sciendo

Research Article • DOI: 10.25143/socr.26.2023.2.18-27 • 2023 • 26(1) • 18-27

Socrates

Providing healthcare outside working hours: moral and legal aspects

Inga Kudeikina*, Marina Losevich**, Aigars Laizans***, Nataliya O. Gutorova****

*Rīga Stradiņš University, Faculty of Law, Riga, Latvia, inga.kudeikina@rsu.lv, ORCID: 0000-0002-7895-4264
**University of Latvia, Faculty of Medicine, Riga, Latvia, marina.losevica@lu.lv, ORCID: 0000-0001-9371-5061
***BJK Advocates, Riga, Latvia, aigars@bjk.lv, ORCID: 0000-0002-6504-7905
****Poltava Law Institute of Yaroslav Mudry National Law University, Ukraine, natalygutorova@gmail.com, ORCID: 0000-0003-2485-0651

Abstract

It would often be in the public interest for persons with special knowledge, including the so-called liberal professionals, to exercise their skills voluntarily, as long as a need for their services arises: for example, a healthcare practitioner would provide treatment to anyone in need of emergency care, architects would act as soon as there is a mention of a crack in the load-bearing wall of an apartment building and judges would judge a court on holidays if need arises. But the legal duty to act can be demanded from those who are legally assigned this task only. For all the stakeholders, legal certainty in healthcare is an issue of major importance. To contribute to this aspect, this study aims to detect the legal and ethical framework of the medical practitioner's obligation to provide treatment outside of working hours. The scientific literature, case-law, legal acts and court judgements were studied; the analytic, doctrinal, comparative and modelling methods were applied; the general legal norm interpretation methods were used. The authors conclude that outside of working hours, medical practitioners are exempt from their legal responsibilities, are guided by moral norms and general citizens' obligations only and have the right to refuse to provide professional healthcare services. The inconsistency among legal scholars and legal and medical practitioners concerning the duties of healthcare professionals during their rest time was detected. The recommendations are proposed to ensure legal certainty and achieve consentaneity among the stakeholders.

Keywords

medical practitioners' rights and duties • healthcare • soft law • legal certainty • work ethics • labour rights • working time • rest breaks

Introduction

Good health is a value for everybody. It is recognised as a human right and is safeguarded in both international and national legislation of the highest rank. Primarily, there are two parties involved in maintaining and ensuring health – the person and the medical practitioner. Humanly understandable that in health concerns, every person expects aid from a medical practitioner – preferably, from the nearest one available and around the clock. Balancing health safeguarding and a medical practitioner's right to rest, the state has created a mechanism for providing healthcare services, including emergencies. And yet, the question of the patient-centeredness, availability and accessibility of healthcare crops up. Does the patient have the opportunity to receive treatment any time he or she needs it? It is generally accepted in society that being a medical professional is not just a job with various tacit knowledge, it is a vocation and mission with the ubiquitous culture of self-sacrifice; subsequently, the question of every particular medical practitioner's unlimited availability arises. Thus, the answer to this question lies beyond the legal framework. These private relationships cannot be objectively legally regulated as they are issues of mutual cooperation and mutual trust between the practitioner and the patient, and hence, they fall under the category of ethics. Obviously, a practitioner can provide healthcare outside of working time or exceeding the regulated scope, but is the practitioner obliged to do so just because of being a medical practitioner? The legitimate state scope also requires safeguarding the rights of the medical practitioner. Being a medical professional is not a way of life, it is a profession and job; thus, a medical practitioner as an employee is assigned labour rights, including the right to rest. As the body of legal norms and the so-called soft law is increasing in healthcare, the need for legal certainty and unification in Europe becomes pivotal.

The aim of this study is to detect the legal and ethical framework of the medical practitioner's obligation to provide treatment outside of working hours, to identify practical shortcomings and to propose solutions to them. The authors evaluate the common legal collision between the patient's right to healthcare and the medical practitioner's right to rest break, in consideration of the state's obligation to guarantee a basic level of medical care for

*Corresponding author: inga.kudeikina@rsu.lv

Open Access. © 2023 Inga Kudeikinaet al., published by Sciendo
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 4.0 License.

everyone.

Methods: The scientific literature, case-law, legal acts and court judgements were studied; the analytic, doctrinal, comparative and modelling methods were applied; the general legal norm interpretation methods (grammatical, systemic, historical and teleological) were used.

Research Results and Discussion

Medical treatment as a profession and its legal regulation

Although labour law evolved from private law, it possesses such a sufficient power imbalance between the parties that creates a positive state obligation to intervene, protecting the employee as the weaker party and preventing unfair use of a position of power by the employer.

In general, on the national level, the employee, as the weaker party, is safeguarded by the Labour Law (Labour Law, 2002); due to unique duties, some professions are also regulated by special laws – for example, in Latvia, the Medical Treatment Law, the Law "On Police", etc. exist. In Ukraine, on a national level, these issues are regulated by the Labour Code of Ukraine (Labour Code of Ukraine, 1971) and some special laws including the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare" (Fundamentals of the Legislation of Ukraine on Healthcare, 1992).

For medical practitioners, the priority of the special law over the general law was determined by the first part of Section 531 of the Medical Treatment Law, according to which the medical practitioner is assigned the legal norms of labour law, as far as this law does not stipulate otherwise (Medical Treatment Law, 1997); the section was excluded from the law since 1st Jan 2022. There is no such indication in Ukrainian legislation, but there is a general rule of competition between the general and special norms, according to which the special norm takes precedence.

