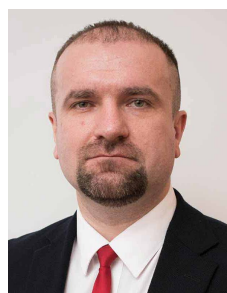


UDC 343.6

DOI 10.31733/2786-491X-2023-1-249-256



Volodymyr SHABLYSTIY ©
D.Sc. in Law,
Professor
(*Dnipropetrovsk State University of Internal Affairs*),
Ukraine



Valentyn LIUDVIK ©
Ph.D. (Law),
Associate Professor
(*Dnipropetrovsk State University of Internal Affairs*),
Ukraine

DISTINGUISHING THE ENDANGER BY THE MOTHER OF A NEWBORN CHILD THAT CAUSED THE DEATH OF THE CHILD FROM RELATED CRIMINAL OFFENSES BY SIGNS OF THE SUBJECTIVE PART

Abstract. The article deals with the judicial practice of the qualification of leaving a newborn child in danger by the mother, which caused the death of this child. It has been established that there are no uniform approaches to determining whether the mother has a condition caused by childbirth, since the conclusions of a complex forensic psychological and psychiatric examination do not always give a clear answer to this question. Analysis of court verdicts under Art. 117, ch. 2, 3 Art. 135 of the Criminal Code of Ukraine indicates that it is not mandatory to appoint a complex forensic psychological and psychiatric examination for this category of criminal proceedings, which does not contribute to proving the circumstances that affect the degree of severity of the committed criminal offense, and allows to distinguish the components of the specified criminal offenses.

In the case of leaving a newborn child in danger by the mother, if the mother was not in a state determined by childbirth, which caused the death of this child, the subjective part consists only in the direct intention of the act. The mental attitude of the mother to the death of her newborn child when left in danger is characterized by criminal wrongful self-confidence or criminal wrongful negligence. If the mother has an indirect intention to cause the death of her newborn child, her actions must be qualified according to clause 2, part 2 of Article 115 of the Criminal Code of Ukraine. It is proposed to enshrine in the conclusion of the Grand Chamber of the Supreme Court of Ukraine the provision according to which the intentional killing by the mother of her newborn child should be qualified under Art. 117 of the Criminal Code of Ukraine, if it is committed in the presence of a special mental and physical condition of a woman, which reduces her ability to manage her actions during childbirth or immediately after it.

Keywords: *abandonment in danger, newborn child, condition due to childbirth, criminal liability.*

Introduction. Part 2 of Art. 135 of the Criminal Code of Ukraine provides for criminal liability for knowingly leaving a newborn child without assistance by the mother, if the mother was not in a condition due to childbirth. In part 3 of this article, causing the death of a person or other serious consequences as a

© Shablystiy V., 2023
ORCID iD: <https://orcid.org/0000-0003-0210-1772>
vo-1_shablisty@ukr.net

© Liudvik V., 2023
ORCID iD: <https://orcid.org/0000-0002-3385-6046>
k_kpk@dduvs.in.ua

result of such actions is recognized as a particularly aggravating circumstance. According to its objective and subjective characteristics, the above-mentioned act in the case of causing the death of a newborn child is related to such criminal offenses as intentional killing by the mother of her newborn child during childbirth or immediately after childbirth (Article 117, Criminal Code of Ukraine, 2001) and intentional homicide of a minor child (Clause 2, Part 2, Article 115, Criminal Code of Ukraine, 2001). In the theory of criminal law and investigative judicial practice, there are currently no clear criteria for distinguishing these components of criminal offenses according to subjective characteristics, in particular, the form and type of guilt, the emotional state of the mother during childbirth or immediately after childbirth.

O. Shevchenko notes that a special psychophysiological state is not present in all cases of pregnancy and childbirth, and consists in changes in physiological, mental and psychological states that lead to a limitation of a person's ability to realize the actual properties of his actions and/or control them. Therefore, in every case of intentional murder by the mother of her newborn child, it is necessary to conduct a comprehensive forensic psychological and psychiatric examination to establish the presence or absence of a special psychophysiological condition (Shevchenko, 2014).

