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**Some questions of the civil legal responsibility of the executor
on the contract for provision of medical services**

The article is devoted to problems of civil responsibility of the performer under the contract on rendering medical services. The subject of article is especially relevant in the time of updating of the civil legislation of the Republic of Kazakhstan and development of norms on consumer protection. Interest in a subject is attracted by a huge number of the civil disputes arising now concerning inadequate medical attendance of patients. The legislation on health of the people and a health care system constantly changes. It is directed to regulation of the relations between medical institutions and patients, establishing guarantees of implementation and protection of the rights by them. Meanwhile, law-enforcement practice shows that in the sphere of civil responsibility of health workers a certain gap is traced. There are no accurate criteria of restriction of responsibility and release from responsibility of the health workers allowing inadequate execution of the obligations for the contract including owing to medical errors. All this does the patient by weakness of the contract, and the contract on rendering medical services — the transaction, risk for its rights and interests. The author of article defines some problems of legal regulation in this sphere and offers ways of their decision. In respect that in Kazakhstan not so many scientific works devoted to problems considered by the author, the article content is worthy, and its findings may contribute to the improvement of civil legislation and legislation on health services in the Republic of Kazakhstan.

Keywords: medical, service, legal regulation, problems, patient, health, insurance, medical organizations, treatment, responsibility.

Providing patient's right to qualified medical care- the main goal of the state, which establishes norms, regulating relations arising on the provision of medical services. Until recently, the problems of legal regulation of medical services were studied partially, and the prospects of development of legislation on health care were rather indeterminate. For a long time, legislation which regulates medical services, had a public law nature; declarative norms were aimed at providing the rights of the patient and they were not the constituent part of the civil law. Legal illiteracy of Kazakhstani patients, as well as a pronounced administrative principle in regulating health relations in the past, had a negative impact on the development of a systemic law on liability in the field of health care. This was also facilitated by the fact that for a long time the attitude of the doctor and patient in our country was regulated mainly by the orders and instructions of the Ministry of Health issued under the heading «For official use» and therefore were inadequate for the population, and many medical statistics were closed.

A new approach to the realization of the citizens' right to health, which has become a consequence of the change in the status of public health bodies, caused a genuine interest in the problems of civil liability in connection with the provision of medical services. The change in the norms of the current civil legislation and the freedom of private business activity, which spread to the social sphere, finally consolidated the relationship between the doctor and the patient, a private nature, and the establishment of the Civil Code provisions regulating contractual relations in the sphere of rendering nonmaterial services, allowed to fully ensure

the civil and legal interests of their parties. In this regard, questions have emerged about the legal nature, grounds and extent of liability of medical workers to patients for improperly rendered services.

The complexity of the qualification and evaluation of the executor's actions is explained by the very essence of the obligation to provide medical services. Since there is no focus on a specific result in the conclusion of a contract, there are no clear criteria that the patient-customer could guide, proving improper execution of duties by the party providing the medical service. In other words, the obligation itself is defined by the so-called «presumption of the professionalism of the executor», therefore all the actions of medical workers carried out within its framework are understood as properly performed, until proven otherwise.

To date, there has not been a single approach to determining the legal essence of the responsibility of medical workers for harm caused by the health of the patient when they violate their professional duties.

The concept of «quality of medical care», either the health care legislation or the legal science has not been worked out yet. The World Health Organization proposed to take into account such criteria of qualities as: adequacy, efficiency and level of application of modern medical knowledge and technologies [1; 21]. Meanwhile, a number of objective and subjective factors, such as the presence of certain achievements in medical science, the possession of certain knowledge by a doctor, skills and abilities, the availability of necessary medical equipment and medicines.

In addition, the achievement of a positive effect is due not only to the choice of the method of treatment, but also to the characteristics of the organism, the tolerability of drugs used in the treatment, the presence of contraindications, etc. For this reason, it seems unreasonable to use in medicine a large number of rigid standards.