In cases of labour disputes, healthcare practitioners have a special vulnerability as their ethical obligation to patients' health and life (a component of the internal security of society) is often cited as a counterargument (although within the contract law, they are obliged to deliver services, not life and health as such). In addition, the ethical requirements for healthcare workers nowadays are close to the standard of the categorical imperative of the great philosopher I. Kant (Kant, 2023). Disputes may be based on the employer's lack of understanding of legally controversial and ethically complex situations that healthcare practitioners have to manage every day. In the face of scarce healthcare resources, employers may expect employees to perform above and beyond their scope of duties. Healthcare practitioners' performance depends directly on the work organisation in the facility, but employers reluctantly recognise their responsibility, when deciding on sanctions (disciplinary penalty or dismissal), acting contrary to the principle of natural rights, which came from ancient Roman law *Nemo iudex in causa sua*1.

The authors argue that safeguarding healthcare practitioners' rights, including the right to overall safety and respect at the workplace and prevention of burnout, is the state obligation as it is inextricably related to the patient's right to quality treatment.

Ethics of healthcare

In hindsight, medical treatment has come a long way, both in terms of technical progress and public perception and attitude. Historically, assisting a person by alleviating suffering, getting rid of some physical ailment and restoring working abilities were considered a miracle performed by a person with supernatural abilities. Nowadays, medical treatment has become scientific, evidence-based and increasingly positively regulated. According to the Law of Latvia, a medical practitioner is a person who has medical education and is engaged in medical treatment (Medical Medicine Law, 1997). Medical practitioners (e.g., physicians and nurses) are listed in the classification of professions (Regulations of the Cabinet of Ministers, 2017); thus, it can be concluded that it is subject to legal regulation, including the regulation of labour relations. Similar provisions are contained in the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare" (Fundamentals of the Legislation of Ukraine on Healthcare, 1992), as well as by-laws and regulations of Ukraine in healthcare. Consequently, the medical practitioner has regular working hours during which he or she fulfils his or her work duties (according to the job description). Is it expected that the medical practitioner has obligations to fulfil his or her duties and to provide help outside of working hours? Private life is protected by both international and national legal acts, such as the Constitution of the Republic of Latvia (Constitution of the Republic of Latvia, 1922) and the Constitution of Ukraine (Constitution of Ukraine, 1996). Does the emergency situation (the presence of a sick or injured person) breach the principle of private life protection of a medical practitioner as a special knowledge bearer? Such questions are thought-provoking because in part, society's attitude towards medical practitioners as the altruistic devoted missionary still remains. This opinion is supported by the special mission, ethics and moral categories. Indeed, the dividing line between ethical-moral standards and legal obligations is quite fragile. However, in today's world, treatment is no longer a miracle, but it is the use of science-based methods and techniques to ensure human health;

1 Latin for "No one should be a judge in their own cause".

in addition, it is no longer the individual responsibility of the doctor – the state possesses the positive obligation to provide healthcare services and ensure their availability. A person who needs medical treatment is obliged to follow the order, in which medical services, including emergency care, are provided.

There is a question of justice in medical ethics: whether realising the rights of one party (the patient) and the rights of the other party (the medical practitioner) should be respected and if the rights of both parties should be proportionately balanced. It is necessary to note that ethics is not a set of amorphous concepts or individual opinions. Ethics is shaped by the general opinion of society and keeping with the spirit of the times. In ethics, it is possible to define the criteria for evaluating the ethicality of actions (by application of the axiological principles or others). For example, Swedish researchers point out that in the case of scarce healthcare resources, it is extremely important to determine ethical criteria and limits that can be applied to evaluate the patient–medical practitioner relationship – that is, the principle of human dignity and non-discrimination, the principle of necessity and solidarity, and the principle of expediency (Engström & all, 2020).

In German jurisprudence, the subject of healthcare practitioners who are approached outside their practice and on-call hours and actually intervene is being discussed significantly; according to German law, a doctor who is not on duty is not subject to any further duty to assist than would apply to other citizens (Prütting, J., 2022).

Thus, the statement that the rights of the patient *per se* prevail over the rights of the medical practitioner enjoys no support. Appealing to the Hippocratic Oath as such, without considering the current socio-legal conditions and existing state healthcare system, is an expression of double morality. The revised Hippocratic Oath is still traditionally taken by graduates of medical schools. However, it is not legally binding and does not contradict or expand the requirements of the legal framework. In contrast to the legalist's oaths (e.g., sworn attorneys), it is not a prerequisite for access to the profession. The oath provides the principles of the physician's professional acts when he or she is engaged in treatment but does not extrapolate these obligations to a person's entire life span by obliging them to be always on duty. Nevertheless, since the centrality of soft law (e.g. recommendations, clinical guidelines, codes of conduct, non-binding resolutions and standards of care) in global health law governance is described (Sekalala, S., & Masud, H. (2021), some legal scholars regard the oath and medical ethics as soft law for healthcare (Demchenko, I., 2020).

To our knowledge, the first litigation trial between a doctor and his employer in Latvia happened in 1930: a doctor was litigated with a hospital for terminating his employment contract, which was terminated based on the plaintiff's behaviour (unspecified, whether during his working hours or rest time) – *inter alia*, the doctor offered snacks to the patients at his office and refused to see a patient claiming to have dinner, and he drank alcohol so as the patients could see it. The court pointed out a special position of a general practitioner and acknowledged the highest moral standard applied to physicians and their responsibilities, as he should not be guided by formal rules on the duties of a general practitioner but by love for humanity and social consciousness (Lytvynenko, 2022).

Refuse to deliver medical care outside working hours: illegal or unethical? Case analysis.

The afore-mentioned issues were brought to the fore in the court judgement in case No. CA-0261-21/8 (Judgment of the Zemgale Regional Court, 2021) on the termination of the employment contract with a medical practitioner. The civil litigation on this labour dispute has been examined in three court instances, and the judgement of the appellate instance entered into legal force as the cassation complaint was rejected.

