MEDICAL ERROR: CIVIL AND LEGAL ASPECT

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MEDICAL ERROR: CIVIL AND LEGAL ASPECT

Buletsa S., Drozd O., Yunin O., Mohilevskyi L.

Uzghorod National University, Uzghorod, Ukraine

Medical errors are relatively common in the care of hospitalized patients and may result in serious morbidity and mortality. The problem of medical errors has long been known throughout the world, in spite of the level of the development of medicine, there is no country, where doctors never make mistakes. According to the statistics in the world, medical errors are among the top five causes of death. At the same time, the provision of medical services applies to almost all people. There is no reliable statistical data on the amount of foreign objects (clips, needles, gauze napkins, etc.) that are forgotten in the body, since such cases doctors try not to carry out outside the hospital, and with sufficient competence localize and solve the conflict on its own. For example, the patient has lived for 3 years with a foreign body in the pleural cavity [19, p.19]. Considering the fact that the person in Ukraine is recognized as the highest social value, medical services should be of high-quality and effective. Providing poor-quality medical services harms to health, and sometimes the life of a person, can lead to injury or even death. The right to health protection is one of the fundamental human rights guaranteed by the Constitution of Ukraine, therefore the issue of medical errors and liability for them is extremely urgent.

The objective of this article is theoretical and legal analysis of the notion of "medical error", research of civil and legal aspects of legal regulation of this phenomenon.

It should be noted that the problem of medical errors and liability for them was the object of research in Ukraine in the works of Andriievska T.I., Antonov S.V., Buletsa S.B., Hlushkov V.A., Prasov O., Savchenko V.O., Svistun L. Ya. and others.

The National Patient Safety Foundation (NPSF) prefers the term "healthcare error" to "medical error," and defines such errors as follows: "An unintended healthcare outcome caused by a defect in the delivery of care to a patient. Healthcare errors may be errors of commission (doing the wrong thing), omission (not doing the right thing), or execution (doing the right thing incorrectly)." A useful brief definition of a medical error is that it is a preventable adverse event [4, p.83]. Medical error - it is always reckless actions or methods of providing medical care [28, p.246]. Medical error is the action or omission of a physician, which causes negative health effects, and sometimes the patient's life. Right now, this topic becomes very relevant not only in regard to qualified medical professionals, but also concerning experienced lawyers. Applying with lawsuits, the injured patients consider that medical employees are obliged to answer for his mistakes in any case, since the life and health are the most valuable benefits of a person. In fact, these benefits are not only under the protection of moral norms, but also under the norms of legislation, in particular the Constitution, the Civil Code and the Criminal Code of Ukraine. But the moral and legal assessment of the physician's actions does not always coincide in practice. Despite the size of the damage done to the patient, legal sanctions against such physicians may or may not be applied [10, p.94].

Others pointed out that the term "medical error" is misleading, because it implies "physician error." They argue that a more appropriate term is "healthcare error," because many different types of healthcare providers commit errors. Several readers believe that the category of medical error should be expanded to include "patient error." One physician wrote, "If medical error should be listed as a cause of death, then so too should patient error, or lifestyle error—namely, inhaled nicotine, overeating, sedentary living, and alcohol ingestion" [7]. Most doctors believe that a medical error is the actions (inactivity) of the physician, which are based on the imperfection of modern medical science, objective conditions of work, lack of qualification or inability to use available knowledge [12, p.7]

A medical error can be defined "as the failure of a planned action to be completed as intended (ie, error of execution) or the use of a wrong plan to achieve an aim (ie, error of planning)" [6, p.45] or medical error is "a commission or an omission with potentially negative consequences for the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were negative consequences" [8, p.770]. Using this definition, a medical error can be either active (a commission) or passive (an omission). Similarly, a medical error can lead to harm or no harm. Harms can range from minimal to permanent injury or death. In contrast, a near miss (or close call) is a recovery from potential harm before the consequences of a medical error reach the patient because of checking for such events or by fate alone [2, p.282]. Even errors that result in no physiological harm may still induce pain, psychological harm, and anxiety for the patient. The ultimate consequences of apparent minimal-harm errors are often unknown until a certain amount of time has elapsed. Therefore, immediate disclosure of all medical errors seems the best approach. Full disclosure of minimal-harm or near-miss errors strengthens the patient-surgeon relationship, cultivates an open atmosphere of dialogue, and facilitates patient participation in medical decision making [2, p.286].

