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Problems of the guiltless civil liability of medical workers

The legal regulation of relations in the field of medical services in the Republic of Kazakhstan is dynamic and flexible, and its content complies with modern international standards in the field of human and citizen rights. In these conditions, the main task of the state is to improve legislation regulating civil law relations in the medical field, which is accomplished by increasing the quality of medical care through legal mechanisms to protect the rights of the patient. The problems of application and the possibility of expanding the grounds for guiltless liability in the medical field are relevant, are of great scientific and practical interest, and also considered by the author reasonably and quite timely. The author of the article raises questions that enable medical activity as part of consumer turnover, as well as a source of increased danger, which makes it possible to apply the norms of increased responsibility to relations that are associated with its implementation. The article also substantiates the need to reform the norms on compensation for moral damage in connection with its infliction to the patient, which will ensure the right to protection of infringed civil rights most fully.

Keywords: healthcare, medicine, health, life, medical service, civil liability, source of increased danger, patient, medical worker, moral harm.

Introduction

Legal responsibility has always been and remains one of the main institutions of law, for the reason that "law without reliable secured protection turns into a set of inactive declarative prescriptions and unrealistic subjective possibilities" [1; 9].

The main task of the state in terms of regulating the relations that arise in the provision of medical care is to create effective legal mechanisms that make it possible to streamline responsibility in this area. For a long time, the nature of the patient's rights has not been studied in detail, and the responsibility of medical workers in connection with their infringement was based on the principles of bringing infringers to criminal and administrative responsibility.

In the recent past, the normative illiteracy of Kazakhstani patients and the pronounced administrative nature of relations related to the protection of citizens' health hindered the development of the institution of civil liability in the medical field. The regulation of medical care relations was carried out exclusively by orders and instructions of the Ministry of Health, which were intended for "official use", and this predetermined the lack of information about their content among the population, and most medical statistics were not available.

A new approach to regulating relations related to the protection of citizens' health and the treatment of medical services within the framework of the free market has aroused great and significant interest in the problems of civil liability in connection with their provision.

Legal responsibility in civil law fulfills such social tasks as protecting subjects from offenses and ensuring their rights and legitimate interests. Its signs are state enforcement, the presence of adverse consequences for the infringer. Civil liability is compensatory in nature, it is aimed at restoring the property sphere of the injured party, and, in addition, it also performs preventive and punitive functions.

When analyzing the content of civil infringements in the medical field, it is especially important to highlight the grounds of civil liability for them. Often, negative consequences from medical services can occur without the doctor's fault, but his guiltless actions do not always release him from responsibility.

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From a legal point of view, it is especially important to correctly qualify the illegal guilty actions of medical workers and cases of harm to the patient in the absence of guilt. The actions of a doctor that caused damage to the health or death of a patient due to the complexity of the disease or the imperfection of medical science should not be punishable if they could not have been foreseen and do not depend on the attention of conscientious medical personnel.

On the other hand, the current legislation provides for civil liability of medical workers, which is based on a truncated structure of a civil offense, that is, liability without fault. The purpose of this article is to analyze the issues of guiltless liability of medical workers in the provision of medical services, as well as the problems of legal regulation related to its application.

Methods and materials

The methodological basis of the research is presented by the method of scientific cognition, which is aimed at studying the state of problems, understanding their relevance, as well as forming proposals for their prompt resolution.

The application of the dialectical method allowed the author to assess the state of civil legislation and legal doctrine in the field under research; formally, the logical method allowed the author to substantiate the guiltless civil liability of medical workers. It became possible to solve the problems posed in the article by studying and generalizing materials through the use of scientific methods, such as the method of system analysis — in order to identify and resolve legal and practical problems, the synthesis method — in order to combine conclusions, judgments and inferences made on the basis of the analysis.

Results

The civil liability of medical institutions is regulated as delictual and contractual. The establishment of such legal alternative is obviously related to a legislator's wish to determine reasonable and effective methods of protection against violators of civil rights, providing the aggrieved party with the best choice in each specific situation. In the sphere of relations we are considering, the patient becomes such a party, due to whose interests this issue should be resolved.

