

## Research Article

# LEGAL LIABILITY OF A PHYSICIAN FOR PROVIDING INADEQUATE MEDICAL CARE TO A PATIENT: ANALYSIS OF APPROACHES BASED ON THE EXAMPLES OF KAZAKHSTAN AND THE UNITED STATES

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## ABSTRACT

**Background:** This research focuses on the determination of liability for medical professionals causing harm to patients, using the criminal legislation of the Republic of Kazakhstan as a foundation. Criminal liability for medical offences is stipulated in Chapter 12 of the Criminal Code. By identifying the mandatory characteristics or elements of a medical criminal offence according to the criminal legislation of Kazakhstan, parallels are drawn with the types of culpability provided for in developed countries worldwide. The authors reviewed scholarly works examining the effectiveness of handling cases involving harm to patients and decisions regarding the satisfaction or dismissal of the patient's claims in Kazakhstan. Attention has been given to empirical data collected within the territory of the Republic of Kazakhstan. The results of sociological research conducted by the authors over a period of 3 months among healthcare professionals from different regions of the country have been utilised. Special attention has been devoted to international experiences in implementing measures to improve patient safety, reducing citizen complaints regarding the quality of healthcare services, and enhancing the legal protection of medical personnel. The research selects provisions from scholarly works that reduce the risk of harm to patients and thereby contribute to reducing medical crime levels.

**Methods:** In this research, the authors employed a number of methods of scientific research to achieve their goals and solve their tasks, in particular legal analysis, comparative legal analysis, survey, questionnaire, and interviewing. Legal analysis of the Criminal Legislation of the Republic of Kazakhstan, including Chapter 12 of the Criminal Code, was conducted to identify the specifics of criminal liability for medical offences, exemplified by Article 317. This analysis highlighted the nuances of criminal liability for medical offences in Kazakhstan.

*Comparative legal analysis made it possible to compare the responsibilities of doctors in the USA and Kazakhstan. Attention was drawn to the similarity of the concepts of guilt in the form of negligence, with a specific emphasis on the American approach, which offers valuable insights for Kazakhstan. These aspects could be adapted to improve Kazakhstan's legal system. The specific cases of harm to patients considered by the courts of the Republic of Kazakhstan were studied, and court decisions concerning the satisfaction of patients' claims and their rejection were analysed, which allowed the authors to identify the main arguments and trends in judicial practice.*

*Surveys and questionnaires were conducted among medical workers from various regions of Kazakhstan to gather empirical data on their perceptions of duties and responsibilities. Additionally, in-depth interviews were also conducted with experts in the field of medicine and law, as well as patients, and representatives of health authorities, providing high-quality data on the problems and challenges faced by medical workers.*

*Statistical data collected during sociological research were processed and analysed. This included data on citizen complaints about the quality of medical care, cases of harm to patients and other relevant statistical indicators. The study of the problem at various levels revealed the level of patient safety and legal protection of medical personnel.*

**Results and Conclusion:** *Creating conditions for medicine and ensuring effective social and professional medical insurance are some factors that provide opportunities for medical practice as a whole and the healthcare system. These facts also facilitate a proper legal assessment of a doctor's performance.*

## 1 INTRODUCTION

The issue of holding healthcare professionals accountable for the harm caused to patients during medical care always sparks debate across society, particularly among the medical community and affected patients. Since ancient times, society has consistently expressed its stance on the harm caused by a physician while treating patients. Historical monuments vividly depict these occurrences, spanning millennia. It is evident to us now that society has never overlooked the medical profession. Various cultures have referred to those providing medical assistance by diverse titles such as healers, shamans, physicians, healers, infirmaries, priests, clerics, asclepiads, wise men, philosophers, and others.

The concepts of medical care and treatment practices in antiquity differed from modern standards and methods of medical science. Medicine in ancient times was largely based on religious, philosophical, and magical beliefs and did not always correspond to contemporary medical standards and the scientific approach to treatment. Medical practices and methods could vary across different societies and cultures, incorporating techniques such as herbs, amulets, prayers, rituals, magical remedies, and other means.

Despite limited knowledge and resources available in antiquity, many civilizations developed systems of medical care that played crucial roles in the health and well-being of

their populations. Ancient healers and physicians gathered and transmitted experience and knowledge about treating various illnesses. These practices laid the foundation for future medical science and practice.

It is worth noting that modern medicine has made significant advancements in scientific and technical aspects. Today, medical care is provided by highly skilled medical professionals based on scientific research, clinical trials, and evidence-based medicine. The high achievements of medical science, evidence-based research, practical experience, and innovations improve the outcomes of medical care, enabling people to recover from diseases and ailments previously considered incurable.

Medical activity as a profession is marked in history not only by positive achievements but also by unfavourable outcomes of the diagnosis and treatment process.

In the Republic of Kazakhstan, the number of complaints from healthcare service recipients regarding quality is increasing. The global trend of increasing scrutiny towards the activities of healthcare professionals aligns with the time frame observed in Kazakhstan, which is approximately since 2005. However, the number of complaints from citizens regarding healthcare workers continues to rise year by year. Among the citizen complaints, a significant portion is related to professional ethics, but concerns are raised regarding the quality of healthcare services.

In 2019, the World Health Organization (WHO) adopted Resolution WHA72.6, “Global Action on Patient Safety,” at its seventy-second session,<sup>1</sup> highlighting the urgent need for global attention to patient safety. This call to action is driven by industries associated with high-risk levels, such as aviation and the nuclear industry, which have much higher safety records than the healthcare sector. For instance, the probability of a person dying in a car accident is one in 3 million, whereas the likelihood of a patient dying as a result of an adverse event in medical practice is one in 300.<sup>2</sup>

Annually, low and middle-income countries report approximately 134 million cases of medical errors or negligence by healthcare providers, resulting in an estimated 2.6 million deaths. In high-income countries, it is estimated that one in every ten patients experiences harm while receiving hospital care. Harm can be caused by a range of adverse events, and nearly 50% of them are preventable. According to the World Health Organization (WHO), the occurrence of adverse outcomes due to healthcare is likely one of the top 10 causes of death and disability worldwide.

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1 Resolution WHA72.6 of 28 May 2019 ‘Global Action on Patient Safety’ <<https://www.who.int/teams/integrated-health-services/patient-safety/policy/resolutions>> accessed 10 April 2024.

2 WHO, ‘10 Facts on Patient Safety’ (*World Health Organization (WHO)*, 26 August 2019) <<https://www.who.int/news-room/photo-story/photo-story-detail/10-facts-on-patient-safety>> accessed 10 April 2024.

In primary and ambulatory healthcare settings, up to 4 out of 10 patients worldwide experience harm, with as much as 80% of these incidents being preventable. The most detrimental errors are related to diagnosis, prescribing, and medication use.<sup>3</sup>

Recognised on 17 September annually, World Patient Safety Day highlights patient safety as a global health priority. In 2020, the WHO called upon governments and healthcare leaders to take action to eliminate factors that systematically threaten the health and safety of healthcare workers and patients.<sup>4</sup> They introduced the Charter for Patient Safety.<sup>5</sup>

The importance of addressing patient and healthcare worker safety issues is indicative of a society's cultural development. Ensuring patients' rights while receiving medical care or services is guaranteed by laws in each country's fundamental legislation and international regulatory acts. Regulating the legal relationship between patients and healthcare workers in cases of harm to the patient's health requires a meticulous and fair approach that ensures the rights and freedoms of both parties.