As follows from the actual circumstances, a medical practitioner (a physician assistant, hist., germ *Feldscher*, hereinafter D) worked in the medical unit of a prison, and during her duty on June 14, 2020, at 2:04 p.m., a prisoner (hereinafter victim) was found hanged himself in the prison walking yard.

The prison servant on duty called D at 2:05 p.m., but D refused to arrive. She supported her opinion by the fact that she had an unpaid rest break (according to the labour contract, from 1:00 until 3:00 p.m.) and was allowed to leave the workplace. The advice to call the emergency medical service (EMS) was given to the prison service. Occasionally, at that time, she happened to be at her workplace right 300 m away from the victim (as D explained to the court that she had just taken a shower and could not arrive immediately, but the court did not believe her).

There were no other medical practitioners near the scene. Prison servants administered cardiopulmonary resuscitation to the victim, until the EMS team arrived, but to no avail, the victim was deceased.

After the audit check, the Prisons Administration (hereinafter the employer) gave D a written notice of termination of an employment contract on the basis of Section 101, Part One, Clause 2 of the Labour Law, as the employee, when performing work, has acted illegally and therefore has lost the trust of the employer (Labour Law, 2002).

The employee trade union, of which D was a member, did not agree to the termination of the employment contract and pointed to the shortcomings of the work organisation at the prison: there was no guardian in the walking yard; the mean of suicide – a belt – was a prohibited item; D had priorly informed the employer that a second medical practitioner is required during the shift, but the employer has not improved the work

organisation and has not provided additional worker.
The employer filed a complaint for the termination of the employment contract, stating the loss of the employer's trust, because D, being a medical practitioner – an employee with special knowledge in medicine – refused to provide first aid and emergency care to save a person's life; D has not fulfilled her legal obligation set forth in Section 46 of the Medical Treatment Law to ensure the detainee his rights guaranteed in Article 111 of the Constitution of the Republic of Latvia; she has not acted ethically.
The invited prosecutor admitted: D, as a medical practitioner, had the obligation to arrive immediately to exercise her duty stipulated in Article 46 of the Medical Law, ensuring the rights guaranteed by Article 111 of the Constitution of the Republic of Latvia. D acted dishonestly and did not fulfil her work duties as she was the only medical practitioner at the scene at the time of the incident who could independently make a decision to provide emergency medical assistance to the victim and could and should have provided professional emergency medical care, as she was in the workplace during her rest break and the situation required urgent action. Later, she could request the employer to pay for the overtime work. D has violated several internal regulations, norms of professional Codes of Ethics and principles of conduct.
The court of first instance assessed whether the medical practitioner's right to rest prevails over his or her duty to provide emergency medical care in emergencies and concluded that the priorities are determined by the Constitution of the Republic of Latvia and the Medical Treatment Law. Namely, Article 93 of the Constitution of the Republic of Latvia stipulates the right to life of everyone shall be protected by law. Then, Article 111 of the Constitution of the Republic of Latvia stipulates that the state protects people's health and guarantees everyone a minimum of medical assistance (Constitution of the Republic of Latvia, 1922). In turn, the basic duty of a medical practitioner is determined by a special law – the Medical Treatment Law (Medical Treatment Law, 1997): Article 46 determines the duty of a medical practitioner to provide first and emergency medical aid to every person, without linking it to the work duties, which the court recognises as a well-known fact that does not need to be proven as such (Civil Procedure Law, Article 96, Part 1).
The court concluded that D, being employed in a government agency, actually acts for the benefit of the state, ensuring the state-guaranteed right to life and health and immediate emergency medical care for everyone, as a medical practitioner, which is the so-called position of trust.
Within the legal norm hierarchy, the Constitution and the Medical Treatment Law prevail over the Labour Law. The general society opinion regarding the illegal acts and the employer's assessment of D's misconduct are both applicable to the evaluation of the loss of trust.
The employer could rely on and expect D to act professionally as a medical practitioner and to provide emergency care to a person in immediate need when time is or may be of the essence. The employer's worries that D does not realise the significance of what happened, seeks for excuse in her rights and is foreseeably expected to act similarly in a similar situation are justified. As a result of her illegal acts, the employer's trust in D has been lost.
According to the court, the existing case-law of labour disputes in relation to Article 101, Part One, Clause 2 of the Labour Law is not applicable because in this case, the circumstances and their legal assessment are different. The act (omission) of D was evaluated during her rest break specifically.
The court also stated that D does not enjoy legal protection as she exercised her right to rest contrary to the principle of good faith established in Article 1 of the Civil Law and did not respect the justified interests of other persons – namely, the employer and the victim (Civil Law, 1937). D also did not respect the legitimate interests of society and did not respect certain ethical boundaries: D, as a medical practitioner, puts her individual rights and duties above the state and society's rights, including the basic right to the protection of life and health. The court recognised that D acted illegally and lost the employer's trust.
The court of first instance satisfied the claim. The appellate court agreed with the reasoning of the first instance court's judgement, recognising it as being correct.
The appellate court stated that in the dispute, the provisions of the Medical Treatment Law are special legal provisions. The appellate court has not established a basis for applying the exceptional rights set forth in Article 47 of the Medical Treatment Law only to the time of performance of work duties (viz., Chapter VIII, Duties and Rights of Medical Practitioners in Medical Treatment): a medical practitioner has the right to refuse first aid and emergency medical care in circumstances that endanger the life of the medical practitioner himself or herself and also where a medical practitioner is incapable of doing so due to his or her state of health. Such an interpretation is not applicable in this case because the medical practitioner at any time must balance his or her rights and the rights of other persons in the context of life and health matter. The court recognised that D was at the workplace at the time of the incident, and she, taking into account the emergency situation, was able to provide medical assistance to the victim and apply later to the employer for an overtime work fee.
The appellate court also considered the existing national case-law on the loss of the employer's trust and performing work duties at the rest breaks non-applicable.
The authors of this article believe that the judgement under consideration is a landmark one as it evaluates the employee's behaviour during a rest break and provides criteria for the illegal behaviour of the medical practitioner.

