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LEGAL MECHANISMS OF PATIENT'S RIGHTS PROTECTION

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ABSTRACT

Introduction: Human life and health are considered to be of the highest social value, with particular emphasis on health care. However, the patient's rights are pretty often violated by medical professionals. According to statistics, a medical error is recognized as one of the most common causes of patient's rights violations in Europe and the United States. That's why the research of jurisdictional mechanisms of patients' rights protection in the context of medical error, seems particularly relevant.

The aim: To propose the effective jurisdictional mechanisms of the patients' rights affected by medical error protection and to summarize scientific approaches for understanding the essence of medical error.

Materials and methods: The research used a set of general scientific and special methods of scientific cognition, in particular, dialectical; comparative legal; analysis and synthesis; formal-logical (dogmatic); statistical and generalization. The empirical base of the study is the statistics of the Prosecutor General's Office of Ukraine and the State Judicial Administration of Ukraine within 2014-2018, generalization of the practice of the Constitutional Court of Ukraine, as well as statistics in the field of protection of patients' rights of some countries of Europe, USA and Japan, as well as the authors' own experience who serve as a judge and a judge assistant of the Supreme Court, a judge of the Constitutional Court of Ukraine.

Results: It is argued that the most effective jurisdictional mechanisms for protecting the patients' rights affected by a medical error include: criminal, civil and constitutional ones. Summarizing national and foreign positions of scholars and practitioners, four main approaches to the interpretation of the "medical error" concept are highlighted.

Conclusions: In order to protect the patients' rights adequately, including those affected by a medical error, the state must guarantee the right of access to jurisdictional protection mechanisms, as well as establish a system of non-jurisdictional mechanisms for the protection of health rights.

KEY WORDS: criminal-legal jurisdictional mechanism of protection, civil-legal jurisdictional mechanism of protection, constitutional jurisdictional mechanism of protection, medical error, patient's rights

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INTRODUCTION

Protecting the person's rights in the field of health care is an important element of the state's activities. At the same time, the person's rights to health care, in particular a patient's right, may be violated by medical professionals. One of the most common causes of patient's rights violation is a medical error. For example, a study commissioned by the Directorate-General for Health and Consumers found that 8–12% of patients admitted to a hospital in the European Union had adverse events while receiving health care; most of the events could have been prevented. The main events were health care-associated infections, medication errors, surgical errors, medical devices failures, errors in diagnosis and failure to act on the results of a test. A Danish study on adverse events in 2018 found that 9% of patients suffered harm, while a recent unpublished Polish study (2015) reported that 7.2% had adverse events [1]. In the U.S. medical errors account for 9.5% percent of all deaths in the country, which is making errors the third leading cause of death after heart disease and cancer [2]. There are no statistics available in Ukraine to assess the real situation of patients' rights violations due to medical errors, but there is little reason to believe that the problem is significantly different from that of other countries. Taking into account

the above, we believe that the study of jurisdictional mechanisms of patients' rights' protection affected by a medical error appears to be particularly relevant.

THE AIM

Solving the scientific problem of identifying the most effective jurisdictional mechanisms for protecting the patients' rights affected by medical errors and generalizing scientific approaches to understanding the essence of medical error.

MATERIALS AND METHODS

To achieve this aim and to provide scientific substantiation of the research results, such methods of scientific knowledge as dialectical, comparative legal method; methods of analysis and synthesis; formal-logical (dogmatic) method; statistical method and generalization method were used. The empirical basis of the research is the statistics of the Prosecutor General's Office of Ukraine within 2014-2018 on the quantity of reported criminal offenses; statistics provided by the State Judicial Administration of Ukraine within 2014-2018 regarding the number of convicted persons for crimes in which the medical subject is a special subject, statistics

within 2016-2018 regarding the amount of compensation to victims of criminal offense; results of generalization of the practice of the Constitutional Court of Ukraine in the field of health; statistics on protection of patients' rights in some countries in Europe, US and Japan, as well as the authors' own experience who serve as a judge and a judge assistant of the Supreme Court, a judge of the Constitutional Court of Ukraine. In addition, the authors used their own previous experience in advocacy, including the protection of patients' rights affected by medical error, and as practicing lawyers whose combined experience is over 20 years.

