Study on Judicial Determination of Crime of Medical Malpractice

Jia-Yu TONG
Qiqihar Medical University
Email: 164967651@qq.com

Key words: Crime of medical malpractice, judicial determination, study

Abstract: The thesis combines law theories and clinical practices and studies judicial constitution of crime of medical malpractice by analyzing constitution of crime of medical malpractice, differentiating crime and non-crime of medical malpractice and crime and similar crime of medical malpractice, which has significant guiding function for judicial practice.

People pay more and more attention to the health and have higher and higher requirements for safety and quality of medical service with development and progress of society. But the adverse medical incidents cannot be completely avoided for the complexity, high risk and unpredictability of medical industry [2]. Most of the medical incidents are determined as medical malpractices. Judicial determination of crime of medical malpractice directly affects the disposal and determination of medical disputes, which is vital to normalize the behaviors of medical staff. Crime constitution is the legal basis to determine the crime. When executing judicial determination for crime of medical malpractice, it is required to check whether the behavior conform to constitutive requirements of the crime. The thesis analyzes and explores the judicial determination for crime of medical malpractice by combining clinical practices.

Study on legal constitution of crime of medical malpractice

The State Council defined the medical malpractice in the Regulations for Handling of Medical Malpractice issued in 2002 as: “medical malpractice is the malpractice that causes personal injury to the patient in the medical activity by behaviors of medical staff that violates medical health management laws, administrative rules and regulations, department regulations and diagnosis, treatment and nursing routines [3]”. National department laws do not directly define the crime of medical malpractice. It is only specified in Article 335 of Criminal Law that: “in case medical staff make person seeking medical service dead or cause serious injury to the health of person seeking medical service for serious irresponsible behavior, he/she shall be sentenced to a fixed-term imprisonment or criminal detention of not more than three years [4].” Subject to current laws and regulations, crime constitution of medical malpractice has four aspects: subject of the crime, subjective aspect, object and objective aspect. Crime subject of crime of medical malpractice is a special subject. Firstly, the subject must be medical person with age of criminal responsibility and criminal capacity who has passed the assessment, acquired the approval and permit of health administrative departments and acquired practicing qualification and been registered. Secondly, manifestation of crime of medical malpractice is fault in subjective aspect, which means the actor has fault but does not do it on purpose subjectively. Thirdly, the object of crime of medical malpractice is the order of medical institution or right of life and health of the citizen. Fourthly, element for crime object is that the behavior of actor that violates relevant laws and regulations or medical operation regulations makes the person seeking medical service dead or cause personal injury to the person. In case the result is the behavior does not cause personal injury to the person or the injury is too slight to constitute crime of medical malpractice.
Judicial determination distinction of crime and non-crime of medical malpractice

**Distinction identification of medical malpractice and medical error**

There is no definition of medical error in the current laws of the state. American IOM once defined error in medical treatment as: failure of planned action, which means the behavior achieves a special intention intentionally or in a wrong way [5]. According to practice research, medical error refers to the dereliction or technical fault of medical staff in the medical treatment that violates relevant laws and regulations or nursing, diagnosis and treatment codes but it does not cause any adverse consequences of death, physical disability and dysfunction of damage to tissue or organ. The constitutions of crime of medical malpractice and medical error are similar. The biggest difference is that damages of different degrees caused by the behavior. For example, a nurse from internal medical department injected the patient with gentamicin of 800,000 units that she thinks is penicillin. The mistake was found and corrected promptly and the patient did not have any adverse reactions. The behavior of the nurse does not constitute crime of medical malpractice but it does not comply with nursing, diagnosis and treatment codes. The irresponsible behavior causes operation error and constitutes medical error. Severe medical error refers to the error that the medical fault of the actor causes actual adverse consequence to the person seeking medical service, such as pain of patient is intensified, treatment time is prolonged or the patient has some uncomfortable symptoms. For example, an orthopedist fixes external limb for the patient before selective operation but the external fixation is too tight for inexperience of the orthopedist, which causes the soft issue of affected limb swells severely so that the operation on the next day is put off. The operation can be carried out after the swelling is reduced after conservative treatment. Although the behavior does not cause severe personal injury to the patient, it intensifies patient’s pain and increase the time in hospital so the behavior is severe medical error rather than crime of medical malpractice.

