UDC 347. (574)

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Some problems of health care workers' civil liability for medical malpractice

The article covers the problems of civil liability in medicine. The relevance is caused by medical disputes resonance concerning medical malpractice when rendering health care services and the difficulty of their legal treatment. The author believes that a lack of clear criteria for medical error leads to gaps in the law enforcement practice. The author points out the need to improve legislation on physicians' responsibility concerning conceptual questions, and also offers the definition of legal categories that exclude health care workers' liability. The article analyzes the scientific and practical approaches to determining the medical and legal malpractice, its nature is studied and features are defined. It is noted that a medical error in all cases should be considered as the grounds for civil liability. A medical error is considered in relation to the concepts of «accident in medicine», as well as the category of «objective omission» proposed by the author, which, in accordance with his judgment, must have different legal consequences. Particular attention is paid to the evidence of reasonable medical risk as the basis for the release of medical workers from liability. The results of the study are novel and original, the author's position is justified and of interest to employees whose activities are related to the interpretation and application of the rules on the responsibility of medical workers.

Keywords: health services, liability, malpractice, reasonable medical risk, accident in medicine, patient, health care, medical worker.

Introduction

The problems of physicians' liability to patients in health services were and remain the most urgent. Frequent cases of health-care workers for improper fulfilment of their commitments lead to scandals and resonance in the state and society, as well as to their mixed reviews given by law enforcement agencies.

Besides the ordinary errors of doctors, which lead to dire but reversible consequences for some patients, there are egregious cases related to criminal negligence towards several persons or more. These are the events of 2006, when 84 children and their 12 mothers became infected with HIV during blood transfusion in the South Kazakhstan oblast, and the situation of 2009, when the parents of 10 babies having leukemia, accused Almaty doctors of infecting their children with hepatitis C [1].

In our opinion, the detail provisions of current legislation concerning the determination of what erroneous actions of doctors should lead to tort liability, will contribute to the correctness and uniformity of professional medical liability jurisprudence.

The works we have analyzed showed that the most controversial issue concerning medical workers' responsibility is determining the content and consequences of medical errors. Moreover, according to statistics, the disadvantages of medical services are most often associated with their implementation.

Methods and Materials

The methodological background of the research is represented by systemic approaches to the study of theory, legal acts concerning the health care liability. Moreover, the methods of analysis, synthesis, comparison, as well as dogmatic analysis, historical and regulatory, content-related and functional techniques are used. The research regulatory basis is represented by the Civil Code of the Republic of Kazakhstan and other regulatory legal acts. The works of such scientists as F.Yu. Bredichevsky, S.V. Nagornaya, M. Maleina, etc. were the theoretical basis of the study.

Results

Separating the approach of the authors who give medical error the nature of a tort, an act of guilty, responsible behavior, we pay our attention to the following.

We believe that a medical error should be understood as guilty acts, somehow violating the applicable statutory requirements and medical science common requirements. In our opinion, misconduct caused by personal reasons should be recognized as a medical mistake.

In our opinion, a medical error is most often connected with carelessness when the person committing it does not foresee harmful consequences, although he could or should have foreseen them with due care and diligence or with flippancy when he foresees them, but expects to prevent them recklessly.

It seems that the causes of «medical errors», from their subjective content viewpoint, are always carelessness, negligence, lack of physician's professionalism in a situation where he could and should define correctly and render health care services based on his knowledge and level of medical science development.

We believe that a medical error, which results in causing death or injury to the patient's health, is always related to an improper medical care due to professional ignorance, lack of knowledge and skills. This shows the violation, and, therefore, should entail civil liability.

We want to point out that wrong actions of health care personnel can also be caused by objective circumstances. Objective causes leading to wrong medical actions include conditions under which there is no opportunity or funds for conducting a particular research or medical treatment. Objective causes that entail errors can also be associated with the imperfection of theoretical and practical medicine, as well as with exceedingly rare body features of some patients and their reaction to medical procedures.

In our opinion, wrongdoing caused by objective reasons, due to relative and imperfect medical science and practice, emerging diseases, giving abnormal symptoms, rare allergies that cannot be predicted and prevented by the health care personnel giving a due care and diligence, should not be admitted as «medical error», but as the so-called «objective omissions».

