

## ORIGINAL ARTICLE

## HEALTH DISORDER ASSOCIATED WITH PERMANENT DISABILITY AS THE SIGN OF BODILY HARM

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Igor I. Mytrofanov<sup>1</sup>, Igor V. Lysenko<sup>1</sup>, Mykola M. Riabushko<sup>2</sup>, Volodymyr H. Hryn<sup>2</sup>, Roman M. Riabushko<sup>2</sup>, Valentyna P. Bilash<sup>2</sup>

<sup>1</sup>KREMENCHUK MYKHAILO OSTROHRADSKYI NATIONAL UNIVERSITY, KREMENCHUK, UKRAINE

<sup>2</sup>POLTAVA STATE MEDICAL UNIVERSITY, POLTAVA, UKRAINE

### ABSTRACT

**The aim:** The paper is aimed at creation of the procedure and criteria for determining a health disorder associated with permanent disability as a sign of serious bodily harm.

**Materials and methods:** To identify the problems faced by forensic medical and judicial practice in determining a health disorder associated with permanent disability, we studied more than 100 criminal proceedings from 2007 to the present time.

**Results:** Ways to further improvement of the procedure for conducting expert studies on health disorders, associated with persistent loss of general ability to work as a characteristic feature of the bodily harm have been found to avoid errors in forensic medical and judicial practice. The issues of conducting forensic medical examinations to determine the degree of loss of general ability to work remain unresolved. The lack of joint research projects conducted by both medical and legal scientists leads to the polysemy and different approaches in the stating of certain concepts that are the subject of study of both medical and law sciences. Currently, the definition of the offence against health is debatable and the issues of criteria for determining such damage are not completely settled to date.

**Conclusions:** We consider the development of the Procedure and Criteria for determining the degree (in percentage) of the permanent loss of general ability to work of victims of criminal offences, established by forensic medical experts, is crucial.

**KEY WORDS:** serious bodily harm, permanent disability, forensic medical and judicial practice

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### INTRODUCTION

According to the Constitution of Ukraine, human life and health is declared as the highest value nationwide. That is why the criminal legislative normative standards of the Criminal Code (hereinafter referred to as the CC) of Ukraine, adapting the constitutional provisions, established penalties for the offence against the highest value, and in the Article 1 of the CC of Ukraine puts the human rights and freedoms forward in the hierarchy of objects of the criminal law.

The analysis of facts of offences causing severe and moderate bodily harm, reported by domestic and foreign researchers, as well as the practice of conduct of the forensic medical examination have shown that, mostly, health disorder associated with permanent disability is the consequence of criminal offence against victims' health. Forensic medical examination faces legal uncertainty in establishing such consequences. The paragraph 2.1.6 of the Rules of Forensic Medical Examination on defining the degree of bodily harm severity, approved by the Order of the Ministry of Health of Ukraine No. 6 as of January 17, 1995 (hereinafter referred to as the Rules), states that health disorder is a consistently developed illness that associated directly with bodily harm. Following by this, the Rules specify that the amount of permanent (stable)

loss of the general ability to work related to bodily harm is established after the consequence of the harm, which has been defined, on the basis of objective data, taking into account the documents that guide the work of the Medical and Social Expert Commission (hereinafter referred to as the MSEC) [1]. Currently, the Order of the Ministry of Health of Ukraine (hereinafter referred to as the MOH of Ukraine) as of 05.06.2012 № 420 "On the approval of the Procedure and Criteria for Medical and Social Expert Commissions to determine the degree of permanent disability in percentage for employees with health disorder related to the performance of occupational duties is active [2].

However, the CC of Ukraine states a health disorder associated with permanent disability of not less than one third as the sign of serious bodily harm; long-term health disorder or significant permanent disability of less than one third as the sign of moderate bodily harm; short-term health disorder or minor disability as the sign of minor bodily harm. In other words, the CC of Ukraine does not indicate either general or professional ability to work. The existence of legal uncertainty is stated, which calls into question the conclusions of the forensic medical examination.

The issues of legal regulation of sentencing for causing bodily harm, improvement of law enforcement practice in

this domain have been considered only fragmentarily in the works on criminal law counteraction to bodily harm. However, no investigations related to solving the problems of sentencing for bodily harm that caused health disorder associated with permanent disability, made by the joint efforts of criminologists and medical scientists have ever been conducted, resulting in existing of terminological confusion in the current legislation not only on criminal liability, but also on public health. However, the study of this problem leads to the conclusion that the issues of determining the bodily harm that caused health disorder associated with permanent disability are characterized by complexity, i.e. are both medical and legal issues.