On one side, patients are seeking medical care or services from a doctor or healthcare institution. On the other side, healthcare professionals are morally and professionally bound to provide diligent care.

If there is a negative outcome resulting in harm to the patient in the context of the provision of medical care, there is a need for a qualified investigation. In such cases, it is necessary to conduct an examination, investigate the circumstances, analyse the actions or inactions of the doctor, study the behaviour of the patient, and determine whether the doctor's negligence in fulfilling their professional duties played a role in causing the harm.

This study attempts to determine the type of responsibility for a medical doctor based on the nature of the harm caused and the extent of their actions or inactions.

## 2 GOALS AND OBJECTIVES OF RESEARCH

The objectives of the research are to study the criminal liability of a medical worker under the legislation of the Republic of Kazakhstan for medical criminal offences and to compare the responsibility of foreign countries using the example of the United States. The article aims to define the direction of the search for effective legal instruments to reduce the level of medical crime. Central to this study is Article 317 of the Criminal Code of the Republic

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3 *ibid.*

4 WHO, 'Keep Health Workers Safe to Keep Patients Safe' (*World Health Organization (WHO)*, 17 September 2020) <<https://www.who.int/news/item/17-09-2020-keep-health-workers-safe-to-keep-patients-safe-who>> accessed 20 April 2024.

5 WHO, 'Patient Safety Rights Charter' (*World Health Organization (WHO)*, 16 April 2024) <<https://www.who.int/publications/i/item/9789240093249>> accessed 20 April 2024.

of Kazakhstan,<sup>6</sup> which will undergo doctrinal analysis and be juxtaposed with the experience of the United States.

To study foreign experience in improving the level of patient safety and legal protection of medical personnel. Ultimately, this research aims to develop recommendations for reducing the level of medical crime and improving the quality of medical care in Kazakhstan.

The research objectives include the analysis of the criminal liability of a medical worker in the Republic of Kazakhstan under Article 317 of the Criminal Code, comparing it with events that entail similar negative consequences for patients abroad and the legal instruments used to combat them. An attempt is made to compare these approaches to determine trends in the legal responsibility of a medical professional and adopt positive experience.

Studying the US experience of pre-trial consideration of claims for harm gives grounds for the development of professional medical insurance and legislation on patient safety, which is a global trend. Collecting empirical data through a sociological survey of medical workers, patients and employees of investigative units will highlight the inefficiency of the tools of the criminal legislation of Kazakhstan and confirm the need to develop more effective methods to combat the facts of providing substandard medical care and services. Development of recommendations on improving legislation regarding medical criminal offences and alternative types of liability to improve the quality of medical care. One of the core tasks is a practically applicable scientific search to improve the quality of medical care and legal protection for both patients and medical workers.

### 3 CRIMINAL LEGISLATION ON MEDICAL CRIMINAL OFFENSES IN KAZAKHSTAN: A COMPARATIVE ANALYSIS OF THE ELEMENTS OF MEDICAL CRIMINAL OFFENSES USING THE EXAMPLE OF KAZAKHSTAN AND THE USA

Analysing the features and elements of medical criminal offences allows for their classification within the framework of criminal law in Kazakhstan.<sup>7</sup>

The general theory of criminal law in the Republic of Kazakhstan identifies the following characteristics of a criminal offence in accordance with the codified legislation: social danger, unlawfulness, culpability, and punishability.

Unlawfulness is a characteristic that establishes the prohibition by a specific criminal law norm. Social danger is a material characteristic that reveals its social essence. Culpability is

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6 Code of the Republic of Kazakhstan no 226-V of 3 July 2014 'Criminal Code of the Republic of Kazakhstan' <<https://adilet.zan.kz/eng/docs/K1400000226>> accessed 20 April 2024.

7 EV Espergenova, 'Problems of the Theory and Practice of Applying the Legislation of the Republic of Kazakhstan in Countering Medical Criminal Offenses Committed by a Special Subject' (PhD (Law) thesis, Karaganda Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan 2019).

characterised by a person's internal mental attitude towards the committed act, which can be expressed in the form of intent or negligence. Punishability refers to establishing by law the possibility of imposing punishment for the committed act.

The composition of a criminal offence is a scientific category in criminal law that is necessary for the accurate determination of the presence or absence of the elements of a criminal offence in a person's actions. It includes four essential elements (object, objective side, subject, and subjective side), and if any of these elements are missing, the composition of the criminal offence is disrupted.

In the present study, we rely on the criminal offence provided for in Article 317 of the Criminal Code of the Republic of Kazakhstan. This article defines various scenarios and corresponding penalties for medical professionals:

- “1. Non-performance, improper performance of professional duties by a medical or pharmaceutical employee due to negligent or unconscientious attitude to them, if these actions entailed infliction of harm of average gravity to human health by negligence, – shall be punished by a fine in the amount of up to two hundred monthly calculation indices or corrective labours in the same amount, or community services for a term of up to one hundred eighty hours, or arrest for a term of up to fifty days.
2. The actions, provided by the first part of this Article, entailed the infliction of grievous harm to the health by negligence – shall be punished by a fine in the amount of up to three thousand monthly calculation indices or corrective labours in the same amount, or restriction of liberty for a term of up to three years, or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in certain activity for a term of up to one year or without it.
3. The actions, provided by the first part of this Article, entailed the death of a person by negligence – shall be punished by imprisonment for a term of up to five years with deprivation of the right to occupy determined posts or to engage in a determined activity for a term of up to three years.
4. The actions, provided by the first part of this Article, entailed the death of two or more persons by negligence – shall be punished by imprisonment for the term of three to seven years with deprivation of the right to occupy determined posts or to engage in a determined activity for the term of three years.
5. Improper performance of professional obligations by medical employees, as well as employees of organisation of domestic or other service to the population due to negligent or unconscientious attitude to them, if this action entails infection of another person with HIV / AIDS – shall be punished by imprisonment for the term of up to five years with deprivation of the right to occupy determined posts or to engage in a determined activity for the term of up to three years.”<sup>8</sup>

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8 *ibid*, art 317.

This article aims to determine the characteristics of medical criminal offences provided for in Article 317 of the Criminal Code of the Republic of Kazakhstan through systematic analysis, comparing them with international approaches and examining the legal measures to combat such offences.

The systematic approach allows us to position the phenomena under study in a structured manner, thereby identifying their internal logical connections, understanding them as parts of a whole, and predicting the existence of missing links. It enables us to diagnose and predict new phenomena. This approach is achieved by determining the phenomenon being studied, which necessitates defining the concept of criminal offences committed by medical personnel.<sup>9</sup>

First, it is necessary to provide a clear definition of the object of medical criminal offences envisaged in Article 317 of the Criminal Code of the Republic of Kazakhstan. According to E.I. Kairzhanov:

“The object of a crime is an element of the composition whose presence to a significant extent determines the possibility of criminal encroachment upon it: the purpose, content of the subjective side, the nature of specific actions by the guilty party, harmful consequences, and even the danger to the personality of the crime's subject.”<sup>10</sup>

G.R. Rustemova generally relates the objects of medical criminal offences to the sphere of medical services, the understanding of which should be approached from the concept of serving the population while distinguishing it from the concept of the sphere of services, which implies the production of consumer value. In medical contexts, services are delivered to benefit patients' health, distinguishing them from typical consumers services.