In our opinion, misconduct caused by these circumstances should not be admitted as a «medical error», but as the so-called «objective omissions». We can treat only improper illegal acts as «medical malpractice» that cause injury to the patient's life and health, committed due to a medical worker's wrong behavior, when he could and should have the necessary knowledge and skills, based on his professional qualifications.

A «medical error» is always a committed offence consequence (tort), which means it should entail civil liability. We believe, a health care worker has no right to make mistakes due to circumstances that directly depend on him.

The physician's actions under the influence of unpredictable circumstances, for which they are not responsible and which they cannot prevent, are not always erroneous. An unfavorable and unexpected outcome for a patient often occurs by coincidence when there are person's unlawful actions (and sometimes erroneousness) rendering health care services. In most literature sources, such actions are called as «medical accident».

In order to detail the current legislation on health care liability, we consider it expedient to distinguish the concept of «objective omission» and «accident» proposed by us, according to the reversibility of the patient's consequences.

The risk of accidental adverse effects in medicine is always due to a combination of anatomical, physiological, morphological, constitutional and other features of the patient and his diseases (injury); environmental influences, «extrinsic factors»; as well as the health care worker's actions in these conditions. If such an unpredictable incident causes an unfavorable and irreversible outcome, it definitely becomes an accident.

We think that «objective omissions» are «wrong actions or inactions of a medical worker caused by such external circumstances as imperfection of medical science and practice, uncertain etymology of the disease, abnormal symptomatology, atypical disease, the patient's unique anatomic features, as well as the development of his rare allergic reactions and polypathia), which cannot be foreseen and prevented by the doctor and entail adverse but reversible consequences for the patient».

Modern dictionaries define «omission» as «it was needed to be done and was not done unintentionally» [2; 322]; «breach of duty, error, malpractice» [3; 234]; «mistake; omission, malpractice; blunder» [4; 128]. «Objective» is connected with external conditions, not depending on one's will or capabilities [5; 401].

We associate the term proposed by us with the fact that the actions of a health care worker are related to the fact that he misses the opportunity to act or act correctly under the influence of objective (external) factors and circumstances that exist outside and without regard to him.

«Objective omissions» can cause injury to the patient's health, entail complications and pain sensations that could be avoided, without causing the endpoint by alleviating or restoring the health and even being relatively critical. Their main feature should be the possibility of full or partial recovery of such consequences. We believe that these omissions are not characterized by guilt and therefore should not entail responsibility, especially if the adverse consequences are reversible.

Despite this, such omissions in medicine should certainly be given legal bearing. In our opinion, the reversible effects, due to a patient's treatment failure, should entail the possibility of his right to receive compensation, but not within the civil liability institution, but from a specially created fund.

The development of a compensation system without fault in our country may become one of the solutions. It has an effect in a number of countries where the assessment of health care workers' liability by the court is not a precedent condition for providing compensation to the injured patients. As a rule, the injury and complications connected with medical procedures or the fact that they could be preventable, are the grounds for compensation. Compensation for injured patients is financed privately by business and non-profit insurance organizations (in Denmark, Finland) or by the state (Sweden and New Zealand).

We propose to consider «the adverse outcome of medical intervention associated with accidental, unforeseen and unavoidable circumstances and leading to the patient's death» as an «accident» in medicine. In our opinion, this term points out the main features of the phenomenon considered by us, that is, accident, emergency, unpredictability, unavoidability, irreversible consequences. From a legal point of view, an «accident» implies a lack of wrongfulness in the health care worker's actions, and therefore also cannot be the civil liability.

In this regard, we propose to consider them as one of special grounds for discharging medical personnel of civil liability in the professional sphere. In medicine, «the reasonable medical risk» should also be related to circumstances excluding wrongfulness.

The actions of a medical worker should be considered lawful, in which he foresees an adverse result possibility, but expects to prevent it, but in reality, the adverse consequences become unavoidable. However, the doctor cannot come through the injury due to the fact that preventing it by other available means in this situation goes beyond his possibilities.

In our opinion, the adverse outcome of medical trials when they were carried out legally, due to a socially useful objectives, the specified goal could not be achieved by other means not related to risk, and all possible measures were taken to prevent injury, should be acknowledged as the result of «reasonable medical risk».

