

THE POSITION OF A DOCTOR IN CASES OF VIOLENCE ATTACK COMMITTED BY A PATIENT FROM THE POINT OF VIEW OF JURISTIC THEORY

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There is no doubt, that the medical staff has often to face aggressive patients, their threats and even their violent physical attacks today. More frequently than ever they are faced with the necessity to think over and consider very carefully the way to defend against imminent or persistent attack on them.

First, I would attempt to qualify patients' aggressive behaviour – from lesser acts, when the violent attack is not imminent, through threatening with killing, inflicting aggravated bodily harm or causing exceptionally serious damage or enforcement by violence, the threat of violence or the threat of causing another serious damage, to do something, to desist from doing something or tolerate something, to the imminent or persistent attack. Then I would try to describe the best ones of possible ways of self-defence against various levels of aggressive behaviour.

INTRODUCTION

At present doctors and other medical staff have to face aggressive behaviour committed by patients more and more often. Unfortunately, bad words or verbal assaults are not the only cases of this inappropriate behaviour. Information from medical practice persuade us of increasing seriousness and brutality of these attacks. Discussing the legal issues of their profession with the medical staff, I often meet this question: Being a doctor / a nurse, am I entitled to self-defend? How shall I behave, if the verbal assaults turn to a violence attack? I will attempt to find apposite answer.

If there is used the word medical staff in the text, it shall mean any medical worker – doctors, nurses and other medical workers.

Verbal assault-threatening

Unless there is the imminent peril of violent attack against the medical staff and if the aggressive patient uses only invectives, verbal assaults and threatens, his act could be qualified as an offence against public order, or depending on judging concrete level of dangerousness and other prevailing circumstances (*res gestae*) of the case as a crime – rowdism (§202 Act No. 140/1961 Coll., Criminal Code, as amended¹)

However, if the patient threatens with killing, inflicting aggravated bodily injury or causing exceptionally serious damage and the way he does it is enough to cause justified concerns, this act could be qualified as a criminal act – violence against a group of persons and against an individual. (§197a Act No. 140/1961 Coll., Criminal Code, as amended¹)

The client also may force the social worker by violence, the threat of violence or the threat of causing another serious detriment, to do something (to act/*facere*), to desist from doing something (to omit/*omitere*) or tolerate something (to suffer/*pati*). According to the Criminal Act, this act could also be judged as committing a crime – blackmailing/extortion (§235 Act No. 140/1961 Coll., Criminal Code, as amended¹)

The protection against the above mentioned courses of action – altogether various forms of threatening – which are impossible to get them under control by the psychological approach mentioned above – could be summed up into following instructions:

1. Summon the witnesses (colaborators, doctors, nurses, medical staff,...)
2. If it is possible, call the security service of the hospital
3. Call police officers so that they can record the official case report, report of facts which may serve as a basis for a witness summons and, if need be, commencement of criminal prosecution
4. And if anything of above mentioned is impossible, call police operation bureau of police headquarters.

Violent attack/assault-using (necessary) self defence

We are in a very different situation, if the attack – intentional, unlawful action of a man – is imminent or persistent. Just at that moment is the defender entitled to use legal institute called – self defence (§ 13 Act No. 140/1961 Coll., Criminal Code, as amended – further just Criminal Code). (Necessary) Self-defence belongs to the circumstances excluding illegality, the next ones are: extreme emergency (§ 14 of Criminal code), justified (lawful) use

of a weapon (§ 15 of Criminal Code), consent (permission) of the injured and reasonable exercise of rights and discharge of duties. The last two mentioned circumstances are not described directly in Criminal Code².

The circumstances excluding illegality are such circumstances, which make that the act, which would otherwise be considered a criminal offence, has no dangerousness of a crime, which means the material elements of a crime are not satisfied at all; and the illegality (one of the elements of a body of crime) is also missing (it means – the formal elements of a crime are not fully accomplished) and the act can not ever be considered a crime³.

