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MEDICAL ERRORS OR HARM RESULTING FROM MEDICAL INTERVENTION: LIMITS OF LEGAL REGULATION

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Abstract

The article discusses the issues of scientific analysis of medical error as an option for the provision of inappropriate assistance. The questions of the practice of protecting the rights of patients, the conceptual apparatus of the topic are analyzed. The Constitution proclaims the right to protection of health and guarantees its implementation by fixing the following system of specific measures taken by the state. In the Russian Federation, federal programs for the protection and promotion of public health are financed, measures are being taken to develop state, municipal, and private health systems. The concept of constitutional responsibility is a relatively new phenomenon in the field of law since the Constitution of the Russian Federation was adopted in 1993. The existing definition of the concept of health protection in the law makes it possible to formulate the concept of the legal protection of health. Legal protection of health is a system of legal measures aimed at protecting the health of every person, at providing medical care in case of loss of health. However, a system of measures is needed aiming at improving health and maintaining a long-term active, human life. The conclusion about the direction of the legislation towards comprehensive legal protection of health is based on the analysis of the current legislation containing norms that promote health protection. Formally, this means that legal measures aimed at protecting human life and health should be contained in the protective standards of all branches of domestic law.

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1. Introduction

According to the Constitution of the Russian Federation, everyone has the right to protection of health and medical care (Part 1, Art. 41). Medical assistance in state and municipal health care institutions should be provided to citizens qualitatively and free of charge from the corresponding budget, insurance contributions, and other income. Health and human life are the highest value for the state and should be under strict control and protection.

In recent years, the number of complaints about incorrect or illegal actions of medical workers in the performance of their professional duties has significantly increased in Russia (Andreev, 2006). Expert commissions most often decide on the correctness of the chosen treatment strategy and tactics, the adequacy of treatment measures, the timeliness of hospitalization and medical care, the causal relationship of an unfavorable outcome with the actions of medical personnel, and other issues. Summing up the legal framework for a system of preventive actions directly related to the protection of the highest good, the good of life and health gives an understanding of the relevance of the topic we are studying. What are the terms used by doctors, ordinary lawyers to denote errors in the field of therapeutic activity, how to correctly qualify the actions of a doctor that led to adverse consequences, this and many other questions we face in this study.

2. Problem Statement

The term "medical error" is not in the legislative acts. This means that a mistake is not an offense, an offense, or a crime. But in the public mind, it is customary to consider any harm to the patient as a medical mistake.

The concept of "medical error" I.V. Davydovsky defined it as "a conscientious error of a doctor, based on the imperfection of medical science itself and its methods, or as a result of the atypical course of the disease or insufficient preparation of the doctor, if this does not reveal elements of negligence, inattention, and medical ignorance" (as cited in Pashinyan & Ivshin, 2006, p. 28).

The main difficulty lies in determining the amount of harm, that is, punishability or impunity. So, A.L. Makovsky and F.Yu. Berdichevsky believes that under certain conditions, a doctor's mistake should be qualified as a crime; in other cases, it is a disciplinary offense. An error in the presence of guilt, if there are signs of a crime, does not cease to be an error, a punishable error, a criminal (as cited in Florea, 2001).

A.G. Pancakes offers an exciting interpretation of the medical error and responsibility for it. He points to the need to distinguish between the objective and subjective causes of medical errors (as cited in Blinov, 2004).

Objective causes of medical errors due to external factors: the lack of sufficient information in medical science about the essence of the pathological process, the lack of the possibility of conducting individual studies of the disease without pronounced symptoms, and other factors. Subjective causes of medical errors due to internal factors: insufficient qualification of the doctor, incomplete medical history, insufficient or delayed examination, and other factors.

The reference book for lawyers "Forensic medical examination" contains the following definition: "Medical errors recognize the conscientious error of a doctor arising from certain objective conditions without elements of negligence, negligence and professional ignorance; with these actions of the doctor, intent is completely excluded" (Vinogradov et al., 1985, p. 64).

The Criminal Code of the Russian Federation does not contain articles expressly providing for liability for medical error. In judicial practice, separate formulations are used that are associated with causing death or serious bodily harm.