Medical standards are aimed at optimizing the treatment and diagnostic process, they are used in assessing the activities of doctors at the level of medical and preventive institutions, insurance medical organizations by comparing and calculating compliance indicators, quality, defectiveness, etc [2; 82]. However, the standards themselves act as a sample, standard, normative model without taking into account the peculiarities of individual phenomena. The human body in the treatment requires a professional approach, taking into account the individual characteristics of the body and the application of those methods of treatment that are the achievements of science at the time of the provision of medical services, and therefore can not be accounted for by established standards.

Some authors see it expedient to set minimum mandatory medical requirements in a largely prohibitive manner, allowing the doctor to use their knowledge, skills and experience in treatment, applying the individual approach in each case for the sole purpose of achieving a change in the patient's health in the same direction [3; 8]. However, such a position is also controversial. Attempts to unreasonably narrow the list of compulsory requirements established for the treatment of certain groups of diseases may lead to a complete disregard for general clinical criteria that ensure the achievement of positive results of treatment. With this approach, these criteria can cease to exist at all, which will lead to an estimated and, as a consequence, legal disorder in medicine.

We believe that the existence of common standards in this field is indisputably necessary. However, they must be subsidiary, that is, they should be applied only in the event of a dispute over the quality of the services provided in medicine. In this case, the doctor should be able to independently choose the algorithm of treatment, but taking into account the criteria developed by science and legislation that positively influence the quality of the services rendered by him.

The purpose of the contract is to satisfy the patient's need for obtaining an effective result from the treatment. Despite the fact that this result has no material expression, it must be predictable in advance. And if the chosen method, taking into account the patient's condition and all medical indications, the method of treatment allows to eliminate or improve the negative psycho-physiological state of the patient — the utility on the face. Consequently, the quality of the service should not be called into question.

A poor-quality medical service attracts the civil-law response of its executor. In this case, the question arises on the legal nature of this responsibility. The vast majority of claims related to compensation for harm caused by health workers to the life and health of the patient and they are considered in accordance with the rules of tort, not contractual liability. Features of the medical service, which are directly related to the impact on the human body without achieving a material result, in the event of negative consequences predetermine the nature of the requirements imposed by the patient — to compensate for harm caused to health.

The opinions of the authors studying the content of the doctor's responsibility before the patient were divided. Some of them indicate that such cases arise tort liability. This point of view is held by

N.I. Sergeeva, A.N. Savitskaya, Maidannik, K.B. Yaroshenko. Others prefer the liability for harm from improper performance of contractual obligations [4; 102].

In our opinion, in this case, one must proceed from the contractual nature of the relations of the parties. That is, in case of non-fulfillment or improper performance of contractual obligations by medical workers, the grounds for bringing them to justice according to the rules on delicts can not be applied. Applying non-contractual liability for causing harm is only necessary in the absence of a contractual basis of the obligation or the fact of its non-fulfillment/improper performance, taking into account the unlawfulness of the action, the existence of a causal link between the unlawful action and causing harm, and the presence of the fault of the inflictor of harm.

The rationale for such a position is seen in the approach developed by the civil literature, according to which, in the presence of prerequisites for a contractual claim, the extra-contractual one falls off, the contractual suit replaces the extra-legal one. This guarantees each party full protection of its rights and does not weaken the statutory responsibility [5; 70].

Anyway, according to the current civil legislation, the responsibility of the doctor to the patient on a general basis is built today on the principle of responsibility for guilt (Article 359 of the Civil Code of the Republic of Kazakhstan). Meanwhile, modern civil law, seeking to protect the weaker party in the legal relationship, gradually introduces into its separate spheres of regulation the rules on the subject's innocent liability (regardless of guilt). Omitting the controversy of some authors about the admissibility/inadmissibility of establishing qualification signs for determining in civil relations the status of a «weak side» [6; 12], we note that the extension of the legislation on the protection of consumers' rights to the relations in the provision of medical services is a *fait accompli* today. And this means that the responsibility of the provider of the medical service is complete, that is, providing the possibility of collecting in favor of the consumer all losses and increased, that is, regardless of the executor's fault, since he is released from liability for default, only in cases where non-performance or improper performance occurred due to force major and other grounds provided for by law.