Even in ancient times there was legislation that to some extent regulated the liability of medical employees for their medical errors. One of the most famous legislative acts that consolidated this provision was the Code of Hammurabi. In ancient Greece, medical skills were very highly valued, so physicians for their errors were relieved of liability if the patient died "against the will of the healer".

The Roman law stipulated the punishment of a physician for gross mistakes, and the concept of "medical errors" was quite broad. These include inexperience, carelessness of doctors, failure to provide medical care. Although the Roman law at that time allowed the lawfulness of the death of a patient due to the severity of the disease. During the Middle Ages physicians for their professional mistakes were largely deprived of practice, and some even were burned at the stake as "devil's accomplices".

Treatment in the history of Ancient Russia was equated with magic. Therefore, a physician was liable for medical errors as for a deliberate offense.

It is believed that the term "medical error" was first used by the prominent Russian surgeon M.I. Pirogov, who paid great attention to the analysis of the errors of medical employees. Then the term became widely used not only among medical employees, but also among lawyers [24, p. 191]. With regard to Ukraine, today there is a large number of legislative acts that directly regulate the liability of medical employees for causing harm to the patient's life or health. However, the term of "medical error" is not included in the legislation of Ukraine.

Laws promoting patient safety will have to strike a delicate balance between competing interests in order to create the right incentives while safeguarding the legal protection of patients.

Grober ED. and Bohnen John M.A. had noticed that medical error: an act of omission or commission in planning or execution that contributes or could contribute to an unintended result. This definition of medical error includes explicitly the key domains of error causation (omission and commission, planning and execution), and captures faulty processes that can and do lead to errors, whether adverse outcomes occur or not. The inclusivity and explicitness of the definition should make it useful for research into the etiology of errors from the perspective of the provider: given this definition, a health care worker has a clear roadmap with which to designate a process as error-prone or error-laden. By including potential adverse outcomes, the definition includes the "silent majority" of errors that do not cause harm but reflect faulty processes. At the same time, it ignores trivial mistakes (for example, taking the wrong route to visit a patient) that have no potential for adverse outcome. Medical errors represent an important public health problem and pose a serious threat to patient safety. The growing awareness of the frequency, causes and consequences of error in medicine reinforces an imperative to improve our understanding of the problem and to devise workable solutions and prevention strategies. Variations in nomenclature without a universally accepted definition of medical error hinder data collection and collaborative work to improve health care systems [3, p.43].

As medical professionals point out, the feature of a medical error is the impossibility for a doctor of any specialty to anticipate it, and in the future to prevent the consequences [23]. We have to notice that sincere apologies offered in the wake of a medical error may lead to a lessening of suffering for both patients and physicians in coping with the error and its consequences, contribute to improved relationships between physicians and patients such that these relationships are able to continue, and reduce costs by preventing lawsuits and facilitate the settlement of valid claims [5, p.380-381].

Medical error in modern legal science is treated as a dual concept: medical and legal. Medical errors include the erroneous actions of a physician in establishing a diagnosis or treatment of a patient due to the state of medical science at this stage of its development, the special, unfavorable conditions and circumstances of providing medical care or the lack of medical experience, made in the absence of awareness of danger, without foreseeing the possibility of causing harm or with the confidence in preventing it. This provision refers to the "medical area" [27, p.100].

Medical errors are physician's mistakes within professional activities, due to conscientious deceit in the absence of carelessness, negligence or ignorance [13, p. 44]. A medical error is something a provider did or did not do that caused a bad outcome. According to O.O. Prasov, medical errors should be considered in the broad and narrow sense. In the broad sense, these are both guilty and innocent acts, and in the narrow one – they are only innocent acts of medical employees [22, p. 94].