RESULTS

According to Article 13 of the European Charter of Patients' Rights, every person has the right to complain of suffering and damage and to receive a response or other appropriate reaction. According to Article 80 of the Basics of the Healthcare Legislation, persons who are guilty of violations of health care legislation are subject to civil, administrative or criminal liability under the legislation. Thus, in the event of a patient's rights being violated, the patient may have recourse to various jurisdictional mechanisms to protect his/her rights. Depending on the type of violation, the case may be heard by a court in criminal proceedings, administrative or civil proceedings, as well as in an administrative offense case. In addition, if all domestic remedies are exhausted, the person may also apply to international courts or judicial authorities, in particular the European Court of Human Rights. Let's review the most effective, in our opinion, jurisdictional mechanisms for patient's rights protection in Ukraine.

Criminal-legal jurisdictional mechanism of protection of the patient's rights. The Criminal Code of Ukraine (hereinafter – the Criminal Code of Ukraine) establishes criminal liability for a number of crimes with special subject, such as medical professionals.

Thus, according to the statistics of the General Prosecutor Office of Ukraine [3] under Art. 131 of the Criminal Code of Ukraine – a misconduct that caused infection with human immunodeficiency virus or other incurable infectious disease - pre-trial investigation was initiated in 2014 in 19 criminal proceedings; in 2015 there were also 19 such proceedings; in 2016 - 4; in 2017 - 19; in 2018 - 2. However, according to the State Judicial Administration, from 2014 till 2018, no person was convicted under this article.

Under Art. 137 of the Criminal Code of Ukraine – a misconduct in the field of protection of life and health of children - in 2014, 380 criminal offences were registered, 6 persons of them were convicted; in 2015 – there were 485, 1 convicted; 529 criminal offences were in 2016, 2 convicted; 546 were in 2017, 5 convicted; 352 were in 2018; 3 convicted.

According to Art. 139 of the Criminal Code of Ukraine - failure to assist sick person by medical professional - 226 criminal offenses were recorded in 2014; in 2015 - 257; in 2016 - 318; in 2017 - 22; in 2018 - 222. According to the State Judicial Administration, from 2014 till 2018, no person was convicted under this article.

From 2014 till 2018, pre-trial investigation was conducted in 20620 criminal proceedings under Art. 140 of the Criminal Code of Ukraine – a misconduct of medical or pharmaceutical professionals. At the same time, only 35 persons were convicted of committing this crime, which is less than one percent of the total number of conducted investigations. From 2014 till 2018, no criminal offense was reported under Art. 141 of the Criminal Code of Ukraine - violation of the patient's rights.

Thus, by analyzing the statistics, the authors can conclude that this category of crimes is small enough. The main reason for such a situation is that theorists and practitioners consider the lack of an effective methodology for investigating health crimes, difficulties in establishing the evidence base and establishing a causal link between the medical professionals' actions and a harm caused to a patient, etc. After all, the fact of referring patients to law enforcement agencies with the corresponding statements is not yet sufficient reason to believe that actions of medical professionals have indeed an available composition of concrete crime.

At the same time, despite a few of medical professionals who have been convicted of violating patient's rights, we still believe that criminal-legal jurisdictional mechanism for protecting health rights should be applicable. Although, according to the experience of Japan [4], excessive criminalization of medical professionals' actions does not solve existing problems, but creates additional ones. Therefore, along with criminal law, there must be other jurisdictional mechanisms of patients' rights' protection.

Special mention should be made of patient's inalienable right to bring a civil action in criminal proceedings, which is the only way of compensation for the damage caused by the crime (property and / or moral) in the criminal process.

However, according to the prescriptions of part 7 of Art. 128 of the Criminal Procedure Code of Ukraine, if the patient has not filed a civil claim in criminal case, or his/her civil claim is left without consideration, he/she has the right to bring this claim in civil procedure.

Civil-legal jurisdictional mechanism of protection of the patient's rights. The main mechanism for protecting patient's rights in civil proceedings is to bring a lawsuit. A key requirement of a claim is the ability to indemnify property and non-pecuniary damage caused to a patient by actions or omissions of medical professionals and / or healthcare facility.