On behalf of justice and to prevent legal obstruction, the court resolved this extremely unusual case with the *contra legem* method: the court ignored the provision of the relevant article of the Labour Law that the illegal conduct should take place “when performing work” and subsumed the circumstances of the case to this norm; declared the relevant case-law non-applicable; expanded the concept of “losing the trust of the employer while performing work”, applying it to situations where *negotiorum gestio* behaviour during rest time was expected from the employee; the court has repeatedly emphasised the special status of the medical practitioner and the importance of special knowledge; the legal duty of a medical practitioner to provide emergency medical assistance to everyone, without linking it to the performance of work, was recognised as an axiom, a well-known fact; the employee of a governmental agency was recognised as a person performing a state administration function in the position of trust.

In our opinion, this truly corresponds to the *contra legem* method and disrupts the principle of legitimate certainty regarding the permissible conduct of a medical practitioner during rest. A novel legal fiction was created: a medical practitioner is obliged to provide emergency medical assistance to everyone, regardless of working hours.

The following questions should be scrutinised: was D’s behaviour illegal as such (acknowledging that in a legal state, relations are regulated by legal acts and moral norms are not generally binding)? Is a medical practitioner subject to the Medical Treatment Law outside of working hours? Does the legal status of a natural person change upon obtaining a medical practitioner’s license, do any new general obligations arise (e.g., providing emergency medical assistance to any person, without connecting it to the work duties)? Was there an emergency situation at the prison at the time of the event? To judge D’s actions’ illegality, the content of the legal relationship (rights and duties) in which D was at the time of the event has to be analysed.

In court, D had to prove that she was under no obligation to undertake work duties and was under no duty to care for the detainees at the time of the event. That corresponds to the civil procedural principle of proof *negativae non probantus2*. As stated by legal scholar A. Līcis, such an assumption “is completely justified, because it is not possible, for example, to prove the absence of an obligation or duty (..). The division of the burden of proof is based on the principle *ei incumbit probatio qui dicit, non qui negat* (the one who asserts must prove the evidence and not the one who denies)” (Līcis, 2003). Negative facts can be proven with positive facts, which the authors of the article also intend to accomplish – for example, by establishing who was actually obliged to provide emergency aid to the victim.

In addition, although in this case, the existence of a professional–patient relationship at the time of the event was not a subject of proof, if established, it can form the criteria of medical neglect (Article 138 of the Latvian Criminal Code, Improper performance of the professional duties of a medical practitioner) (Criminal Law, 1999).

First, from the labour law perspective, since D was not a public servant, her work was regulated by the Labour Law and the Medical Treatment Law. When evaluating the operation of the Medical Treatment Law by the subjects, it is also necessary to analyse the relationships regulated by this law. The Medical Treatment Law subjects are medical practitioners – “persons who have medical education and who practice medical treatment” (Medical Medicine Law, 1. Second part of Article, 1997). Hermeneutically, the purpose of granting a person a medical practitioner status (special registration of persons with relevant education) is to ensure the quality of treatment (Medical Council, 2019), as well as the realisation of the principle of public trust (in relation to the national register of medical practitioners), not to identify the persons with special knowledge, who can be expected to perform public functions when such a need arises. In other words, with this legal status, a person is granted rights, not additional obligations. There is no imperative legal act that determines the additional legal obligations of medical persons or persons with special medical knowledge or regulates their behaviour during rest.

Analysing the preparation documents of the Medical Treatment Law (Preparatory materials of the Medical Treatment Law, 2001) and the protocols of the sessions of the Parliament/Saeima Commission (Social and Labor Affairs Committee of the 6th Saeima of the Republic of Latvia. Commission meeting minutes, 1997), it is established that Article 46 of the Medical Treatment Law was adopted almost unchanged from the previous legal act: “Each medical practitioner has the duty to provide first and emergency medical aid in case of danger to human life” (Cabinet of Ministers Regulations No. 177 of August 30, 1994, 1994).

Analysing the transcripts of the sessions of the 6th Saeima of the Republic of Latvia, when the Law on Medical Treatment adopted on June 12, 1997 (transcripts of the 6th Saeima of the Republic of Latvia, 1996) was viewed, it is clarified that the term “emergency care or assistance” should be understood as a professional activity only (“emergency medical assistance – assistance provided to victims (persons who have been taken ill) in a critical state of danger to life or health, provided by persons specially prepared (trained, equipped) for such cases with relevant qualifications in medicine who in accordance with such qualifications have legal liability for their actions or omissions and the consequences of such actions or omissions” (Medical Treatment Law, 1997), which the state undertakes to guarantee to every person and which should be organised

2 Latin for “Negative facts do not need to be proved”.

and financed in accordance with the relevant regulations of the Cabinet of Ministers; this was particularly pointed out by deputies A. Požarnovs and R. Jurdžs (transcripts of the 6th Saeima of the Republic of Latvia, 1996). Thus, it should be concluded that the operation of the Medical Treatment Law on medical persons does not apply to their free time.

Second, from the public administration principles perspective, the basic rights defined in Article 111 of the Constitution of the Republic of Latvia and healthcare services provided by the state are ensured by the mediation of medical facilities and medical practitioners (Constitutional Court of the Republic of Latvia, 2015), but not directly. The Medical Treatment Law does not delegate tasks of state administration to medical practitioners (Supreme Court of the Republic of Latvia, 2008) – in contrast, for example, to state police officers (Law "On Police", 1991).

