate the "solely 'direct' causal link in criminal law" [14, p. 62]. Indeed, the recommendations are based on the assumption that "presence of indirect (circumstantial, mediated) causation link … means that an act lies outside legally relevant causation link", while "determining the presence or absence of causal (direct) link between the action (omission) of a medical professional and the negative outcome for the patient is obligatory for the expert commission»[8]. Accordingly, they direct forensic medical experts at distinguishing the types of causal links, among which only the direct one means that failure to provide or improper provision of medical care inflicted (or lead to) harmful consequences. The shortcoming of this understanding is the lack of criteria to distinguish the types of such connections.

At the same time, the methodical recommendations have expanded the definition of harm inflicted on human health by including among its reasons not only the damaging factors, but also failure to provide medical care to a patient and improper discharging of professional obligations. Essentially they have eliminated the defect of definition that previously existed in the Medical Criteria of 2008 [15, p. 9]. The refusal of the Ministry of Healthcare of Russia (as a body authorised by the federal legislator to introduce the necessary regulations in this matter) to normatively clarify the term "harm inflicted on health" testifies to *de facto* acceptance of the approach reflected in the methodical recommendations as the correct one.

The Medical Criteria 2008 in their item 25 pointed to impossibility of establishing harm to health where it was inflicted due to defect of medical care provided. Normatively, there was no clarification of the term "defect", and this led to discussions and allowed for different interpretations [4, p. 39; 16]. Instead, the new Order uses the term "shortcoming of provision of medical care" (items 18 and 19).

On the one hand, "defect of provision of medical care" is often described as "shortcoming", thus these terms are accepted as equal and synonymous [17, p. 10, 15]. On the other hand, it is accepted that in an expert conclusion use of the term "shortcoming of provision of medical help" is preferable since this term is more clear and easy to understand [18, p. 33]. Also, it is worth noting that the above-noted Methodical Recommendations of 2017 use the term "shortcoming" but do not expand on this notion.

The Dictionary of State Language published in accordance with the Government Instruction ща 30 April 2025 № 1102-r lists two definitions of the word "shortcoming": "negative quality or property of someone or something, some imperfection, flaw" and "lack of someone, something in a required, adequate quantity"[9]. Accordingly, a shortcoming may be qualitative or quantitative.

Yet, Article 21 of the Federal Law "On the Basics of Health Protection of Citizens in the Russian Federation" uses only the term "quality of medical care"[10]. As of 1 September 2025 the criteria of assessment of quality of medical care have come

[7] Kovalev A.V. the Order of Conduction of Forensic Medical Expert Examination and Determination of Causal Links with regard to Failure to Provide or Improper Provision of Medical Care: Methodical Recommendations. 2nd ed., revised and updated. M.: FGBU «RTsSME», 2017. 29 p. URL: https://legalacts.ru/doc/porjadok-provedenija-sudebno-meditsinskoi-ekspertizy-i-ustanovlenija-prichinno-sledstvennykh-svjazei-po/ (accessed on 06.09.2025).

[8] Kovalev A.V. Ibid. URL: https://legalacts.ru/doc/porjadok-provedenija-sudebno-meditsinskoi-ekspertizy-i-ustanovlenija-prichinno-sledstvennykh-svjazei-po/ (accessed on 06.09.2025).

[9] URL: https://ruslang.ru/sites/default/files/doc/normativnyje_slovari/tolkovyj_slovar_chast1_A-N.pdf (accessed on 06.09.2025).

[10] Item 21 defines quality of medical care as "sum of features reflecting timely character of provision of medical care, correctness of choice of measures related to prophylactics, diagnostics, treatment and rehabilitation in provision of medical care, and the grade of achievement of the planned result".

into force[11] as well as the order of expert examination of it quality[12]. Given this, shortcoming of medical care may be understood as such provision of medical care that does not meet the normatively established criteria for the quality of its provision. The shortcomings themselves may be significant or insignificant, therefore only significant shortcomings of medical care provision are capable of having a causal link to infliction of harm on health. It follows that the notion of "shortcoming of provision of medical care" is evaluative.

