

# IS THE PHYSICIAN A PERSON EQUIVALENT TO A PUBLIC SERVANT AND THE SPECIAL ENTITY OF FAILURE TO PERFORM OFFICIAL DUTIES ACCORDING TO THE CRIMINAL CODE OF THE REPUBLIC OF LITHUANIA?

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## Abstract

The author analyzes in the article the concept of a person equivalent to a public servant defined in paragraph 3 Article 230 of the Criminal Code of the Republic of Lithuania, in order to determine if a physician who has improperly provided individual health care services through negligence is considered to be a person equivalent to a public servant for the purpose of Article 230 of the Criminal Code of the Republic of Lithuania, i.e. if he can be the entity of failure to perform official duties (Article 229 of the Criminal Code of the Republic of Lithuania).

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**Keywords:** Person equated to public servant, professional practice, public services

## Introduction:

The patient and the physician are linked by the obligation, the content of which includes the physician's duty to ensure that this obligation is carried out by adding the maximum effort, i.e. ensuring maximum degree of attention, diligence, prudence and proficiency. The physician who has breached that duty shall, *inter alia*, compensate for damages. In addition, the physician may be subject to disciplinary liability and/or to criminal liability as *ultima ratio* measure in the event of particularly grave violation of the duties causing serious consequences. Thus, although the physician's professional liability (compensation for damages caused) issue should be, first of all, resolved using civil law instruments, and only when it is found that results can not be achieved with other instruments (administrative, disciplinary, civil penalties and public exposure means) unrelated to application of criminal penalties, criminal liability should be applied. However, the cases where application of criminal liability to the physician as *prima-* or even *solo ratio* is sought regardless of the scale of the physician's failure to perform his duty and dangerousness of the act are becoming increasingly common in practice. Application of criminal liability as *prima-* or even *solo ratio* is extremely facilitated by Article 229 "Failure to Perform Official Duties"<sup>138</sup> of the Criminal Code of the Republic of Lithuania (further referred to as the Criminal Code), which through its abstract wording and the lack of doctrinal and systematic interpretation of its composition enables application of criminal liability to physicians as *prima-* or even *solo ratio*. (Im)possibility of application of this Article to physicians providing individual health

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<sup>138</sup> Article 229. Failure to Perform Official Duties. A public servant or a person equivalent thereto who fails to perform his duties through negligence or performs them inappropriately, where this incurs major damage to the State, a legal or natural person, shall be punished by a fine or by arrest, or by imprisonment for a term of up to two years.

care services to patients will be analyzed in the article using systematic and teleological interpretation.

### **I.:**

Article 229 of the Criminal Code “Failure to Perform Official Duties” criminalizes (1) omission, i.e. failure to perform the duties that fall within one’s competence and are necessary to ensure interests of the service, or (2) inappropriate performing of official duties, i.e. negligent, poor, careless, insufficiently effective performing of one’s duties thus not ensuring interests of the service, committed by a public servant or a person equivalent to a public servant<sup>139</sup>. Thus, as apparent from the wording of the Article, criminal liability under Article 229 of the Criminal Code may arise only to a special entity – a public servant or a person equivalent to a public servant. The concept of a person equivalent to a public servant is provided in paragraph 3 Article 230 of the Criminal Code stating that a person who works at any state, non-state or private body, undertaking or organisation or engages in professional activities and holds appropriate administrative powers or has the right to act on behalf of this body, undertaking or organisation or provides public services shall also be held equivalent to a public servant. Summarizing this complex and difficult structure of the special entity’s attributes chosen by the legislator it shall be stated that in order for a person to be considered a person equivalent to a public servant, the person must have at least 2 mandatory attributes: 1) to work at any state, non-state or private body, undertaking or organisation or engages in professional activities; and 2) to hold appropriate powers (administrative powers, the right to act on behalf of this body, undertaking or organisation or provide public services).