Since the healthcare services is a part of consumption, the civil law allows to bring a claim in tort if there is a contract. Thus, the Article 936 of the Civil Code of the Republic of Kazakhstan states that if harm is caused to the life and health of a citizen due to breach of contract, indemnification for it should be made in accordance with the rules on tortious liability [2]. If legislative acts or an agreement provide for the increased liability for this type of relations, then the rules established in it are applied.

This legislative solution is due to the desire of the state to ensure protection of a citizen's interests most fully and effectively, since the mechanism of non-contractual liability is imperative and guarantees strict legal protection of persons who have suffered harm.

It seems that when applying civil liability in order to protect patient's rights, we should proceed from the fact that the majority of disputes, where he is a participant, is due to a need to pay damages for the harm caused to him as an individual, as well as his personal benefits. And the tortious nature of liability in this case can precisely be justified by this, since a person is the subject of legal relations but not its object.

Skipping the controversy regarding competition of claims, we should note that it may be provided by current rules in the Republic of Kazakhstan and, in our opinion, is permissible for possible harm to a patient's life and health. It means that if harm is caused to the life or health of a patient by violating the contract (on medical treatment), contractual liability should be applied. However, if the law or contract sets a higher level of liability for a wrongdoer, the rules on tort must be applied. This approach will promote consistency in practice and patients' interests.

It is difficult to overestimate the importance of recognizing the nature of increased danger for certain types of medical measures. The establishment of guiltless liability by law seems to be quite fair in conditions when the protection of patient rights in connection with improper actions of medical workers in most cases is associated with the need to go to court. The legislatively fixed assumption of the guilt of a person bearing civil liability in a situation where medical professionals can mutually support each other and interpret the situation in their favor, which allows them to evade responsibility, significantly complicates the procedural situation of the patient. This, in turn, narrows the possibilities for obtaining compensation for damage within the framework of legal mechanisms for compensation for harm. And all this against the background of an already aggravated or neglected disease of general depression and fear, which in most cases are experienced by patients who find themselves in such a situation.

Emphasizing the importance of recognizing the status of a consumer for a patient in the modern turnover of medical services, we note that it allows for protection not only in case of improper actions of doctors, expressed directly in improper treatment and can serve as a reason for it. This is also possible in cases of infringement of other patient rights provided for by current legislation in the consumer sphere (the right to receive and complete information, the safety of services provided, etc.).

The provision of medical services is directly related to the impact on one of the most significant benefits — health. Based on this, it seems quite reasonable to establish a legal rule for compensating moral damage on a no-fault basis in all instances where harm to a patient's life or health is due to improper treatment. According to paragraph 3 of Article 951 of the Civil Code, such a possibility is fixed in the current legislation only if harm to life and health was committed by a source of increased danger [2]. To date, judicial practice of Kazakhstan is characterized by ambiguous and unjustified discrepancies in the appointment of specific amounts to be reimbursed as moral compensation to the injured citizen from the committed infringement. Hence, an immediate resolution of the issue of determining the amount of moral damage that is subject to compensation is required — this will be the basis from which the courts should start when appointing it. We believe that it is advisable to link the average amount of compensation to the minimum wage set by the state. At the same time, the formula, depending on the circumstances specified in the law, should determine the amount of compensation for moral damage, which is subject to compensation for each of the objects of encroachment separately (health, life (including the patient) or personal non-property right).

Discussion

According to the general rules, the civil liability of medical organizations occurs in the presence of the following four conditions: the presence of harm to the patient; the illegality of the causer's behavior; the causal connection between the unlawful behavior of the causer and the harmful result; the fault of the causer of harm.

Guilt as the basis of responsibility is an integral part of the structure of a civil offense and reflects the subjective side of the infringer's behavior. Guilt (intentional or negligent) is usually understood as a person's mental attitude to their behavior and its results. However, as noted by Yu.G. Basin, the concept of guilt has changed in recent years. It is revealed through behavioral categories, that is, "... the criterion for determining guilt has been transformed into an assessment of the infringer's use of all measures that depend on him to prevent an infringement and reduce its negative consequences" [3; 47].

It should be noted the characteristic differences between guilt in civil law and the same institution in criminal law. Firstly, civil law, in order to guarantee the interests of victims in compensation for harm, establishes the presumption of guilt of the causer (paragraph 6 of Article 9 of the Civil Code of the Republic of Kazakhstan) [2]. In accordance with civil law, the fact of infringement presupposes the culpability of the causer, who, in turn, must prove his innocence. It would be difficult, and sometimes impossible, for the victims to prove the guilt of the causer. The causer of harm, in order not to be held accountable, is obliged to prove that he has taken all measures in his power to prevent an infringement. Secondly, liability in civil law occurs in the presence of any form of guilt, whether intentional or negligent.