**Comparison identification of crime of medical malpractice and complication**

Medical complications are inevitable and non-preventable adverse consequences of the patient that occur in the process of diagnosis, treatment and nursing and can be predicted by scientific modern medical technologies. The occurrence of such adverse consequences does not have a cause-effect relation directly with the fact whether the medical staff has any misconduct in the medical treatment. Adverse consequences or other disease caused by complications do not have a cause-effect relation directly with the behavior of medical staff so it is different from crime of medical malpractice. In clinical practice, the typical complications are: maternal pubis symphysis separation triggered in delivery operation; intestinal fistula for weak tissue in children abdominal operation; the sick child is dead for massive hemorrhage in children tracheotomy operation that is conducted in a correct way. All the cases above are complications rather than crime of medical malpractice.

**Comparison identification of crime of medical malpractice and medical accident**

There are different definitions of medical accident in academic circle. Some scholars think medical accident is the adverse consequence to the patient for irresistible reasons in normal diagnosis, treatment and nursing that is difficult to predict and prevent [6]. In a comprehensive point of view, medical accident the behavior of medical staff that unpredictable and non-preventable adverse consequences of death, physical disability or dysfunction of the patient for the physical specify of patient’s disease in the diagnosis, treatment and nursing. The actor does not have any fault or intention subjectively and subjective and objective consequences have no cause-effect relation. The subjective consequences of death, physical disability or dysfunction result from physical specialty of the patient or accidents that cannot be predicted or changed subjectively. So the medical accident does not have constituent elements for crime of medical malpractice. In clinical practice, for example, the patient suffered a car traffic accident and needs an operation immediately, otherwise it the injured person is going to die. However the patient died for asphyxia in anesthesia because of satiety. This adverse consequence in emergency is cannot be resisted by medical staff and medical
staff has no fault or intention for the consequence subjectively. The behavior and the consequence have no cause-effect relation. So it is medical accident rather than crime of medical malpractice.

**Distinction of crime of medical malpractice and rescue behavior**

Rescue behavior refers to “the behavior that medicals staff take to rescue the life or cure the disease of the patient, which cannot be achieved by other measures. Sometimes the behavior may damage relatively small interest of the patient to protect his/her large interest (life health) from being damaged [7]”. The distinction of rescue behavior and crime of medical malpractice is the subjective intentions of actor are not the same. The subjective intention of rescue behavior is to save the life of patient and protect the right of life and health under emergency circumstances and medicals staff has no crime intention and fault. Adverse even severe consequences of rescue behavior do not constitute a crime and are exempt from criminal responsibilities. According to provisions of clinical practice and jurisprudence of act of rescue, the writer has summarized implementation conditions of rescue behavior: the first condition is the subjective intention of actor must be to heal the wounded and rescue the dying rather than profit or other intentions. Second condition is that the time of the damage caused by rescue behavior to the patient must be instant. Consequences of death or severe personal injury must happen to the patient in emergency rescue behavior is not conducted. Third condition is the damages to the personal injury of the person seeking medical service shall not exceed necessary limits.

**Distinction between crime of medical malpractice and similar crime**

**Distinction between crime of medical malpractice and crime of illegal medical practice**

Crime of medical malpractice is similar to crime of illegal medical practice to some degree. The crime objects of both crimes both are public health order and right of life and health of citizen. Differences of two crimes are: firstly, subjects are different. Subject of crime of illegal medical practice is the person who does not acquire doctor practicing qualification but the subject of crime of medical malpractice is the medial staff engaged in medical industry with the approval of national competent departments. Secondly, subjective aspects are not the same. Manifestation in subjective aspect of crime of illegal medical practice is a state of intentional crime but the Manifestation in subjective aspect of crime of medical malpractice is a state of fault. Thirdly, objective aspects are not the same. Crime of illegal medical practice belongs to circumstance crime. One element of such crime is the circumstances are serious it will not cause death or personal injury to the person seeking medical service certainly. Crime of medical malpractice belongs to consequential crime. One requirement if convicted is the illegal behavior of the actor must cause severe personal injury or death to the person seeking medical service.