A.A. Herts points out that medical errors cover both the guilty action (omission), which due to adverse consequences for a patient, determines the legal liability of medical employees and the innocent action (omission), which due to the adverse consequences for a patient, does not result in the legal liability of medical employees [15, p. 52].

Thus, the main thesis of the supporters of the "legal direction": a medical error is negligent, unscrupulous, careless acts and methods for the provision of medical care (services), which resulted in a bodily injury or death of a patient. That is, it turns out that medical errors always entail civil and legal liability.

In this regard, there are errors that are caused by subjective and objective factors. Subjective mistakes are to include those that arise precisely from the negligent attitude of medical employees to their duties and assume the risk of insufficiency of knowledge or experience. Such errors are often related to inattention during the examination, lack of necessary consultations, incorrect determination of conclusions of laboratory data, etc.

Thus, objective factors are the actions or ommission of medical employees that do not violate the rules established by the law and by-laws, but have caused damage to the patient's health or his death as a result of:

- imperfections of medical science at this stage of its development,
- adverse conditions or circumstances of medical intervention,
- objective difficulties in diagnosing some diseases,
- a-typical development of the disease, individual anomalies of anatomical structure of the body or functioning of the patient's body,

- allergic reactions, which could not be foreseen with the standard medical intervention (diagnosis or treatment) [10, p.95].

Observing the statistics, it can be argued that the situation regarding medical errors in Ukraine is not manifested in the mass media, only a few cases become known to the public. The practice of court hearings of such cases is not directly disclosed or recorded. According to unofficial data, almost 65% of patients who have suffered from medical employees generally refuse to sue. There is a practice of voluntary confidential reporting about medication errors from phisicians and medical staff in countries such as the United States, Canada, Spain, the United Kingdom, France, Sweden, Denmark and others. Medication errors associated with a lack of knowledge, can relate to any type of knowledge: general, specific or expert. For example, penicillin can cause PR (this is general knowledge), the patient is allergic to penicillin (this is specific knowledge), cofloampicil contains 2 antibiotics penicillin (this is - expert knowledge. Unknowing any of these facts may lead to an error. Mistakes related to violation of rules, standards and norms are divided into: incorrect application or non-compliance with rules, standards and norms; application of wrong rules, standards and norms [17, p.10].

It should be noted that civil and legal liability for failure to provide or poor quality medical care can be contractual and non-contractual [11, p.16]. According to civil law, there is the principle of the presumption of guilt of the causative agent while providing medical care, therefore the absence of guilt must be proved by a person who committed the offense. Assessing the unlawful nature of the actions of medical employees, it is necessary to take into account normatively fixed and unfixed customs of medical practice, as well as the harmful consequences of the actions or omission of medical employees. Besides, it is mandatory to establish causal relationship between the acts of medical staff and the harmful consequences for a patient. Therefore, consideration of civil cases involving unfavorable consequences in medical practice is connected with the fact that the conclusions of forensic examination are of great importance in such cases. However, it is important to keep in mind the rules for assessing evidence by the court, as well as the fact that any evidence has not got a force for the court and should be considered in conjunction with other evidence in the case.

Regarding the fault of medical employees as conditions of civil and legal liability, the widespread belief in science is that a medical error itself can not be the basis of liability or circumstances that exclude it. Therefore, only the presence of a person who has committed a medical error, is the basis for bringing him to civil and legal liability [18, p.346].

The main task of the injured patient in the trial is to prove the causal relationship between the physician's negligence and the harm done. This should be proved by the fact that in the course of treatment or diagnosis, a physician significantly deviated from the established norms, which negatively affected the health of a patient.

It should be noted that those medical employees' actions committed in a state of extreme necessity are legitimate because the harm caused is less than prevented, and therefore it is possible to talk about certain social utility of such actions. However, the court may oblige a person who caused the damage to reimburse it.

