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CRIMINAL LIABILITY OF THE HEALTHCARE SPECIALIST - THE NURSE

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***Abstract:** The purpose of this scientific work is to trace the contradictions regarding the criminal liability of the nurse in the Republic of Bulgaria. The tasks are aimed at examining the criminal law of Bulgaria in relation to the criminal liability of the nurse as a healthcare specialist. An important point in the publication is the analysis of existing terms related to the topic and the proposed new formulations that distinguish the criminal liability of the nurse from the criminal liability of all other medical professionals. Emphasis is placed on the need to put into practice nursing records, including an individual nursing record, as well as medical standards for health care. This will differentiate exactly the responsibility that the nurse might claim in the event of a job failure. The introduction of nursing records will lead to an increase in the quality of healthcare in the country. Nursing is a complex profession with a socially relevant function and, as such, requires a high level of competence and qualification, which in turn justifies increased responsibility - both civil and criminal.*

***Keywords:** Criminal liability, Nurse, Nursing, Nursing records, Health care standard.*

INTRODUCTION

In Bulgaria, there is a perception that there is no adequate legal framework for the responsibility of medical professionals. This is largely due to the poor legal culture of the population, the loss of confidence in the judiciary, and the reluctance of citizens to exercise their rights. At the same time, this view turns out to be partly false.

Medical error affects and damages a person's most valuable goods - his life and health. It is for these reasons that the legislator foresees criminal liability for all medical professionals, as the most serious form of liability. Its main purpose is to fear the punishment while encouraging the healthcare professional to fulfill his / her professional duties accurately.

Medical error is not a problem observed only in the Bulgarian state. It is a problem in many developing and developed countries around the world. In recent years, there seems to be a sense in our society that the incidence of medical errors is increasing. Rather, it is due to a phenomenon that is observed in the accentuation of similar cases by the media, which have led to the death or serious damage to the health and bodily integrity of the person caused by medical professionals in the performance of their professions. However, the psychological feeling is that cases of medical error are increasing. According to the World Health Organization (WHO), a person is more likely to be the victim of a medical mistake than the victim of a plane crash.

EXPOSITION

The criminal-law view of nursing in Bulgaria

Our view on the subject under consideration, namely the criminal liability of the nurse and the related problem of physician's error, is that "physician error" as a concept, if used and used as such, can and should be considered broad and narrow sense.

First of all, we need to clarify the very concept of "physician error". The term is not legal and has no legal definition in our legislation. It has been used in medical practice and in journalism. The Medical Audit Executive Agency, which was later restructured into the Medical Supervision Executive Agency, gives the following definition of a physician error: "Professional conduct or misconduct or combination of both, by a physician, performed under optimally created working conditions, which, as a result ignorance or underestimation of the patient's circumstances and / or condition, have led to unfavorable outcome for the patient's health and which could have been prevented. "This view of a physician error is narrow sense and relates solely to those, who exercise the medical profession.

Prof. Al. Stoynov also defines a physician error, which reads: "... that unlawful or improper act or omission or a combination thereof, on the part of the medical specialist, which has a negative or potentially negative impact on the patient's health, as protected by law as unity of bodily integrity, physiological state, and the functioning of a collection of tissues, organs, and systems of the human body at all times of its biological existence, without this negative change being targeted or assumed by the specialist. " This understanding is broader and encompasses all medical professionals, not just physicians, and supports our understanding if we are to speak of a "physician error" as unlawful and improper conduct by a medical professional - a nurse who violates the rules established with the legal norms and corresponds directly with the norms of the Penal Code, including the negligent performance of a duty or other legally regulated activity, which are a source of increased danger.