At the same time, judicial practice shows the lack of uniform approaches to determining whether the mother has a state caused by childbirth, since the conclusions of a complex forensic psychological and psychiatric examination do not always give a clear answer to this question, but formulate it, in particular, noting that the mother was in a state emotional tension, which is caused by the physiological processes of childbirth (<https://zakononline.com.ua/court-decisions/show/71196826>), which allows law enforcement agencies and the court to arbitrarily interpret such a conclusion. These and other problematic issues of distinguishing leaving a newborn child in danger by the mother from related criminal offenses on the basis of the subjective part determined the expediency of their research.

Analysis of recent research and publications. The works of P. Andrushka, I. Gorelik, O. Gorelik, S. Druk, K. Marisyuk, P. Orlov, L. Ostapenko, O. Sosnina are devoted to the issue of criminal responsibility for leaving a newborn child in danger by the mother and related criminal offenses, O. Starka, M. Havronyuk, O. Shevchenko, N. Yarmysh and other domestic and foreign scientists. However, a unified approach to solving the issues of distinguishing leaving a newborn child in danger by the mother from related criminal offenses has not been worked out to date.

The purpose of the article is to generalize theoretical materials and materials of court practice in terms of determining the subjective signs of leaving a newborn child in danger by the mother in order to distinguish this act based on the specified signs from related criminal offenses.

Formulation of the main material. Criminal liability for leaving in danger is provided for in Article 135 of the Criminal Code of Ukraine. Such an offense is not something novel in the world. Thus, in particular, criminal liability for leaving in danger is provided for in Art. 144 of the Criminal Code of the Republic of Lithuania (Lykhova, 2012, p. 11), in § 221 of the Criminal Code of the Federal Republic of Germany (<https://www.gesetze-im-internet.de>), in Art. 223-3 of the Criminal Code of France (<https://www.legifrance.gouv.fr>), etc.

Sometimes criminal responsibility for leaving children in danger is contained in independent criminal law regulations. So, in particular, Art. 158 of the Criminal Code of the Republic of Lithuania "Child Abandonment" provides for the criminal liability of the father, mother, guardians, or other legal representatives of the child, for leaving a minor child unable to take care of himself without the necessary care in order to get rid of him (Lykhova, 2012).

Endangerment must be distinguished from other criminal offenses. As mentioned, the form and type of guilt, the emotional state of the mother during childbirth or immediately after childbirth should be recognized as signs of the subjective part of leaving a newborn child in danger by the mother, which should be distinguished from related criminal offenses.

When leaving in danger, the person's fault is expressed in the form of intent to the committed act and carelessness to the consequences. At the same time, to the consequence in the form of the death of a person, in particular, a newborn child, as well as other serious consequences, the attitude of the guilty person can be characterized only by carelessness... the inaction of the person who himself put the victim in a life-threatening condition or took advantage of his condition, knowingly allowing the death of the latter or other serious consequences, provided that the occurrence or non-occurrence of these consequences depends on the given person, it is necessary to qualify according to the articles providing for responsibility for intentional killing or causing bodily harm (Mykytchyk & Babanina, 2009).

In the case of the mother leaving a newborn child in danger, if the mother was not in a state determined by childbirth, which caused the death of this child, the subjective part consists in the direct intention of the act, that is, the mother's awareness of the fact of leaving her newborn child without help for the presence of the obligation and the possibility of providing such assistance and the desire to leave the child without this assistance. A subjective attitude to the act in the form of indirect intent, in our opinion, is impossible in this composition of the criminal offense.

As for the mental attitude of the mother towards the death of her newborn child when left in danger, it is characterized either by predicting the abstract possibility of such death with a frivolous calculation of its non-occurrence (the mother is counting on specific circumstances capable of averting the death of her child), or by not predicting the death of her newborn child in the presence of the obligation and the possibility of such a prediction.

