

The criminal liability of the medical examiner for the crimes committed in relation to his professional duties

Viorel Vasile¹, Marin-Claudiu Țupulan²

Abstract: The importance of the medical examiner in the criminal trial is undeniable, as his activity is essential to the act of justice when certain biological and medical data are needed for the clarification of a case. The actions or inactions of the medical examiner while exercising his profession can draw legal liability, which is the reason why the authors of this study will analyze the most serious type of legal liability – the criminal liability and the elements of jurisprudence exemplified wish to contribute to the popularization of the most common offenses in the field, in order to reduce them.

Key Words: abuse, neglect, corruption, bribery, forgery of official documents, false recording in official documents.

Criminal liability is the legal criminal coercion relation, which, as a result of the crime committed, arises between the state, on the one hand, and the offender on the other hand, a complex relation which comprises the right of the state, as a representative of the society, to hold the author liable, to apply the penalty provided for the offense and to enforce it as well as the offender's responsibility, related to his deed, to comply with the applicable sanctions, in order for the legal order and the rule of law to be restored [1].

Medical examining work, an integral part of healthcare involves performing surveys, examination findings, laboratory tests and other medical examining on living persons, dead bodies, biological products and material evidence in order to establish the truth in cases involving offenses against the life, physical integrity and health of persons or as otherwise provided by law, and conducting medical psychiatric examinations, establishing parenthood and the purpose of the medical examining science is to provide scientific evidence for the prosecution, the courts, as well as for people who have an interest in solving criminal cases, civil cases or otherwise, contributing to the establishment of the truth

through specific means provided by law, as the medical examining institutions contribute to scientific research in the field and improve healthcare assistance by elaborating medical scientific opinions [2].

Medical examining activities, as a branch of medicine, combine medical and biological knowledge with legal ones, being favorably influenced by the scientific and technical progress as well as the development of the legal rules related to the field. These activities are performed by medical examiners, employed in medical examining institutions [3].

The findings and conclusions of the medical examiner experts are reflected in the following medical and legal documents: medical examinations reports, certificates, analyses and notices - and can be issued by one or more medical examiners or by a committee which comprises, in addition to medical examiners, specialized medical doctors from the fields related to the case under analysis, and the documents prepared by medical examiners constitute evidence in criminal proceedings due to their scientific character and play an important role in shaping the legal responsibility and instituting legal measures [4].

1) *Police Questor, Deputy General Inspector of Romanian Police*

2) *Lecturer, "Alexandru Ioan Cuza" Police Academy*

The specificity and importance of the work of medical examiners can be the premises of breaching criminal law with the consequence of attracting criminal liability on their side and may raise the interest of third parties to intervene and influence the work of medical examiners, in violation of the provisions of Art. 3 para. 2 of Government Ordinance No.1/2000, which state that any interference with the medical examining is prohibited, otherwise administrative, civil or criminal liability can be drawn for those responsible.

Regarding the possibility of drawing criminal liability and the offenses that can be committed by medical examiners in exercise of the powers specific to the profession, it should be noted that the medical examiner is part of the professional body of physicians.

During the totalitarian regime physicians were considered civil servants, but then the profession changed, so that now art. 375 para. 2 of Law no. 95/2006 on healthcare reform establishes that the physician is not a public servant, the medical examiner operates under individual employment contract with medical examining institutions subordinated to the Ministry of Health from an administrative point of view, so that the doctor is a normal "employee" according to art. 147. 2 of the Criminal Code [5, 6].

As a normal employee, the medical examiner may be active subject of the offense of abuse of office against the interests of persons, for example if he unreasonably refuses to release a death confirming certificate after the autopsy. The discriminatory behavior of the medical examiner based on race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion, political affiliation, belief, wealth, social origin, age, disability, non-contagious chronic disease or HIV / AIDS can be circumscribed to the offence of abuse of office by limiting rights, for example if the medical examiner refuses to examine a person because of their religion. He can also be held liable for abuse of office against public interest, if he drives, for personal use only, a car of the institution, specially designed to transport corpses, a car which he destroys in an accident, so that the transportation of bodies from the scene to the morgue for autopsy, as provided by art. Article 36. 1 of the Procedural rules for conducting examinations, findings and other medical examining work becomes impossible, thus causing significant disturbance to the activity the institution.

Negligent deviation from the medical examining service duties can be classified as negligence in work duties, for example if the medical examiner bases his conclusions on prescriptions, referral notes, sick leave and so on, or if he recklessly destroys one of two blood samples collected for determination of alcohol, so that the retroactive calculation of blood alcohol levels cannot be done, thus harming the legal interests of the vehicle driver investigated [7, 8].

Using offensive expressions, threatening, hitting or other violence, causing bodily harm or grievous bodily harm by a medical examiner on offense a person may be classified as abusive behavior and as the medical examiner is not a public servant, the special maximum of the penalties for these offenses will be reduced by one third, and the criminal proceedings for the offenses specified in Art. 246, Art. 247 and Art. 250 para. 4 of the Criminal Code, shall be initiated upon prior complaint from the injured party.

Corruption offenses distinguish themselves among the offenses that can be committed by medical examiners, which have a special role among other work or work-related offences because there are people interested in corrupting the medical examiner because of the particular importance of the activities performed and the role that the documents issued by them play in criminal, civil, disciplinary proceedings and the interest of such persons could be related to establishing a smaller level of alcohol in the blood in order to escape criminal liability and be held liable only for a misdemeanor, or to establish a lower number of days of care which would lead to a milder criminal treatment or to certify that they have a serious illness in order to obtain the delay or interruption of the sentence.