The definition of a (necessary) self-defence could be found in article 13 of Criminal Code – The act, which a man is obstructing an imminent or persistent attack on an interest protected by the Act herein, otherwise considered a crime, is not a crime. It is not a (necessary) self-defence, if the defence was obviously quite inappropriate to the manner of the attack.

So that we can speak about (necessary) self-defence, following conditions must be fulfilled:

1. The attack is imminent or persistent
2. The attack on an interest protected by Criminal Code
3. The defence must not be obviously inappropriate to the manner of the attack

The medical worker must be fully aware of existence of all these conditions when using the necessary self-defence and he or she must fully satisfied all of them, it means he or she must act only within the legal limits so that his or her action could be as a matter of necessary self-defence.

There is no dangerousness of a crime in acting in necessary self-defence, on the contrary, this act is desirable, because it supplies public authority action – police raid. It is necessary to stress again that the acting in necessary self-defence is not a crime, because it does not accomplished all elements of a body of crime and it is also not illegal.

Necessary self-defence and extreme emergency (necessity)

Comparing necessary self-defence with another circumstance excluding illegality – extreme emergency, we can say that necessary self-defence as a legal institute is special case to the legal institute of extreme emergency – we speak about relation of speciality.

There are these main differences between above mentioned legal institutes: The element of extreme emergency is averting any danger, while the element of necessary self-defence is only averting the attack, which is intentional, unlawful action of a man. Action of the defender has to be directed exclusively against the attacker, if not, defender's action could be only taken as the acting in extreme emergency.

Acting in necessary self-defence allows to cause larger damage than the one which had threatened – the defence can be stronger than the attack, but not obviously inappropriate. (nowadays the attacker should not be respected so much). Damage caused in extreme emergency

can not be clearly as serious or even more serious than the one which had threatened – this is called the principle of proportionality.

Another element of extreme emergency is the principle of subsidiarity – it means – there was no way to avert the threatening danger otherwise – for example to escape, to call the police... This principle does not belong to elements of necessary self-defence.

But these two legal institutes have some common principles: Anybody is entitled to act in both the extreme emergency and necessary self-defence. If person attempts to avert attack on someone else, we speak about help in necessary self-defence.. Both the danger and the attack must violate or endanger the interest protected by Criminal Code, it means the protected interests are the same. And both the danger and the attack must be directly threatening or continuing – this important condition is the same in both the institutes⁴.

Violence attack/assault-sanity and insanity

Now, I would like to focus on considering of necessary self-defence from the point of view of the attacker, who can but need not always be sane (mentally healthy) and I would like to compare the understanding of the attack of sane and of insane patient by previous and present juristic theory and practise.

a) sane patient

If the sane patient commits the attack on a member of medical staff (attack is defined by the juristic theory as an intentional unlawful action of a man, which is dangerous to society) there is no doubt, he or she shall be criminally liable for his or her act. Aggrieved medical worker, as anybody else, can act in necessary self-defence. This rule was always valid in the main. But earlier, especially before the year 1993, the established practise of courts used to interpret the statutory limitations of necessary self-defence too strictly. General public did often not understand how to defend, what are the limitations of allowed lawful reasonable self-defence.

That is why the main amendment of Criminal Code of the year 1993 changed the text of the article 13, so the previous wording "...if the defence was evidently inappropriate to the character and dangerousness of the attack, it is not a necessary self-defence." was replaced with new wording "...It is not a (necessary) self-defence, if the defence was obviously quite inappropriate to the manner of the attack."

The legislator showed clearly new legislative intent – to allow such defence which enable to avert the attack certainly, and it means the defence must be stronger than the attack. Otherwise the legal institute of necessary self-defence would lose its sense.