An important novel is the indication of types of consequences of improper provision of medical care recognised as harm to health (items 18 and 19 of the Order). Now, particular types of harm to health include unfavourable outcome of provision of medical care and complications of medical intervention. Such clarification will evidently contribute to a more foreseeable law-enforcement practice.

Thus, the methodical recommendations approved by the Ministry of Healthcare in 2004 the complications of medical interventions in hospitals list the relevant consequences (for example, side-effects of medicines as complications of medicine treatment, post-injections phlebitis, apostema as complication of medical manipulations, acute myocardial infarction in the course of treatment of a patient with hypertension as complications of an illness developed after medical intervention)[13].

Despite the similarity of the analysed notions, the logic behind regulatory framework is visible. The outcome can be seen as the result for the patient's health, that is achieved after (upon completion of) the set of medical services. At that, where the outcome is positive (recovery, elimination of symptoms or consequences related to illness, trauma, poisoning etc.), the shortcomings of particular medical services cannot be regarded as sign of infliction of harm. Given the usage of terminology in the Federal Law "On the Basics of Health Protection of Citizens in the Russian Federation" complications of medical intervention are the side-effect of a medical examination and (or) manipulation which takes the form of health decline, aggravation of the main illness (new symptoms of conditions), or the development of a new illness (trauma, damage etc.).

It follows that normative changes to terminology eliminate many of accumulated discussions and overall expand the list of situations where medical workers can be brought to criminal liability.

4. Causal link in cases of failure to provide medical care

If interpreted literally, items 18 and 19 of the Order of determination of gravity of harm to health do not concern the incidents of failure to provide medical care since they use core terms "provision" or "intervention" implying active actions on the part of a medical worker, and certainly not omission. Here, there is an apparent difference between the legal (criminal law) and expert (forensic medical) understanding of causal link.

Elements of crime foreseen by Article 124 of the CC RF postulates that omission of a person obliged to provide medical care inflicts (or is capable of inflicting) harm on human health, or even death. But from a physician point of view, the closest and natural cause of these consequences is the illness (condition, trauma, poisoning etc.) that required provision of medical care in the first place. It is no coincidence that the cases on omission of medical workers lack a unified expert approach to establishment of a causal link, and some even express doubts as to possibility of its forensic medical assessment [12; 15, p. 8]. The criminal law also has the discussion continued, with the prevailing position that the link between omission and publicly dangerous consequences is not causal but conditional [19], which is at variance with the "letter" of the law.

[11] Order of the Ministry of Healthcare of Russia of 14 April 2025 № 203n "On Approval of Criteria of Assessment of Quality of Medical Care".

[12] Order of the Ministry of Healthcare of Russia of 14 April 2025 № 204n "On Approval of the Order of Performing Expert Examination of Quality of Medical Care Excluding Medical Care provided in Accordance with the Legislation of the Russian Federation on Obligatory Medical Insurance".

[13] Constant Perfection of the Process of Treatment and Diagnostics, and Ensuring Safety of Patients within the Industrial Model of Managing Quality of Stationary Medical Care. Methodical Recommendations № 2004/46 (approved by the Ministry of Healthcare on 19 March 2004).

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Accordingly, the expert cannot determine what omission inflicts, but is capable of answering questions, such as whether there was a possibility to provide medical care, what type of care should have been provided, was it capable of preventing the consequences (the answer to this latter question is generally a probability statement, and the elements are subject to prove beyond reasonable doubt). Depending on the answer it is for the court to establish whether a medical worker omission has led to harm stipulated in the criminal law.

It should be noted *inter alia* that Article 196 of the CC RF also does not require an obligatory expert examination of the reason of harm to health. Previously it was already subject to criticism that law-enforcement officials thought to replace the burden of determining the causal link between a medical worker act and the negative consequences present [20, p. 89], or even to "provide legal assessment of the medical workers' actions" [21, p. 58].

