REVIEW ARTICLE

CONTENTS

Legal principles of using special medical and psychiatric knowledge in criminal proceedings: Ukrainian context and international standards

Olena Makarova[1], Mykola Kolomoitsev[2], Ivan Iemets[2], Ivan Yatsenko[2], Iryna Shynkarenko[1]

[1]KHARKIV NATIONAL UNIVERSITY OF INTERNAL AFFAIRS, KHARKIV, UKRAINE

[2]NATIONAL SCIENTIFIC CENTER «HON. PROF. M. S. BOKARIUS FORENSIC SCIENCE INSTITUTE» OF THE MINISTRY OF JUSTICE OF UKRAINE, KHARKIV, UKRAINE

ABSTRACT

Aim: This article aims to determine the standards of interaction of medical professionals, psychiatrists, and psychologists with participants in criminal proceedings during the implementation of various forms of use of special knowledge, as well as update their adherence in medical practice and criminal procedural activities.

Materials and Methods: As empirical material, the decision of the ECHR, the practice of the Ukrainian courts, the results of scientific research by scientists, dedicated to the related subject of research, were used. In order to realize the set goal, the authors used a whole complex of general scientific and special methods of cognition, namely: system-structural method, method of generalization, dogmatic method, analysis and synthesis, methods of analysis of quantitative indicators, etc.

Conclusions: The use of medical and psychiatric knowledge must be carried out in compliance with a number of legal principles. All participants in criminal proceedings are required to comply with them. The main criteria for the use of special knowledge include: the validity of the grounds for the implementation of certain forms, the impartiality and independence of the person entrusted with the examination or other form, the rule of law, the inadmissibility of disclosing the secret of the pre-trial investigation, the right to receive another independent opinion.

KEY WORDS: crime; human rights; physical examination; forensic medical examination; investigative actions

Wiad Lek. 2025;78(2):435-441. doi: 10.36740/WLek/197137 DOI

INTRODUCTION

Modern trends in criminality indicate that violent crimes are increasingly the result of neurocognitive and mental disorders. Such disorders lead to aggressive, inadequate, and sometimes sadistic behavior of a person. The socially dangerous consequences of such behavior consist of causing physical and moral harm to the victim. This actualizes the need for timely provision of competent medical, psychological, and sometimes psychiatric assistance to victims and suspects. Investigating such criminal offenses is also impossible without the qualified support of doctors, psychiatrists, and psychologists. The legal and organizational basis for the participation of experts and specialists in criminal proceedings is currently unresolved. This is the situation based on the principles of their interaction with the investigator, the prosecutor, the attorney, etc. This direction of scientific research is determined by the need to develop an optimal balance between ensuring the rights of a person who has become a criminal proceedings participant and providing criminal justice with objective scientific knowledge in the context of gathering evidence and proving certain circumstances of a court case.

AIM

This article aims to determine the standards of interaction of medical professionals, psychiatrists, and psychologists with participants in criminal proceedings during the implementation of various forms of use of special knowledge, as well as update their adherence in medical practice and criminal procedural activities.

MATERIALS AND METHODS

As empirical material, the decision of the ECHR, the practice of the judicial bodies of Ukraine, the results of scientific research by scientists, dedicated to the related subject of research, were used. These are, in particular, 16 decisions of the ECHR. Judicial decisions of the courts of general jurisdiction of Ukraine, adopted during

2014-2023, in violent crimes, as well as the results of research by scientists from Europe and other countries of the world, were also subjected to systematic analysis. Such empirical material was chosen for the purpose of improving the legal tools of the best practices for the observance and restoration of violated human rights and legitimate interests. The results of research in the fields of medicine, psychiatry, criminology and criminology are also taken into account. Open data from the Unified State Register of Court Decisions was also subjected to statistical analysis.

In order to realize the set goal, the authors used a whole complex of general scientific and special methods of cognition, namely: system-structural method, method cognitive realization, methods of analysis and synthesis, methods of analysis of quantitative indicators.

Methods of analysis and generalization were used for textual analysis of decisions of the ECHR and courts of Ukraine. The method of comparison contributed to the comparison of the results obtained by us and the data reflected in the studies of scientists selected by us based on the subject of the study.