Third, from the medical ethics and law perspective, a healthcare professional has a duty of care while in a professional–patient relationship. In late 1936, a legal researcher, the assistant of the sworn advocate Alfrēds Jākobsons, already pointed out the positive duty of a healthcare professional to ""provide help in special cases" without obtaining informed consent, referring to Article 461 of the Penal Law of 1933: "Whoever, by virtue of his status, position or occupation, is obliged to provide help to a person in obvious danger, and who has not fulfilled this duty, shall be punished:..." and Article 464: "Whoever has not fulfilled the obligations of the law or a binding provision on providing assistance to a sick or unconscious person, shall be punished:..." (Jākobsons, A., 1936). The special features of the Article subject (namely, status, position or occupation, and legally bounded obligations) are obvious.

At the end of working time or shift, as the duty to rest comes into force, the duty of care is legally transferred to another practitioner (handover) (Medical Council, 2019). Consequently, D's responsibility and duty in the provision of state-guaranteed healthcare ended. Compliance with rest time rules is not only an employee's right but also an obligation (Supreme Court of the Republic of Latvia, 2020). If the employee voluntarily continues to perform work duties outside of working hours, it is recognised as non-compliance with the employer's order on working hours (Senate of the Supreme Court of the Republic of Latvia, 2010/2011).

At the retrospective assessment, at the time of the incident, the situation in the prison did not meet the criteria of emergency as well: it is well-known that self-harm is the leading cause of death among prisoners worldwide (Favril, Louis, et al, 2020). In Latvia, according to the data of the Prisons Administration, a suicide occurs, on average, once every 2 months; thus, in 2020, out of 33 deaths, 7 were suicides (Prison Administration public report, 2020, Riga, 2021), and in 2021, out of 26 of deaths, 6 prisoners died by suicide (Prison Administration Public Report 2021, Riga, 2022).

In late 1993, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stated that there should always be a person (preferably a licensed nurse) in the prison, who can provide first aid (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1993), and the legislator has foreseen the situation when a medical practitioner is not available: "If it is not possible to provide the prisoner with emergency medical aid at the place of imprisonment or there is no medical practitioner available at the prison and there are reasonable suspicions of serious health problems of the prisoner, or the prisoner has obvious physical injuries, the servant on duty immediately calls the emergency medical assistance service" (Regulations of the Cabinet of Ministers No. 276, 2015). In our mind, "immediately" should be understood as without wasting time calling a medical practitioner (in the hope that he or she is nearby and yet available), but approaching the EMS directly. Unfortunately, this point of the regulations was not raised in the arguments, and, thereby, was not analysed in the court.

According to Prison Administration internal Order No. 290 of October 17, 2019, the employees are entitled to a rest break during the shift, which the employee can use at his or her discretion, including leaving the workplace (from 1:00 p.m. to 3:00 p.m.). During the medical personnel's break, the detainees were not provided with professional healthcare on the spot – during this time, the first aid was provided by the prison servants, calling the EMS if necessary.

Thus, D's advice to call the EMS was both medically correct (after the successful resuscitation, the victim needs medical examination and observation to exclude the concomitant traumas) and legally flawless – in accordance with the aforementioned Cabinet Regulations.

Returning to the moral assessment of the case, its historical seeds should be emphasised: in Abrahamic religions, the moral and ethical obligation to help, developed into the Good Samaritan doctrine (in Israel «Stand-not-idly-by-thy-neighbour's – blood») and was enshrined in the legal framework as the so-called Good Samaritan laws in some countries (they protect the volunteer helper from legal prosecution in case of failure; require just reasonable measures and efforts to be provided, not the initiation of work duties) (West B, Varacallo M, 2022).

Finally, the moral duty to rescue, not to leave helpless, and to act without leaving endangered was enshrined in criminal law: for example, in Latvia, criminal liability for failure to provide assistance is provided for in Article 141 of the Criminal Law "Abandonment without Assistance" (Criminal Law, 1999).

The German Criminal Code (StGB) has the analogous Section 323c ("Failure to render assistance; obstruction of persons rendering assistance") (German Criminal Code, 1998). According to Prof. Dr. Jens Prütting, LL.M. oec., the general

duty to help can be somewhat more severe for healthcare practitioners as everyone must help within the bounds of what is possible and reasonable for them; however, they do not have to enter into any form of classical medical emergency representation and are not treated as if they were on duty (Prütting, J., personal communication).

Especially, it is necessary to note that in the case under analysis, the victim was not left helpless or abandoned without assistance – the prison servants resuscitated him; therefore, D did not violate the principle of the duty to rescue either.

Therefore, from a moral and ethical perspective, according to the principle of the Good Samaritan and legal framework, D's assistance to the victim should be considered a desirable, ethical and praiseworthy action, but not the only legally possible act. She was not obliged to exercise her work duties according to the job description. However, as already emphasised earlier, the fulfilment of a moral obligation must be distinguished from legal obligations and duties. A labour contract can be terminated due to failure to fulfil the requirements of the legal framework only as losing the trust of an employer is related to illegal, not unethical, behaviour.

Theoretically, a possibility of an identical legal situation persists in Ukraine also: according to Article 37 Law of Ukraine, "Fundamentals of the Legislation of Ukraine on Healthcare" (Fundamentals of the Legislation of Ukraine on Healthcare, 1992), medical workers shall be obliged to provide the necessary medical care immediately in the event of an emergency (part 1). The perpetrators shall be liable in accordance with the law for untimely and poor-quality delivery of necessary medical care, which has led to serious consequences (part 2). The Criminal Code of Ukraine (Criminal Code of Ukraine, 2001) includes Article 139 – "Failure of a medical worker to provide help to a patient" – and Article 140 – "Improper performance of professional duty by a medical or pharmaceutical worker."