## THE AIM

The creation of the procedure and criteria for determining a health disorder associated with permanent disability as the sign of serious bodily harm, the punishment for which is provided by the Article 121 of the CC of Ukraine, and moderate bodily harm (Art. 122 of the CC of Ukraine), as well as the ability for their legislative modeling and establishing in the medical law.

## MATERIALS AND METHODS

To identify the problems faced by forensic medical and judicial practice in determining a health disorder associated with permanent disability as the characteristic feature of a serious bodily harm, the punishment for which is provided by the Article 121 of the CC of Ukraine and moderate bodily harm (Art. 122 of the CC of Ukraine), we studied more than 100 criminal proceedings from 2007 to the present time (01.02.2020 inclusive), in which forensic medical examination was conducted to identify cases of assessment of the presence of the above sign in victims. The conventional methods of research have been used, namely, the analysis and synthesis, statistical method as well as our own observations of the process of court trial of the above criminal proceedings. Moreover, to analyze the perception of victims of crime and their physical condition, individual interviews and survey have been made. Respondents of the investigation were directly victims and their family members in total of 39 people and 18 forensic experts. The survey was also conducted among judges, investigators and prosecutors (hereinafter referred to as the lawyers) in total of 129 people to explicate their opinion on the need for amendments to legislative acts on the statement of signs of serious bodily harm.

## RESULTS

Section 1 of the Article 121 of the CC of Ukraine established a penalty for intentional serious bodily harm, i.e., intentional bodily harm ... which caused a health disorder, associated with permanent disability not less than one third, ... liable for imprisonment for a term of five to eight years. Section 1 of the Article 122 of the CC of Ukraine

established a penalty for intentional moderate bodily harm, i.e., intentional bodily harm, which is not life-threatening and not entailing the consequences provided for in the Article 121 of the CC of Ukraine, but that caused long-term health disorder or significant permanent disability of less than one third, liable for correctional labor up to two years or custodial restraint up to three years, or imprisonment up to three years. Section 2 of the Article 125 of the Criminal Code of Ukraine provides for a penalty for intentional minor bodily harm that caused a short-term health disorder or minor disability, liable for a fine of fifty to one hundred non-taxable minimum incomes of citizens or community service order for a term of one hundred and fifty to two hundred and forty hours or correctional labor up to one year, or sentence of confinement up to six months, or custodial restraint up to two years.

Thus, for all types of bodily harm, criminal law requires the establishment of disability. At the same time, the emphasis is put on determination of percentage of general disability and in such cases should be guided by the MSEC documentation. The MSEC determines the degree in percentage of permanent loss of professional ability to work of employees with health disorder related to the performance of occupational duties. Then what should forensic experts do in such uncertainty? In this case, M.M. Tagaev proposes to use the Table, developed by the Central Department of State Insurance of the Ministry of Finance of the USSR as of 12.05.74 № 110 "On the organization and conduct of medical insurance examination" [3].

The above approach cannot be considered rational for the following reasons: 1) neither the body that adopted this normative act, nor the country in which the document was adopted exist anymore; 2) updated table was developed by the Central Department of State Insurance of the Ministry of Finance of the USSR on January 8, 1986 № 2 "On the organization and conduct of medical insurance examination" [4]. With the adoption of this Instruction (as of January 8, 1986), the Instruction as of May 12, 1974 was of no legal force. Forensic practice is based on these considerations. Thus, in the proceeding № 1-кп / 391/32/19, Kompaniivskiy district court of Kirovohrad region referred to the conclusion of the forensic expert № 672 as of November 22, 2018, which established that PERSON\_1 was exposed to bodily harm in the form of the penetrating wound of the sclera with loss of membranes and the contents of the left eye, hyphema, hemophthalmia of the left eye, which led to the extraction of the eye. Taking into account the data of the medical records of the inpatient named PERSON\_1, the nature of the injuries described in it does not exclude the possibility of injury made on 24.10.2018. Given the visual acuity of the left eye before injury according to the outpatient medical record = 1.0, and the extraction of the left eye as a result of injury, bodily harm is assigned to the category of the serious bodily harm that caused permanent disability by more than 1/3. According to the "Table of percentages of loss of general ability to work as a result of various injuries" of the "Instruction on the procedure for the organization

and conduct of medical insurance examination” as of 08.01.1986 № 2, Article 24, the percentage of disability can be accounted for 35% (thirty-five) [5].