The statutory limitations of necessary self-defence are wide enough to enable the active defence. We can not tax the defender heavily. The legal nature of necessary self-defence is averting of the attack on social relationships, interests and values protected by Criminal Code by the act directed exclusively against the attacker. The defender

has always the disadvantage of an attacker, fortunately the investigative, prosecuting and adjudicating bodies start to comprehend and respect it now.

The defence can be more intensive than only reasonable adequate self-defence, the limitations are really wide.

It is impossible to demand so that the medical worker, or any other defender, could not use more effective means than the attacker (aggressive patient) had. The defender must logically choose such means of defence, which enable to avert the attack certainly, without endangering of defender's life.

The defence need not be only passive, even the active defence does not turn the defender into the attacker. The attack must be imminent, then the defender has not to wait till the attacker hits him, but he can land the first blow. The juristic theory and practice have concluded that the menace of the person known with his violence prediction could be considered an imminent attack in certain circumstances.

On the other hand, if the attack is only prepared, but it is not imminent yet, one of the main conditions was not fulfilled and it means the person does not act in necessary self-defence. It is important to realise, that the terminated attack also excludes acting in necessary self-defence. The question of the time of termination of an attack is difficult – this moment need not coincide with the time of completing the criminal offence.

But anyway, it is possible to conclude, that there is a great change in judging limits of appropriation of the necessary self-defence in favour of the defender in a few last years.

b) Insane patient

But what happens, if anybody of the medical staff is attacked by the insane patient, will this person be criminally liable for his or her act? Can be the legal institute of necessary self-defence used in the same extent. Now, I would attempt to reply these questions too.

First, we must clear up the term "sanity". There is no legal definition of this term in Criminal Code. Juristic theory interpretes it as a criminal capacity – capability to commit a crime – depending on a psychic competence of an offender⁴.

The adult (mature) attacker of medical worker must be mentally competent person in order to be considered criminally liable for his or her attack. The sanity is conditional on the ability of an offender to recognize the danger his or her act represents to society or to control his or her conduct⁴.

Criminal Code defines the term insanity – The person, who due to his mental disorder (unsound mind) in the time of performing the action was not able to recognize the danger his or her act presents for society or was not able to control his or her conduct, is not criminally liable for this act" (§12 of Criminal Code).

The definition of insanity is based on two essential elements – biological criterion – The person must act in mental disorder (mental disease) and simultaneously there must be lack of at least one of two abilities – to

recognize the danger his or her act presents for society (cognitive ability) or to control his or her conduct (ability of determination/control ability).

We can conclude, that the person is mentally incompetent, it means insane person, if 1. diagnosed mental disease (mental disorder) leads to the total absence of 2. cognitive ability or 3. control ability, or both of these abilities, that all in the time of acting⁴.

In some special circumstances could the sanity be only diminished – Criminal Code uses, but not exactly defines, this term. The juristic theory interpretes the diminished sanity as a state when the ability to recognize the danger his or her act presents for society or the ability to control his or her conduct were substantially limited due to person's mental disorder⁴.

The definition of a diminished sanity should be included in the new Criminal Code which is prepared now.

Nevertheless the question of sanity or insanity of the acting person could only be responded by the independent report of the forensic expert engaging in the proceedings and the state of a person's sanity or insanity must always be examined in the relation to the time the person performed the action⁵. The diminished sanity does not mean exemption of offender's criminal liability, but it shall be taken into account during judging of punishment.

As mentioned above, the attack is intentional unlawful action of a man, which is dangerous for society. It means that the attack of an insane patient can not be considered an attack in the exact sense of the term, because the attack is intentional acting of a man.

When the person is insane, we can not speak about culpability, insanity excludes culpability. Because the state of insanity means the absence of the cognitive ability and that is why even the lower level of culpability – unwilling negligence – can not be present, or the control ability misses, which means the freedom of a will misses and the culpability is therefore also excluded⁴.