Questions about indemnification to a patient in civil proceedings may arise from both contractual and tort relationships. For example, if the failure to provide or improperly provide medical care does not cause harm to patient's health or life, at the same time the contractual terms for provision of health care services are not fulfilled properly and / or not fully implemented, then contractual civil liability arises. In the case of failure to submit health services delivery that has harmed the patient's health or life (provided that medical services contract was concluded), contractual and tort liability are combined. If, however, the failure to submit health services delivery has harmed

the patient's health or life (but no health care contract has been concluded), tort will arise under Art. 1195, 1166, 1167 of the Civil Code of Ukraine (hereinafter - the Civil Code of Ukraine).

However, if a medical professional has been prosecuted, a patient as a victim of a criminal offense may also file a lawsuit under Art. 1177 of the Civil Code of Ukraine. This provision establishes the obligation to indemnify (compensate) the harm to an individual who is a victim of a criminal offense. In this case, both property and non-pecuniary damage are liable to compensation. However, it is a prerequisite for a patient to seek legal enforcement of a court order to prosecute a medical professional.

The general conditions of liability, including medical professionals and health care institutions, for causing property and non-pecuniary damage are defined in Art. 1166 and 1167 of the Central Committee of Ukraine. Thus, in order to bring medical professionals to civil liability, the following conditions must be combined at the same time: unlawful decisions, actions or omissions of a medical professional; causing harm (property and / or moral) to a patient with adverse effects on life or health; causal link between decisions, actions (omissions) and such harm; fault of a medical professional.

It should be noted that in the legal relations for the compensation of harm, including, in the provision of medical care, there is a presumption of guilt of an offender. That is, a patient does not prove the guilt of a medical professional and / or health care institution, and the medical professional and / or health care institution prove the lack of guilt. An example is the decision of the Civil Court of Cassation within the Supreme Court in Case No. 537/4429/15-c of 14 March 2018 [5], which granted a cassation appeal and received non-pecuniary damage from a maternity ward caused by a physician's misconduct of this medical institution.

According to court statistics, in 2016, victims of criminal offenses, including crimes committed by medical professionals, were fined to 63 258 308 UAH, including 17 059 606 UAH for moral harm; in 2017 - 67 306 352 UAH, of which 15 541 203 UAH for moral harm; in 2018 - 85 206 547 UAH, including 16 640 387 UAH for moral harm. Therefore, we believe that analysis of statistics shows that compensation for harm to a patient as a victim of a criminal offense is an effective jurisdictional mechanism for protection of his/her non-property rights and ensures the restoration of property rights.

Foreign experience on this issue appears to be interesting in the study context of criminal-legal and civil-legal jurisdictional mechanisms of protection of patients' rights affected by a medical error.

For instance, in the United States aggrieved patients that sustain injuries and damages due to doctor error have legal recourse under civil tort law, which allows the patient (the plaintiff) to initiate a lawsuit in court against the doctor and/or the hospital (the defendants) where the negligent treatment was provided, in order to recover monetary damages [6]. Also, the nurses and physicians involved may

face some sort of administrative sanctions, however, and medical professionals in the US rarely have to be concerned about the risk of criminal proceedings. On the other hand, a case of death due to an error can be considered a crime, but it would have to be a major, gross or reckless one. If a medical accident is to become a criminal case, it would be limited to a case such as murder or when a drunken or drug-addicted physician was involved in an operation [4].

In Sweden victims of medical accidents have full access to traditional litigation, yet practically all cases are settled out of court, often with (full) support of their physician(s) [7].

The continental legal system is characterized by the use of criminal-legal mechanisms of protection of patients' rights, which constitute the criminal offense of negligent or careless acts of medical professionals who have harmed the patient's health or caused his/her death. For example, the Criminal Code of the Republic of Slovenia contains Article 179, which establishes liability for negligent treatment. Under this Article, a medical professional that violates the practices and rules of medical science and profession, and whose conduct negligently causes a significant deterioration in health of a patient can be sentenced to imprisonment up to three years. Paragraph 3 of Article 179 stipulates that if the patient dies, the sanction includes imprisonment from one to eight years. The offence is classified in Chapter 20 of Crimes Against Human Health, where the central protected right is public health and public confidence in health system [8].

A similar approach can be seen in the Criminal Code of the Republic of Croatia, which provides for special offence of negligent medical treatment by Article 181.

The criminal law of Japan contains the composition of the crime named "professional negligence". At the same time, according to scientists, criminal penalties for professional negligence resulting in damage to health or death of patient is widely interpreted by courts and covers medical error [4].

