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THE LIMITS OF EXPERT COMPETENCE AND THEIR LEGAL CONSEQUENCES IN FORENSIC EXAMINATIONS AT CIVIL TRIALS IN RUSSIA

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ABSTRACT — The article deals with the issue of determining the limits of expert competence in forensic examinations in case of improper provision of medical care in civil proceedings. The practical example shows the features of legal evaluation of expert opinion by the court in case an expert goes beyond the limits of specific knowledge. Special attention is paid to objective difficulties in differentiation of an expert legal assessment and a law-enforcement act, which arise while performing examinations on materials of medical malpractice.

KEYWORDS — competence of the expert, forensic medical examination, medical negligence, medical malpractice, iatrogenic pathology.

INTRODUCTION

A significant increase in the number of patient claims related to the quality of medical care leads to an increase in the role of forensic medical examination in civil proceedings. [1, 2] Statistical data on mortality as a result of medical errors cause alarm among health-care providers [3–5]. The cases are usually highlighted in the media, which forms a negative public attitude to unfavorable outcomes in medical care [6]. The high activity of law enforcement agencies in the investigation of potential medical malpractice cases has now led to situations when several doctors are charged with one unfavorable outcome at once.

One of the most important issues when performing such examinations is the compliance with the limits of the expert's competence. On the one hand, experts constantly face legal issues related to compliance with the requirements for the provision of health-

care; standards of medical care; clinical guidelines (treatment protocols) and other regulatory legal acts. On the other hand, experts are not to make a legal assessment of guilt, illegality, etc. of legal categories. In addition, the differentiation of the field of competence of expert commission members (forensic experts and clinicians, as well as clinical specialists) in some cases can also present certain difficulties. The subject of a forensic medical examination in civil cases of damage to health while providing medical care is determined by the competence of the experts who perform it [7]. The expert's opinion is considered to be beyond the limits of the competence if an expert invades the field of non-medical sciences, such as law or psychology [8]. However, in fact, the limits of expert competence are not always obvious, as the example below clearly shows.

A patient filed a lawsuit against a hospital where he was treated with a diagnosis of *open comminuted fracture of the inner ankle of the left shin with a dislocation of the foot outwards, a multi-comminuted fracture of the fibula in the lower third, a detached fracture of the anterior-outer edge of the tibia and a rupture of the distal inter-tibial syndesmosis*. Surgical treatment performed was as follows: metallosynthesis. After the patient was discharged purulent fistulas appeared in the area of the ankle joint. A surgery was performed in order to remove the metal structure and a foreign body was found. It was a broken medical drill bit in the tibia. It was impossible to remove the drill bit during the surgery. A commission forensic medical examination was appointed in the case. The conclusion of this said that there was a complication during the operation in the form of damage to the drill. The nature of the injury (three-ankle Pott-Desto fracture), the presence of the drill bit in the bone (without penetration into the ankle joint cavity), the absence of contact with neurovascular formations showed that the decision of the medical council during the operation to refuse to extract the drill fragment was reasonable and correct. Performing a bone trepanation with an extraction of the foreign body from the damaged bones of the lower leg was associated with a high risk of complications that exceed the risk of complications of the operation

itself and the injury. Intraoperative damage to a surgical instrument (*a broken drill*) is not considered to be a violation of the technique and technology of the surgery and is not regarded as a defect in the provision of medical care. So it is not a subject to a forensic medical assessment of the severity of damage to health. There were no defects in the provision of medical care. The expert commission particularly noted the fact that the drill was broken at the final stage of the surgery, when almost all the elements of the metal structure were already installed. So in order to extract the drill bit, the metal structure had to be almost completely disassembled, then reassembled, which was clearly impractical in a multi-splintered fracture and associated with an unreasonably high risk, which exceeded the risk of leaving the drill bit in the bone (Fig. 1, 2).

object in his body by accident, after a control radiography was performed. So there was a violation of art. 22 of Federal Law No. 323 from 21.11.2011 "On the basics of protecting the health of citizens in the Russian Federation" — the right to be informed about the state of health. As a result of the concealment of the information about leaving of the drill in the tibia by the medical staff the patient learned about the presence of the drill in his body by accident. This information became a complete surprise for the man and he was not properly prepared for the information of this kind. The patient had no medical education, he did not know whether it is permissible to leave a drill in the bone, what risks are associated with it, why the drill was left, etc. Health is not only the integrity of the body from a medical or legal point of view.