A wide range of possibilities for compensation of harm at the expense of a medical institution under the rules of legislation on the protection of consumers' rights (including, if harm is caused due to inaccurate or insufficient information [7]), is another and in favor of contractual liability for harming the life and health of a patient when providing it medical services.

Due to the fact that the provision of medical services is mostly related to the implementation of entrepreneurial activity, the responsibility of doctors of private medical institutions and services rendered on a fee basis can also be regarded as complete, coming regardless of guilt. Proceeding from this, there are proposals in the literature for the destruction of the guilty and innocent liability of doctors to patients, depending on the reimbursement of relations. It seems that this approach can lead to unpunished arbitrariness in the provision of free medical services, as part of the provision of state-guaranteed medical care.

Involvement of medical personnel to liability regardless of guilt is also possible in cases when their actions are associated with increased potential danger for others (using X-ray, laser devices, devices designed to treat oncological diseases, potent drugs and etc.) under the rules on the liability of owners of sources of increased danger.

From the point of view of the patient who finds himself in a situation where, due to the medical treatment that has been performed, his health does not improve, and in some cases with an incorrectly diagnosed diagnosis and the loss of time even becomes worse, the establishment of complete innocent liability of doctors by the law seems quite fair. However, it is impossible to expand the civil liability of doctors too much to infinity, since this can lead to confusion when they fulfill their professional duties. Under the fear of complete unreasonable responsibility, doctors will be compelled to examine the patient during the diagnosis of the disease, so long-term that this will lead to often unnecessary procedures and analyzes, especially in situations where the diagnosis itself is obvious and the loss of time during its treatment is unacceptable.

The civil liability of the provider of the medical service must come if the following circumstances are proved: the obligation of the medical worker (executor of medical services) in relation to the patient, the violation of this obligation, the existence of a causal relationship between the actions of the executor and the consequences that come — the harm of health [8; 5]. The need for the development of special medical legislation and the definition in it of a clear conceptual apparatus will avoid legal conflicts in determining the latter medical errors, accidents in medicine, to justify medical risk and to minimize the responsibility of doctors as a result of an unpredictable negative result in the treatment of a patient.

Due to the specifics of medical activity, it is necessary to fix additional grounds for the release from the responsibility of the person in cases of reasonable professional risk, or in cases when the erroneous actions of the doctor are related to the negligence of the patient who did not inform him of the individual characteristics of the organism, but also at the qualification of the actions of the doctor, who made a mistake in the diagnosis due to the non-perfection of medical science. It should be borne in mind that, from the point of view of the legal assessment of the medical care provided (with a view to establishing the grounds for prosecuting medical workers or the institution), the adverse effects of the treatment are divided on:

- medical errors;
- accidents;
- punishable omissions (professional offenses).

Certain legislative limitations on the responsibility of medical personnel should be established also in cases when medical assistance is provided to patients whose diagnosis does not allow for full recovery because of the lack of effective methods of treatment in medical science and practice.

To date, Kazakhstan has all the prerequisites for the development of legal regulation of relations in the provision of medical services.

Meanwhile, some representatives of the national medical science believe that the relationship between the doctor and the patient should be regulated by ethical and moral standards, believing that the legislative regulation of medical activities in its professional part is secondary. Without denying the importance of medical ethics, it is necessary to emphasize that for today in legal regulation requires not only health management, but also the relations arising during medical treatment directly between the patient and the doctor (medical institution), since this involves interests that have importance for individual citizens and society as a whole.