A classic example of the investigated criminal offense is the following. V. became pregnant in November 2007, and after nine months of fetal life, on August 13, 2008, in the period from 01:30 a.m. until 2 a.m. gave birth to a viable male child in a forest clearing near the Rubizh cafe, located at 26 km 113 m of the Zhytomyr-Mohyliv-Podilskyi highway. After that, V., not being in the condition due to childbirth, realizing that her newborn male child was in a helpless life-threatening condition and deprived of the opportunity to take measures for self-preservation, allegedly left him at the place of birth without any help, although she was obliged to she had to take care of her newborn child, she had to take the necessary measures to avert danger to the child's life. V.'s criminal inaction caused the death of a newborn child, which occurred as a result of an intracerebral injury in the form of hemorrhages under the hard and soft

brain membranes, in the ventricular system of the brain, in the soft tissues of the head, which were formed as a result of the passage of the fetus through the birth canal of the mother without provision of medical assistance during self-help (Criminal case № 1-62/09).

In the cited court verdict, the mother foresaw the abstract possibility of the death of her newborn child, because she left her alone at night without medical and other necessary help, but she recklessly counted on the non-occurrence of this death, because she gave birth to the child in a warm season and left her in a place where quite often there are people who can help her child.

At the same time, in judicial practice, there are not only sentences that raise doubts about the correctness of the qualification of the actions of mothers who caused the death of their newborn children.

So, N., being in a state of pregnancy, deliberately hiding her pregnancy from her relatives and her surroundings, not being registered with a medical institution, intending to leave a newborn child in danger, around 07 o'clock in the morning on September 8, 2014, in the toilet room, which is located on the territory of her household, in the absence of outsiders, she gave birth to a full-term and living female child during a physiological delivery. After that, N., contrary to the requirements of Part 2 of Art. 150 of the Civil Code of Ukraine, according to which the mother has the duty to take care of her child's health, disregarding moral and legal norms obliging to provide assistance to a person who is in a life-threatening condition, realizing the socially dangerous nature of her activity, understanding , that the baby is in a life-threatening condition and is deprived of the opportunity to take measures for self-preservation due to a helpless state, did not provide the necessary help to the newborn child if it was possible to provide such help, hid the newborn child under wooden boards near the toilet, did not take measures to save it life, returned to the premises of the house and did not inform close relatives and other persons about the delayed delivery and birth of the child. The conclusion of the forensic medical examination established that the death of a newborn child of a female article occurred as a result of mechanical asphyxiation from the closing of the respiratory tract by foreign contents. There is a causal relationship between mechanical asphyxia from airway obstruction by foreign contents and the death of a newborn child. Substances of plant origin and particles of mineral origin present in the respiratory tract of a newborn child are particles of plants, dust, earth, particles of other minerals, which were inhaled by the lungs of the child who was breathing while lying on his stomach, facing the ground under the boards (Criminal Case No. 385/1814/18).

According to the court, the actions of N. are qualified under Part 3 of Art. 135 of the Criminal Code of Ukraine as leaving the newborn child in danger by the mother, which caused its death.

In our opinion, in this case, the subjective attitude of N., who was not in the condition caused by childbirth, towards the death of her newborn child consists of indirect intent. N. planned in advance, before the birth, to hide the birth of the child from other people and chose such a method, in which she realized that she was leaving the child without proper medical and other assistance in such a place, where it is difficult for outsiders to see or hear the child, in such a position, which is difficult for even an adult to breathe, predicted the inevitability or real possibility of the death of this child and consciously

assumed it, because she did not count on the quality of specific circumstances capable of averting the death of her child. Based on the above reasons, in our opinion, N.'s actions should be qualified under Clause 2, Part 2, Art. 115 of the Criminal Code of Ukraine as intentional killing of a minor child.

One of the main subjective criteria for distinguishing leaving a newborn child in danger by the mother, which caused the death of this child, from the criminal offense provided for in Art. 117 of the Criminal Code of Ukraine, there is an absence of a condition caused by childbirth in the mother.

Analysis of court verdicts under Art. 117, ch. 2, 3 Art. 135 of the Criminal Code of Ukraine indicates that it is not mandatory to appoint a complex forensic psychological and psychiatric examination for this category of criminal proceedings, since many of these sentences do not contain references to the conclusions of such examinations.