In criminal law, the type and form of guilt significantly affect the qualification of a crime and the measure of punishment. In the understanding of civil law, the subjective attitude of the causer of harm to the infringement committed by them and the degree of guilt itself are not a criterion for determining the measure of punishment, the amount of responsibility, but serve as the basis for bringing to justice.

However, the position of modern scientists regarding the importance of guilt for civil liability is based on the fact that this issue needs to be adjusted. Thus, M.K. Suleimenov notes that guilt in civil liability does not play such a big role, unlike guilt in criminal law [4; 705].

According to the author, within the realm of civil law, the concept of guilt becomes less relevant due to the primary role of civil liability, which is compensatory in nature. "The main thing in civil liability is the restoration of infringed rights, not punishment… And when it comes to restoring rights, the main thing is to get compensation. At the same time, no one is interested in the mental attitude of the infringer to the committed infringement, the fact itself and its illegality are important" [4; 705].

The opinion of the cited author in this matter seems to be certainly justified and authoritative for us. His proposals for improving legislation in terms of establishing the dominant "principle of infliction", while maintaining the "principle of guilt" where necessary due to traditional application, seem necessary for modern civil turnover [3; 52]. Such an approach, in our opinion, will have a positive impact on responsibility in

the medical field. Moreover, we believe that the increased innocent responsibility of medical workers is predetermined by the norms of civil legislation, which allow it to be applied on a number of specific grounds.

The first such reason is that the provision of medical services today is often carried out by subjects of entrepreneurial activity. Therefore, the responsibility of private medical clinics, as well as private medical practitioners, should be considered as a responsibility that occurs regardless of guilt. Thus, in accordance with paragraph 2 of Article 359 of the Civil Code of the Republic of Kazakhstan, a person who has not fulfilled or even improperly fulfilled an obligation that they accepted within the framework of entrepreneurial activity has property responsibility. The exception is the fact that the designated person proves that proper fulfillment was impossible due to force majeure, that is, due to extraordinary and unavoidable circumstances under the given conditions (natural phenomena, military operations, etc.) [2]. It should be noted that some authors distinguish between the guilty and innocent responsibility of medical workers, according to the principle of retribution or gratuitousness of the relations that bind them with patients. It seems that such an approach can not only create a criminal illusion of their own irresponsibility among performers who provide free medical services, but also negate the ideas of patients themselves about protecting their rights as consumers of medical services.

However, this is not the only reason that we can pay attention to. The opportunity to compensate for harm, regardless of the fault of the causer, is possible for other reasons. Such an opportunity is provided for in the implementation of medical measures in relation to the patient, which pose an increased danger, based on the characteristics and properties of the methods and technologies used in medicine. Such examples can serve when there is a diagnosis and treatment with devices intended for the treatment of oncological diseases, as well as the process of using laser and X–ray installations, drugs that cause severe side effects, etc.

Thus, according to Article 931 of the Civil Code of the Republic of Kazakhstan, legal entities and citizens whose activities are associated with increased danger to others (transport organizations, industrial enterprises, construction sites, vehicle owners, etc.) are obliged to compensate for the damage caused by a source of increased danger, unless they prove that the damage arose due to force majeure or intent of the injured [2].

Paragraph 5 of the Normative Resolution of the Supreme Court "On certain issues of application by the courts of the Republic of Kazakhstan of legislation on compensation for harm caused to health" dated 07/9/99 No. 9 specifies the provisions of the Civil Code of the Republic of Kazakhstan. The normative legal document indicates that "any activity should be recognized as a source of increased danger, the implementation of which creates an increased danger of harm due to the impossibility of full control over it by humans, as well as activities related to the use, transportation, storage of objects, substances and other industrial, economic and other facilities with the same properties" [5].

We wrote about almost all sources, devoted to medical law problems, mention about initially risk-related activities of physicians when rendering health care services to patients. The human body may have unpredictable effects which cause medical interventions [6; 84].