The system-structural method, as well as the synthesis, made it possible to determine second principles that are universal in nature and must be observed in the context of the application of medical and psychiatric knowledge in criminal proceedings. Dogmatic, comparative-legal, logical and generalizing methods, as well as the method of legal analysis, were also used to formulate the research conclusions.

REVIEW AND DISCUSSION

The expert and a specialist are the subjects authorized to use special knowledge according to the Ukrainian doctrine of criminal procedural law. In violent crimes forensic medical experts, psychiatrists, and psychologists in criminal proceedings most often keep such procedural statuses. The prosecution and the defense have the right to receive qualified specialist and expert assistance. Such a guarantee contributes to implementing parties' equality and competitiveness principles in criminal proceedings.

In addition, Recommendation No. R (87) 18 of the Committee of Ministers of the Council of Europe defines prosecutorial, investigative, and judicial bodies that need the help of experts should use the help of specialists in such fields as psychology, medicine, psychiatry, accounting, economics, finance, and forensic medicine in a sufficient volume to face the growing technical complexity of crimes and ensure the collection of evidence [1]. The most important thing is that the participation of an expert and a specialist is connected with the objective realization of a person's right to a fair trial, which is proclaimed in Art. 6 of the European Convention on Human Rights (after this – the Convention) and other conventional guarantees [2]. In addition to conventional guarantees, it is also necessary to consider several other legal and organizational principles.

1. The validity of appointing expert studies, collecting confidential medical data, and conducting investigative actions. To fulfill the requirements of convection regarding the fairness and impartiality of the court, the Criminal Procedure Code of Ukraine defines the grounds for which the examination is mandatory and regulates the compulsory participation of specialists in certain investigative (search) actions. When deciding whether to involve competent specialists in criminal proceedings, it is necessary to determine whether sufficient grounds exist.

The involvement of specialists must be justified in cases where confidential medical information will be collected, regardless of whether they contain a specific medical diagnosis (see Surikov v. Ukraine, No. 42788/06) [3]. Such information includes information about a person's mental state. The disclosure of such information will be recognized as a violation of the right to privacy guaranteed by Art. 8 of the Convention [2]. Given this, the collection of such information by state authorities in the absence of sufficient grounds is subject to violation of Article 8 of the Convention [2].

The validity of the grounds for the appointment of a psychiatric examination is a debatable issue. Increasingly, scientists pay attention to the fact that the presence of behavior disorders in a person, his aggressiveness, and neurolinguistics disorders become factors that provoke a person to commit violent crimes [4;5]. Scientists indicate that murderers with mental disorders are 3.19 times more motivated by revenge than non-disordered and undiagnosed offenders [6]. An analysis of 70 cases based on the facts of the murders in Iraq gave reasons to state that almost 40% of the killers did not have mental illnesses, more than 17% had personality disorders, nearly 33% had mental disorders, and 9% had neurotic disorders [7]. Psychotic symptoms are reported in 11% of US criminals, including 18% of mass murderers who did not use firearms and 8% of those who did [8]. 49 out of 79 French citizens who committed murders were diagnosed with paranoia, which is a mental disorder, but this did not excuse them from legal responsibility [9].

A separate group of persons, the psyche of which should become the subject of a psychiatric examination in the event of their committing violent crimes, are persons who have committed violent crimes and have a syndrome of dependence on alcohol, narcotic drugs, or psychotropic

substances. This is explained by the fact that the use of these substances and means weakens or in general paralyzes the inhibitory processes of the psyche, and therefore, personality and behavior disorders develop more quickly in such persons. In particular, L. Eriksson, S. Bryant, S. McPhedran, P. Mazerolle, R. Wortley received a favorable conclusion after testing 302 people convicted of murder in Australia. The researchers found that 38.8% of people had a high level of alcohol problems, and 30.8% had drug problems. At the same time, a large proportion of criminals who committed murders abused these substances in the year preceding the crime [10].