So, for example, by the verdict of the Ulyanovsk District Court of the Kirovohrad Region, O. was convicted under Art. 117 of the Criminal Code of Ukraine under such circumstances. In April 2018, O. learned from physiological signs that she was pregnant. The term of pregnancy was not established. She did not go to medical facilities, and she had an intention to kill the child she was carrying in her womb. On September 7, 2018, around 12 p.m., O., being 35-36 weeks pregnant and not being registered at a medical institution regarding this pregnancy, felt pains in the lower abdomen – cramps, after which the water broke, but the last one went to the medical staff did not contact the institutions, did not call anyone for help, but instead, when the attempts began, she deliberately left the premises of the house to the toilet, which is located on the territory of the household. Later, O., being in the toilet room and realizing that childbirth was about to begin, taking into account the stressful state of her well-being, which was caused by a difficult financial situation, decided to take the life of her newborn child immediately after giving birth (Criminal Case № 385/1814/18).

Proceeding from the constitutive part of the above sentence, O.'s intention to kill a newborn child arose long before childbirth, which excludes the influence of the condition caused by childbirth on the adoption of this decision. Moreover, it follows from the verdict that when making a decision regarding the qualification of the act, the court was guided exclusively by such an objective feature as the time of the commission of the criminal offense – immediately after childbirth. Such a decision formally does not contradict the provisions of clause 21 of the Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of crimes against life and health of a person" dated 07.02.2003 No. 2, according to which the intentional killing by the mother of her newborn child should be to qualify under Art. 117 of the Criminal Code, if it is committed during childbirth or immediately after it. Taking these actions after some time after giving birth in the absence of qualifying signs provided for in Part 2 of Art. 115 of the Criminal Code, bears responsibility for part 1 of the specified article (<https://zakon.rada.gov.ua/laws/>).

At the same time, the given decision does not correspond to the general theory of criminal law regarding the qualification of the intentional killing by the mother of her newborn child, according to which, when distinguishing this criminal offense from the intentional killing of a minor child, one should take into account the moment of the intention to kill the newborn and the presence of

the condition of the child's mother caused by childbirth .

This approach to the qualification of the specified act was enshrined in clause 22 of the Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of crimes against life and health of a person" dated 04.01.1994 no. 1 (expired), according to which intentional murder the mother of her newborn child should be qualified under Art. 96 of the Criminal Code of Ukraine, if it is committed in the presence of a special mental and physical condition of a woman, which reduces her ability to manage her actions during childbirth or immediately after it (<https://zakon.rada.gov.ua/laws/>).

In our opinion, the consolidation of the above provision is also appropriate in modern conclusions of the Grand Chamber of the Supreme Court of Ukraine regarding the norms of criminal law.

Returning to the last of the above judgments of the courts, we note that, taking into account the moment when O. had the intention to kill her newborn child (before childbirth), the absence of a conclusion of a comprehensive forensic psychological and psychiatric examination regarding the presence of a state caused by childbirth in O., its actions, in our opinion, should be qualified under Clause 2, Part 2, Art. 115 of the Criminal Code of Ukraine as intentional killing of a minor child.

Regarding the establishment of the presence or absence of a condition caused by childbirth in the mother of a newborn child, that is, a woman's mental and physical condition, which reduces her ability to control her actions during childbirth or immediately after it, there is currently no single method for determining such a condition in Ukraine, and the available in the materials of criminal proceedings, the conclusions of the complex forensic psychological and psychiatric examination allow their ambiguous interpretation, which affects the qualification of the committed act.