Some scholars interpret these legal provisions as a legal obligation to provide emergency medical care, regardless of whether the healthcare professional is performing at work currently. For example, Ivan Demchenko, candidate of legal science, concludes, "Based on the case law under Art. 139 of the Criminal Code of Ukraine – a medical professional must be obliged in accordance with the established rules to provide care. Can the "duty to care" set out in the Fundamentals of healthcare legislation be considered as established rules? If a healthcare professional does not have a direct duty to care, in his free time – such health professional has a general "duty to help" a person who is in a life-threatening condition. In the event of being left in danger, a health professional who does not perform his duties is obliged to provide them in accordance with the law (see Article 78 of the Fundamentals). Consequently, he may be prosecuted under Art. 135 of the Criminal Code of Ukraine" (Demchenko, 2020).

The authors of this article cannot agree with such a conclusion. As has been convincingly demonstrated earlier, a medical professional has a duty to provide medical care while at work and cannot be compelled to perform work duties outside of working hours.

Conclusions

The study clearly demonstrates the inconsistency among legal scholars and legal and medical practitioners concerning the duties of healthcare professionals during their rest time. The analysed case demonstrates the discrimination of healthcare professionals, by assigning them voluntary fulfilment of obligations outside the legal framework.

The legists and ethicists should keep in mind that a medical practitioner acts within the scope of his or her profession. Outside of working hours, only ethical principles are applicable, like any other person – that is, the natural intention to help within the limits of one's ability. Legal coercive measures are applicable only for violations of legal norms. No legal actions can be taken against a healthcare professional, who, for any reason, does not comply with this ethical norm. In this case, the court incorrectly applied the norms of the Constitution of the Republic of Latvia, the Medical Treatment Law and the Labour Law, which led to erroneous conclusions about D's status and duties and to conclusions about her illegal conduct. The scope of Article 46 of the Medical Treatment Law cannot be interpreted broadly (e.g., obliging the medical practitioner to perform his duties continuously and regardless of the working hours or payment for the work). Otherwise, such an interpretation can easily lead to the justification of slavery, forced labour and interference in private life (e.g., if a future pandemic arises). Forced labour is prohibited – the second part of Article 4 of the European Convention on Human Rights stipulates that no one may be forced to perform forced or compulsory labour, while the first part of Article 8 states that everyone has the right to the inviolability of his private and family life, home and correspondence (European Convention on Human Rights, 1950). The authors intentionally chose this rhetorical hyperbola to emphasise that the Medical Treatment Law is a special law applicable to professional medical treatment relations only and does not regulate the conduct of medical practitioners during their rest breaks or vacation (or on retirement). Outside of working hours, the medical practitioner is not obliged to use his professional knowledge and practical skills. To sum up, in the analysed case, the medical practitioner's right to a fair trial was violated. The labour legal relations were terminated on the basis of her lawful acts.

On the other hand, the court did not evaluate if the employer's actions were compatible with the *bona fidei* principle:

believing that D will fulfil one of the most important public administration tasks (protecting the health and life of the detainees) during her rest hours, creating and maintaining the working conditions that placed employees to a conflict of rights and legal dilemma (the right to rest vs. right to health). Citing the legal researcher Julia Kolomijtseva, the Prisons Administration "gave an order, command or instruction that led to the harm for the patient,...", "...did not ensure the proper organisation of treatment and care processes,... ", "... has not properly identified and assessed the most significant risks, and has not implemented reasonable measures to prevent or reduce the occurrence of these risks in the future" (Kolomijtseva, 2018) and, thus, "... is independently responsible for the employee's staff mistakes and as a result harm to the patient" (Kolomijtseva, 2018).

In addition, the employer's ethics was not evaluated in court as well: for example, the dismissal of the employee, who refused to cover up the managemental flaws in the governmental agency.

To ensure legal certainty, to avoid *contra legem* method in future judgements and to achieve consentaneity among the stakeholders, special attention should be paid to the following aspects:

1. In tort cases against medical practitioners, the court must be aware of the special vulnerability of the defendant and the possibility of unjustified claims;
2. The court must carefully evaluate whether the medical practitioner has been delegated state power and if the professional–patient legal relations were established (resp., if the defendant had a duty to care within private or public law);
3. Despite the adversarial principle of litigation adopted in the civil process, the court *ex officio* should independently establish the justice and apply the relevant legal acts, even if the parties have not presented them as evidence (the proposal to give the judge a more active role was expressed in Recommendation No. R(84)5 of the Committee of Ministers of the Council of Europe adopted on February 28, 1984, on the principles of civil procedure for the improvement of judicial proceedings, which states that "The court should, at least during the preliminary hearing but if possible throughout the proceedings, play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties, including the right to equal treatment" (Council of Europe Committee of Ministers, 1984);
4. The dividing line between the responsibility of the administration of the medical facility and the individual responsibility of the medical person should be established;
5. Society and the professionals (lawyers and healthcare practitioners) have to agree on the conduct (desirable, expected, ethical and legal) that society expects from medical professionals outside their working hours.

Acknowledgment

The authors thank Dr. Jens Prütting, LL.M. oec. (the Lehrstuhl für Bürgerliches Recht, Medizin- und Gesundheitsrecht, Institut für Medizinrecht, Hamburg) for his valuable comments and assistance.

References

Ārstniecības likuma sagatavošanas materiāli, Latvijas Republikas Saeimas Administrācijas Dokumentu pārvaldības nodaļas Arhīvs, Fonda Nr 2001, Apraksts 6 - 46, Lieta 382, 131.lapa/Medical Treatment Law Preparation documents, Archive of the Department of Document Management of the Administration of the Saeima of the Republic of Latvia, f. 2001, op. 6 – 46, d. 382, l. 131.