Discussion

The big medical encyclopedia defines medical errors as «a kind of doctor's honest mistake in his judgments and actions in performing one or another special medical duties» [6].

The most common in medicine is defining a medical error as «a physician's error in performing his professional duties, which was the result of the innocent mistake and could not be foreseen and prevented by him, that is, was not doctor's negligent attitude towards his duties, his ignorance or malicious actions. Malpractice does not carry any disciplinary, administrative or criminal penalties» [7].

S.V. Nagornaya in her thesis research on medical services contract notes that the first attempt in defining a medical error formally can be considered a concept proposed in 1928 by I.V. Davydovsky, who writes that «a malpractice implies the doctor's innocent mistake based on imperfection of medical science and its methods, or as a result of atypical disease, or insufficient residency training if this does not reveal any elements of negligence, carelessness or ignorance» [8; 146].

It should be noted that such a definition is generally accepted and entered the medical encyclopedias with minor changes and is also most often found in legal literature. Lawyers give different definitions to the «medical malpractice» term.

Thus, S.G. Stetsenko believes that this health care error related to improper actions of medical personnel, is characterized by bona fide ignorance if there are not any elements of intentional or negligent crime [9; 534]. M.R. Rokitsky considers malpractice as a bona fide ignorance, which caused or could cause some damage to patient's health [10;13].

Yu.A. Zvezdina says that medical malpractice is a doctor's erroneous actions in making a diagnosis or treating a patient, due to the state of medical science at this stage of its development or due to special unfavorable conditions and circumstances of medical care or due to deficiencies in medical experience, made without risk awareness, that is, without predicting personal injury or being confident in its prevention [11; 15].

O.V. Leontieva suggests that this is an error in performing medical procedures and which, depending on the level of public danger, careless health care worker's mental element of a crime and the injury caused to the patient's health, excludes or leads to the emergence of various types of legal liability [12; 54].

According to P.P. Glushchenko, medical malpractice is such an action or inaction of a health care worker which, taking into account a causal relationship, gives rise to an increase or non-reduction of a patient's disease progression risk, the emergence of a new pathological process, suboptimal use of medical resources and patient's dissatisfaction with health care system [13; 26].

According to E. Khokhlova, medical malpractice is one of the types of health care error, a medical professional error (action or inaction), a physician's honest mistake based on imperfection of medical science and its methods, atypical disease, etc. [14].

A.A. Ponkina says: «The value- and legal-semantic concept of «medical malpractice» («medical error»), adopted in our author's concept, is a physician's innocent mistake, which, under the legal qualification of doctor's actions, is interpreted as the grounds for finding him innocent (in civil, administrative and criminal aspects) [15; 58].

The foreign scientists' viewpoint on this issue is distinguished by an original approach and a clear authorial position.

According to L.T. Kon, J.M. Corrigan and M.S. Donaldson, medical malpractice occurs when «it was impossible to carry out actions aimed at achieving a specific therapy goal as planned, or the wrong plan was made to achieve this goal» [16].

According to Leonard Michael Martin, medical malpractice is defined as «failure, which is the result of human powerlessness in the face of natural phenomena in situations that are not dependent on any medical actions being controlled by the doctor. It means that errors could have been avoided if real circumstances would be different» [17].

The Brazilian authors Julio Cesar Meirelles Gomes and Zhenival Veloso de France write: «Medical malpractice is an incorrect action (improper action) done by a health care worker or inaction (action failure that should have been done) in performing his medical liability, the result of which is the omission to observe such actions' technical standards, which may entail injury to a patient's life or health, if a health care worker causes harm unintentionally» [18].

There is no definition «medical malpractice» in the legislation of the Republic of Kazakhstan, but in practice it is considered as a result of a careless action that caused injury to human life or health. The grounds for legal liability (tort and criminal) are specified injury, and one of the necessary conditions is negligence as a form of guilt [19].

The position of certain authors, as well as the approach of the Kazakhstan law enforcement, is somewhat disputable. And here is the explanation. At first, we believe that medical malpractice is always the result of activism. To imagine a situation in which the doctor neglects is impossible. Even in case of refusal to provide medical assistance, health care worker's inaction is preceded by his actions, expressed in observation, history taking and diagnosis, as a result of which he comes to the conclusion that medical treatment is unnecessary. In our opinion, inaction in this case, is a consequence of an already done diagnostic medical error.