According to the Table 11 of the Criteria for establishing by medical and social expert commissions the degree in percentage of permanent loss of professional ability to work of employees with health disorder related to the performance of occupational duties, with 1.0 visual acuity before injury, the loss of professional ability to work is accounted for 50%.

A profession is a kind of occupation, job activity that requires certain knowledge and skills and is a source of subsistence for someone [6, 7]. In the literature the concepts of a “profession”, “job” and “occupation” are distinguished. International Standard Classification of Occupations - 08 (ISCO-08) contain the definitions of a “job” and “occupation”. Thus, a “job is a set of tasks and duties performed or meant to be performed, by one person, including for an employer, or in self employment”; an “occupation is a set of jobs whose main tasks and duties are characterized by a high degree of similarity” (Article 42) [8].

Psychologists define a profession as a type of job, occupation that requires special (professional) training and appropriate qualities. The encyclopedia of vocational education defines a profession as a type of job activity of a person who has a set of special knowledge and practical skills acquired as a result of purposeful training [9].

That is why the general ability to work cannot be equated with the professional ability to work. Therefore, currently, forensic medical experts cannot take into account the documents that guide the work of the MSEC when determining the amount of injury-related permanent (stable) loss of general ability to work. In the criminal proceedings, investigated by us, no references on the normative legal act have been found, on the basis of which the corresponding conclusions are made. Thus, for example, the sentence of the Gadiach District Court of Poltava region as of June 2, 2016 in the proceedings № 1-кп / 526/90/2016 stated that according to the conclusion made by the expert № 43 as of 31.03.2016, the PERSON\_2 was exposed to bodily harm in the form of: blunt trauma of the right eye, contusion of the right eyeball with a penetrating injury, displacement of the crystalline lens mass in the anterior chamber of the eye, which led to traumatic cataract and decreased visual acuity from 1.0 to light perception only. The above bodily harm were caused by a blow to the right eye with a blunt object with a limited contact surface, which could be a hand clenched into a fist, the statute of limitations does not contradict the term of 31.12.2015. The percentage of the permanent (stable) loss of the general ability to work of the PERSON\_2 is accounted for 35% and in accordance with par. 2.1.1, 2.1.6 of the Rules of forensic medical determination of the severity of bodily harm is regarded as the serious bodily harm by the sign of health disorder associated with permanent loss of general ability to work of not less than one third [10]. However, par. 2.1.1, 2.1.6 of the Rules do not define the criteria for determining the percentage of permanent (stable) loss of the general

ability to work.

The conclusion of the forensic expert is the evidence in the criminal proceedings, so the courts refer to the relevant conclusions, not thinking that they do not comply with current legislation of Ukraine. During the years of independence, the Ministry of Health of Ukraine has issued no appropriate order approving the necessary criteria for determining the percentage of permanent (stable) loss of general ability to work, and a lawyer would not ignore the inconsistency of the provisions of the Criminal Code of Ukraine and the precepts of law of the Order of the Ministry of Health of Ukraine № 6 as of 17.01.95 “On the development and improvement of the forensic medical service of Ukraine”. We have repeatedly drawn attention to the imperfection of the provisions of the Criminal Code of Ukraine, which establishes punishment for bodily harm [11-16]. Discounting the conclusions of forensic medical examinations leads to the cancellation of court decisions.

Thus, the Supreme Court by the Panel of Judges of the First Judicial Chamber by decision as of November 29, 2018 revoked the decision of the Court of Appeal of Cherkasy region as of November 24, 2017 regarding the PERSON\_1 on the grounds that the court, qualifying the actions of the PERSON\_1 under the section 1 of the Art. 286 of the Criminal Code of Ukraine, unreasonably did not take into account the fact that soft tissue wounds of the face on the left, established in PERSON\_2, were healed with a scar, which itself can not disappear, over time will not become less noticeable and requires surgery, and did not take into account such medical criteria, as damage to the facial nerve, which led to asymmetry of the face in lowering the left corner of the mouth and facial expressions of the victim, which complicated articulation, affected the clarity of speech and normal human processes involving facial muscles, such as eating that negatively affects not only the physical but also the psychological state of the victim PERSON\_2. The above indicates the incorrect application of the Law of Ukraine on Criminal Liability (paragraph 1 of the section 1 of the Article 413 of the Criminal Procedure Code of Ukraine) [17].