Central to medical activity is the provision of medical services, encompassing professional activities aimed at promoting patient health, whether carried out on a paid or gratuitous basis.<sup>11</sup> It is precisely in relation to the provision of medical services and assistance to the patient that legal relations are formed, regulated by Chapter 12 of the Criminal Code of the Republic of Kazakhstan.

A medical service must be useful and safe, which determines its quality. The quality of the service is assessed based on two indicators: execution and compliance.<sup>12</sup>

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9 MA Ibrayev, 'Methodology of Investigation of Improper Fulfilment of Professional Duties by a Medical Worker' (PhD (Law) thesis, Kazakh Humanitarian Law University 2010).

10 EI Kairzhanov, 'On the Methodology of Cognition of the Object of Crime' in AE Mizanbaeva (ed), *Criminal Law Understanding at the Present Stage: Methodological Aspects of Law Enforcement* (Globus 2009).

11 GR Rustemova, *Medical Criminal Offenses* (KazAtiso 2016).

12 Wilm Quentin and others, 'Measuring Healthcare Quality' in Reinhard Busse and others (eds), *Improving Healthcare Quality in Europe: Characteristics, Effectiveness and Implementation of Different Strategies* (Health Policy Series no 53, European Observatory on Health Systems and Policies 2019) ch 3 <<https://www.ncbi.nlm.nih.gov/books/NBK549260>> accessed 10 April 2024.

Referring to the concept of medical services as stated in the Code of the Republic of Kazakhstan on People's Health and the Healthcare System dated 7 July 2020 (in paragraph 181, Article 1), healthcare services are defined as “actions of healthcare entities with a preventive, diagnostic, therapeutic, rehabilitation and palliative orientation in relation to a specific person”. In other words, all legal relationships arising from the provision of medical services can be represented by the formula “medical or pharmaceutical worker – medical service – service recipient, i.e. the patient”.

Additionally, the law also includes the definition of medical care, which is expressed as follows: “medical care – a complex of healthcare services aimed at maintaining and restoring the health of the population, including drug provision”.<sup>13</sup> In other words, the concept of medical assistance is broader than the concept of medical service, as the latter is used to define medical assistance.

Thus, under Article 317 of the Criminal Code of the Republic of Kazakhstan, a criminal offence arises at the moment when harmful consequences occur for the patient as a result of non-performance or improper performance of professional duties in providing medical assistance and violating standards. In other words, the quality of medical care has an inverse relationship with the formation of harm. The higher the quality of medical assistance, the lesser the harmful consequences.

Thus, the primary object of this criminal offence is the life and health of a person as the patient, while the proper provision of medical assistance and compliance with medical standards serve as additional objects. The criminal legal relationship arises in the case of gross violations of the proper provision of medical assistance and the violation of medical standards resulting from relationships formed according to the general formula for Article 317: medical or pharmaceutical worker, worker of an organisation providing household or other services to the population – provision of medical assistance, provision of services – patient, client. Another condition is the occurrence of socially dangerous consequences for the patient or client.

The moment when the consequences occur as a result of negligence in the form of moderate harm marks the completion of the act specified in Part 1 of Article 317 of the Criminal Code. Causing serious harm to health due to negligence corresponds to Part 2, while the occurrence of a patient's death due to negligence is covered by Part 3. Part 4 deals with the death of two or more persons due to negligence.

Part 5 of Article 317 establishes criminal liability for negligent actions that result in the infection of a person with HIV. In this part, the legislator distinguishes a specific subject, in addition to the medical worker, namely the worker of an organisation providing household or other services to the population.

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13 Code of the Republic of Kazakhstan no 360-VI of 7 July 2020 'On Public Health and Healthcare System' <[https://online.zakon.kz/Document/?doc\\_id=39793804#activate\\_doc=2](https://online.zakon.kz/Document/?doc_id=39793804#activate_doc=2)> accessed 10 April 2024.



The objective aspect of the criminal offence entails several types of criminal conduct as outlined in parts 1-4:

- failure by medical and pharmaceutical workers to fulfil their professional duties.
- improper fulfilment of professional duties by medical and pharmaceutical workers, which involves non-compliance with the procedures or standards of providing medical care.

The objective aspect of the criminal offence under Part 5, Article 317 involves the improper fulfilment of professional duties by a medical worker or a worker of an organisation providing household or other services, resulting in the transmission of HIV through negligence.

Understanding such criminal conduct starts with recognising what constitutes a failure to fulfil professional duties. It refers to situations where a medical worker, such as a doctor, fails to adhere to legal obligations or regulations or refuses to perform them.

Conversely, understanding improper performance can be achieved by reasoning from the opposite. Proper performance of duties is defined in the dictionary as “such as follows; due, appropriate”.<sup>14</sup> The very concept of conformity in medicine is reduced to consistency, the correctness of the use of scientific medical knowledge based on modern scientific data, new technologies and discoveries in medicine that have proven their effectiveness in practice.<sup>15</sup> Accordingly, they are used in the process of diagnosis, treatment and rehabilitation. This means that such an activity will be inappropriate, inconsistent with certain rules, and not bring a positive result in providing medical care.

In Kazakhstan, like in many countries, adherence to medical standards is crucial. To meet the standards in medicine, work is underway to create clinical protocols for diagnosis and treatment; about 800 types of clinical protocols are used in Kazakhstan; since medicine is developing rapidly, clinical protocols are usually updated every three years. When developing protocols, the main principle is to adhere to the approach of scientific evidence.

The requirement for a physician's actions to comply with the provisions of a treatment protocol is an ambiguous issue, as adherence to the treatment protocol in Kazakhstan is not mandatory and is recommendatory. The treatment protocol provides recommendations on a physician's order of treatment procedure. However, the physician may deviate from the rules to achieve better results in the course of treatment, selectively choosing certain

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14 SI Ozhegov, *Explanatory online dictionary* (AS USSR 1989) <<https://lexicography.online/explanatory/ozhegov/search?s=%D0%BD%D0%B0%D0%B4%D0%BB%D0%B5%D0%B6%D0%B0%D1%89%D0%B8%D0%B9>> accessed 10 April 2024.

15 Ministry of Labour and Social Protection of the Population of the Republic of Kazakhstan, 'Professional Medical Associations will be Involved in the Development of Clinical Protocols' (*Paragraph Zakon.kz*, 22 February 2016) <[https://online.zakon.kz/Document/?doc\\_id=37233852](https://online.zakon.kz/Document/?doc_id=37233852)> accessed 10 April 2024.

recommendations while disregarding others. In other words, a physician should approach diagnosing, treating, and rehabilitating a patient creatively.

According to the results of a survey among physicians in Kazakhstan, a paradox arises. Despite the recommendatory nature of the treatment protocol, penalties and sanctions from management and regulatory bodies may be imposed on a physician who deviates from certain protocol provisions. This represents a clear and dangerous contradiction because it undermines the ability of protocols to ensure the proper performance of a healthcare professional's duties. It means that the issues related to defining the proper performance of a physician's duties remain unresolved and open.

Establishing proper performance of professional duties based on the principles of compliance with international standards is crucial. Treatment protocols should align with these standards while maintaining their recommendatory nature. Furthermore, it is worth noting that Western medicine is based on the principles of evidence-based medicine, which means that every general practitioner and specialist knows precisely which treatment methodology should be applied. We consider this to be a valid approach.