Yes, N. was convicted under part 2 of Art. 135 of the Criminal Code of Ukraine for leaving a newborn child in danger by the mother, if the mother was not in a condition due to childbirth. N.'s defender appealed this decision of the court of first instance to the appellate court, citing the fact that the court ignored paragraph 5 of the conclusion of the comprehensive forensic psychological and psychiatric examination No. 144/157 dated 21.02.2017, according to which N. was in a state of emotional tension, which was caused by the physiological processes of childbirth, and the testimony of a forensic psychiatric expert and a psychological expert that the state of emotional tension caused by childbirth and the state caused by childbirth are one and the same, it is a state in which a woman is under the time of childbirth and a certain time after childbirth. N. was in this state at the time of committing the incriminated actions. The appellate court rejected the appeal of defense counsel N., referring to the testimony of experts who noted that the condition caused by childbirth is a physiological process of a normal woman during childbirth. Being in a state caused by physiological childbirth is normal. Every woman is in a state of emotional tension during childbirth, and this is a normal physiological state, and this state stops when labor stops. No disorders of mental activity were found in N. (<https://zakononline.com.ua/court-decisions/show/711968263>).

Conclusions. In judicial practice, there are no uniform approaches to determining whether a mother has a condition caused by childbirth, since the conclusions of a complex forensic psychological and psychiatric examination do

not always give a clear answer to this question, which allows law enforcement agencies and the court to arbitrarily interpret such conclusions. Analysis of court verdicts under Art. 117, ch. 2, 3 Art. 135 of the Criminal Code of Ukraine indicates that it is not mandatory to appoint a complex forensic psychological and psychiatric examination for this category of criminal proceedings, which does not contribute to proving the circumstances that affect the degree of severity of the committed criminal offense, and allows to distinguish the components of the specified criminal offenses.

In the case of leaving a newborn child in danger by the mother, if the mother was not in a state determined by childbirth, which caused the death of this child, the subjective part consists only in the direct intention of the act. A subjective attitude to the act in the form of indirect intent in this part of the criminal offense is impossible. The mental attitude of the mother to the death of her newborn child when left in danger is characterized by criminal wrongful self-confidence or criminal wrongful negligence. If the mother has an indirect intention to cause the death of her newborn child, her actions must be qualified according to clause 2, part 2 of Article 115 of the Criminal Code of Ukraine.

We propose to enshrine in the conclusion of the Grand Chamber of the Supreme Court of Ukraine the provision according to which the intentional killing by the mother of her newborn child should be qualified under Art. 117 of the Criminal Code of Ukraine, if it is committed in the presence of a special mental and physical condition of a woman, which reduces her ability to manage her actions during childbirth or immediately after it. Confirmation of the presence of such a condition at the time of the murder should be the conclusion of a comprehensive forensic psychological and psychiatric examination.

Conflict of Interest and other Ethics Statements

The authors declare no conflict of interest.

References

- Kryminalnyy kodeks Ukrayiny vid 05 kvitnya 2001 [Criminal Code of Ukraine dated April 5, 2001]. URL : <https://zakon.rada.gov.ua/laws/show/2341-14#Text> [in Ukr.].
- Shevchenko, O.V. (2014). Osoblyvyi psykhofiziolohichnyy stan zhinky yak obovyazkova oznaka sub'yekta zlochynu, peredbacheno ho st. 117 KK Ukrayiny [The special psychophysiological condition of a woman as a mandatory feature of the subject of the crime provided for in Art. 117 of the Criminal Code of Ukraine]. *Visnyk Kryminolohichnoyi asotsiatsiyi Ukrayiny*, no. 6, pp. 98-107. [in Ukr.].
- Kryminalna sprava № 742/760/17. Apelyatsiynyy sud Chernihivskoyi oblasti [Criminal case no. 742/760/17. Court of Appeal of Chernihiv region]. URL : <https://zakononline.com.ua/court-decisions/show/71196826> [in Ukr.].
- Lykhova, S. (2012). Criminal liability for violation of human security under the legislation of the member states of the European Union: monograph. K. : Ed. journal "Law of Ukraine", 88 p. [in Ukr.].
- Criminal Code of the Federal Republic of Germany. URL : https://www.gesetze-im-internet.de/stgb/_221.html [in Ger.].
- Criminal code of France. URL : https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000006165288/#LEGISCTA000006165288 [in Fr.].
- Mykytychuk, O. & Babanina, V. (2009) Sub'yektyvna storona zalyshennya v nebezpetsi [The subjective part of abandonment is at risk]. *Advokat*, no. 5. pp. 26-30. [in Ukr.].
- Kryminalna sprava № 1-62/09 [Criminal case no. 1-62/09]. Arkhiv Zhytomyrskoho rayonnoho sudu Zhytomyrskoyi oblasti. [in Ukr.].