For the sake of completeness and accuracy, if the errors of the medical professionals in general are to be determined in a purely terminological way, i.e. referring to persons with medical education, the term "**medical errors**" would be most correct. In this sense, the terms "medical errors" and "physician's error" should not be identified as equal, because they refer to different medical professionals and activities with specific and well-defined competence. Ordinance 1 of February 8, 2011 for the professional activities that nurses, midwives, associated medical professionals and health assistants may carry out on duty or independently, issued by the Ministry of Health, ref. DV issue 15 of February 18, 2011, regulates the activities of the nurse, which clearly delineates the activities that she performs independently and the activities prescribed to her by a physician. Modern rule of law has adopted a number of acts in its own legislation to protect the most valuable human goods - human life and health. Strict sanctions are foreseen to protect them if they are harmed. The Republic of Bulgaria makes no exception to this rule and through its criminal law embodied in the Penal Code, Chapter Two - Crimes against the Person, Section I Murder and Section II Injury, criminalizes attacks on the life and health of the individual. This also leads to the logical question of what protection the legislator has provided for damage to the life and health of persons by those persons who should help to protect them - medical professionals in general.

The Penal Code provides for two **main** types of crime that can be committed by medical professionals. The first of these is murder by professional negligence - Art. 123 Penal Code. According to paragraph. 1 of this article "Who causes to another death by ignorance or negligent performance of an occupation or other regulated activity constituting a source of increased danger shall be punished by imprisonment for one to six years." Legally regulated activities, a source of increased danger are the activities of the physician, pharmacist, nurse, rescuer, etc. The activity can be both a profession and a hobby. Each of these activities should reveal three features:

1. This activity is necessary and aims at positive results, but at the same time the possibility of negative results - causing death is not excluded;
2. The activity requires specific knowledge and / or skills for its full exercise;

3. The activity may only be exercised with a "permit" (permit) issued after the examination (s) for the specific knowledge and skills required - competences.

In view of this, the profession of Nurse turns out to be precisely such an activity because of the fact that:

1. Imposed in society as an activity that aims at positive outcomes in health care for individuals and at the same time does not exclude the possibility of negative results for various reasons due to the medical specialist;

2. The Nursing profession requires special knowledge and skills in the field of healthcare - protecting, maintaining, restoring and improving the health of individuals and the independence of their vital, physical and mental functions. The essence of the nursing profession is care, treatment and training, acquired competences through theoretical and practical training as a result of the acquired knowledge in the field of biological, social and human sciences;

3. The nurse profession may only be pursued after obtaining a Bachelor's Degree in Nursing. Higher education The nurse acquires higher education upon successful completion of an accredited higher education institution in the territory of the Republic of Bulgaria or the EU (the training in Bulgaria is in accordance with Regulation on EDI / Decree No 248 / 22.11.2005, Decree No 257 / 01.11.2010, Decree No. 86/15 April 2016, Regulation No 1 / 08.02.2011 and Directive 2005/36 / EC and Directive 2013/55 / EU of the European Union, and for the other EU Member States, in accordance with local legislation, with Directive 2005/36 / EC / and Directive 2013/55 / EU).

All this leads to the only conclusion that the nurse as a healthcare specialist falls within the scope of the cited provision and may be the subject of crimes under Art. 123, para. 1 PC, i.e to cause death by negligence by performing its lawfully regulated activity, which in turn is a source of increased danger. It leaves unclear why then there is only a "physician error" in society.

The second main clause is the negligent causing of serious or average bodily injury by professional negligence under Art. 134, para. 1 of the Penal Code. It states: "Whoever causes grievous or moderate bodily harm to others due to ignorance or negligent performance of an occupation or other regulated activity constituting a source of increased danger shall be punished ..." This provision differs from causing death by occupational negligence only on the basis of the injurious result - moderate or grievous bodily harm. The subject of this crime may again be a physician, pharmacist, health care specialist, etc., i.e. the nurse falls within this range. It follows that the nurse will be held criminally liable not only if she causes death by negligence while performing her professional activity, but also if she causes moderate and serious bodily harm to her patient during care.

In addition to the two basic clauses of professional negligence described above, the PC provides for four more qualified (Article 123, paragraph 2, paragraph 3 and Article 134, paragraph 2 and paragraph 3 of the CC) and two privileged formulations (Article 123, paragraph 2). 4 and Article 134, paragraph 4 of the Criminal Code), which may be performed by medical specialists and non-specialists.

The first group of two qualified formulations is related to ignorance or negligent performance of the occupation or other legally regulated activity, which represents a source of increased danger, performed by the specialist when he was drunk or has caused death, serious or moderate bodily injury to more than one person.

The second group refers to activities that are legally regulated, and constitute a source of increased danger, but which the doer is not entitled to exercise and cause death by negligence, serious or moderate injury.