As for the practice of Ukraine, during 2014-2023, on average, 7.46% of criminal proceedings on violent crimes are sent to court annually, with a request for the application of coercive measures of a medical nature. The data we obtained correspond to other studies conducted by Ukrainian scientists. As for those convicted of murder, 14% of such persons had mental and behavioral disorders due to the use of alcohol, or narcotic drugs (syndrome of dependence on alcohol, opioids, amphetamine, etc.), 8% of the accused were in a state of simple alcohol intoxication, 4% of persons had a syndrome alcohol dependence (chronic alcoholism), 2% of persons had an emotionally unstable personality disorder, 2% suffered from a mental illness, 1% of the defendants had a personality and behavior disorder due to organic brain damage, and 1% had clinical signs of post-traumatic stress disorder [11]. This shows that the specific weight of persons who took the lives of other people while being in a state of insanity or another morbid state of mind is quite significant. In our opinion, such practice indicates the need to revise the presumption of mental health, which operates in Ukraine.

We agree that individuals' criminal responsibility and legal capacity may vary depending on the legal situation. When applying for a forensic psychiatric examination of these patients with mental comorbidities, the patients should not be biased in terms of their level of cognitive competence, and each case should be evaluated individually [12]. At the same time, we believe that the grounds for appointing forensic psychiatric examinations in criminal proceedings should be expanded at the level of national legislation. A person suffering from a mental disorder has a double role in the judicial process: he or she is an interested person and, at the same time, the main object of the judicial investigation [13; 14]. The national legislation of Ukraine should be supplemented with the grounds for the appointment of a forensic psychiatric examination. Yes, in the case of the suspect receiving injuries to the head and spine, brain discoloration, or damage to the spinal cord, as well as in the case of committing a violent crime by a person who was under the influence of alcohol or drugs or who was under the supervision of a narcologist. This approach corresponds to the principles of adaptation and integration into the social life of people diagnosed with psychopathology, as well as the provision of emergency psychiatric care [15].

Adherence to the validity of the grounds is also required during investigative (search) actions. Exhumation of the body of the deceased is a common investigative action in which medical professionals participate. In the context of the validity of the grounds for conducting an examination or investigative (search) actions related to the application of special medical knowledge, it should be taken into account that the exhumation of a person's body without the voluntary consent of relatives can also be recognized as a violation of the right enshrined in Article 8 of the Convention [16]. In this regard, it is also important to enshrine a legal mechanism in the national legislation, which provides for obtaining consent from relatives to conduct this investigative (search) action.

Considering the diversity of methods that suspects resort to, during the investigation there is a need to examine the suspect's body, which is connected with examining his body cavities. A systematic analysis of the provisions of the Criminal Procedural Code and separate Judgements of the ECHR allows us to conclude that the physical integrity of a person is covered by the concept of "private life" protected by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) [2] and concerns the most intimate aspects of private life, and compulsory medical intervention, even insignificant, constitutes an interference with this right (Decision "X and Y v. the Netherlands" [17]), but such interference is usually justified in accordance with Clause 2 of Art. 8 of the Convention as urgency to prevent a crime ("Tirado Ortiz and Losano Martin v. Spain" [18]) or as the only possible way to save a person's life.

However, any recourse to coercive medical intervention to obtain evidence of a crime must be convincingly justified by the facts. This is especially relevant when a procedure involves gaining access to a person's body cavities to extract evidence.

2. *Independence and impartiality of judicial experts and specialists.* One of the legal bases of activity and interaction of participants in criminal proceedings with experts is their independence and unpredictability. The ECHR rules that the procedural guarantees that ensure their formal and factual independence and unpredictability are the independence of the judicial expert from the persons involved in the events that became the subject of the trial [18].

The independence requirement is essential when obtaining medical opinions from experts, who must have formal and factual independence from those involved in the events (see Bačić v. Croatia, no. 41108/10, § 95, November 13, 2012) [19]. In its practice, the ECHR has determined that the demonstration of the unpredictability of a court-appointed expert in specific characteristics may lead to a violation of the principle of equality of parties admitted to a fair trial (see Bonisch v. Austria, May 6, 1985) [20]. In addition, such a factor as the procedural position/status of the expert and his role in the relevant proceedings should be obtained (see Sara Lind Eggertsdóttir, cited above, § 47, and Letinčić, mentioned above, § 51) (para. 60 of the judgment) [21, 22], his relations with other participants in criminal proceedings. Any doubts about the unpredictability of the expert and specialist leave the public's trust in the judicial system at risk; therefore, "visibility" is essential [23].