The Supreme Court of Lithuania (criminal case No. 2K–P–89/2014) noted that making a decision on whether a person is to be considered a person equivalent to a public servant for the purpose of Article 230 of the Criminal Code, i.e. if he can be the entity failing to perform his official duties (Article 229 of the Criminal Code), it is necessary to assess the fact that the said criminal act under the Criminal Code is attributed to crimes and misdemeanours against public service and public interest (Chapter XXXIII of the Criminal Code). Thus, the subject of this criminal act is normal operation of state institutions, their authority and authority of state service in general, public interest<sup>140</sup>, and the danger is that such acts may cause damage to normal functioning of the public service, operation of state authorities, their prestige and public interest. The mere formal compliance with the attributes of paragraph 3 Article 230 of the Criminal Code can not be considered sufficient for arising of criminal liability under Article 229 of the Criminal Code – it has to be stated that such activities of a person are associated with ensuring of public interest, and failure to perform or improper performance of such activities would mean violation of public interest. “Otherwise, if any person who formally corresponds to the attributes laid down in paragraph 3 Article 230 is treated as a person equivalent to a public servant without assessing significance of his activities in ensuring public interest or public service, it would distort the essence of crimes and misdemeanours against public service and public interest, the purpose of norms established in Chapter XXXIII of the Criminal Code” (The Supreme Court of Lithuania, criminal case No. 2K–P–89/2014).

Analyzing the cases heard at courts<sup>141</sup>, in which physicians were indicted under Article 229, it shall be stated that physicians are found guilty completely without providing any reasons of their compliance with mandatory attributes of a special entity (a person equivalent

<sup>139</sup> Klaipėda Regional Court, criminal case No. 1A-12-557/2008.

<sup>140</sup> Public interest as the value protected by law, and can be understood as the interest of public that persons authorized to deal with various matters of public interest, would do so in an impartial, fair manner, in accordance with the procedure laid down by laws (The Supreme Court of Lithuania, criminal case No. 2K–P–89/2014).

<sup>141</sup> E. g. Criminal cases No. 2K-62/2011, No. 2K-299/2008, 2K-444/2008.

to a public servant) – usually it is only state in court judgements that X has been convicted because being a person equivalent to a public servant, working as a physician in hospital Y, he chose wrong tactics of treatment in contradiction to the provisions of the item N of the job description. It should be based on the assumption that the court considered the physician providing individual health care services to patients as a person equivalent to a public servant, as according to the court assessment, the physician working under a contract of employment or pursuing professional activities was providing public service. Further in the article reasonableness of considering the physician a person equivalent to a public servant for the purpose of Article 229 of the Criminal Code will be analyzed.

As already mentioned, the state legislator associates the status of a person equivalent to a public servant with two mandatory attributes, one of which is the legal basis on which the person has acquired the duties (powers). Compliance with this attribute is associated with labour relations on the basis of an employment contract at any state, non-state or private body, undertaking or organisation or engagement in professional activities. Possession of powers on the basis of an employment contract does not cause much uncertainty, which can not be said about the concept “professional activities”.

Gruodytė (2006) considers holding of the licence to engage in specific activities and autonomy of professional activities (the person acts on its own behalf and risk) to be the distinctive attributes of professional activities. The Supreme Court of Lithuania<sup>142</sup> describes engagement in professional activities using the same attributes, stating in its ruling that engagement in professional activities under paragraph 3 Article 230 of the Criminal Code most often activities performed by persons not under employment contracts, which require professional qualification (e.g. special education, knowledge, skills, experience); normally such activities are related to passing qualifying examination and/or holding some licence.

Meanwhile, the Constitutional Court of the Republic of Lithuania<sup>143</sup>, while formulating the constitutional concept of state service, stated that public service is professional activities of persons related to ensuring the public interest. Thus, the Constitutional Court of the Republic of Lithuania interprets the concept of professional activities in a considerably wider way, and equates activities carried out by the person (both on the basis of an employment contract and on other grounds) to engagement in professional activities; it only matters that the person would be acting as a professional.

Such different interpretation of “professional activities” complicates application of this attribute. For example, physicians usually provide individual health care services under the employment contract with a health care institution, therefore it seems to be possible to conclude that the physician meets the first attribute, i.e. works under the employment contract at any state, non-state or private body, undertaking or organisation. However, according to the definition of “professional activities” provided by the Supreme Court of Lithuania, the physician’s activities in providing individual health care services should be seen as engagement in professional activities (with special professional education and the licence necessary for engagement in activities).