Kryminalna sprava № 140/72/15-k [Criminal case no. 140/72/15-k]. Arkhiv Nemyrivskoho rayonnoho sudu Vinnytskoyi oblasti. [in Ukr.].

Kryminalna sprava № 385/1814/18 [Criminal case no. 385/1814/18]. Arkhiv Ulyanovskoho rayonnoho sudu Kirovohradskoyi oblasti. [in Ukr.].

Pro sudovu praktyku v spravakh pro zlochyny proty zhyttya ta zdorovya osoby: Postanova Plenumu Verkhovnoho Sudu Ukrainy vid 07.02.2003 r. № 2 [On judicial practice in cases of crimes against life and health of a person: Resolution of the Plenum of the Supreme Court of Ukraine dated February 7, 2003 no. 2]. URL : <https://zakon.rada.gov.ua/laws/show/v0002700-03#Text> [in Ukr.].

Pro sudovu praktyku v spravakh pro zlochyny proty zhyttya i zdorovya osoby: Postanova Plenumu Verkhovnoho Sudu Ukrainy vid 01.04.1994 r. № 1 [On judicial practice in cases of crimes against life and health of a person: Resolution of the Plenum of the Supreme Court of Ukraine dated April 1, 1994, no. 1]. URL : <https://zakon.rada.gov.ua/laws/show/v0001700-94#Text>. [in Ukr.].

Володимир ШАБЛИСТИЙ, Валентин ЛЮДВІК
ВІДМЕЖУВАННЯ ЗАЛИШЕННЯ В НЕБЕЗПЕЦІ МАТІР'Ю
НОВОНАРОДЖЕНОЇ ДИТИНИ, ЩО СПРИЧИНИЛО СМЕРТЬ ДИТИНИ,
ВІД СУМІЖНИХ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ
ЗА ОЗНАКАМИ СУБ'ЄКТИВНОЇ СТОРОНИ

Анотація. У статті розглядається судова практика кваліфікації залишення матір'ю новонародженої дитини в небезпеці, що спричинило смерть цієї дитини. Встановлено, що єдиних підходів до визначення наявності у матері пологового стану не існує, оскільки висновки комплексної судової психолого-психіатричної експертизи не завжди дають чітку відповідь на це питання. Аналіз судових вироків за ст. 117, гл. 2, 3 ст. 135 КК України вказує на необов'язковість призначення комплексної судової психолого-психіатричної експертизи за цією категорією кримінальних проваджень, що не сприяє доведенню обставин, що впливають на ступінь тяжкості вчиненого кримінального правопорушення, та дозволяє виділити склади вказаних кримінальних правопорушень.

У разі залишення новонародженої дитини матір'ю в небезпеці, якщо мати не перебувала в стані, обумовленому пологами, що спричинило смерть цієї дитини, суб'єктивна сторона полягає лише в прямому умислі діяння. Психічне ставлення матері до загибелі новонародженої дитини в умовах небезпеки характеризується злочинною неправомірною самовпевненістю або злочинною недбалістю. У разі наявності у матері непрямого умислу на спричинення смерті новонародженої дитини її дії мають кваліфікуватися за п. 2 ч. 2 ст. 115 Кримінального кодексу України. Пропонується закріпити у висновку Великої Палати Верховного Суду України положення, згідно з яким умисне вбивство матір'ю своєї новонародженої дитини має кваліфікуватися за ст. 117 КК України, якщо воно вчинене за наявності особливого психічного та фізичного стану жінки, що знижує її здатність керувати своїми діями під час пологів або безпосередньо після них.

Ключові слова: залишення в небезпеці, новонароджена дитина, обумовлений пологами стан, кримінальна відповідальність.

Submitted: 14.02.2023

Revised: 14.03.2023

Accepted: 04.04.2023