In Ukrainian realities, when the investigator or the defense engages an expert, it isn't easy to implement the requirements for checking the excellence and independence of the expert. When the decision on the appointment of expertise is sent, the head of the expert institution or the head of the relevant department of this institution reviews it and actually determines the executor. Therefore, the exact verification of the expert's incomparability is carried out at the stage of familiarization with the received opinion, and the defense side in other cases – at the stage of familiarization with the materials by Art. 290 of the CPC of Ukraine [24]. This practice requires verification of findings at all stages of criminal proceedings.

3. Inadmissibility of disclosing the secret of the pre-trial investigation. One of the legal bases for the use of an expert's special knowledge is the secrecy of a pre-trial investigation or the principle of the inadmissibility of disclosing information of criminal proceedings, which imposes on the expert the duty not to disclose without the permission of the party to the criminal proceedings, which involved him or the court. He knew this information in connection with the performance of the duties assigned to him. The possibility of their disclosure is allowed only with the written permission of the investigator or prosecutor within the limits determined by the latter (the decisions "Bédat v. Switzerland", "Sellami v. France") [25, 26].
4. Rule of law. Regarding the forced hospitalization of a person in a psychiatric institution, clear and effective guarantees against arbitrariness must necessarily be provided, given the vulnerability of persons suffering from mental disorders and the need to give excellent reasons to justify any restrictions on their rights (see the decision of 2 May 2013 in the case "Zagidulina v. Russia," application No. 11737/06, paragraph 53) [28]. This applies to forced treatment and inpatient psychiatric examinations. The task of the court is not to re-evaluate the above conclusions, which were drawn up by professional psychiatrists and which contain opposite conclusions, and to decide which of them were correct and which were incorrect. However, its task is to verify whether the national courts have examined the relevant findings with the necessary care and whether they have correctly justified their decision regarding the compulsory treatment of the applicant in a psychiatric institution (see the decision in the case "Raudevs v. Latvia", application No. 24086/03, paragraph 71) [29].

Most studies suggest that people with mental disorders and illnesses are hospitalized longer than necessary to fulfill two functions: 1) to care for and treat the patient (for their own sake, as well as to reduce future risk); and 2) to protect society from harm by the offender. Clinical experience and research show that safe forensic services are not always the most effective when patients remain in overly restrictive conditions for too long, no longer needing or benefiting from the services offered [30]. For example, among the 1.2 million population of North London in 1999, the average length of stay in non-forensic beds was 79 days, while for forensic beds the figure was 1367 days. Overall, 23.4% of general psychiatric patients were in for more than one year and 17.9% for more than 5 years, while the corresponding figures for forensic patients were 81.2% and 39.1% respectively [31].

5. Principle of legality. This principle requires that all actions carried out by experts and specialists comply with legal regulations. It is also important that the same principles guided all experts and specialists and that their conclusions were without contradictions or disagreements.

In this context, the presumption of mental health should be addressed. The mandatory basis for the appointment of a forensic psychiatric examination is the presence of a person with a disorder of mental activity or a mental illness, which is certified by a relevant medical document (Part 1 of Article 509 of the Criminal Procedure Code of Ukraine) [24]. In 64% of the criminal proceedings we analyzed, it became the basis for a forensic psychiatric examination appointment. The ECHR indicates that a person cannot be considered "mentally ill" and deprived of liberty if three minimum conditions are not met. First, this objective examination must reliably show that the person has a mental illness; secondly, the mental disorder must be such that it causes the forced detention of a person in a psychiatric

hospital; thirdly, the need for continued detention in a psychiatric hospital depends on the persistence of such a disease (see the decision in the case "Winterwerp v. the Netherlands", paragraph 39, Series A No. 33) [27].

It is also important that all experts follow the same approach when formulating their conclusions. The scientific literature indicates that such approaches are not unambiguous. For example, scientists who evaluated the approaches of experts in France to establish the mental state of murder suspects diagnosed with schizophrenia indicated the presence of several inconsistencies. Such disagreements between experts are at the level of forensic interpretation and discussing the relationship between pathology and offense. Scientists stated that the differences are often associated with personal beliefs or different schools of thought that influence the interpretations and conclusions of experts. According to their approach, it is necessary to strengthen training, increase experience, and ensure knowledge exchange between professionals [32].