In Kazakhstan, however, delays in updating treatment protocols to incorporate the latest global scientific advancements are evident due to bureaucratic hurdles. This delay impacts the effectiveness of medical care provided to patients. Unlike in developed countries where healthcare systems utilise a worldwide database of scientific publications as a platform accessible to healthcare professionals, access to such resources in Kazakhstan is hindered, often requiring proficiency in English for healthcare professionals to benefit fully.

For example, in developing treatment protocols for COVID-19, foreign specialists adopted various approaches, including the treatment methodology for atypical pneumonia. Certain foundational principles were initially built upon the treatment methodology for atypical pneumonia. Subsequently, the treatment methodology for COVID-19 started to acquire its uniqueness based on the experience gained from treating this disease in different parts of the world.

According to Article 317 of the Criminal Code of the Republic of Kazakhstan, the subject of the criminal offence is a specific individual who is a medical or pharmaceutical worker or an employee of an organisation providing household or other services to the population. The subject refers to individuals who have reached the age of sixteen at the time of committing the socially dangerous act (Article 15 of the Criminal Code of the Republic of Kazakhstan). Still, it should be noted that the subject must be related to medical or pharmaceutical personnel.

According to the definition provided in the Law of the Republic of Kazakhstan, "On Public Health and Healthcare System", a medical worker is an individual who possesses professional medical education and engages in medical activities. Therefore, pharmaceutical workers have pharmaceutical education and engage in pharmaceutical activities. The mandatory requirement for these categories of individuals is the possession

of medical and pharmaceutical education, the definitions of which are provided in the same law. Thus, this matter does not pose difficulties during the investigation and qualification of criminal cases.

Besides the mentioned individuals, the legislator, in the capacity of a special subject under Part 5 of Article 317, identified a worker of household or other population servicing who, as a result of providing a household service, caused harm to a client by infecting them with HIV.

Including this category of individuals in the aforementioned article of the criminal code is controversial because workers of households or other population servicing do not provide medical assistance but use medical instruments. For this reason, they are not considered within the scope of this article since this category of individuals is not comprised of doctors or medical workers. Moreover, there is no recorded practice of implementing Part 5 of Article 317 in the Republic of Kazakhstan.

The subjective aspect of a criminal offence is the fourth element, and establishing it for this type of offence is an important and challenging task. Guilt in criminal law is considered as the mental attitude of a person towards the socially dangerous act they commit, as provided by criminal law and its consequences.

By establishing criminal liability for intentional encroachment on legally protected goods and values, the state and society express their official legal assessment regarding the demonstrated negative attitude of the subject towards the interests of others.<sup>16</sup>

Determining the guilt of the subject of a criminal offence as a subject of proof requires a clear definition of the actions or omissions of the medical worker and establishing the link with the resulting consequences.

For this reason, in both scientific and practical contexts, the burden of proving guilt is assigned to a subsequent stage after the previous elements – the object, the objective aspect, and the subject – have already been established and identified:

In other words, establishing guilt is a process in which the law enforcement agency, having information about the object, the objective side of the criminal offence, and the subject, establishes a cause-and-effect relationship between the socially dangerous act and the resulting consequences. It involves assessing the behaviour of the subject in relation to the events that led to the harm.

A study and survey of healthcare professionals have revealed that the perception of guilt by the healthcare workers themselves is often distorted. As a result, many doctors who are subject to criminal prosecution simplify their understanding to the notion that “if they didn't do anything, they are not guilty.” According to doctors' opinion, inaction does not lead to criminal liability. This misconception leads to the traditional mindset within the

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16 II Rogov and KJ Baltabaev (eds), *Criminal Law of the Republic of Kazakhstan: General Part* (LN Gumilyov Eurasian National University 2015).

medical community that excludes the possibility of criminal liability for doctors by using the term “medical error”, which is not a legal concept.

In response, the legislator has explicitly identified a form of guilt for medical criminal offences under Article 317 in the form of negligence, manifested as reckless imprudence and criminal negligence. Negligence occurs when healthcare workers fail to anticipate the potential occurrence of socially dangerous harmful consequences or improperly rely on preventive measures, leading to reckless imprudence.

The survey results indicate that 54.7% of healthcare workers are not familiar with the provisions of criminal legislation under Chapter 12 of the Criminal Code of the Republic of Kazakhstan, which means they cannot provide a legal assessment of their actions in case of negative consequences for the patient.

For example, 45.3% of respondents stated they had not encountered criminal legislation regarding medical criminal offences. In our opinion, this is a subjective assessment because when asked if they have been taught the basics of criminal legislation that provides for criminal liability for medical criminal offences, 73.3% of the respondents indicated that they had not.

Of the total respondents, 40% of healthcare workers indicated that criminal liability for these types of criminal offences is unquestionably necessary. In comparison, 47.7% stated that there is no need for criminal liability.

The data from the sociological survey demonstrates that most healthcare workers are unwilling to bear criminal responsibility for inadequate performance of professional duties. This is attributed to low legal awareness and a lack of knowledge in the field of medical criminal relations.<sup>17</sup>

Statistics from the past three years show that an average of 300 to 320 criminal cases under Article 317 of the Criminal Code of the Republic of Kazakhstan are initiated per calendar year across the country. Only 1% of the total criminal cases receive a legal assessment with charges filed. In these cases, medical workers are accused under Article 317 of the Criminal Code of the Republic of Kazakhstan, resulting in a court verdict and the imposition of criminal punishment. Notably, 10% of the 300-320 criminal cases are terminated due to the absence of guilt on the part of the healthcare worker, meaning there was no violation of medical care standards.

A significant majority, 89% of criminal cases are suspended because forensic medical experts cannot determine the presence or absence of guilt on the part of the doctor. Consequently, the law enforcement agency cannot provide a legal assessment.<sup>18</sup> However,

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17 'Questionnaire for Doctors: Electronic Questionnaire, misteraibek@gmail.com' <<https://docs.google.com/forms/d/19Q5l5-fSjkRLGJxDdJXI4ox8bzKeBdD9Pfu0-PtXsmQ/viewanalytics>> accessed 10 April 2024.

18 'Statistical Reports' (*Portal of Legal Statistics*, 2024) <<https://www.qamqor.gov.kz/crimestat/statistics>> accessed 10 April 2024.

in such cases, a forensic medical expert's opinion indicates the percentage of doctor and patient guilt, for example, 70/30, 60/40, 50/50. This implies that there are violations on the part of the doctor.<sup>19</sup>

The legislation of the Republic of Kazakhstan also provides for the responsibility of healthcare workers in an administrative procedure for causing minor harm to health. Over the past three years, there have been two cases of healthcare workers being held accountable under Article 80 of the Code of Administrative Offenses,<sup>20</sup> resulting in fines and the revocation of their medical licenses. Administrative proceedings are carried out by the authorised body, the Medical and Pharmaceutical Control Committee of the Ministry of Health of the Republic of Kazakhstan.

In cases of civil liability, six lawsuits have been filed for compensation for health damage and wrongful death resulting from inadequate medical care. Only in one case did the court reject the patient's claim. In the remaining five cases, the claims were partially granted. In these decisions, the court recognised the guilt of the medical practitioners and obliged the responsible parties to fully compensate for the material damages. The claims for moral damages in these civil cases were partially satisfied, with the court reducing the amount of moral damages.

There are disparities in the number of complaints made by citizens seeking to restore their rights due to health damage, material losses, and moral harm. It seems that patients who have suffered at the hands of medical professionals have more trust in the authorities responsible for criminal prosecution. However, on the other hand, we see that the investigation of criminal cases is ineffective.