There is no intention at the insane person, the attack is excluded, because the attack is intentional unlawful action, that is why the action of a mentally incompetent person, which endangers his or her surroundings is not an attack in the strict sense of an article 13 of Criminal Code, but it can be considered a danger in a sense of extreme emergency. But a person averting the danger must not cause damage clearly as serious or even more serious than the one which had threatened (§14 of Criminal Code). This principle seems to be void and inconvenient exactly in the case, when the damage shall be caused to the person who induced the emergency (f.e. the insane patient endangers the medical worker's life)(ref.³).

The juristic theory and practice attempted to solve this problem by analogic extension of the circumstances of necessary self-defence to the conditions of acting in the extreme emergency and allowing causing as serious damage as had threatened. Such analogy is allowed because it restricts the criminal liability³.

This method of solution of this problem was not optimum, because it only admitted causing as serious damage as the one which had threatened, but not more serious

damage. But the defender has often to act under the great pressure for time, in a stress, under extreme psychic pressure. He or she does often not know even the basic of self-defence and that is why he or she is not able to consider all the possible consequences, which he or she may cause, how much he or she may injured the attacker by his or her defence.

Insisting on the strict slavish interpretation of the wording of these articles would mean that we could arrive at the absurd conclusion that is hard to believe – while is allowed causing even the damage more serious than the one which had threatened to the sane attacker, it is prohibited to cause as serious damage as. had threatened to the insane person. In spite of the fact that there is no doubt that the insane person, who can not recognize the danger his act presents for society or who can not control his conduct is much more dangerous than the mentally competent person.

The response to such hardly believable conclusions of the juristic theory was – the criminal liability of an attacker is not requested for possibility to cause more serious damage than the one which had threatened. It means – nowadays necessary self-defence is applicable against the attack of insane person or the person who has not reach the age of 15 yet.

The attack need not be a crime, that is why is not necessary so that the attacker is mentally competent and criminally liable person. The acting of these persons is also considered to be an attack⁴.

We must judge the averting of an attack of the insane person or of a child to be a cases of necessary self-defence and we should not use the analogy, as the juristic theory used to do.

Excess of necessary self-defence

It may happen, that the defence is obviously inappropriate to the manner of the attack, so we speak about an

excess of necessary self-defence. If there is a clear disproportion we speak about intensive excess – f.e. shooting at an unarmed person, who uses only invectives against defender.

It is also possible that the attack is not imminent or persistent at the time of the defence, this situation is called extensive excess – f.e. the attack has been terminated yet, but the defender continues defending.

DISCUSSIONS AND CONCLUSION

I attempted to compare understanding of the legal institute of necessary self-defence in the past and at present. It is clear, that statutory limitations are not so strict now. The interpretation of the circumstances excluding illegality is in favour of the defender, the juristic theory and practise recognize that the defender under the attack need not be able to chose the most appropriate and optimum way of defence.

We can close, that the medical staff is not bound to suffer invectives, threatens, attacks and assaults – they are entitled to use the legal institute of necessary self-defence as anybody else. Criminal Code provides sufficient legal basis for an effective self-defence.

REFERENCES

1. Jelínek, J. a kol. Trestní právo hmotné. Zvláštní část. 1. vyd. Praha: Eurolex Bohemia, 2003. ISBN 80-86432-35-1.
2. Jelínek, J. a kol. Trestní zákon a trestní řád. 21. vyd. Praha: Linde, 2004. ISBN 80-7201-496-X.
3. Novotný, O. a kol. Trestní právo hmotné. I. Obecná část. 3. přeprac. vyd. Praha: Codex, 1997. ISBN 80-85963-24-8.
4. Jelínek, J. a kol. Trestní právo hmotné. Obecná část. 1. vyd. Praha: Linde, 2004. ISBN 80-7201-501-X.
5. Šámal, P. a kol. Trestní řád. I. díl. 4. doplň. a přeprac. vyd. Praha: C. H. Beck, 2002. ISBN 80-7179-634-4.