Consequently, medical errors should be considered in the narrow and broad sense. Medical errors are such actions or omission of a medical employee in carrying out his professional duties, which do not directly violate the rules established by the law, may cause harmful consequences to the patient's health and does not result in legal liability, since they are not connected with the presence of guilt within the actions of medical employees. Medical errors in the broad sense include both innocent and criminal acts of medical employees.

T.I. Andriievska offers to consider under the concept of "medical errors" only those errors (actions or omission) of medical employees who are of a casual nature or are equated with force majeure and, accordingly, do not foresee the occurrence of civil and legal liability [9, p.111].

Addressing international experience of defining medical errors and liability for them, we note that there is no generally accepted definition of a medical error in the world. In Japan, a medical error, which resulted in serious consequences for the patient's health, is qualified as a crime and, accordingly, a physician who has committed it, is prosecuted. In France, medical staff is brought to the liability, if they are not properly provided with medical aid, if there is a fault [21, p. 77-78, 83]. The solution to the problem of medical error is related to the fact that the law stipulates the composition of the medical error as a separate type of offense, which is important for solving the issues and the personal (personal) responsibility of medical staff, and the property liability of medical institutions [26, p.82-83]. A good solution to avoid errors to establish a register of medical errors, after the legislative consolidation of the concept of a medical error, its clear distinction from a criminal offense and fixing the subject of the medical mistake. Indeed, in our opinion, the creation of a registry of medical errors will allow analyzing, discussing errors that occurred during the diagnosis and treatment, and their causes, namely: epistemological, diagnostic, associated with different methods of diagnosis and treatment. All this will contribute to the prevention of occurrence of medical errors in the future [16, p. 219].

S. Buletsa offers that the concept of «medical error» should bear the following content: these are actions (inactivity) of performer of medical services, which do not violate the rules set by the laws and traditions in medicine and are not connected with an unconscientious and careless attitude towards the medical activity, however lead to infliction of harm or death of patient as a result of conscientious deception, that was formed because of objective reasons which do not depend on the performer of medical services, because of the causes which were impossible to foresee (non-typical flow of illness, unforeseen allergic reaction of organism of patient, unknown illness, anomalous anatomic features of organism of patient,

imperfection of diagnostics and others like that). Avoiding of such errors in the future is carried by the way of conducting of pathological anatomical conferences, where patients who died at divergence of clinical and pathological anatomical diagnosis are dealt with [1, p.52].

As doctors note, there are no control bodies at clinical bases that would check the performance of doctors by protocols and standards, which are approved by the orders of the Ministry of Health of Ukraine and are legally binding and prescriptive. When conducting forensic examinations regarding defects in the provision of medical care, it is necessary to carefully collect and examine all the materials provided and to strictly observe the documents regulating the rules of diagnosis, treatment and prevention of diseases, first of all, the protocols and standards for the provision of medical care [20, p.130].

Consequently, she said that a medical error - worsening of the condition of sick or his death, caused wrong with medical standard Ministry of Healthe of Ukraine of the appointed inspection, treatment and prophylactic measures. There are medical errors possible and conscientious, and there are errors unconscientious and impermissible which result in legal responsibility [1, p.53]. The legal responsibility of the doctor depends on the presence of the fault in his actions and the qualification of the negative outcome of the treatment as an acceptable medical error, therefore, it is necessary to distinguish between permissible (unprovoked) and inadmissible (guilty) medical errors [25, p. 83].

For the jurisprudence, the subjective causes of the medical error are important, that is, the insufficient professional training and experience of the doctor, violation of the official and ethical principles of the provision of medical care, and the shortcomings of the moral character of the medical worker. The legal status of a medical mistake occurs when the legal responsibility of the doctor for the harm to the patient's health. Thus, a medical error from a legal point of view should be qualified as a special kind of case and exempt from civil liability of the provider of medical services that allowed it [14, p.522-523].