This situation clearly highlights the need for effective legal instruments to achieve the principle of justice. In reality, there is a need for a tool that would ensure the result described in the proverb "sheep are safe, and wolves are fed". Without drawing final conclusions, it is worth noting that we have experience in investigating medical criminal offences under Article 317 of the Criminal Code of the Republic of Kazakhstan. The main problem with investigating such criminal cases lies in the inability and unwillingness of the law enforcement agency to thoroughly understand the situation that led to harm to the patient. An objective factor is the lack of medical knowledge among the law enforcement agency, the problematic procedure for involving medical professionals as experts, and the perception of the medical community that the law enforcement agency is a punisher, which results in a reluctance to cooperate in establishing the objective truth in the case.

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19 AB Seidanov, 'Investigation of Medical Criminal Offences (On the Example of Art 317 of the Criminal Code of the Republic of Kazakhstan)' (PhD (Law) thesis, Alikhan Bokeikhan University 2023) 121.

20 Code of the Republic of Kazakhstan no 235-V of 5 July 2014 'On Administrative Infractions' <<https://adilet.zan.kz/eng/docs/K1400000235>> accessed 10 April 2024.

The mentioned problems, in their format, are global. It is believed that at this stage of the development of Kazakhstani legislation, a new approach is needed to regulate the relationship between doctors and patients that cause harm to the latter.

We propose considering the experience of the United States as an example. As one of the largest and most developed countries with a well-established legal system, the United States attractiveness lies in the diversity of legal frameworks across states. Therefore, it can serve as a platform for Kazakhstan.

To begin with, let us consider those legal relations that can be recognised as medical crimes in the United States. Like in some other countries, medical crime in the United States can take various forms. Some common types of medical crimes in the United States include:

1. Healthcare fraud: This may involve falsification of medical records, billing fraud, unlawful billing practices, illegal insurance payouts, and other types of fraud committed by healthcare professionals, patients, or third parties.
2. Improper prescribing and dispensing of medications: This may include prescribing unnecessary medications, incorrect dosages, prescription forgery, or illegal sale of controlled substances, such as narcotics.
3. Misconduct by healthcare personnel: This may involve violations of medical ethics and professional standards, such as incompetence, improper treatment, breach of patient confidentiality, sexual harassment, physical or emotional abuse, and other forms of misconduct.
4. Theft of medical equipment and supplies: This may include the theft of medical equipment, instruments, medications, and other materials.
5. Non-compliance with safety rules and quality standards: This may involve violations of hygiene rules, infection control measures, and failure to meet treatment and diagnostic standards, which can lead to adverse outcomes for patients.
6. Falsification of medical documents: This may include falsifying medical records, examination reports, laboratory test results, and other documents with the intention to deceive or conceal errors or unlawful actions.
7. Crimes related to scientific research: This may involve violations of ethical principles and rules governing clinical trials, data falsification, unlawful use of research funding, and other crimes related to scientific activities.
8. Abuse of power and authority: This may include the abuse of power and authority by healthcare professionals, such as coercing patients into unnecessary procedures, sexual harassment, discrimination, or other forms of abuse of power.
9. Financial crimes or manipulations: Some cases of medical crime may be linked to financial motives, such as obtaining unlawful financial benefits, bribes, kickbacks, or other financial manipulations within the healthcare system.

10. Personal factors: Some cases of medical crime may be associated with personal factors of healthcare professionals, such as substance abuse, alcoholism, mental disorders, or other personal problems that can influence their professional behaviour and decisions.<sup>21</sup>

Indeed, one of the main differences in understanding medical criminal offences in the United States is the legal system based on precedent. Kazakhstan, on the other hand, has codified criminal legislation that limits all medical criminal offences to a few articles of the Criminal Code of the Republic of Kazakhstan.

The aforementioned crimes and criminal offences, according to Kazakhstan's criminal legislation, can be grouped based on the criterion of identifying a specific subject, namely a medical worker or physician. However, the socially dangerous acts designated as medical crimes in the United States are covered in different chapters of Kazakhstan's Special Part of the Criminal Code. One of the mandatory criteria in Chapter 12 of the Criminal Code of the Republic of Kazakhstan is medical practice, the procedure for providing medical care, conducting examinations, disclosing medical confidentiality, and other actions and omissions directly related to medical responsibilities towards patients, clients, and similar individuals.

Performing a more detailed comparison, the following elements of criminal offences can be identified that correspond to the criminal legislation of the United States regarding medical crimes in Kazakhstan:

Article 190 of the Criminal Code - Fraud;

Article 116 - Coercion to extract or unlawful extraction of human organs and tissues;

Article 131 - Insult;

Article 189 - Embezzlement or misappropriation of entrusted property;

Article 188 - Theft;

Article 247 - Receipt of illegal remuneration;

Article 296 - Unlawful handling of narcotics, psychotropic substances, their analogues, or precursors without the intent of distribution;

Article 298 - Theft or extortion of narcotics, psychotropic substances, and their analogues;

Article 303 - Violation of rules for handling narcotics, psychotropic or poisonous substances;

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21 Paul Jung, Peter Lurie and Sidney M Wolfe, 'US Physicians Disciplined for Criminal Activity' (2006) 16(2) Health Matrix 335.

Article 305 - Concealment of information about circumstances that pose a danger to the life or health of individuals;

Article 361 - Abuse of official powers;

Article 369 - Official forgery.

According to the criminal legislation system in the United States, the key criterion for classifying crimes as medical crimes is the involvement of a specialised professional, namely a doctor. A doctor can commit a socially dangerous act that qualifies as a crime. In the United States, a doctor can engage in criminal misconduct directly or indirectly related to providing medical care or services, and such socially dangerous acts would be categorised as medical crimes. Therefore, the understanding and approach to medical criminal offences in the United States and Kazakhstan exhibit significant differences.

## 4 THE EXAMINATION AND INVESTIGATION OF CASES INVOLVING HARM TO A PATIENT AS A RESULT OF MEDICAL TREATMENT

In many jurisdictions, civil tort law allows patients to file lawsuits regarding medical negligence. A civil lawsuit may involve financial compensation to the injured patient for damages and losses such as medical expenses, loss of income, physical pain and suffering, as well as psychological and emotional harm.

Additionally, in some cases, medical negligence can be considered an administrative or professional violation, and a physician may face disciplinary proceedings or have their license revoked based on the decision of the medical regulatory body.

A significant and main difference in the US legal system is that patient claims and lawsuits do not go unanswered. In our view, this is a positive factor that influences the realisation of patient rights and indicates their priority. It means that a court decision is reached in each case, or the parties reach a mutual agreement, thereby implementing the provisions of patient safety laws. This directly impacts the accountability of the physician who caused harm.

In criminal cases involving medical offences in the United States, there are prosecutors on one side and the physician as the defendant on the other side. Compensation for damages is typically covered by insurance premiums paid by insurance companies that have undertaken the responsibility of insuring medical practice. However, the physician is personally responsible for the criminal punishment.

A significant problem in Kazakhstan is that out of 300 criminal cases related to medical offences, only 1% result in criminal liability. 10% of the cases are dismissed due to the absence of guilt from the healthcare worker. This means that the actions of the physician and healthcare worker are deemed by the court or law enforcement agency as not meeting the criteria for criminal offence or wrongdoing. The remaining 89% of the criminal cases remain unresolved, with legal authorities unable to decide objectively. In other words, the



law enforcement agency does not decide the guilt or innocence of the healthcare worker and physician. The reason for this is that medical experts cannot provide clear conclusions regarding the guilt or innocence of the physician or healthcare worker.