Whether medical activity is a source of increased danger has not been clearly determined by science. This issue is among the controversial ones, and scientists who have devoted their works to studying the nature of this phenomenon have divided into three groups.

Some unconditionally recognize the nature of the source of increased danger for medical activities. Thus, A.V. Tikhomirov points out that "the technology of production of medical services in itself is a source of increased danger, since it is associated with the possibility of harm to health" [7; 126].

Others assert that "due to its heterogeneity, therapeutic activities generally do not meet the signs of a source of increased danger, although individual methods of diagnosis and treatment may relate to such" [7; 145].

M.N. Maleina identifies various sources of heightened danger in the medical field, including "laser devices, cobalt cannons, radon baths, nuclear heart rate regulators, toxic potent drugs, X-ray machines, explosive and flammable medicines, and devices utilizing ultrasound and electric currents" [8; 146]. A third group of scholars asserts that "only specific exceptional types of medical procedures do not meet the criteria for sources of increased danger. These procedures, by their nature, cannot be considered as such, whereas medical activities in general should be categorized as potential sources of heightened danger".

The third group of scientists believes that "only exceptional types of medical manipulations do not fall under the signs of a source of increased danger, and such manipulations by their structure in no case can be such, while medical activities themselves should be classified as potential sources of increased danger [9; 17]".

We believe that the most convincing are the opinions of the authors, who justify the increased danger of only certain methods and types of diagnosis and treatment; therefore, we note the following. The purpose of medical activity is to protect the life and health of the patient from danger. This implies that healthcare professionals, while providing medical services, must exercise care and caution, as the patient's positive outcome directly depends on these actions.

In addition, technologies and methods of carrying out medical activities play an equally important role, and even assume decisive importance for the result. We believe that only some of the criteria that have been developed by science to recognize the nature of increased danger for medical activities are appropriate for application.

The assessment of the increased danger of individual methods and methods of diagnosis and treatment can be carried out through appropriate established criteria. "Methods of carrying out highly dangerous activities have one thing in common: they are developed and used to prevent harm, they orient owners of sources of increased danger to special care and vigilance [10; 25]". In addition, it is also possible to emphasize the tools of carrying out highly dangerous activities, which "are objects with harmful properties [10; 25]".

It should be noted that in addition to the potential harmfulness of medical manipulations related to sources of increased danger, attention should be paid to the standards established by the Supreme Court of the Republic of Kazakhstan, which states that the main criterion should be considered the impossibility of full human control over them. The presumption that it is impossible to control all types of medical measures, in our opinion, contradicts the nature of medical activity, negates its functions and levels the principles of medical care, which should be aimed at actions within a clear algorithm controlled by professional medical personnel. In addition, such basic methods as diagnostic methods (visual examination, palpation, measurement of body temperature and blood pressure, laboratory tests), treatment methods (surgical intervention according to indications), methods of rehabilitation (physical therapy) and prevention (medical massage) do not meet the signs of increased danger, since they are carried out under the control of the will and consciousness of a medical worker.

Therefore, we believe that the sources of increased danger should include certain types of medical actions, such as diagnostics and treatment using potentially dangerous objects, such as laser and X–ray installations, devices using ultrasound and electric currents, magnetic resonance imaging.

Author A.A. Mokhov points out that all medical drugs are also a source of increased danger due to the presence of the necessary signs in them [11; 6].

E.V. Muravyeva, in her dissertation on medical liability, argues that "vaccination, as a special type of medical drug therapy, should be classified as an activity that creates increased danger. This is due to the high volume of drug administration and the rise in complications from their use. Side effects are caused by various factors, and the pharmacological action of the drug in therapeutic doses does not always predict them" [12; 141-142]".

We believe that the source of increased danger in medicine should be recognized as therapy using drugs characterized by high biological and chemical activity, and which are highly likely to cause undesirable side effects (iatrogenism) or allergic reactions, as well as other ambiguous body reactions leading to complications in the patient's health. This means that drug therapy with their use automatically becomes a source of increased danger and does not need additional regulation and evaluation.

An analysis of the current norms suggests that, despite the fact that the Kazakh legislator does not directly recognize the nature of increased danger for certain types of medical manipulations, but anticipates the likelihood of adverse consequences in connection with their realization. Thus, the imperative requirements of the legislator for the content and form of informed consent of the patient, established for cases of therapeutic and diagnostic invasive procedures, in our opinion, are predetermined by their risky nature, which allows us to conclude about their increased danger.