Part 2, Art. 109 of the Criminal Code of the Russian Federation – causing death by negligence due to improper performance by a person of his professional duties. So, on November 6, 2018, in the city of Alapaevsk, the verdict against D.K. Rudenko. He, being in an X-ray room, during the performance of his professional actions, showing criminal negligence, i.e., without foreseeing the possibility of the public danger of his action in the form of the death of the patient. Being a qualified employee, he did not conduct conformity control visually and aloud of the drug presented by the nurse, and he introduced a substance not used for these purposes to the patient. As a result, the patient died. D.K. Rudenko was convicted and sentenced to 2 years of imprisonment with deprivation of the right to engage in medical diagnostic activities for 2 years.

Part 2, Art. 118 of the Criminal Code of the Russian Federation – causeng grievous bodily harm through negligence, committed as a result of improper performance by a person of his professional duties." For example, on May 7, 2015, Novokuybyshevsk announced the verdict against S.V. Pavlova. The doctor performed an operation during which the patient, due to improper performance by Pavlov S.V. of their professional duties, through negligence, serious harm was caused to the health of the patient. Namely, the doctor did not carry out operative access, which does not provide sufficient control over the topographic and anatomical parameters in the operation area and a precise verification of the elements of the hernia; did not perform the action (insertion of a catheter) to clarify the location of the urethra, in the area of which tissue was excised; tissue excision (including the spongy part of the urethra) without proper anatomical verification, which caused severe harm to the patient's health. The doctor was convicted and sentenced to a restriction of freedom for 1 year.

Also, medical workers are attracted by:

- Part 2, article 124 of the Criminal Code of the Russian Federation – failure to assist a patient, for example, when refusing to be hospitalized by a doctor, as a result of which the patient died;
- Part 4, article 122 of the Criminal Code of the Russian Federation – infection of another person with HIV infection due to improper fulfillment by a person of his professional duties;
- Article 293 of the Criminal Code of the Russian Federation – negligence. On December 25, 2013, Kimry announced the verdict against P.N. Kopteva. Citizens with complaints of headache and dizziness were admitted to the admission department of the "Kimrskaya Central District Hospital." Due to the deterioration of the patient's condition, an operation was performed. During the operation, a milling search hole was placed on the right side of the skull. But no hematoma was found. By agreement with the head of the trauma department P.N. Koptev, a decision was made not to impose a milling search hole on the opposite side of the skull. The specified diagnosis was made incorrectly; many errors were made during its

establishment, which led to an incorrect assessment of the severity of traumatic brain injury. The following errors were made: lack of a complete neurological examination upon admission; lack of examination by a neurologist and conducting ECHO-EG upon admission and on the first day; lack of inspection of an oculist at admission and on the first day; the dynamics of neurological status during treatment is not reflected; C.T. scan and MRI of the brain were not performed for 9 days; if it is difficult to make a diagnosis and treatment tactics, the neurosurgeon GUZ OKB did not consult on time. In connection with the mistakes made during the diagnosis, accordingly, the tactics of treatment of the victim were chosen incorrectly, which led to death. Koptev was found guilty and sentenced to imprisonment for a term of 2 years 6 months without deprivation of the right to occupy certain positions or engage in certain activities.

The lack of a legal justification for medical errors and their unified interpretation from the law does not allow solving the issues of objective criminal and other liability for their commission.

Holding a doctor liable is possible in case of his mistakes, which must meet the following conditions:

- the presence of socially dangerous consequences (death or grievous bodily harm)
- illegal behavior of a doctor
- a causal relationship between unlawful behavior and harm
- the doctor's fault.

The Criminal Code of the Russian Federation establishes circumstances that exclude criminal liability. These include justified risk (of the Criminal Code of the Russian Federation, Article 41), a variety of which is a medical risk. It is possible with surgical interventions, treatment, during various biomedical experiments.

In medical practice, professional errors occur in situations where the doctor, although he foresaw the possibility of socially dangerous consequences of his actions (inaction), but could not prevent these errors, such errors can be attributed to a reasonable risk.