There is no doubt that interpretation of many features connected to lethal consequences or other harm to human health is rather difficult without special medical knowledge [22, p. 167], but "forensic medical expert examination is needed for description of the factual circumstances from the expert and medical point of view, while only a court can provide their legal qualifications" [13, p. 125]. Meanwhile, at the core of an expert assessment lies clinical and morphological approach, but not legal or philosophical approaches [15, p. 9]. For example, the clinical description of trauma consequences would be the same if the victim decided not to ask for medical care, and where the victim was refused such care. But to the court these are completely different situations.

Since legally omission can be most broadly characterised as failure to discharge a legal obligation (meaning an obligation that is normatively established in social relations, and not fully present in material world), the causal link from omission is a social link that is established by a reversal of logic through a law-enforcement officer train of thought.

Accordingly, the establishment of a causal link between failure to provide medical care and negative consequences (there is no complications of medical intervention since such intervention is precisely what is refused in this situation) goes beyond medical competences and acquires legal nature.

5. Direct causal link to publicly dangerous consequences as a special property of improper provision of medical care

The most important (while not free of criticism) decision of the Ministry of Healthcare of Russia was to normatively establish that negative consequences are regarded as harm only of a direct causal link is established between them and the shortcoming of medical care provided.

Presently, there is a scientific discussion regarding the nature of an act defining the features of harm to health. On the one hand, the Medical Criteria 2008 were appraised as directed primarily at specialists in forensic medicine rather than subjects of law-enforcement [23, p. 50]. On the other hand, it is believed that such legal acts, while being intended for regulation of an expert procedure to establish gravity of harm inflicted, still bear material legal nature, and thus may be applied by investigator or court directly as normative legal acts connected to criminal legal prohibitions [24]. This means that the very feature of "inflicting harm on health" is a blanket one [25]. On the basis of constitutional legal interpretation[14] it can be accepted that the new Order discloses the criteria of harm that are to be taken into account by law-enforcement official in qualification of a crime. Therefore, the provision on establishment only a direct causal link between shortcomings of medical care and publicly dangerous consequences is a normative one, and not only heightens the standards of proof for causal links, but also is subject to direct application by criminal courts.

In a discussion about direct or circumstantial causal link it is for general jurisdiction courts to determine whether there are grounds for liability for infliction of harm[15]. But presently, establishment of any causal link except for a direct one (i.e. circumstantial, intermediate, cumulative, atypical or other [26]), excludes the possibility of recognising

[14] Judgement of the Constitutional Court of the Russian Federation of 11 January 2024 № 1-P.

[15] Decision of the Constitutional Court of the Russian Federation of 20 December 2018 № 3193-O.

consequences of improper provision of medical care as harm to health, as well as qualifying the relevant act as a crime.

6. Conclusion

The analysed normative changes of 2025 substantially affect the practice of qualification of failure to provide medical care or improper provision of medical care. At that, the new Order of determination of gravity of harm to health is intended to application not only by experts, but also by courts which must not blindly follow the expert's findings but should rather compare them with normative regulations on the quality of medical care, and features of harm to health. Therefore, the implementation of criminal legislation provisions on the harm to health is impossible without judicial interpretation of medical normative acts, and inclusion of its' results into the reasoning of judgments.

The novels which came into force on 1 September 2025 eliminate most part of discussion issues (regarding the type of a medical worker's guilt, the definition of "harm to health" and on including the consequences of omission thereto). But there is still an issue of understanding of causal link where a patient is refused medical care, which must be established as a social one – given the obligations of a concrete person, and his or her capability of preventing the negative outcome. The shortcomings of provision of medical care themselves are evaluative, and correlate with failure to meet the established quality criteria. The indication of direct causal link of medical care with the negative consequences should serve as the guaranty of certainty of normative regulatory framework, and of legal protection of medical workers, but in practice increased attention should be given to particularities of cumulative and atypical link.

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