These two formulations of negligent crime can only be carried out by persons who do not have the necessary knowledge and skills (competences) in the relevant field, do not have the necessary document for qualification, education, etc., but nevertheless carry out this legally regulated activity or craft resulting in accidental death, serious or moderate injury. With respect to the privileged composition of this type of negligent crime - if the perpetrator after the act has done everything in his power to assist the victim, in causing death, the punishment is less in size, and in

causing medium and grievous bodily harm, this is taken into account as a mitigating factor in determining the sentence.

Analysis of some aspects of Ordinance No. 1 of February 8, 2011 regarding the professional activities that nurses, midwives, associated medical professionals and health assistants may carry out as assigned or independently

As specified, in order to realize the composition of the described crimes, it is necessary at the same time to have a legally regulated activity or craft, which represent a source of increased danger. These concepts have found legal definitions in the cases of the Supreme Court and the Supreme Court of Cassation, which accept that an activity is legally regulated, when exercising of this activity requires special knowledge by virtue of a normative act and for which the person is authorized accordingly. The source of increased danger is only such occupations or activities where ignorance or careless performance creates a danger to the life or health of others. What does this really mean?

Having made a comprehensive reference to the Bulgarian legislation, the authors came to the conclusion that the only normative act defining the activities that nurses can perform is Ordinance No. 1 of February 8, 2011 on the professional activities that nurses, midwives, associated medical professionals and health assistants may perform as assigned or independently. In it, the Ministry of Health has exhaustively defined the professional activities that nurses can carry out independently and as directed by a physician. The ordinance is sufficient reason to claim criminal liability of the nurse when it falls within the already described hypotheses of the Penal code. *For example*, the nurse performs the 'administration of muscle injection' to patient X in the wrong place, resulting in nerve involvement and leaving the patient with a paralyzed limb. This hypothetical case will constitute causing grievous bodily harm to another due to the negligent performance of a legally regulated activity, which is a source of increased danger under Art. 134, para. 1 of the Penal Code. In the careless performance of the activity, the person has the necessary knowledge and experience, but did not comply with them and the rules for the exercise of the activity. The professional activity of the nurse is regulated by law, because Regulation № 1 defines in Art. 3, para. 1, Vol. 5, b. a, that she can herself administer injections - subcutaneous, intramuscular, intravenous, intradermal. At the same time, the PC defines the loss or mutilation of a leg or arm as serious bodily injury. In addition, in order for the arm to be mutilated, it is sufficient that the thumb and index finger are missing or not functioning, and for the leg to be mutilated it is sufficient that his foot or heel is missing or that he is paralyzed (as in our hypothesis). Next, the nurse can go beyond her powers and perform the manipulation that should be done by a physician and "harm" the patient (for example, placing a catheter on a man). Then, depending on what caused it, a serious or moderate injury, she will be treated as a provider of activity that is legally regulated (but for a physician), a source of increased danger, but which the nurse is not entitled to exercise (Article 134, paragraph 2 of the Penal Code considered above). Another hypothesis is that the physician may have prescribed the correct dose of medication, but the nurse administers a larger dose, resulting in death, serious or moderate injury. In this case again the nurse will be the criminal responsible person, because she will not fulfill the medical appointment, since in the Ordinance by Art. 4 - professional activities that the nurse performs as a physician and is entrusted with the obligation to distribute and give patients medicinal products upon a physician's order.

Society's understanding is that medical malpractice cases are civil cases for the compensation of patients who claim to have been injured during a healing process, and only then are the criminal cases for the death or personal injury of a medical professional. When referring to "convicted", it is appropriate to specify that one may be sentenced to pay compensation to another in a civil dispute or to be sentenced by a sentence of criminal conviction.