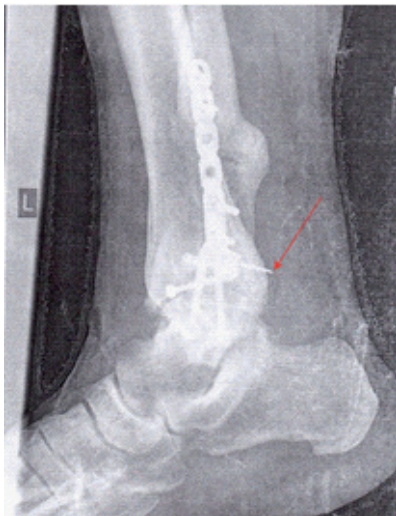


Fig. 1. Metal structure and the drill fragment (indicated by arrow) in the tibia

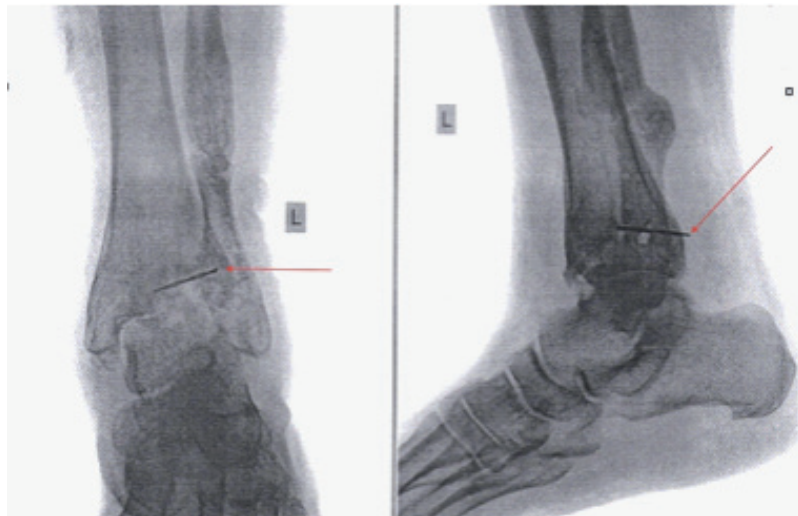


Fig. 2. Drill fragment in the tibia (indicated by arrows) after the removal of the metal construction

The court of the first instance refused to satisfy the claims, but the court's decision was appealed. The Court of Appeal drew attention to the fact that there were conclusions of a number of specialists in the case that contradicted the conclusion of experts, and considered this a sufficient reason for a secondary examination.

This secondary forensic examination revealed an important fact that was not taken into account during the primary examination. The patient was not informed about the complication (leaving the drill bit in the bone). The attending physician confirmed this fact in the court and said, *I did not think that it was necessary to notify the patient about this*. As a result, the patient learned about the presence of a foreign

The lack of information about the drill left in the bone caused fear and anxiety of the patient, which he experienced from the moment when he became aware of the presence of the drill in the bone. The defect in the provision of medical care was not the damage to the drill during the surgery or the decision to leave the drill in the bone, but the concealment of the information about the drill from the patient. Thus, the failure to provide the patient with information about the presence of a drill in the body was a violation of both Federal law and one of the fundamental principles of medical activity: *it is not necessary to treat the disease, but the patient*. Moreover, it is not known what the medical staff expected, hiding the fact of the presence of the drill in the bone. In any case, the patient had to

be taken to a control radiography, in which the drill would have been detected.

The court's assessment of the secondary examination report is very interesting. The court decided that the provision of incomplete information to the patient was a violation of the general rights in the field of health protection, while the medical care provided to the patient was of good quality and did not cause damage to health. The decision of the court of the first instance was completely annulled and a new decision was made, which partially satisfied the claims for compensation for non-pecuniary damage.

Assessing the conclusion of the secondary examination, the court pointed to contradictions and illogic facts in its conclusions. However, there are contradictions both in the conclusion of the expert examination and in the court's decision.

To name but a few:

- if the expert opinion was illogical and contradictory, it is not clear why the court put it as the basis for the decision;

- if the rights of the consumer were violated, but no damage to health was caused while providing medical care, then it is not completely clear what the person consumed (it is obvious that he was a consumer of medical services);

- if the rights of the patient in the field of health protection were violated, it is not clear why the court concluded that medical care of appropriate quality was provided;

- following the logic of the court, in each case of compensation for non-pecuniary damage, it is necessary to appoint a forensic psychiatric examination, since non-pecuniary damage (according to Article 151 of the Civil Code of the Russian Federation) is physical or moral suffering;

- if the court considered it necessary to conduct a forensic psychiatric examination, it is not clear why it was not appointed;

- if the court considered that any legal assessment was beyond the competence of the expert examination, then why was there a question for an expert: *What exact defects were there while providing medical care, what were they expressed in, what exact standards and norms of treatment were violated, what consequences for the health of the patient entailed?*

One thing is clear: the primary examination, which, in the opinion of the court, did not go beyond the limits of the expert competence, did not reveal any defects or violations in medical care. The court of the first instance also did not identify them, and if the secondary examination had not established the fact of improper informing the patient about the results of the surgery, the court's decision would have remained the

same. During the secondary examination the patient was examined by a surgeon. The patient was fixed on painful sensations in the area of the ankle joint and was firmly convinced that they were associated with the presence of a drill in the bone, as well as the need to remove the drill from the bone. Each doctor during the diagnosis of somatic pathology evaluates the neuropsychiatric status of the patient, a psychiatric examination is not required for this. Whatever the court means by the general rights of the patient in the field of health protection, the violation of these rights would not have been established without an appropriate expert opinion, which would have led to an unfair court decision. As a rule, materialistic approach to the provision of medical care is a characteristic of healthcare providers, especially of operating surgeons. So it is surprising to see the judges' lack of understanding that a surgery is not a repair of a mechanism, but a complex act that affects both the body and the mind of the patient. We can partly agree with the court that the application of federal laws should be beyond the competence of experts. Within the framework of the examination, it is quite sufficient to assess the compliance with departmental regulatory legal acts, such as procedures and standards for the provision of medical care. However, in this particular case, the examination indicated a violation of a fundamental principle of medical practice *to treat not the disease, but the patient*. The understanding of this principle and its practical application belongs to the field of special knowledge in the area of medicine and it is within the competence of experts.

CONCLUSION

The analysis of this example from expert practice allows us to draw a number of conclusions:

1. Despite the traditional view that any legal assessment is outside the competence of the judicial examination, the courts are not always able to make such an assessment on their own.

2. Expert legal assessment of the quality of medical care, if it is sufficiently justified and factually correct, contributes to a proper consideration and resolution of civil law disputes in the field of healthcare and medical services, even if the experts go beyond the limits of their competence. Knowledge in the field of medical law can be attributed to the competence of forensic medical examination.

3. When conducting commission and complex forensic medical examinations on the materials in potential medical malpractice cases, experts should not limit their work reviewing only medical documentation. It is important to analyze all the materials of the case, including the testimony of medical staff in court sessions.

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