Demchenko I.S. (2020) Shchodo "Oboviazku kdopomahaty" medychnykh pratsivnykiv pid chas pandemii/"Duty to care" of healthcare professionals in a time of pandemic. *Privatne i Publichne Pravo,* 3(2020), in Ukranian. Available: http://pp-law.in.ua/archive/3_2020/13.pdf [rev. 25.07.2023]

Engström, I., Sahlin, N-E., Hermerén, G., & Westerholm, B. (2020). Principer för prioriteringar av intensivvård ifrågasätts. *Läkartidningen.* Available: https://lakartidningen.se/opinion/debatt/2020/03/principer-for-prioritering-av-intensivvard-ifragasatts/[rev. 25.07.2023]

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Available: https://www.refworld.org/docid/3ae6b3b04.html [rev. 25.07.2023]

Eiropas Komiteja spīdzināšanas un necilvēcīgas vai pazemojošas rīcības vai soda novēršanai (KPT), CPT/Inf (1993)12-part, Medicīniskā aprūpe ieslodzījuma vietās, Izvilkums no Trešā vispārējā ziņojuma, publicētā 1993.gadā/European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Excerpt from the 3rd General Report, published in 1993. Available: https://rm.coe.int/16806ce937 [rev. 25.07.2023]

Favril, L., Yu, R., Hawton, K., & Fazel, S. (2020). Risk factors for self-harm in prison: a systematic review and meta-analysis. *The Lancet. Psychiatry*, 7(8), 682–691. Available: https://doi.org/10.1016/S2215-0366(20)30190-5 [rev. 25.07.2023]

Law of Ukraine. Fundamentals of the Legislation of Ukraine on Health Care (1992), The Official Bulletin of the Verkhovna Rada of Ukraine (BVR), 1993, No. 4, Article 19. Enacted by the Resolution of the Verkhovna Rada No. 2802-XII of 19 November 1992, BVR, 1993, No. 4, Article 20. Available:
https://zakon.rada.gov.ua/laws/show/2801-12?lang=en#Text [rev. 25.07.2023]

Ieslodzījuma vietu pārvaldes publiskais 2020.gada pārskats, Rīga, 2021./The public report of the Prison Administration (2020), Riga. Available: https://www.ievp.gov.lv/lv/gada-publiskie-parskati?utm_

source=https%3A%2F%2Fwww.google.com%2F [rev. 25.07.2023]

Ieslodzījuma vietu pārvaldes publiskais 2021.gada pārskats, Rīga, 2022./The public report of the Prison Administration (2022), Riga. Available: https://www.ievp.gov.lv/lv/media/5294/download?attachment [rev. 25.07.2023]

Jākobsons, A. Ārsta atbildība pēc 1933. g. sod. lik. 218. un 219. p.: Referāts, Rīga, Star, 1936, 32 lpp./The physician's liability according to Section 218 and 219 of the Penalty Code. Report, Riga, Star, 1936, p 32.

Kants, I. (2023) Tīrā prāta kritika. Rīga: Jānis Roze, 600 p.

Kolomijceva. J. (2018) Ārstniecības iestādes civiltiesiskā atbildība par nodarbinātas personas izdarītu deliktu, *RSU Zinātniskā Konference*, 2018. gada 22.–23. martā, Sociālās zinātnes, lpp 302./The civil liability of a medical institution for a tort committed by an employed person, Abstract in Latvian, *RSU Scientific Conference*, March 22 – 23, 2018, Social Sciences, p.302. Available: https://www.rsu.lv/sites/default/files/imce/Zin%C4%81tnes%20departaments/zinatniskas_konferences/2018/arstniecibas_iestades_civiltiesiska_atbildiba_par_nodarbinatas_personas_izdaritu_deliktu.pdf [rev. 25.07.2023]

Latvijas Republikas pamatlikums: Latvijas Republikas Satversme/Law of the Republic of Latvia, The Constitution of the Republic of Latvia, Latvijas Vēstnesis, 43, 01.07.1993.

Latvijas Republikas 6.Saeimas Sociālo un Darba lietu komisija. Komisijas sēžu protokoli Nr 1. – 86., 07.01. – 15.12.1997., lietā 186 lapas. Fonda Nr 2001, Apraksts Nr 6 – 31, Lietas Nr 3.

Latvijas Republikas Saeimas 1996. gada 14. novembra 6. Saeimas sēdes stenogramma, 1. lasījums/Transcript of the 6th session of the Saeima of the Republic of Latvia on November 14, 1996, 1st reading. Available: https://www.saeima.lv/steno/st_96/st1411.html [rev. 25.07.2023]

Latvijas Republikas Saeimas 1997. gada 20. marta 6. Saeimas sēdes stenogramma, 2. lasījums/Transcript of the 6th session of the Saeima of the Republic of Latvia on March 20, 1997, 2nd reading. Available: https://www.saeima.lv/steno/st_97/st2003.html [rev. 25.07.2023]

Latvijas Republikas Saeimas 1997. gada 12. jūnija 6. Saeimas sēdes stenogramma, 3. lasījums/Transcript of the 6th session of the Saeima of the Republic of Latvia on June 12, 1997, 3rd reading. Available: https://www.saeima.lv/steno/st_97/st1206.html [rev. 25.07.2023]

Latvijas Republikas likums. Ārstniecības likums/Law of the Republic of Latvia, Medical Treatment Law, Latvijas Vēstnesis, 167/168, 01.07.1997.

Latvijas Republikas likums. Civillikums/Law of the Republic of Latvia, The civil law. Valdības Vēstnesis, 41, 20.02.1937.

Latvijas Republikas likums. Darba likums/Law of the Republic of Latvia, Labour Law. Latvijas Vēstnesis, 105, 06.07.2001.