Secondly, we believe that medical malpractice in all cases should be characterized by unintended consequences, as well as wrongfulness and guilt, and its determination as a bona fide ignorance can make obstacles for ensuring the patient's right to receive professional health care services.

Analyzing the nature of medical malpractice, the scientists attach unequal importance to their main features.

Thus, V.V. Sergeyev thinks that if the doctor carries out his duties from good faith and for a proper purpose when doing a professional error, therefore his deed does not include wrongfulness [20; 42].

It's hard to agree with approaches said above. In our opinion, the factual error is always related to the doctor's wrong action, even if he is in good faith mistaken. The wrongfulness occurs not only in cases when the law is violated, but also when there is really violation of person's legal right (in this case, the patient's right to receive quality health care).

There are opinions in legal literature that those actions that pose a threat to the harmful consequences should be considered as a medical error [21; 277].

We believe that this approach does not reflect the essence of responsibility for it. In our opinion, malpractice is the result of misbehavior and it becomes possible to state the fact of its commission only if the patient's injury complications have already occurred, and, therefore, this becomes the grounds for liability.

S.V. Nagornaya considers the main feature of medical error is wrongfulness and says that «the concept of medical error is beyond mental element in a participant's behavior of obligations to provide medical services and should be defined as actions (inactions) of health care personnel that violate legal requirements and generally accepted requirements of medical science. The attitude of a medical worker to such an error and the consequences that it entails do not determine the essence of this concept. Therefore, a medical malpractice is a kind of default that characterizes the contractor's liability under the agreement on providing health care services causing death or injury to the patient's health» [7; 148].

At the same time, we want to note that the subjective component of a medical error is the main reason for various opinions concerning responsibility for it. Thus, contrary to the tendency observed, forensic physicians and a number of clinicians have constantly emphasized that the concept of good faith used in «medical malpractice» construction is ambiguous (F.Yu. Bredichevsky, 1970); and «the doctor has no right to do errors for subjective reasons» (I.A. Kassirsky, 1970, E.I. Chazov, 1979, M.R. Rokitsky, 1986) [22].

Approximately 30 years ago, lawyers and doctors asserted that one should not mix the concepts of «iatrogenic pathology» and medical malpractice, and attempts to delimit medical disputes from crime, referring to a good faith category, cannot be considered reasonable [23; 70].

The use of the term in medical reports to mitigate guilt is unacceptable. Society does allow actions that do not exclude risk, but in these actions one cannot focus on error tolerance [24;165].

A.V. Tikhomirov defines a medical error as: «non-recognition or disproportion of actions to the nature and degree of pathological process, the natural progression of which leads to an inevitable threat (realization of this threat) of a patient's life or health. And it doesn't matter whether the consequences of medical worker's actions have occurred due to his unfair misconception by causing patient's physical harm or due to professional ignorance. The legal liability of such a person comes, based on the degree of these consequences but not on how fully the regulations of the relevant instructions are complied with» [25; 98].

According to A.V. Kudakov, «a medical error is the selection by a medical worker of methods, diagnosis and treatment that are dangerous for a patient's life or health, caused by ignorance or arrogant disregard of legally significant requirements towards professional behavior in a current situation» [26; 65].

Ya. Leibovich, R.K. Rigelman consider medical malpractice as actions that entail responsibility.

The criminal liability of medical personnel for professional error is reflected in the German Penal Code, which has a separate article «medical malpractice» sanctioned with a fine or imprisonment for up to five years [26; 9].

F.Yu. Berdichevsky said the same, considering a reasonable possibility to foresee a health care worker's adverse effects as a distinctive feature of medical malpractice [22; 201].

We believe that a medical error, which results in causing death or injury to the patient's health, is always related to an improper medical care due to professional ignorance, lack of knowledge and skills. This shows the violation, and, therefore, should entail civil liability.

M.N. Maleina refers entailing injury due to insufficient provision of institutions with specialists, equipment, medicines to medical errors that exclude act liability [27; 64].