Conclusions. Hence, summing up the above stated, we can conclude that:

1) the definition of the notion of "medical error" should be legal consolidated;

2) besides, the legal assessment of medical errors should be based on the single principles enshrined in the legislation and confirmed by the judicial practice;

3) medical errors continue to be national problem, employers who wants to improve quality and patient safety with an allowable cost they do not want to pay the costs of medical errors;

4) medical error in civil aspect is including problems with service quality, relatively low level of development of medicine and medical equipment, inadequate study of diseases by medical science, medications (so, medical errors include problems in practice, products, procedures, and systems) and this leads to the emergence of civil liability; apology for medical error helps to renovate the emotional and psychological balance between the patient and the healthcare provider;

5) medical error in legal aspect is an erroneous action or inactivity of healthcare providers, expressed in improper provision (non-delivery) of assistance, diagnosis of diseases and treatment of patients (victims) that worsening of the condition of sick or death of patient, caused wrong with a medical standard Ministry of Healthe of Ukraine of the appointed inspection, treatment and preventive measures;

6) closed medical data of patients related to medical errors are therefore a great source of information to understand error patterns and identify ways and means of improving patient safety;

7) attorney could discover information about the medical error in the healthcare provider's original medical data, providers who hope to learn from medical errors and to develop a culture of safety in their organizations can report patient safety information without fear that the information will later be used against them in a court of law;

8) to avoid medical error doctors must tell patients and their relatives about errors, doesn't matter minor or major event. But in practice hospital lawyer often advised against voluntary disclosure of information about medical errors to patients or their families, fearing that this information would be detected and used by plaintiff's attorneys;

9) it is necessary to create a register of medical errors in Ukraine in order to prevent their occurrence in the future;

10) attentiveness of the entire staff of all teams is a prerequisite for preventing medical errors.

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SUMMARY

MEDICAL ERROR: CIVIL AND LEGAL ASPECT

Buletsa S., Drozd O., Yunin O., Mohilevskyi L.

Uzghorod National University, Uzghorod, Ukraine

The scientific article is focused on the research of the notion of medical error, medical and legal aspects of this notion have been considered. The necessity of the legislative consolidation of the notion of «medical error» and criteria of its legal estimation have been grounded.

In the process of writing a scientific article, we used the empirical method, general scientific and comparative legal methods. A comparison of the concept of medical error in civil and legal aspects was made from the point of view of Ukrainian, European and American scientists.

It has been marked that the problem of medical errors is known since ancient times and in the whole world, in fact without regard to the level of development of medicine, there is no country, where doctors never make errors. According to the statistics, medical errors in the world are included in the first five reasons of death rate. At the same time the grant of medical services practically concerns all people. As a man and his life, health in Ukraine are acknowledged by a higher social value, medical services must be of high-quality and effective. The grant of not quality medical services causes harm to the health, and sometimes the lives of people; it may result in injury or even death. The right to the health protection is one of the fundamental human rights assured by the Constitution of Ukraine; therefore the issue of medical errors and liability for them is extremely relevant.

The authors make conclusions, that the definition of the notion of «medical error» must get the legal consolidation. Besides, the legal estimation of medical errors must be based on the single principles enshrined in the legislation and confirmed by judicial practice.

Keywords: medical error, damage caused to the health, guilt, civil liability.

РЕЗЮМЕ

МЕДИЦИНСКАЯ ОШИБКА: ГРАЖДАНСКИЙ И ЮРИДИЧЕСКИЙ АСПЕКТ (ОБЗОР)

Булеца С.Б., Дрозд А.Ю., Юнин О.С., Могилевський Л.В.

Ужгородский национальный университет, Украина

В научной статье основное внимание уделяется исследованию понятия "медицинской ошибки", медицинских и правовых аспектов этого понятия. Обоснована необходимость законодательной консолидации этого понятия

и рассматриваются критерии ее юридической оценки.

В процессе написания научной статьи использованы эмпирический, общенаучный и сравнительно правовой методы. Проводилось сравнение понятия "медицинской ошибки" в гражданском и правовом аспекте с точки зрения украинских, европейских и американских ученых.