Considering the above in our current study and realizing that medical practice, taking into account objective reasons and its nature, is more at risk of adverse outcomes and errors that may be associated with harm to the health or life of the patient, we would like to note the following. It is not legally correct to recognize the nature of increased danger for medical activities in general. We believe that our position on this issue is quite justified, for the reason that if all medical activities are brought under a source of increased danger, then relations in the field of medical services, as well as the responsibility of medical workers, should be regulated exclusively by the rules on tort obligations. At the same time, in this scenario, it implies the exclusion of the application of Chapter 33 of the Civil Code of the Republic of Kazakhstan, which regulates contractual relations in the field of paid services, which is not logical and correct.

The third reason for compensating for the damage caused, regardless of guilt, is established by Article 947 of the Civil Code of the Republic of Kazakhstan, in the event that such damage is caused due to deficiencies in goods, works, services, including medical ones. "The harm that is caused to the life, health or property of a citizen or the property of a legal entity as a result of constructive, prescription or other defects in the product (work, service) is subject to compensation by the seller or manufacturer (contractor), regardless of their guilt and whether the victim was in a contractual relationship with them or not. This also applies to cases of unreliable or insufficient information about the product (work, service) [2]".

Emphasizing the importance of adopting the patient's status as a consumer in modern health services, we point out that it provides protection both in case of doctors' misconduct which are expressed directly in wrong treatment and can serve as a reason for it, and in cases of other patient rights' violation as provided for by the current Law in the consumer sphere (the right to receive and complete information, service safety, etc.). In addition, we consider that the civil liability of medical workers cannot limitlessly be extended, excluding its limits, as this can lead to their reasonable uncertainty when serving the patient. Unlimited presumptive liability will force medical personnel to examine a patient for such a long time that it will inevitably lead to a waste of time, inappropriate procedures and unnecessary diagnostic maneuvers even when diagnosis is evident.

In addition to causing material damage, improper behavior of the performer can cause the patient moral suffering.

In modern civil turnover, compensation for moral damage is a reliable and effective way to protect infringed civil rights and is expressed in coercive influence on a subject who commits infringements in the personal non-property sphere.

In the process of providing medical services, the patient may experience psychological and physical suffering, leading to the destabilization of emotional resources, since the object of encroachment on the part of the performer is personal integrity, dignity, health, life, personal secret. In these designated cases, the court may oblige the infringer, who bears civil liability, to pay monetary compensation as part of compensation for caused moral damage.

Notably, Article 952 of the Civil Code of the Republic of Kazakhstan states that compensation for moral damage is provided regardless of any property damage compensation. When determining the amount of such compensation, the court considers the degree of the violator's guilt and other relevant circumstances. In addition, the court must take into account the degree of physical and moral suffering associated with the individual characteristics of the victim, as well as the actual circumstances in which the harm was caused.

Moral damage may also be associated with the disclosure of medical secrets.

M.N. Maleina identifies criteria that should be used to determine the amount of moral damage to be compensated in the event of such a situation. According to the author, this should include: "... the volume and nature of the disseminated information that constitutes medical secrecy; the degree of breadth of dissemination of information; the composition of persons who received information about medical secrecy [13; 89]".

It seems that the infliction of moral harm is especially involved in a person when the disclosure of secrets is associated with the disclosure of information about a citizen's treatment in certain medical institutions (psychiatric hospital, drug treatment center, etc.). Disclosure of medical secrets related to this kind of treatment certainly causes adverse consequences for a citizen in the labor and family sphere. We can agree with the opinion of the author M.N. Maleina that in such cases the amount of moral damage should be higher than when disclosing information about hypertension, asthma, etc. "If the result of improper treatment was the death of a patient who was close to the claimant, when determining the amount of compensation, it is necessary to take into account the degree of proximity of the dead and the claimant, the method of obtaining information about the death (whether the claimant witnessed the death, how correct was the form of providing information about the death, etc.) [13; 96]".