Scientists from Brazil indicate that the key points in ensuring a unified approach when conducting a psychiatric examination are detailed knowledge of psychopathological concepts inherent in legal capacity, standardization of the examination, use of psychometric indicators developed specifically for forensic psychiatry (in particular, those that assess exclusively legal capacity), and concise drafting of the expert opinion. Other key points are the preferential use of established scientific terms, the avoidance of jargon and buzzwords in the expert report, and the simultaneous assessment by professionals with the same education and experience in the field [33].

Such discrepancies may lead to different legal consequences in similar cases. Therefore, a position is being formed according to which inter-expert reliability in forensic psychiatric/psychological matters is the basis for the court to regularly receive the opinions of several experts to reduce the risk that a single expert opinion may be misleading [34]. The use of different approaches is contrary to the principles of law since the law requires that the same legal procedure be applied to everyone. In this regard, all approaches of experts and specialists must be based on scientific provisions, and their application and activities in general must comply with legal principles.

As a positive example of developing unified approaches to solving expert tasks, we can cite the "Rating Scale of Criminal Responsibility for the Mentally Ill (RSCR)", developed by Chinese scientists. Its essence is that the scale includes eighteen items, namely: criminal motivation, aura before the offense, incitement to the crime, time and place and selectivity of the object and instrument of the crime, emotions during the crime, evasion of responsibility for the offense, concealment of the truth during the investigation, disguise, understanding the nature of the crime, assessment of the consequences of the crime, impairment of vitality, impairment of study or work, impairment of insight, impairment of reality testing and impairment of self-control. This scale can be applied to all cases and is easy to use, according to the results of its application, in almost 89% of cases; similar conclusions were obtained in the cases studied [35].

6. *Guarantee of obtaining another independent opinion.* It is important to guarantee the opportunity for patients to get a second opinion from independent experts. This principle also included in the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Psychiatric Care (see paragraph 63). It is an essential guarantee against possible arbitrariness when making decisions regarding the continuation of the application forced treatment (see the decision in the case "X v. Finland," application No. 34806/04, paragraph 169, ECHR 2012, and the decision in the case "M. v. Ukraine" (M. v. Ukraine), item 66) [36, 37]. The same principles should be observed when using medical knowledge, particularly when conducting forensic examinations. This approach is consistent with the principle that no evidence has a predetermined force.

CONCLUSIONS

The use of medical and psychiatric knowledge must be carried out in compliance with several legal principles. All participants in criminal proceedings are required to comply with them. The main criteria for the use of special knowledge include the validity of the grounds for the implementation of certain forms, the impartiality and independence of the person entrusted with the examination or other form, the rule of law, the inadmissibility of disclosing the secret of the pre-trial investigation, the right to receive another independent opinion.

The practice of many European countries and others is still not perfect and does not always fully agree with convection principles. That is why certain norms need revision and improvement. The grounds for the appointment of psychiatric examinations and the interpretation of the presumption of mental health, and approaches to assessing a person's insanity need revision. After all, behavioral disorders against the background of alcohol and drug addiction, neurocognitive disorders, and others are increasingly becoming a factor characterizing a person convicted of a violent crime.

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CONFLICT OF INTEREST

The Authors declare no conflict of interest

CORRESPONDING AUTHOR

Mykola Kolomoitsev

Hon. Prof. M. S. Bokarius Forensic Science Institute
8a Zolochivska st, 61177, Kharkiv, Ukraine
e-mail: kolomoitsev.mykola@ukr.net

ORCID AND CONTRIBUTIONSHIP

Olena Makarova: 0000-0002-5480-5942 A B D F
Mykola Kolomoitsev: 0009-0005-8957-5509 A B D F
Ivan Iemets: 0009-0003-9056-5346 A B D F
Ivan Yatsenko: 0000-0001-8903-2129 B D E F
Iryna Shynkarenko: 0000-0001-7136-3333 A B F

A – Work concept and design, B – Data collection and analysis, C – Responsibility for statistical analysis, D – Writing the article, E – Critical review, F – Final approval of the article

RECEIVED: 01.10.2024
ACCEPTED: 09.12.2024