Given the fact that the construction of this attribute formed by the legislator (performing the duties on the basis of employment contracts or performing the duties on other than employment contracts basis), and such intention to cover also the persons operating not on the basis of employment contracts corresponds to the concept of “self-employment” used in the public law, which means independent activities performed by natural persons, by which the person seeks to generate income or other benefits for a continuous period of time, it is considered to be appropriate to replace the concept “professional activities” with the concept

<sup>142</sup> The Supreme Court of Lithuania, criminal case No. 2K–P–89/2014.

<sup>143</sup> Ruling of Constitutional Court of the Republic of Lithuania in 13 December 2004 // Valstybės žinios. 2004. Nr. 181-6708.

“self-employment”. This replacement with “self-employment” would enable avoiding situations where “professional activities” and work under employment contracts overlap, and would allow to clearly distinguish between the powers derived from an employment contract and the powers acquired through self-employment.

In any case, according to paragraph 3 Article 230 of the Criminal Code, the fact of professional activities or existence of the employment contract is not sufficient that a person engaged in professional activities or working under the employment contract would be recognised a person equivalent to a public servant. In order a person engaged in professional activities or working under the employment contract, could be considered a person equivalent to a public servant, he must have an appropriate authority. One of such powers specified in paragraph 3 Article 230 of the Criminal Code is provision of public services. Unfortunately, the content of the “public services” concept and/or its main elements is not presented in the Criminal Code.

The courts interpreting the concept of “public service” refer to the definition presented in paragraph 18 Article 2 of the Law on Public Administration: “Public service shall mean activities of legal persons controlled by the State or municipalities when providing social services for persons, as well as services in the spheres of education, science, culture, sports and other services provided for by laws. Other persons may also provide public services in the cases and in the manner provided for by laws”. As can be seen, the concept provided in the law is not clear enough – it only gives an exemplary list of services that can be considered public services for the purpose of this law. Interpretation of this concept in accordance with the definition presented in the Law on Public Administration was also supported by the Supreme Court of Lithuania, which in its previous<sup>144</sup> practice considered the nature of the service and regulation of such a service by law to be the essential criteria for the recognition of the service as public. However, such taking over of the concept from the other law and its application regardless of the crime subject, caused insurance, property security services recognition as public services, which resulted arising of criminal liability to relevant persons<sup>145</sup> according to Article 229 of the Criminal Code.

The Constitutional Court of the Republic of Lithuania<sup>146</sup>, interpreting the substantive attributes of the concept of provision of public services, indicated that the public service shall be seen as a service provided to the public and shall satisfy the public interest. Thus, according to the court interpretation, in order to recognize the service as a public service, it shall be of a public nature, i.e. it shall satisfy the public interest, and in order the person could be considered a public service provider, he shall be actually authorised to perform the obligations of general economic benefit, and these obligations must be clearly defined

Čaikovskij (2007) identified 4 mandatory attributes of a public service: “1) only a service regulated by the law could be deemed a public service; 2) a service must be provided by legal persons controlled by the state or the municipality; any other persons may be providers only in the cases provided by the laws; 3) direct or at least indirect clients (i.e. recipients of that service) should be dwellers; and in some cases the society as such is the client, taking into account the character and significance of that service; 4) a service must be supervised, controlled and otherwise administrated by entities of public administration who inter alia

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<sup>144</sup> E. g. criminal cases No. 2K-326/2006, No. 2K-304/2008. The assumption about previous practice shall be made from the clarifications provided in the criminal case No. 2K-P-89/2014 that the position of the Supreme Court of Lithuania regarding the concept of “public service” has changed.

<sup>145</sup> To a legal counsellor (criminal case No. 2K-326/2006) and security officer (criminal case No. 2K-304/2008).

<sup>146</sup> Ruling of Constitutional Court of the Republic of Lithuania in 21 December 2006 // Valstybės žinios. 2006. Nr. 141-5430.

issue permits for the provision of public services to private persons”<sup>147</sup>. Given the fact that the person providing public services that correspond to these attributes will be recognized the entity failing to perform his official duties (Article 229 of the Criminal Code), and the attributes provided do not reflect at all that improper performance of such a public service would cause a potential violation of or hazard to the public interest, the conclusion should be drawn that these attributes should be supplemented with characteristics related to ensuring of direct links between activities and the public interest. Such extremely general definition of a public service distorts the essence of criminal acts public service and public interest, the purpose of the norms established in Chapter XXXIII.