Nursing documentation and specifically the individual nursing record and criminal liability - relationship and dependencies

One of the professional activities that the nurse can perform independently is to draw up a plan for nursing care (Article 3, paragraph 1, item 3, subparagraph o of the Ordinance). We agree

with the Ministry of Health that the professional activity of the nurse should be planned, taking into account the modern concept of nursing related to the skills and knowledge of the nurse for clinical observation, analysis of the patient's condition and implementation of an individual holistic approach in nursing care. However, from the Ordinance, it is not clear what kind of nursing plan it should be. If it is to be a mere thought process, without being documented, it can fall into the hypotheses of forgetting, performing without actual reporting, or failing, but reported as fulfilled. From a criminal point of view, documenting the nursing care plan (as well as putting the individual nursing record into practice) is crucial for a possible criminal process. In this sense, this poses a major problem for the Bulgarian nursing sector - the inability to trace the professional activity of a particular nurse. With the introduction of the nursing dossier as a single document, it will be possible to trace each of the stages of nursing care, not just the plan. Here we come to the conclusion that there are gaps in the Ordinance, which, however, cannot be filled in by the amendment and its supplementation, and it is necessary to adopt a new normative act, which regulates the adoption of nursing documentation with all necessary requisites and requirements. Thus, the nursing profession will reach a new level of development in Bulgaria and, in addition to the search for criminal (and also disciplinary) responsibility, good examples in nursing may be distinguished.

CONCLUSION

The conclusions that can be drawn after an in-depth analysis are the need to distinguish 'medical errors' from 'nursing errors'. Once the activity of the nurse is regulated (even now through Regulation 1), terminological clarification and the use of "nursing error" are appropriate. Only in this way, and after some legislative changes, **can adequate legal liability be expected**. This would be achievable after the **implementation of nursing records, nursing files, medical standards in health care**, etc. This is crucial so that nurses are not abused to bear unlawful criminal liability under unclear competences from other healthcare professionals. Another important point is that there is no record of nursing errors. We believe that it is extremely necessary to make comparisons of the level of health care in different regions, regions, countries and continents. Based on medical standards, good nursing practices in the country can be distinguished in healthcare.

The Nursing Errors and Good Nursing Practice Registry is an indispensable innovation through which healthcare providers will be able to consult and receive information about the nurse's professional status - has she made a nursing mistake in her professional practice, was she a part of a team that was excellent for good nursing practice, meeting accepted standards in healthcare and more. The specific proposals made by the *de lege ferenda* (from the point of view of future law) to change the legislation governing nursing careers do not aim solely and only at increased responsibility to be sought by the nurse, but to improve overall health care in the country. In order to achieve autonomy in the nursing profession as it is in many European countries, it is necessary to clearly and accurately differentiate competences, without falling into dependence on other healthcare professionals, to seek responsibility for failure to fulfill obligations, and to promote good practices. To improve the quality and safety of healthcare, it is necessary to adopt a clear and specific methodology and system for measuring and evaluating healthcare in Bulgaria.

REFERENCES

- Girginov, A. (2009). Criminal Law of the Republic of Bulgaria. Common part, Sofia.
- Girginov, A. (2005). Criminal Law of the Republic of Bulgaria. Particular Part, Sofia, 99-101.
- Lyubenov, L. (2019). Actual problems of realization of the right of personal protection of the accused in the context of the requirement for a term for pre-trial investigation according to the Bulgarian criminal procedure.// *Lex ET Scientia International Journal*, No 1, ISSN 1583-039x.
- Lyubenov, L. (2018). Some theoretical considerations on the problems of the civil claim in the criminal proceedings.// *Collection of reports -The role of criminology and related sciences in*

the fight against crime, Law Faculty, Department of Criminal Law Sciences and Security, "Angel Kanchev" University of Ruse, ISBN 978-619-207-150-9;

Mukhina, S.A., Tarnovskaya, I.I. (2006). Theoretical Foundations of Nursing Care, Pleven.

Nenov, I. (1992). Criminal Law of the Republic of Bulgaria. Common part. Book One, Sofia.

Nenov, I. (1992). Criminal Law of the Republic of Bulgaria. Common part. Book Two, Sofia.

Ordinance No. 1 of February 8, 2011 on the professional activities that nurses, midwives, associated medical professionals and health assistants may carry out as assigned or independently.

Penal Code. Collection of regulations. (2019). Sofia.

Stoynov, A. (2015). Criminal law. Common part, Sofia.

The author's team. (2017) Health Care Guide (technical datasheets). Tutorial for nurses, midwives and laboratory assistants. Pleven.

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