Отмечено, что проблема медицинских ошибок известна с древних времен и во всем мире. Согласно статистике, медицинские ошибки включены в первые пять причин смертности. В то же время предоставление медицинских услуг практически распространяется на всех людей. Как человек и его жизнь, здоровье в Украине признано более высокой социальной ценностью, медицинские услуги должны быть качественными и эффективными. Предоставление некачественных медицинских услуг причиняет вред здоровью, а иногда и жизни людей; это может привести к травме или даже смерти. Право на охрану здоровья является одним из основополагающих прав человека, закрепленных Конституцией Украины; поэтому проблема медицинских ошибок и ответственности за них крайне значима.

Рекомендована, юридическая консолидация понятия «медицинская ошибка» и юридическая оценка медицинских ошибок должна основываться на единых принципах, закрепленных в законодательстве и подтвержденных судебной практикой.

რეზიუმე

სამედიცინო შეცდომა: სამოქალაქო და იურიდიული ასპექტები (მიმოხილვა)

ს. ბულეცა,ო. დროზდი,ო. იუნინი, ლ. მოგილევსკი

უჟგოროდის ეროვნული უნივერსიტეტი, უკრაინა

კვლევის მიზანს შეადგენდა "სამედიცინო შეცდომის" ცნების საკანონმდებლო დონეზე კონსოლიდაციის და მისი იურიდიული შეფასების კრიტერიუმების განსაზღვრის აუცილებლობის დასაბუთება.

კვლევა ეფუძნება ემპირიულ, ზოგადსამეცნიერო და შედარებით-სამართლებრივ მეთოდებს. ჩატარდა სამედიცინო შეცდომის ცნების სამოქალაქო და სამართლებრივი ასპექტების შედარება უკრაინელი, ევროპელი და ამერიკელი მეცნიერების თვალსაზრისით.

რეკომენდებულია «სამედიცინო შეცდომის» ცნების განსაზღვრის იურიდიული კონსოლიდაცია,ხოლო სამედიცინო შეცდომების იურიდიული შეფასება უნდა ემყარებოდეს კანონმდებლობაში განსაზღვრულ და სასამართლო პრაქტიკით დადასტურებულ ერთიან პრინციპებს.

IMPLEMENTATION OF THE RIGHT TO HEALTH PROTECTION DRUG ADDICTS (SEPARATE ASPECTS)

[1]Shevchuk O., [2]Rzhevska O., [2]Korop O., [3]Pyliuha L.

[1]Yaroslav Mudryi National Law University; [2]Kharkiv Medical Academy of Postgraduate Education; [3]National Pharmaceutical University, Kharkiv, Ukraine

The spread of drug abuse around the world, and in Ukraine particularly, is one of the most urgent health problems, the lack of its solution is dangerous for human health. According to the United Nations Office on Drugs and Crime, in 2010 there were about 230 million people worldwide [2], and in 2013 – 246 million people with experience in the use of narcotic or psychotropic drugs [3]; in 2014 - 250 million, that is almost equivalent to the population of Germany, Italy, the United Kingdom and France in total [5]. Worry is caused by the fact that about 30 million of these consumers suffer from mental disorders and behavior, caused by taking of narcotic drugs. Rapid formation of a persistent dependence on the taking of drugs causes an urgent need for the treatment of such consumers [4].

The UN World Drug Report 2010 notes that Ukraine ranks the third in Europe for the using of opiates [1]. As of January 1, 2017 in Ukraine, there are 694,928 people controlled, with mental disorders, caused by taking of psychoactive drugs, while in 2016 – 115,170 people were initially registered with mental and behavioral disorders diagnosed because of taking of psychoactive drugs, that is 1,3% more than in 2015. Of the total number of initially registered 3,080 people - children from 0 to 17 years old inclusive; 51832 - youth from 15 to 35 years old; 41660 people (dispensary and preventive supervision groups) were rural residents [20].

International law, and the national one in particular, do not always manage to react timely to the progressive increase in the number of drug addicts. Often this leads