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М.Ю. Прудникова

Медициналық қызмет көрсету жөніндегі шарт бойынша орындаушының азаматтық-құқықтық жауапкершілігінің кейбір мәселелері

Мақала медициналық қызмет көрсету жөнінде шарт бойынша орындаушының азаматтық-құқықтық жауапкершілігінің мәселелеріне бағытталған. Тақырып Қазақстан Республикасының азаматтық заңнамасының жаңаруы мен тұтынушылардың құқықтарын қорғау туралы нормалардың дамуы жағдайында ерекше өзекті болып табылады. Науқастардың медициналық қызмет көрсетуді тиісті түрде орындамауына байланысты қазіргі кезде туындаған азаматтық-құқықтық даулардың санының өсуіне байланысты осы тақырыпқа қызығушылық туындауда. Халықтың денсаулығы мен денсаулықты қорғау жүйесі туралы заңнама тұрақты түрде өзгеруде. Ол медициналық мекемелер мен пациенттердің арасындағы қатынастарды олардың құқықтарын қорғау мен кепілдіктерін жүзеге асыруды бекіту арқылы реттеуге бағытталған. Сонымен, құқыққолдану тәжірибесінде медицина қызметкерлерінің азаматтық-құқықтық жауапкершілік аясында белгілі бір ақаулықтардың бар екендігі көрініс табууда. Шарт бойынша өз міндеттерін тиісті түрде орындамауына байланысты жол берілетін, соның ішінде дәрігерлік қателіктер салдарынан медициналық қызметкерлердің жауапкершілігіне босату және жауапкершілікті шектеудің нақты өлшемі жоқ. Бұның бәрі пациентті шарттағы әлсіз тарап ретінде көрсетеді, ал медициналық қызмет көрсету бойынша шарттың өзі мәміледегі оның құқықтары мен мүдделері үшін қауіп болып табылады. Автор осы салада құқықтық реттеудің кейбір мәселелерін анықтап, оларды шешудің жолдарын ұсынды. Қазақстанда қарастырылатын мәселеге арналған ғылыми еңбектердің көп емес екендігін ескеретін болсақ, мақала көңіл бөлуге тұрарлық, ал автордың тұжырымы азаматтық заңнаманы және Қазақстан Республикасындағы медициналық қызмет көрсету туралы заңнаманы жетілдіруге ықпал етуі мүмкін.

Кілт сөздер: медициналық қызмет көрсету, заңнамалық реттеу, мәселелер, науқас, денсаулық, сақтандыру, медициналық ұйымдар, емдеу, жауапкершілік.

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Некоторые вопросы гражданско-правовой ответственности исполнителя по договору об оказании медицинских услуг

Статья посвящена проблемам гражданско-правовой ответственности исполнителя по договору об оказании медицинских услуг. Тема статьи является особенно актуальной в свете обновления гражданского законодательства Республики Казахстан и развития норм о защите прав потребителей. Интерес к теме вызван огромным количеством гражданско-правовых споров, возникающих в настоящее время по поводу ненадлежащего медицинского обслуживания пациентов. Законодательство о здоровье народа и системе здравоохранения постоянно изменяется. Оно направлено на регулирование отношений между медицинскими учреждениями и пациентами, устанавливая гарантии осуществления и защиты ими своих прав. Между тем правоприменительная практика показывает, что в сфере гражданско-правовой ответственности медицинских работников прослеживается определенный пробел. Отсутствуют четкие критерии ограничения ответственности и освобождения от ответственности медицинских работников, допускающих ненадлежащее исполнение своих обязанностей по договору, в том числе вследствие врачебных ошибок. Все это делает пациента слабой стороной договора, а сам договор об оказании медицинских услуг — рискованной для его прав и интересов сделкой. Автор статьи определяет некоторые проблемы правового регулирования в данной сфере и предлагает пути их решения. Учитывая, что в Казахстане рассматриваемым автором проблемам посвящено не так много научных трудов, содержание статьи заслуживает внимания, а выводы автора могут способствовать совершенствованию гражданского законодательства и законодательства о медицинском обслуживании в Республике Казахстан.

Ключевые слова: медицинское, обслуживание, законодательное регулирование, проблемы, пациент, здоровье, страхование, медицинские организации, лечение, ответственность.

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