The risk in medical activity is recognized as justified when the analytical data of medical science substantiate this possibility. That is, we are talking about a real situation in which the doctor took all possible measures to prevent harm to the patient's life and health, but failed to save his life, or to avoid causing harm to the patient's health. The opportunity to use the right to risk is guaranteed to the doctor, who is the source that creates the danger of harming the patient's law enforcement interests. Point 2 of Art. 41 of the Criminal Code of the Russian Federation "Justified Risk" states "Risk is recognized to be justified if the specified goal could not be achieved by non-risky actions (inaction), and the person who committed the risk took sufficient measures to prevent harm to the interests protected by criminal law".

The Investigative Committee of Russia proposed to introduce an article in the Criminal Code of the Russian Federation, Art. 124.1 "Inappropriate provision of medical care (medical services)" and Art. 124.2 "Concealment of violations of medical care." The reason for this was the fact that there were more frequent cases of complaints of medical workers by citizens. Severe penalties were imposed for these

crimes, for example, under Section 124.1, restriction of liberty, forced labor, or imprisonment for up to 6 years if the patient died as a result of a medical error. According to Art. 124.2 provided for a fine or imprisonment of up to 4 years.

Ivan Pecherey, a medical lawyer, opposed the introduction of this article. He says that virtually every doctor, performing his duties, is a potential criminal, and their professional activity is considered a crime area.

Lawyer Ivan Manyukin does not see the need to supplement the current law. In his opinion, the problems are connected with "law enforcement practice, low quality of investigation, falsely understood corporate solidarity and the presence of an objective opportunity for persons who committed a crime to change and falsify medical records."

Attorney Pavel Astakhov also doubts the need for the introduction of new compositions in the Criminal Code: "no special rules are required, the medical professional is a special subject in his official position," his actions are not equivalent to "the actions of a simple person with a knife." Mr. Astakhov said that the problem of protecting the rights of patients and the objective consideration of "medical cases" has long been ripe. However, now, it is essential to improve the investigation quality and the doctors' work, and not the amendments to the Criminal Code.

In our opinion, the introduction of these articles in the Criminal Code of the Russian Federation is not solving the problem of medical errors in general. An integrated approach is needed, and it is worth starting not with toughening legislation, but, at a minimum, with maintaining regulatory and legal acts revealing the concept of "medical error," as well as qualifying these acts. The objective side of the alleged crimes is not defined, as well as those properties by which one can distinguish medical errors that are not criminal offenses. It is worth starting with the material and technical equipment of medical institutions, as well as acts regulating therapeutic activities. We believe that the introduction of these compounds is not useful in law enforcement practice.

After some time, the Investigative Committee and the National Medical Chamber advocated that doctors not be sentenced to imprisonment. In their judgment, they proceeded from the fact that prison is an excessive punishment for doctors. Victims and victims should be paid insurance. As a result, the bill introducing new articles was deleted.

In Russia, compensation is provided for pecuniary and non-pecuniary damage caused by a medical error, as enshrined in the Civil Code of the Russian Federation, Articles 1064–1101.

Harm is any derogation of any good or interest protected by law. It includes property and moral harm. All expenses incurred, treatment, additional meals, purchase of medicines, prosthetics, spa treatment are subject to compensation. The court determines the amount of compensation, guided by reasonableness and justice, the nature and degree of suffering, the degree of guilt of the causer.

Medical errors can occur for both objective and subjective reasons. The former include the lack of appropriate conditions for the provision of medical care, the imperfection of existing methods of treating diseases, the severity of the patient's condition. To the second – insufficient experience of a medical professional; inattention when examining a patient; incorrect interpretation of laboratory and instrumental studies; underestimation or reevaluation of the results of consultations of other specialists and other reasons (Stetsenko, 2004).

In medical practice, there are a wide variety of medical errors, and you can classify them for various reasons. So, for example, depending on the various stages of the work of doctors, one can distinguish: diagnostic; medical tactical; medical and technical; organizational; errors in maintaining medical records; errors in the behavior of medical personnel in medical institutions (Gromov, 1976).

I.F. Krylov proposed classifying medical errors into three groups:

- diagnostic (non-recognition or erroneous recognition of the disease);
- tactical (incorrect determination of indications for the operation, erroneous choice of time and volume of the operation);
- technical (improper use of medical equipment, foreign bodies left in operation in cavities and wounds) (as cited in Grando, 1988).

Unfortunately, the official statistics of medical errors are not kept in the Russian Federation, in contrast to foreign countries, such as the USA, Germany, Great Britain, Italy.