It is believed that this approach can affect abuses by health care workers who, under the conditions of medical care, will not take into account patient's interests and the need to act, overcoming difficulties encountered and searching for an alternative approach, but the opportunity to «go with the tide», stating the fact of external circumstances exempting them from liability.

Another thing is objective reasons caused by relativity and imperfection of medical science and practice, the emergence of new and previously unknown diseases, as well as the manifestation of unique and rarely encountered, abnormal advanced symptoms, atypical disease, the patient's abnormal anatomical features, uniquely rare allergic reactions, the development of combined diseases which cannot be foreseen and prevented by health care personnel, even with due care and precaution. We offer such actions to calify as «objective omissions «. Another category which provokes disputes concerning its legal nature is «accident».

Professor Gromov defined the accident in medical practice as an adverse disease outcome connected with a matter of chance that the doctor cannot predict or prevent [28; 71].

Yu.P. Edel refers fatal injury, diseases that have not been studied in medical science yet, adverse outcomes due to a patient's fault and his relatives to the «medical accident» [29].

Accidents include all fatal cases that were unexpected for the doctor. Examples of such fatal cases include: 1) chronic infection activation after surgery; 2) post-surgery complications, that is, peritonitis and bleeding after ordinary appendectomies, surgical scar rupture or thrombosis many days after surgery, aerendocardia and many others; 3) vomiting during anesthesia; 4) death after encephalography, esophagoscopy, etc.

Accidental fatalities, independent of the doctor's actions, are observed during blood transfusion, surgical interventions, anesthesia, as well as in taking medicines, when they cause an unpredictable body reaction sensitive to its components, although they are considered to be perfect from medical science provisions' viewpoint.

When analyzing these and other definitions, it should be noted that most authors relate circumstances by determining the action as an «accident» with irreversible consequences in the form of a fatal outcome.

Such concept of authors as «causing injury if it is impossible to make the right diagnosis and prescribe appropriate medication due to external factors does not legally stipulate the doctor's guilt», should be recognized as correct [30].

«Objective omissions» can cause injury to the patient's health, entail complications and pain sensations that could be avoided, without causing the endpoint by alleviating or restoring the health and even being relatively critical. Their main feature should be the possibility of full or partial recovery of such consequences. We believe that these omissions are not characterized by guilt and therefore should not entail responsibility, especially if the adverse consequences are reversible.

Despite this, such omissions in medicine should certainly be given legal bearing. More often, medical workers assume emergency risk, when delay and inaction can become so dangerous that it will lead to a patient's irreversible results. However, even in these cases, the doctor should strive for a positive result, basing on the actual procedures that he uses.

A risk is considered to be reasonable: 1) if it occurs for achieving a socially useful objectives 2) if this goal could not be achieved by other means not related to risk 3) all measures were taken to prevent injury.

As M.Yu. Fedorova notes, such situations should include, first of all, clinical trials of new drug treatments for health care workers [21; 270].

We believe it necessary to put restrictions on the relief of medical workers' liability due to lawful medical risk only in this area. Our viewpoint on this issue is due to difficulties in assessing this phenomenon, as well as the peculiarities of proving its relevance. We are convinced that the grounds for relieving medical workers of liability should not be broadly interpreted and should exclude any errors in treating these legal phenomena in the law enforcement practice.

In our opinion, the adverse outcome of medical trials when they were carried out legally, due to a socially useful objectives, the specified goal could not be achieved by other means not related to risk, and all possible measures were taken to prevent injury, should be acknowledged as the result of «reasonable medical risk».

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. At each stage of medical science development and practice, doctors are to state the fact of their insufficient development. The cause of new previously unknown diseases is technogenic factors and environmental problems. Virus mutation, the rapid spread of dangerous infections in modern society, a high probability of hereditary diseases, previously unknown allergic reactions of a human body to external factors, the existence and growth of a large number of serious and still incurable diseases pose risks to the quality of a modern person's life. The objective of medical practice is to reduce the risks of adverse effects related to medical intervention and to prevent their occurrence. In conditions where medical activity carries risks based on its nature and objective preconditions, the legal substance of reasonable medical risk should be clearly defined and liability release due to it should be restricted.