Latvijas Republikas likums. Krimināllikums/Law of the Republic of Latvia, Criminal Law. Latvijas Vēstnesis, 199/200, 08.07.1998.

Latvijas Republikas Satversmes tiesas 2015.gada 12.februāra sprieduma lietā Nr.2014-08-03 11.3. punkts/The Constitutional Court of the Republic of Latvia Judgment of February 12, 2015 in case No. 2014-08-03, point 11.3. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2014-08-03_Spriedums.pdf [rev. 25.07.2023]

Latvijas Republikas Augstākās tiesa, Senāta Administratīvo lietu departamenta 2008.gada 26. jūnija spriedums Lieta Nr. A42484105, SKA-155/2008/The Supreme Court of the Republic of Latvia, Department of Administrative Affairs of the Senate, Judgment of June 26, 2008 Case No. A42484105, SKA-155/2008. Available: https://www.tiesas.lv/nolemumi/pdf/10668.pdf [rev. 25.07.2023]

Latvijas Republikas Senāta Civillietu departamenta 2020.gada 18.jūnija spriedumā lietā Nr.C33617618, SKC–481/2020/The Civil Affairs Department of the Senate of the Republic of Latvia Judgment of June 18, 2020 in case No. C33617618, SKC–481/2020. Available: https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/hronologiska-seciba?lawfilter=0&year=2020

Latvijas Republikas Augstākā Tiesa, Tiesu prakse lietās par individuālajiem darba strīdiem, 2010/2011/Supreme Court of the Republic of Latvia, Judicial practice in cases concerning individual labor disputes, 2010/2011. Available:
https://www.at.gov.lv/files/uploads/files/docs/petijumi/tiesu%20prakses-darba%20stridi.doc [rev. 25.07.2023]

Latvijas Republikas likums: "Par policiju"/Law of the Republic of Latvia "On Police" Latvijas Republikas Augstākās Padomes un Valdības Ziņotājs, 31/32, 15.08.1991.

Lytvynenko, A., (2022). Medical Liability in the First Period of Independence of Latvia (1918–1940). *Teisė*. 122. pp.125-149. doi: 10.15388/Teise.2022.122.9.

Līcis A., Prasības tiesvedība un pierādījumi. Rīga, Tiesu namu aģentūra, 2003.,70.-71.lpp.

Medical Council (2019) Guide to professional conduct and ethics for registered medical practitioners (amended), 8TH edition. Dublin: Medical Council, 58 p.

Ministru kabineta 2015. gada 2. jūnija noteikumi Nr. 276 "Apcietināto un notiesāto personu veselības aprūpes īstenošanas kārtība"/Regulations of the Cabinet of Ministers of June 2, 2015 No. 276 "Procedures for implementing health care for arrested and convicted persons", Latvijas Vēstnesis, 110, 08.06.2015.

Ministru kabineta 1994. gada 30. augusta noteikumi Nr. 177 "Ārstniecības noteikumi"/Regulations of the Cabinet of Ministers of August 30, 1994 No. 177 "Treatment Rules". Latvijas Vēstnesis", 10.09.1994., Nr. 106. Available: https://www.vestnesis.lv/ta/id/57553-arstniecibas-noteikumi [rev. 25.07.2023]

Ministru kabineta 2017. gada 23. maija noteikumi Nr. 264 "Noteikumi par Profesiju klasifikatoru, profesijai atbilstošiem pamatuzdevumiem un kvalifikācijas pamatprasībām"/Regulations of the Cabinet of Ministers of May 23, 2017 No. 264 "Rules on the Classifier of Professions, Basic Tasks Corresponding to the Profession and Basic Qualification Requirements". Latvijas Vēstnesis, 104, 29.05.2017. Available: https://likumi.lv/ta/id/291004 [rev. 25.07.2023]

Prütting, J., 2022, Ersthelfer im Fokus des Haftungsrechts. *Neue Ju-*

ristische Wochenschrift (2022) Nr. 48, S. 3465-3469.

Recommendation No. R(84) on the principles of civil procedure designed to improve the functioning of justice, Council of Europe, Committee of Ministers, Adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies. Available: https://www.justice.gov.sk/dokumenty/2021/05/RECOMMENDATION-No.-R-84-5.pdf [rev. 25.07.2023]

Sekalala, S., & Masud, H. (2021). Soft Law Possibilities in Global Health Law. *Journal of Law, Medicine & Ethics,* 49(1), 152–155. Cambridge University Press.

The Law of Germany. German Criminal Code (Strafgesetzbuch – StGB). Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (Federal Law Gazette I, p. 4906)

The Law of Ukraine. The Constitution of Ukraine. The Official Bulletin of the Verkhovna Rada of Ukraine (BVR), 1996, No. 30, Article 141. Available: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text [rev. 25.07.2023]

The Law of Ukraine. The Criminal Code of Ukraine. The Official Bulletin of the Verkhovna Rada (BVR), 2001, No. 25–26, Article 131. Available: https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text [rev. 25.07.2023]

The Law of Ukraine. The Labor Code of Ukraine. Approved by Law No. 322-VIII of 10.12.71 BVR, 1971, Appendix to No. 50, Article 375. As amended in accordance with the Decrees of the Presidium of the Verkhovna Rada of the Ukrainian SSR Available: https://zakon.rada.gov.ua/laws/show/322-08?lang=en#Text [rev. 25.07.2023]

Zemgales apgabaltiesas 20.05.2021. spriedums lietā Nr. CA-0261-21/8./Zemgale regional court Judgment on May 20, 2021 in case no. CA-0261-21/8. Available: https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi

West B, Varacallo M. (2022) Good Samaritan Laws. In: *StatPearls*. StatPearls Publishing, Treasure Island (FL); PMID: 31194333.