Conclusion

Summing up the research, it should be noted the following: issues requiring direct resolution in relation to civil liability in the field of medical services, and naturally implying an increase in the limits of such liability on certain grounds include:

– legislative classification of activities that pose an increased danger to others: individual medical manipulations (including diagnosis and treatment using potentially dangerous objects such as laser and X-ray installations, devices using ultrasound and electric currents, magnetic resonance imaging) and medical drug

therapy (using medical products that have high biological and chemical activity, and which are highly likely to cause undesirable side effects (iatrogenism) or allergic reactions and other ambiguous reactions of the body leading to complications of the patient's health);

– changing the norms on compensation for moral harm by establishing the obligation of the contractor of medical services to compensate for moral harm, regardless of guilt, in cases of improper provision of medical services.

The solution of these issues will allow the patient to compensate for the harm caused to them without the guilt of the contractor, which means that they will have a real right to protection in the field of medical care.

At the same time, we believe that it is also impossible to expand the civil liability of medical workers indefinitely, excluding its limits, since this may lead to their justified uncertainty of the contractor when servicing the patient. Unlimited presumed responsibility will force medical staff to examine the patient so long-term that it will inevitably lead to loss of time, unnecessary procedures and unnecessary diagnostic measures, even when the diagnosis is obvious.

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М.Ю. Прудникова

Медицина қызметкерлерінің кінәсіз азаматтық-құқықтық жауапкершілігі мәселелері

Қазақстан Республикасында медициналық қызметтер көрсету саласындағы қатынастарды құқықтық регламенттеу серпінділігімен және икемділігімен ерекшеленеді, ал оның мазмұны адам және азамат құқықтарын қамтамасыз ету саласындағы қазіргі заманғы халықаралық стандарттарға сәйкес келеді. Мұндай жағдайларда мемлекеттің негізгі міндеті пациенттің құқықтарын қорғаудың құқықтық тетіктері арқылы медициналық көмектің сапасын арттыру жолымен медициналық саладағы азаматтық-құқықтық қатынастарды реттейтін заңнаманы жетілдіру. Медициналық салада кінәсіз

жауапкершілік үшін дәлелдерді қолдану және кеңейту мәселелері өзекті болып табылады, ол үлкен ғылыми және практикалық қызығушылық тудырады және автор өте орынды көтеріп отыр. Мақала авторы медициналық қызметті тұтынушылық айналымның бөлігі ретінде, сондай-ақ оны жүзеге асыруға байланысты қатынастарға жоғары жауапкершілік туралы нормаларды қолдануға мүмкіндік жасайтын қауіптің жоғарылау көзі ретінде қарастыруға мүмкіндік беретін мәселелерді көтереді. Мақалада сонымен қатар пациентке зиян келтіруіне байланысты моральдық зиянды өтеу туралы нормаларды реформалау қажеттілігі негізделген, ол өз кезегінде бұзылған азаматтық құқықтарды қорғау құқығын барынша толық қамтамасыз етуге мүмкіндік береді.

Кілт сөздер: денсаулық сақтау, медицина, денсаулық, өмір, медициналық қызмет, азаматтық-құқықтық жауапкершілік, жоғары қауіп көзі, пациент, медицина қызметкері, моральдық зиян.

М.Ю. Прудникова

Проблемы безвиновной гражданско-правовой ответственности медицинских работников

Правовая регламентация отношений в сфере оказания медицинских услуг в Республике Казахстан отличается динамичностью и гибкостью, а ее содержание соответствует современным международным стандартам в сфере обеспечения прав человека и гражданина. В этих условиях основной задачей государства является совершенствование законодательства, регулирующего гражданско-правовые отношения в медицинской сфере, путем повышения качества медицинской помощи через правовые механизмы защиты прав пациента. Проблемы применения и возможности расширения оснований для безвиновной ответственности в медицинской сфере являются актуальными, представляют большой научный и практический интерес и поднимаются автором обоснованно и вполне своевременно. Автор статьи исследует вопросы, позволяющие рассматривать медицинскую деятельность как часть потребительского оборота, а также как источник повышенной опасности, что позволяет применять к отношениям, связанным с ее осуществлением, нормы о повышенной ответственности. В статье также обоснована необходимость реформирования норм о возмещении морального вреда в связи с его причинением пациенту, что позволит обеспечить право на защиту нарушенных гражданских прав наиболее полно.

Ключевые слова: здравоохранение, медицина, здоровье, жизнь, медицинская услуга, гражданско-правовая ответственность, источник повышенной опасности, пациент, медицинский работник, моральный вред.

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