Conclusion

We believe that the distinction between punishable «medical malpractice» and non-punishable «objective omissions», «accidents», as well as «reasonable medical risk» will resolve uncertainty and regulate responsibility jurisprudence in medicine, as well as avoid errors in the legal assessment of punishable and non-punishable acts. The legalization of conceptual questions proposed by us will contribute to the current legislation improvement in the health care services.

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Медициналық қызметкерлердің дәрігерлік қателіктері үшін азаматтық-құқықтық жауапкершіліктің кейбір мәселелері

Мақала медициналық қызымет көрсету саласындағы азаматтық-құқықтық жауапкершілік мәселелеріне арналған. Медициналық қызмет көрсету кезінде жіберілетін дәрігерлік қателіктер және олардың біліктілігінің күрделілігі медициналық даулардың өзектілігіне резонанс тудырады. Автор медициналық қателіктің нақты критерийлерінің болмауы құқық қолдану тәжірибесіндегі олқылықтарға алып келетінін айтады. Сонымен қатар тұжырымдамалық аппаратты бекіту тұрғысынан

дәрігерлердің жауапкершілігі туралы заңнаманы жетілдіру қажеттігін көрсетеді; сондай-ақ медициналық қызметкерлерді жауапкершіліктен босататын құқықтық санаттардың анықтамасы ұсынылған. Мақалада дәрігерлер мен заңгерлердің дәрігерлік қателіктерін анықтауға арналған ғылыми және практикалық тәсілдер талданды, оның табиғаты зерттелді, белгілері анықталды. Дәрігерлік қателік барлық жағдайларда азаматтық-құқықтық жауапкершіліктің негізі ретінде қарастырылуы керек екендігі көрсетілген. Дәрігерлік қате «медицинадағы қайғылы жағдай» ұғымына, сондай-ақ автор ұсынған «объективті жіберіп алушылық» категориясына қатысты қарастырылды, оның пікірінше, әртүрлі құқықтық салдары болуы мүмкін. Медициналық қызметкерлерді жауапкершіліктен босатудың негізі ретінде медициналық қауіп-қатердің дәлелдеріне ерекше көңіл бөлінді. Зерттеу нәтижелері жаңашылдықпен өзіндік ерекшелікке ие, автордың ұстанымы медицина қызметкерлерінің жауапкершілігі туралы ережелерді түсіндіру мен қолдануға байланысты, қызметкерлердің мүддесін қорғауға негізделген.

Кілт сөздер: медициналық көмек, жауапкершілік, дәрігерлік қателік, дәйекті медициналық қауіп-қатер, медицинадағы қайғылы жағдай, науқас, медициналық көмек, медициналық қызметкер

М.Ю. Прудникова

Некоторые проблемы гражданско-правовой ответственности медицинских работников за врачебную ошибку

Статья посвящена проблемам гражданско-правовой ответственности в сфере медицинского обслуживания. Актуальность вызвана резонансом медицинских споров, возникающих по поводу совершения врачебных ошибок при оказании медицинских услуг и сложностью их квалификации. Кроме того, отмечено, что отсутствие четких критериев врачебной ошибки влечет пробелы в практике правоприменения. Автор указывает на необходимость совершенствования законодательства об ответственности медиков в части утверждения понятийного аппарата, а также предлагает определение правовых категорий, исключающих ответственность медицинских работников. В статье проанализированы научные и практические подходы к определению врачебной ошибки медиков и юристов, исследована ее природа, определены признаки. Отмечено, что врачебная ошибка во всех случаях должна рассматриваться в качестве основания гражданско-правовой ответственности. Врачебная ошибка исследована в соотношении с понятиями «несчастный случай в медицине», а также предложенной автором категорией «объективного упущения», которые, в соответствии с его суждениями, должны повлечь разные правовые последствия. Особое внимание уделено признакам обоснованного медицинского риска как основанию освобождения медицинских работников от ответственности. Результаты исследования обладают новизной и оригинальностью, авторская позиция обоснована и представляет интерес для работников, чья деятельность связана с толкованием и применением норм об ответственности медицинских работников.

Ключевые слова: медицинское обслуживание, ответственность, врачебная ошибка, обоснованный медицинский риск, несчастный случай в медицине, пациент, медицинская помощь, медицинский работник.

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