Based on the above, as well as summarizing the provisions of the laws of certain foreign countries, we can state that in the English-American (in particular, in the US) legal system and in the Scandinavian jurisdictions there are civil-legal mechanisms that are able to protect the rights in civil litigation and extrajudicial mechanisms, including those related to insurance and alternative ways of conflict resolution applied. At the same time, both in continental legal system and in some other countries (Japan in particular), along with civil jurisdictional mechanisms of protection there are also criminal laws that provide for the possibility of criminal prosecution of medical professionals due to their negligence or carelessness that caused harm to patient's health or life.

Constitutional jurisdictional mechanism of patient' rights' protection. The Constitutional Court of Ukraine has a special role in the protection mechanism of patient's rights in the field of health care in Ukraine. This judicial authority is empowered to exercise constitutional control over the observance of individual rights, including healthcare scope.

An appeal form to the Constitutional Court, within which a person (patient) can defend his/her rights, is a constitutional complaint. In a constitutional complaint, a patient asks the Constitutional Court about unconstitu-

tionality of the law of Ukraine (its provisions), which was applied by the court in a final judicial decision in a case (criminal, civil, administrative) affecting the rights and interests of such patient, and which in his/her opinion violates their constitutional rights in the field of healthcare.

Constitutional representation is another appeal form to the Constitutional Court which, although it may not be personally implemented by a patient as a physical person, is equally important to a person and a state legal system.

Analyzing the case law of the Constitutional Court of Ukraine, it is possible to outline the following key decisions made in cases on constitutional representations that were of importance for the protection of patients' rights, they are:

- Decision of October 30, 1997, № 5- зп., where the Constitutional Court interpreted the meaning of medical information concept and determined the revealing specifics of such information;
- Decision of November 25, 1998, No. 15-пп., where the Constitutional Court declared unconstitutional the provisions for approving the list of paid services that can be provided in public health care institutions and for allowing medical institutions to accept payment from patients for other medical services provided as voluntary compensation;
- Decision of May 29, 2002, No. 10-рп /2002, where the Constitutional Court concluded that the provisions of part three of Article 49 of the Constitution of Ukraine should be understood so that medical care in state and communal health care institutions is provided to all citizens regardless of its volume and without their previous, current or subsequent calculation for providing such help.

The above decisions of the Constitutional Court have played an important role in establishment and protection of person's rights in the field of health care, including patient's rights, since these decisions have resulted in changes of existing legislation that have significantly improved legal regulation in this area.

Thus, the role of the Constitutional Court of Ukraine among jurisdictional mechanisms for the protection of patients' rights is to ensure the supreme legal force of the Constitution of Ukraine and to prevent amendments and additions to the Constitution of Ukraine, which result in a narrowing of scope or content of the relevant right.

DISCUSSION

Due to the lack of a clear definition of the term “medical error” in the national legislation of Ukraine and foreign countries, scientific discussions on the content and essence of this concept in the legal doctrine are ongoing. At the same time, having examined the positions in domestic and foreign literature and practice, we consider it possible to distinguish the main scientific approaches to interpretation of the “medical error” concept, according to which this concept meaning is: legitimate and justified actions (inactivity) of medical professionals, due to circumstances objective

and / or subjective in nature that have led to adverse health or life effects of a patient [9; 10; 11; 12; 13; 14; 15]; iatrogeny, that is, any adverse effects of various medical effects on a patient, resulting from both erroneous and correct actions of a doctor [16; 17; 18]; a kind of defect in the provision of medical care [19; 20]; negligence and / or dishonesty of medical professionals [21; 22; 23].

CONCLUSIONS

In democratic countries, human life and health are recognized as the highest social value. That is why it is the direct responsibility of every state, including Ukraine, to ensure that effective jurisdictional mechanisms are in place to protect patients' rights, including those who have suffered from a medical error. In our opinion, the most effective jurisdictional mechanisms for protecting the patients' rights affected by a medical error are: criminal law, civil law and constitutional law mechanisms. At the same time, as international experience shows, there is also a need to create an effective system of non-jurisdictional mechanisms for protection of patients' rights, which must include different insurance systems and alternative means of dispute settlement, in particular mediation.

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The Authors declare no conflict of interest.

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