Namely, because of such extremely general concept of public services, Čaikovskij (2007) made the conclusion that provision of individual health care services shall be recognised the public service, as paragraph 6 Article 2 of the Law on Health System provides the definition of individual health care – “the activities of natural and legal persons licensed by the state, the purpose whereof is to timely diagnose and prevent the individual’s health disorders, also to help recover and strengthen health”. “It shall be noted that enterprises and institutions shall acquire the right to engage in health care activities only upon receiving the licences according to the procedure prescribed by the Government or the institution authorised by it (paragraph 2 Article 16), and the right to engage in a certain type of health care practice shall be recognised to natural persons who have been issued, in the manner prescribed by law, a licence and a certificate (paragraph 1 Article 16)”<sup>148</sup>. Therefore, in the opinion of Čaikovskij (2007), the physician engaged in individual health care, shall be considered the entity of Article 229 of the Criminal Code.

As can be seen from the concept of individual health care provided in the law, provision of such service can not be considered a public service for the purpose of Paragraph 3 Article 230 of the Criminal Code, and the physician who has provided it improperly or failed to provide it can not be considered the entity of the crime specified in Article 229 of the Criminal Code, as although the quality of health care services is important, the State has other instruments to ensure it rather than applying criminal liability for the crime, whose object is normal operation of state authorities, authority of a public service and public interest, and dangerousness of the act is expressed in causing damage to normal functioning of public service, operation of state authorities, their prestige and violation of public interest. The mere formal compliance of the provision of individual health care services with the attributes of paragraph 3 Article 230 of the Criminal Code can not be considered sufficient for arising of criminal liability to the physician under Article 229 of the Criminal Code, as such physician’s activities are not related to ensuring public interest and failure to perform or improper performing of such activities does not mean violation of a public interest.

In order to avoid situations in the future, where recognition of actually any person who formally complies with the attributes of paragraph 3 Article 230 of the Criminal Code as a person equivalent to a public servant can be sought without assessing significance of his activities to public interest or public service, it is suggested to replace the word the word “provides” the word “administers”, in such manner preventing the excess application of this norm, without considering the value of the law (the subject matter) to be retained.

### **Conclusion:**

Criminal liability under Article 229 of the Criminal Code may arise only to a special entity – a public servant or a person equivalent to a public servant; a person equivalent to a

<sup>147</sup> Čaikovskij A. Valstybės tarnautojui prilygintas asmuo: funkcijos ir įgaliojimai // Jurisprudencija. 2007. Nr. 6(96), p. 96.

<sup>148</sup> Čaikovskij A. Valstybės tarnautojui prilygintas asmuo: funkcijos ir įgaliojimai // Jurisprudencija. 2007. Nr. 6(96), p. 95.

public servant must have 2 mandatory attributes: 1) to work at any state, non-state or private body, undertaking or organisation or engages in professional activities; and 2) to hold appropriate powers (administrative powers, the right to act on behalf of this body, undertaking or organisation or provide public services).

By making a decision on whether a person is to be considered a person equivalent to a public servant for the purpose of Article 230 of the Criminal Code, i.e. if he can be the entity failing to perform his official duties (Article 229 of the Criminal Code), it is necessary to assess the fact that the said criminal act under the Criminal Code is attributed to crimes and misdemeanours against public service and public interest (Chapter XXXIII of the Criminal Code). The mere formal compliance of the provision of individual health care services with the attributes of paragraph 3 Article 230 of the Criminal Code can not be considered sufficient for arising of criminal liability to the physician under Article 229 of the Criminal Code, as such physician's activities are not related to ensuring public interest and failure to perform or improper performing of such activities does not mean violation of a public interest.

Provision of individual health care service can not be considered a public service for the purpose of Paragraph 3 Article 230 of the Criminal Code, and the physician who has provided it improperly or failed to provide it can not be considered the entity of the crime specified in Article 229 of the Criminal Code.

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