Thus, the act of the civil servant of asking or receiving money or other benefits to which he is not entitled to, or accepting the promise of such advantages or failing to reject such a promise, in order to perform, not to perform or to delay an act concerning his service duties or in order to perform an act contrary to these duties, represents the offense of receiving bribe, and if upon the completion of his service duties, the employee receives money or other benefits this act represents the offense of receiving undue benefits. If an official receives, claims money or other benefits, if he accepts promises, gifts for himself or for another, while having an influence or leading to the belief that he can induce an employee to do or not to do an act falling within his service prerogatives, represents the offense of influence peddling [9].

Since corruption offenses committed by medical examiners can be committed in connection with documents (surveys, observations, opinions) that are taken into consideration by the judiciary in making decisions and that they can influence, this requires applying the provisions of Art. 6 in conjunction with Art. 1 para. 1 letter b) of Law No.78/2000 on preventing, discovering and punishing corruption. Thus, offenses of receipt of bribery, receipt of undue benefits and influence peddling shall be punished according to those legal provisions [10].

Recent judicial practice shows cases of convicted medical examiners for corruption offenses: the Criminal Decision no. 766/28.02.2011 issued by the High Court of Appeals and Justice, stated that the defendant, RCH County Chief Medical Examiner at the County Medical

Examining Service of Bistrita – Nasaud, Bistrita Nasaud county, was sentenced to three years of imprisonment with conditional probation, being established that he requested an amount of EUR 500 from MS when conducting a medical examination on Ş.I. the victim of a car accident cause by the briber, with whom S.I. reconciled, in order to rule on establishing the necessary supplementary days of medical care to the ones in the medical certificate released on July 4, 2006. R.C.H conditioned the release of a medical act in favor of denouncer, not adding days of medical care over the number of 60 and was caught in the act on February 14, 2007, while receiving EUR 500, claimed as bribery, an act which comprises the constituting elements of bribery under Art. 254 para. (1) of the Criminal Code., referring to art. 6 of Law no. 78/2000. On the 6th of November 2012, the defendant BD, medical examiner, was sentenced by the Mures Court of Appeals regarding the offense of repeatedly receiving bribery provided by Art. 254 para. 1 of the Criminal Code, with the application of Art. 41 para. 2 of the Criminal Code, being established that he received various sums of money from relatives of deceased and autopsied persons in order to release death certificates, although it was his task according to the job description. In this case, because the death certificate was necessary for natural persons, Law No.78/2000 did not apply [11].

Closely related to corruption offenses, medical examiners may commit other offenses under the criminal law, such as disclosure of professional secrecy when, without right, he gives a third person (or several persons) information which he has come to know as a result of his professional activities, such is, for example, the disclosure that a public person, present by their own will at the medical examining institution was the victim of a sexual offense, without their prior consent to publicize this fact.

Documents issued by the medical examiner are public documents and therefore the interfering with such an act, by counterfeiting the writing (copying, faking etc) subscription (imitating the signature or stamp) or altering (changing the content) constitutes the offense of forgery of official documents, and if the medical examiner, intentionally, while exercising his powers of service, certifies circumstances he knows are false or knowingly omits to insert some facts or circumstances, commits false recording in official documents, which we exemplify by the deed of the medical examiner who does not consider the certificates, medical papers and clinical observation sheets issued by the health care facilities of the Ministry of Health or the ones accredited by it, issuing an examination report providing fewer days of care needed for healing than would be the case, or records the existence of lesions that do not exist so as to establish a higher number of days of care needed for healing.

Because medical examiners do not prescribe treatments, do not perform surgeries on patients, etc. the

probability that the physical integrity or health of persons is damaged as a result of their investigations is extremely low, but cannot be excluded, for example, in the case of repeated or prolonged exposure to ionizing radiation, which can cause physical injury or health damage to the person exposed [12].

The offenses listed can be committed both through separate acts and through the same act which comprises several crimes because of its circumstances and consequences, or by repeating the same material acts so as to achieve the same criminal purpose, in which case there is only one repeated offense and in terms of criminal participation we can distinguish the main contribution of author and co-authors, or the secondary one, specific to instigators and accomplices.

Criminal liability results in criminal sanctions, the main criminal penalties that can be applied under Article 53 paragraph 1 of the Criminal Code being the prison and a criminal fine. Life imprisonment is not applicable to such offenses, and together with the main penalties, complementary penalties may be applied, the deprivation of the right to occupy a position or pursue a profession or to conduct business of the kind that was used for the offense being remarkably incident, governed by Art. 64 paragraph 1 letter c) of the Criminal Code [13].

In addition to criminal penalties, other criminal sanctions may be imposed as safety measures designed to eliminate a state of danger, provided by Art. 115 of the Criminal Code, which governs the prohibition of exercising a position or a profession, which may be taken against one who has committed an offense under the criminal law because of the inability, lack of professional preparation or other causes that make him unsuitable for employment or to perform a particular profession or other occupation.

Other criminal sanctions are administrative, which can be applied by the prosecutor or by the court if they find that the deed does not show the seriousness of a criminal offense, in which case, criminal liability is replaced by administrative responsibility, applying one of the penalties provided by Art. 91 which are: reprimand, reprimand with a warning, a fine of 10 lei to 1000 lei [14]. Criminal liability is removed when the offence is amnestied, the period of time available for drawing criminal liability has expired and if the prior complaint is missing or the parties have reconciled, but only when the law provides the two latter possibilities.

Work done by the medical examiner is complex, requiring further studies and constant research and is permanently exposed to the rigors that can always create situations attracting criminal liability, but the moral and professional quality of medical examiners from Romania is reflected in the extremely low of number of cases that have been sentenced for committing criminal offences, with an accidental character, as evidence of the responsible conduct in the exercise of the service duties.

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