At this stage of the development of criminal and criminal procedural legislation, it is necessary to acknowledge the fact that the procedure for examining and investigating criminal cases related to medical offenses in Kazakhstan, during the pretrial stage, is ineffective.

For this reason, we have turned to the experience of the United States in an attempt to develop effective tools and models that can be applied in Kazakhstan to address and rectify the negative practices in handling this category of criminal offences.

In Kazakhstan, many physicians are involved in the remaining percentage (89%) of criminal cases and are under constant suspicion. This factor leads to phenomena such as “burnout syndrome”, a reluctance to enhance their professionalism, degradation of professional qualities, the development of a “cold” attitude towards their profession, and indifference towards patients.

Combined with such negative phenomena, the level of healthcare decreases, leading to citizens' mistrust towards physicians and healthcare workers. Often, many patients resort to alternative methods of treatment (shamanism, healers, etc.), and in many cases, worsen their health conditions.

The study of healthcare issues has led to the conclusion that the medical community comprises highly educated individuals dedicated to delivering healthcare and medical assistance services to citizens. While striving to improve healthcare quality, the community also seeks to protect healthcare workers and physicians. For example, professional unions of healthcare workers have been established in Kazakhstan. However, a problem in the Kazakhstani healthcare system is that these professional unions rarely include legal experts. There is a lack of specialists who can provide legal assistance and support in addressing patient complaints regarding the quality of medical care.

Sociological research has shown that the majority of doctors and healthcare workers are members of professional unions and pay membership fees. However, these unions primarily focus on labour relations, which involve the relationship between healthcare workers and employers. When questioned about how patient complaint issues are regulated, a significant number of doctors responded that such problems are resolved directly between the healthcare worker and the patient. In other words, the mechanism for regulating conflicts in these situations is informal, and the healthcare worker and patient may not come to a mutual agreement. Consequently, patient satisfaction with filed complaints may be lacking, indicating a lack of patient safety. This means that the role of professional unions of healthcare workers has a limited impact on the quality of medical care and does not address the existing problems.

A fundamental issue contributing to these challenges is the lack of a professional liability insurance system, exacerbated by a lack of understanding among healthcare professionals about its purpose and benefits. The topic of professional medical liability insurance is actively discussed on social media platforms, but healthcare professionals themselves do not believe in the effectiveness of this mechanism. This scepticism is due to the fact that the previously established Mandatory Medical Insurance Fund did not live up to the expectations of doctors as a whole. The allocation of financial resources for ensuring quality healthcare has imbalances that affect the opinions of both doctors and patients. State hospitals and their doctors lack the means to provide quality medical care. Patients are forced to spend their own additional funds to receive medical assistance and services.

Moreover, in Kazakhstan, medical administrators are frequently prosecuted criminally for committing official and other crimes unrelated to the provision of medical care.

It is important to note that insurance of professional medical activities as a means of ensuring patient safety and physician protection requires careful study and development at the legislative level, drawing on the experience of leading countries.

There are also downsides to such cases. The U.S. government considers medical malpractice and all related legal proceedings as a “black hole” into which enormous sums of money from filed lawsuits endlessly disappear. The insurance business suffers, and some participants go bankrupt and exit the insurance market because they cannot fulfil their obligations to provide insurance payouts. As a result, there is a drain of medical professionals, leading to a shortage of personnel. All these factors contribute to a decline in the level of healthcare in different regions of the country. Therefore, the situation varies in different states. For example, the state of Arizona is experiencing a shortage of medical personnel in certain areas.

The solution in such cases is to establish upper limits for compensation claims for moral damages, which helps to balance the situation. However, doctors often fear patients, considering them potential plaintiffs.

In the United States, in addition to criminal and civil liability measures, another legal tool is used to address the largest number of complaints and patient grievances regarding the quality of medical care. Most disputes are resolved outside of court through the direct involvement of the patient, the doctor, and professional lawyers. This process is called case closure. A similar method of conflict resolution between doctors and patients, mediation, can be applied in our country.

The American practice of litigation and case closure has extensive experience. It is noteworthy that the American public and political representatives pay significant and due attention to these issues. An important consequence is that in the United States when the fact of harm caused by a doctor's actions is proven, the patient receives compensation for

damages and moral harm from the insurance company. Medical malpractice insurance assumes the risks of insurance claims.

However, the aim of this article is to compare the American model of criminal investigation with the Kazakhstani one. First, it is important to establish that criminal responsibility for medical criminal offences in both countries shares the same objectives.

Criminal responsibility for medical criminal offences serves several purposes:

1. Justice: It provides the opportunity to punish violations of the law and compensate victims of medical negligence or other medical crimes.
2. Deterrence: Criminal responsibility acts as a deterrent and can prevent potential medical offences by instilling fear of punishment.
3. Protection of society: Criminal responsibility for medical crimes protects society from wrongful behaviour by healthcare professionals and others associated with medical institutions, contributing to maintaining trust in the healthcare system.
4. Regulation of medical practice: Criminal legislation can also serve as a tool for regulating medical practice by establishing standards of conduct and professional duties for healthcare professionals.

If a doctor causes harm to a patient due to negligence, the question of whether they should be brought to trial depends on various factors, such as the nature and severity of the harm, the degree of negligence, the actions of the doctor, the actions of the patient, and other circumstances specific to the case.

It should be emphasised that the decision to pursue criminal responsibility should be based on a careful examination of each individual case, taking into account all circumstances and factors, including medical standards and professional duties of the doctor, evidence of negligence or violation of medical practice standards, as well as the degree of culpability, motives, consequences, and other aspects. It is also important to ensure fairness and protect the rights of healthcare professionals to avoid unjust prosecution or fear thereof.

Previously in the article, the criminal-legal characteristics of Article 317 of the Criminal Code of the Republic of Kazakhstan were provided. Now, we will discuss the American approach to understanding the indicators of medical criminal offences and crimes.

American researchers identify five factors that determine medical negligence or malpractice:

1. Duty of care towards the patient.
2. Breach of the standard of care (duty).
3. Injury or harm.

4. Causal relationship (the breach caused the injury).
5. Damages (the injury is significant enough to warrant compensation).<sup>22</sup>

In cases of medical negligence, duty is usually the simplest component of responsibility. However, it is not necessarily the least concerning component. In fact, establishing an unconscious duty is one of the most insidious traps that a doctor can fall into, unaware of the dangers hidden in seemingly casual and innocent conversations and encounters. As noted in the report, “Key Elements of Medical Negligence – Duty”, casual conversations (or “curbside consultations”) with another doctor about a specific patient, calls from an emergency department physician, and so on, as well as situations where a doctor is unsure about what to do with a patient, calls from an emergency department physician seeking only advice about a patient, and even personal and private discussions about someone's health problems, can all expose doctors to potential legal consequences if adverse events occur that can be linked to their decisions or omissions based on trust in their professional knowledge and experience.