In the United States of America, in the event of harm caused by medical intervention, damages of about \$ 9 million a year are compensated, and moral compensation for inappropriate treatment can also be received. Judicial proceedings in such cases are held in the presence of jurors, on whose decision the outcome of the case depends. Besides, the main feature is that in America, lawyers are specializing exclusively in medical and pharmaceutical law.

The situation in Russia leaves much to be desired since there are no proper effective legal mechanisms to protect the rights of patients to quality medical care. In our country, quite often there are cases of improper performance by medical workers of their official duties, which entailed infliction of grievous bodily harm, as well as the death of children.

3. Research Questions

The subject of study in our work was public relations arising from the health and ill-health of citizens with persons with special status as medical workers.

4. Purpose of the Study

The purpose of the work is expressed in a comprehensive study, analysis, generalization, and assessment of the diverse opinions and positions of scientists and practitioners regarding medical error as a medical, legal phenomenon in the field of human and civil rights and freedoms for health.

5. Research Methods

In preparing the article, such methods were used as systemic, historical-legal, comparative-legal, structural-logical, and formal-legal.

6. Findings

As a result of the study, we concluded that one of the combat medical errors ways is to monitor civil society to identify attitudes that are formed in the population through the media.

Also, it should be said that new technologies should be developed and introduced for diagnosing, treating, and creating the necessary conditions in medical institutions for the sufficient work of medical workers.

The President's message to the Federal Assembly in 2019 states that two world-class rehabilitation centers will be created. Oncological diseases are one of the principal vices of our time. Within six years, the latest advanced technologies are introduced those help people in the retreat of this dangerous disease. One trillion rubles are allocated for this direction.

It is essential to pay attention to damage insurance. It is necessary to classify all errors and the amount of compensation for harm.

An important role is played by raising the level of qualification, that is, constant conferences, clinical training, and consultations. Thus, in 2018, the Ministry of Health developed a bill that would oblige doctors who violate special instructions for the treatment of various diseases to undergo extraordinary accreditation – admission to professional activities. Also, the Minister of Health Veronika Skvortsova explained that if the doctor does not pass accreditation, he is assigned a second admission to professional activities. The issue of admission considered by an expert commission consisting of representatives of non-profit organizations, executive authorities in the field of health protection, medical, educational and scientific organizations, and trade unions of medical workers.

In our opinion, this is one of the main ways to combat medical errors. It is worth introducing a unified system of personnel policy, the primary purpose of which is training and retraining of specialists, advanced training, and testing of knowledge.

Also, in our opinion, it is worth developing a database where the best doctors in Russia are located with contact information and customer stories. The database allows quickly finding the right specialist and presents a real picture of medical care from Russia. It is worth combining all the clinics in our country on one service. This service will contain all the comments of patients about this or that doctor. If there is any complaint, the patient could fill out a specific form and send it to the clinic doctor. This service should not be made anonymous, and the right to comment is granted only after visiting a particular doctor. For example, when sending a comment, you need to enter the code that is issued after the procedure.

These are some of the ways to deal with medical errors. Unfortunately, they cannot be eliminated.

As mentioned earlier, we believe that it is worth introducing the discipline of "Medical Law" in higher education institutions, and it is essential to qualify the actions of employees of medical organizations in determining criminal or non-criminal. But, there are many difficulties in this, since medicine itself is unique, and each case is individual in its way.

7. Conclusion

Thus, we can conclude that the doctor, of course, must provide appropriate medical care in a timely, complete, and reasonable manner, observing the technique of medical interventions. But we should not forget about the features of therapeutic activity, the effectiveness of which depends not only on the professionalism of medical personnel. Besides, the increasingly frequent discussions about the wording of the concept of "medical error" make it clear that medicine and jurisprudence need the rapid

legal consolidation of the above term. Of course, this helps to solve the problems of practice when holding doctors accountable for violations of medical activities.

It is maintaining the concept of "medical error" at the legislative level does the work on protecting the rights of patients more effectively. This concept creates a particular framework for monitoring and resolving disputes taking into account the medical component. Indeed, this does not solve the problem of medical errors, and it provides a distinction between criminal and unlawful acts

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