**Distinction between crime of medical malpractice and crime of intentional homicide and crime of intentional injury**

It is specified in the Article 232 of Criminal Law issued by the state that crime of intentional homicide is the behavior to deprive other person’s life intentionally and illegally. It is specified in the Article 234 of Criminal Law issued by the state that crime of intentional injury is the behavior to damage other persons’ personal health intentionally and illegally. Both of the crimes belong to criminal offense in the crimes that infringe rights of human life of citizens and they are different from crime of medical malpractice. The first difference is that crime subjects are not the same: crime subjects if crime of intentional homicide and crime of intentional injury are general subjects that are natural persons of age for criminal responsibilities and with criminal capacity but subject of crime of medical malpractice is special subject that is medical staff with practicing qualification. Second difference is subjective aspects are not the same: the subjects of crime of intentional homicide and crime of intentional injury must have a crime intention but the crime of illegal medical practice only has fault in subjective aspect. The crime objects are not the same: objects of crime of intentional homicide and crime of intentional injury are other people’s right of life and
health. The object of crime of medical malpractice is broader than that of previous two crimes and it refers to social management order, working order of medical institution and right of life and health of citizens. The fourth difference is objective aspects are not the same: manifestation of crime of intentional homicide and crime of intentional injury in objective aspect are illegal deprivation of other people’s life and infringement of other people’s personal health. Manifestation of crime of medical malpractice in objective aspect is severely irresponsible behavior of medical staff with practicing qualification causes severe injury or death to the person seeking medical service.

**Distinction of crime of medical malpractice and crime of negligent homicide and crime of negligent injury**

It is specified in Article 323 of Criminal Law issued by the state that the crime of negligent homicide is the behavior makes other people dead by fault. Article 325 defines the crime of negligent injury as the behavior that causes serious physical injury to other people by fault. In the subjective aspect of three crimes is fault rather than intention. And dangerous results are basically the same so they are easily to be confused. Differences of these three crimes are as follows:

Firstly, crime subjects are not the same. Crime subjects if crime of negligent homicide and crime of negligent injury are general subjects but subject of crime of medical malpractice is special subject. Secondly, subjective aspects of crimes are not the same. Subjective fault manifestation of crime of medical malpractice is business fault and dereliction of medical staff that violates health laws and regulations and codes for diagnosis, treatment and nursing. Subjective faults of crime of negligent homicide and crime of negligent injury are general faults, fault range of which is broader than that of crime of medical malpractice. Thirdly, crime objects are not the same. Object of crime of medical malpractice is human right of life and health but objects infringed by crime of negligent homicide and crime of negligent injury are working management order of medical institution. Fourthly, it is not the same objectively. Infringed object of crime of medical malpractice is human right of life and health but the manifestation of crime of negligent homicide and crime of medical malpractice is to make other people dead or severely injured by illegal means.

Study on judicial determination of crime of medical malpractice defines crime constitution of crime of medical malpractice essentially, plays a significant guiding role in clarifying crime of medical malpractice, non crime and other similar crimes in judicial practice and is of great importance to protect health right of citizens and maintain authority of law and harmonious and stable society.

**Reference**

[1] Social Science Foundation of Qiqihar Medical University: A qualitative research of the rights of practicing physicians in the affiliated hospitals of Qiqihar Medical University (QYSKL2015-02).


[4] Article 335 of Criminal Law, passed by the second session of the fifth National People’s Congress (NPC) on July 1, 1979 and revised by the fifth session of the eighth National People’s Congress (NPC) on March 14, 1997.