A doctor is never completely “off duty”. A medical practice license is a privilege that carries constant responsibility, which cannot be left behind at the hospital or office. This report serves as a reminder of the need to always exercise caution when expressing professional opinions or advice, even inadvertently and outside the professional environment.<sup>23</sup>

Laws vary in different states of the United States, but five main factors constitute the “risk of harm to the patient”. These factors include the following:

1. All foreseeable types of harm.
2. The frequency or probability of harm.
3. The severity of harm.
4. The public interest in preventing future harm.
5. Any moral blameworthiness attributed to the doctor.<sup>24</sup>

One of the authors who studied this issue noted that “it is best to avoid damages from negligent practice by reducing adverse outcomes and developing unambiguous practical recommendations, rather than attempting to make unusual care more justifiable through the use of vague recommendations.”<sup>25</sup>

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22 B Sonny Bal, ‘An Introduction to Medical Malpractice in the United States’ (2009) 467(2) *Clin Orthop Relat Res* 339, doi:10.1007/s11999-008-0636-2.

23 Dr. James R. Bean is a neurosurgeon in Lexington, Kentucky. He received his medical degree from Tulane University School of Medicine and has been in practice for more than 20 years.

24 Gregg W Luther, ‘The Key Elements of Medical Negligence-Duty’ (2021) 88(6) *Neurosurgery* 1051, doi:10.1093/neuros/nyab077.

25 Steven L Clark and others, ‘Improvement Outcomes, Fewer Caesarean Deliveries, and Reduced Litigation: Results of a New Paradigm in Patient Safety’ (2008) 199(2) *Am J Obstet Gynecol* 105.e1-7, doi:10.1016/j.ajog.2008.02.031.

In defining negligence as a form of fault in the United States, physicians are advised to exercise caution when providing medical care to patients to minimise risks and ensure the safety and effectiveness of treatment. Here are several key aspects of caution that physicians should consider:

1. **Caution in adhering to standards of medical care:** Physicians must act in accordance with accepted medical practice and professional standards of care. This includes knowledge and application of current clinical protocols, procedures, and recommendations.
2. **Caution in diagnosis:** Physicians must exercise caution in the diagnostic process to avoid errors or omissions. This may involve a thorough examination of the patient's medical history, conducting necessary investigations, and interpreting results with caution and accuracy.
3. **Caution in choosing treatment tactics:** Physicians must exercise caution in prescribing and conducting treatment to avoid errors in medication dosage, selection of procedures, and other medical interventions. This also includes considering potential side effects and drug interactions.
4. **Caution in timeliness and coordination:** Physicians must ensure timeliness and coordination of medical care to avoid delays, omissions, and improper handling of patients. This may involve proper prescription and monitoring of treatment, ensuring the availability of necessary resources, and timely communication with other members of the medical team.
5. **Caution in communication:** Physicians must exercise caution and clarity in communicating with the patient, explaining diagnoses, treatment decisions, and potential risks or side effects. This helps the patient make informed decisions and collaborate in their treatment.

General caution and adherence to professional standards help physicians ensure the safety and quality of medical care for their patients.

Failure to comply with these factors can lead to the development of professional ignorance, which may result in criminal consequences, such as a physician committing medical malpractice.

Professional incompetence of a medical worker can be caused by various factors, including:

1. **Lack of up-to-date knowledge and skills:** Medical practices are constantly evolving, and healthcare professionals need to update their knowledge and skills to stay informed about the latest medical advancements, technologies, and procedures. If a medical worker fails to keep up with updates in their field and does not enhance their professional knowledge and skills, it can lead to professional incompetence.
2. **Errors in education and training:** Insufficient or poor-quality education, lack of systematic training, or absence of appropriate certifications and accreditations can also contribute to professional incompetence in a medical worker. Improper or

incomplete training can limit a medical worker's knowledge and skills, impacting their professional practice.

3. Lack of experience and practical exposure: Experience plays a crucial role in the development of a medical professional. Insufficient experience or lack of practical exposure can restrict a medical worker's ability to make correct decisions and perform complex medical procedures. Lack of experience can also be associated with low confidence levels in a medical worker's professional knowledge and skills, leading to the manifestation of professional incompetence.
4. High workload and stress: Medical practice often involves high workloads, emotional stress, and time constraints. Under stressful and overwhelming conditions, a medical worker may struggle with decision-making, coping with challenging situations, and displaying optimal professionalism.
5. Cultural and organisational factors: Cultural and organisational factors can also influence the manifestation of professional incompetence in a medical worker. Poorly organised work processes, lack of resources, a challenging work environment, ineffective communication, and interaction within the team can all diminish professionalism, leading to displays of professional incompetence.
6. Personal factors: Sometimes, a medical worker's professional incompetence can be associated with personal characteristics such as lack of motivation, inadequate self-assessment, incorrect beliefs, or a lack of professional responsibility.

Professional incompetence in medical workers can stem from multiple causes, necessitating a comprehensive approach to address this issue. Ensuring high-quality education and training, gaining experience and practical exposure, managing stress and workload, organising work processes effectively, supporting communication and teamwork, as well as promoting personal and professional development and motivation are all critical elements in enhancing competence.

The medical profession is one of the world's oldest and most humanitarian professions. There is no greater service than serving the suffering, wounded, and sick. An integral concept of any profession is a code of conduct containing fundamental ethical norms emphasising moral values, regulating professional activities, and maintaining dignity. Medical ethics highlights the values that underlie the relationship between a practising physician and the patient.

Recently, there has been a tendency among professionals to forget that self-regulation, which is at the core of their profession, is a privilege, not a right. This privilege is granted in exchange for an implicit contract with society to provide goods and services competently and to be accountable to the community. It is always important to remember that being a

doctor is a noble profession, and the goal should be to serve humanity. Otherwise, the profession will lose its true value.<sup>26</sup>

The criminal incompetence of a doctor refers to a situation where a physician or another medical worker engages in criminal actions or omissions, displaying a lack of knowledge, experience, or competence, resulting in harm to patients or other individuals. The criminal incompetence of a doctor can take various forms and manifest in different situations, such as diagnostic errors, errors in choosing treatment methods, incorrect prescription of medications, improper performance of medical procedures, violation of medical ethics, and more.

Criminal incompetence of a doctor can have serious consequences for patient health and safety, leading to injuries, worsening conditions, disability, or even death. Legal implications are also significant, as doctors can be held legally accountable for causing harm to patients or violating healthcare legislation.

The causes of a doctor's criminal incompetence are diverse, including inadequate education and training, incorrect interpretation of clinical data, lack of experience, subjective preferences or biases, misperception of risks and benefits, pressure from the environment, violation of medical ethics, fatigue or stress, among others.

To prevent criminal incompetence of doctors, it is important to ensure a high level of medical education and training, adherence to medical standards and protocols, continuous professional development, compliance with medical ethics and professional conduct, as well as the implementation of quality control in medical practice and feedback from colleagues, patients, and other stakeholders. In case of identifying criminal incompetence of a doctor, appropriate measures, including legal accountability, should be taken to protect patients' rights and ensure the safety of medical practice. It is also important to educate healthcare workers on the fundamentals of medical law, ethics, and professional conduct to prevent instances of criminal incompetence by doctors.

Other measures to prevent criminal incompetence of doctors may include:

1. Improving the system of education and training for healthcare professionals, including modern teaching methods, practical training, and internships.
2. Establishing and supporting continuous professional development, including on-the-job training, scientific conferences, seminars, and other events.
3. Developing and implementing medical standards and protocols based on current scientific evidence and recommendations and strictly adhering to them.