## DISCUSSION

The issue of conducting commission examinations in the case of determining the degree (in percentage) of disability is problematic. Paragraph 3 of the Rules of conduct of forensic medical examinations [6] stipulates the need for mandatory forensic medical examinations only in case of loss of professional ability to work. However, par. 2.4 and sub paragraph 2.4.3 of the Instruction on conduct of forensic examination [18] provides for the mandatory participation of several experts and the need for examination in the department of commission examinations not only in cases of determining the degree of loss of professional ability to work, but also in case of determining the degree of loss of general ability to work. Other health disorders associated with permanent disability of not less than one third are not mentioned at all in the Rules of conduct of

commission Forensic Medical Examinations [6] and the Instruction on conduct of Forensic Examinations [18]. So what does the Criminal Code of Ukraine state?

In addition, the statement of the Section 1 of the Art. 121 of the Criminal Code of Ukraine as: “the intentional serious bodily harm, that is, intentional bodily harm that is life-threatening at the time of infliction, or causing the loss of any body organ or its functions, genital mutilation, mental illness or other health disorder associated with permanent disability of not less than one third, or termination of pregnancy or irreparable face defacement...” remains problematic. Apparently, intentional serious bodily harm causes damage, which is manifested in one of its signs, and not vice versa. Based on the rules of the formal logic, at the statement of the other health disorder associated with permanent disability of not less than one third, etc. it is possible to evaluate the bodily harm as the serious ones, but it is not the serious bodily harm that causes other health disorder associated with permanent disability of not less than one third, etc.

## CONCLUSIONS

1. Undoubtedly, human life and health are recognized as the highest value nationwide according to the constitutional provisions. However, the state does not pay due attention even to the protection of these values, but to the regulation of all issues related to cases of damage to health and its determination (medical evaluation). Issues of conducting forensic medical examinations to determine the degree of loss of general ability to work remain unresolved.
2. The lack of joint research projects conducted by both medical and legal scientists leads to the polysemy and different approaches in the statement of certain concepts that are the subject of study of both medical science and law. And currently, the definition of damage to health is debatable and the issues of criteria for determining such damage are not completely settled. Therefore, it is extremely necessary to develop a Procedure and Criteria for determining by forensic experts the degree in percentage of permanent loss of general ability to work of victims with health disorder related to criminal offence against their life.
3. Section 1 of the Article 121 of the Criminal Code of Ukraine should be stated as follows: “infliction of intentional serious bodily harm, that is, intentional bodily harm, life-threatening at the time of infliction, or causing loss of any organ or loss of its functions, mental illness or other health disorder associated with permanent disability of not less than one third, or termination of pregnancy or irreparable face defacement is liable for punishment...”.

The study shows a further need to develop clear medical criteria for determining the severity of bodily harm, based on the achievements of current forensic medical science. Moreover, it is the medical science that must define a clear algorithm for determining the severity of health disorder

associated with permanent loss of general ability to work, resulted from criminal offence.

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#### ORCID and contributionship:

Igor I. Mytrofanov: 0000-0002-1967-1985 <sup>A,B,C,F</sup>

Igor V. Lysenko: 0000-0003-1646-6369 <sup>A,B,C,F</sup>

Mykola M. Riabushko: 0000-0002-3617-4542 <sup>C,E,F</sup>

Volodymyr H. Hryn: 0000-0001-5894-4416 <sup>A,C,E,F</sup>

Roman M. Riabushko: 0000-0002-5073-9095 <sup>A,C,D</sup>

Valentyna P. Bilash: 0000-0002-7178-3394 <sup>C,E,F</sup>

#### Conflict of interest:

*The Authors declare no conflict of interest.*

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#### CORRESPONDING AUTHOR

**Mykola M. Riabushko**

Poltava State Medical University

23 Shevchenko st., 36011 Poltava, Ukraine

tel: +380667716547

e-mail: ryabushko12@ukr.net

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