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26 MS Pandit and Shobha Pandit, 'Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and Enlightened Defense - A Legal Perspective' (2009) 25(3) *Indian J Urol* 372, doi:10.4103/0970-1591.56206.

4. Increasing awareness among healthcare workers about patients' rights and responsibilities, as well as medical law and ethics, through training and informational materials.
5. Establishing feedback mechanisms from patients, colleagues, and other stakeholders to identify potential cases of criminal incompetence by doctors and take measures to address them.
6. Implementing clear procedures and mechanisms for quality control in medical practice, including audits, reviews, and monitoring.
7. Promoting a healthy organisational culture based on professional ethics, fairness, transparency, and accountability to patients and society.

It is important to note that preventing criminal incompetence of doctors is a complex process that requires collaboration among various stakeholders, including healthcare professionals, healthcare organisations, law enforcement agencies, patients, and the public.

## 5 CONCLUSIONS

The comparison of approaches to understanding legal responsibility in the United States and Kazakhstan has many similarities but also several differences. The conceptual differences stem from the legal systems, which explain the approach to defining and understanding medical criminal offences. The United States, as a representative of common law, has its own distinctiveness in that each state has its own legislation, which can differ from others. The functioning of such a complex legal system ensures a meticulous approach to examining and investigating criminal cases related to medical crimes.

Kazakhstan belongs to the civil law system, influenced by the Soviet period. The country has the opportunity to learn from the proven experience of the United States in investigating criminal cases, particularly in pretrial investigations and court proceedings. However, adopting the US judicial procedure may not be feasible.

The Criminal Code of Kazakhstan defines an exhaustive list of medical criminal offences, which are outlined in Chapter 12 and consist of seven components of criminal offences. All other acts that do not meet the criteria for criminal offences in Chapter 12 are not considered as such. Modernising the investigation structure and evidence collection for medical criminal offences requires a systematic approach.

In Kazakhstan, it is necessary to review the procedure for involving experts, establish selection criteria for such specialists, and possibly utilise a "blind" expert examination system similar to the one used in the United States. This would enhance the objectivity of the examination and, as a result, could be used to develop clear recommendations for physicians in their medical practices. Such a solution could reduce the number of citizen complaints by improving patient safety and increasing the legal protection of healthcare professionals.



There is also a need to revise the understanding of criminal responsibility for healthcare workers. Kazakhstan's legislation should develop the concept of harm caused by healthcare workers as a result of providing medical assistance and clearly distinguish elements of negligence, following the example of the United States. Understanding negligence will guide scientists and practitioners toward defining this form of guilt.

Current forms of negligence, such as overconfidence and carelessness, do not provide a precise understanding of this form of guilt and cannot be correctly applied in practice during qualification and proof of guilt. These definitions act as a prism, dispersing negligence into the types of care applied in the United States. Through these changes, it will be easier to combat the ignorance of healthcare workers and enhance their legal literacy and awareness.

In conclusion, we maintain that being a doctor is an important profession that ensures people's quality of life. Caring for doctors as a socially and culturally significant group is a way of taking care of ourselves. Patients must understand that a doctor cannot instantly correct the mistakes of a lifetime that the patient knowingly made, such as an unhealthy lifestyle, harmful habits, or improper nutrition. Taking care of one's personal health is an individual responsibility, and blaming doctors for everything is not fair. A doctor is the person one turns to when facing health problems. However, it is important to remember that a doctor should meet the requirements of their profession. Honest, noble, and highly intellectual individuals should be part of this profession.

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## АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

### ЮРИДИЧНА ВІДПОВІДАЛЬНІСТЬ ЛІКАРЯ ЗА НАДАННЯ НЕНАЛЕЖНОЇ МЕДИЧНОЇ ДОПОМОГИ ПАЦІЄНТУ: АНАЛІЗ ПІДХОДІВ НА ПРИКЛАДІ КАЗАХСТАНУ ТА США

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#### АНОТАЦІЯ

**Вступ.** Це дослідження спрямоване на визначення відповідальності медичних працівників за заподіяння шкоди пацієнтам на підставі кримінального законодавства Республіки Казахстан. Кримінальна відповідальність за медичні злочини передбачена главою 12 Кримінального кодексу. Визначивши обов'язкові ознаки або елементи складу медичного кримінального правопорушення згідно з кримінальним законодавством Казахстану, було проведено паралелі з видами вини, передбаченими в розвинених країнах світу. Автори проаналізували наукові праці з вивчення ефективності розгляду справ про заподіяння шкоди пацієнтам та рішень щодо задоволення або відхилення позовів пацієнтів у Казахстані. Приділено увагу емпіричним даним, зібраним на території Республіки Казахстан. Використано результати соціологічного дослідження, проведеного авторами протягом 3 місяців серед медичних працівників різних регіонів країни. Особливу увагу було приділено міжнародному досвіду впровадження заходів щодо підвищення безпеки пацієнтів, зменшення скарг громадян на якість медичних послуг та посилення правового захисту медичного персоналу. У дослідженні відібрано положення з наукових праць, які зменшують ризик заподіяння шкоди пацієнтам і тим самим сприяють зниженню рівня медичної злочинності.

**Методи.** У цьому дослідженні для досягнення поставленої мети та вирішення зазначених завдань було використано низку методів наукового дослідження, зокрема правовий аналіз, порівняльно-правовий аналіз, опитування, анкетування, інтерв'ювання. Правовий аналіз кримінального законодавства Республіки Казахстан, зокрема глави 12 Кримінального кодексу, був проведений з метою виявлення особливостей кримінальної відповідальності

за медичні злочини, на прикладі статті 317. Цей аналіз висвітлює нюанси кримінальної відповідальності за медичні злочини в Казахстані.

Порівняльно-правовий аналіз дав змогу порівняти відповідальність лікарів у США та Казахстані. Також увага звертається на подібність поняття вини у формі недбалості, з особливим акцентом на американському підході, який пропонує цінні ідеї для Казахстану. Ці аспекти можуть бути адаптовані для вдосконалення казахстанської правової системи.

Досліджено конкретні справи, які розглядаються судами Республіки Казахстан, про заподіяння шкоди пацієнтам, а також проаналізовано судові рішення щодо задоволення позовних вимог пацієнтів та їх відхилення, що дозволило авторам визначити основні аргументи та тенденції судової практики.

Були проведені опитування та анкетування медичних працівників із різних регіонів Казахстану для збору емпіричних даних про їхнє сприйняття обов'язків і відповідальності. Крім того, також були проведені докладні інтерв'ю з експертами в галузі медицини та права, а також пацієнтами та представниками органів охорони здоров'я, які надали якісні дані про проблеми та виклики, з якими стикаються медичні працівники.

Опрацьовано та проаналізовано статистичні дані, зібрані під час соціологічного дослідження. Сюди увійшли відомості про скарги громадян на якість медичного обслуговування, випадки заподіяння шкоди пацієнтам та інші відповідні статистичні показники. Дослідження проблеми на різних рівнях виявило рівень безпеки пацієнтів та правової захищеності медичного персоналу.

**Результати та висновки.** Створення умов для медицини та забезпечення ефективного соціального та професійного медичного страхування є одними з факторів, які створюють можливості для медичної практики в цілому та для системи охорони здоров'я. Ці факти також сприяють належній правовій оцінці діяльності лікаря.

**Ключові слова:** юридична відповідальність, медичні правопорушення, неналежне надання медичної допомоги, Казахстан, США.