

STATEMENT OF INCREASED DANGER IN MEDICINE

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Abstract: *The source of increased danger in medicine is the basis of responsibility without guilt. Medical staff can bear responsibility without guilt while carrying out medical activities.*

Keywords: *statement of increased danger, responsibility, guilt, doctor, patient, equipment, activity.*

1. THE CONCEPT OF STATEMENT OF INCREASED DANGER IN THE CIVIL LAW OF UKRAINE

In medical and legal literature we find that the statement of increased danger might include, for example, the use of x-ray photography units, radon baths, cobalt cannons, nuclear drivers of heart, laser devices, ultrasound devices, poisons, narcotics, strong medications, explosive and inflammable medications, electrical appliances. However, in our opinion, some types of medical activities involve the risk of accidental harm to life and health of patients and thus constitute for him the increased danger, as the doctor is not always able to fully control the process of providing medical aid and the possible results of his activities. It is important to note that the idea that the statement of increased danger is a certain kind of activity, which constitutes increased danger for those who surround the «patient», has been reflected in the works of M. M. Agarkov, V. I. Serebrovskiy, O. S. Ioffe, O. A. Krasavchikov, V. G. Verdnikov and a number of respected authors within the civil science. Thus, in particular, M. M. Agarkov wrote: «The statement of increased danger... is not a thing, but an activity involving the use of the thing»¹. He postulated that increased danger is the production, storage and application of «microbiological preparations that may cause infection»². According to O. S. Ioffe, the statement of increased danger is a certain kind of activity³. According to V. G. Verdnikov the statement of increased danger means certain types of human activity⁴. O. A. Krasavchikov pointed out the «microbiological sources of the increased danger», including here various morbidic microbes⁵. Today there are also viruses with biological origins that influence people's health (VICH, N1H1, Ebola) and other similar threats.

B. S. Antimonov talks in more detail about the statement of increased danger as a certain kind of activity. In his opinion, a source – «is always an action or system of actions ... in order to recognize an activity as a statement of increased danger the character of activity is not important: productive, economic, scientific research or administrative and managerial». «Cases in which responsibility is recognized by the law as the statement of danger, — the author continues, — are not characterized by the person's behavior (injurer, victim).

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¹ АГАРКОВ, М. М. *Гражданское право*. Киев 1944, р. 338.

² АГАРКОВ, М. М. *Обязательства из причинения вреда*. Киев 1939, р. 68.

³ ИОФФЕ, О. С. *Советское гражданское право*. Part II., Киев 1961, р. 3.

⁴ ВЕРДНИКОВ, В. Г. *Советское гражданское право*. Киев 1987, р. 396.

⁵ КРАСАВЧИКОВ, О. А. *Возмещение вреда, причиненного источником повышенной опасности*. Москва 1966, pp. 65–66.

The conclusive cause in such cases, as experience shows, is a certain kind of activity. This activity is not necessarily commercial, economic or professional. Here lies the essence of the concept «the statement of increased danger»⁶. K. B. Yaroshenko also defined the statement of increased danger as an activity – as a rule related to exploitation of objects, which, due to their natural attributes or properties created by man, in spite of their modern-level quality achieved by technical development, are still not fully under the control of the persons using them⁷. She considered that illegality was not a necessary condition making the proprietor of statement of increased danger responsible⁸.

In accordance with the article 1187 part 5 of the Civil code of Ukraine, the person who caused harm under the statement of increased danger is responsible, for the inflicted harm unless he or she proves that the harm was inflicted as a result of insuperable force or the intent of a victim.

Thus, the statement of increased danger is any activity, related to the use, storage or maintenance of transport vehicles, mechanisms and equipment, chemical, radioactive, explosive, inflammable and other substances; by the keeping of wild animals, fighting breed dogs and other that constitutes the increased danger for the persons carrying out this activity, and other persons.

2. THE STATEMENT OF INCREASED DANGER IN MEDICINE

Medical activity consists of a complex of methods and facilities, necessary for the recovery of one's health that are very heterogeneous in their structure. A significant feature of present time is a rapid progress of medical science and technology and the implementation of their fruits in practice. The scientific and technical progress in the medical science extended the diagnostic and medical methods. Consequently, doctors now interfere with deep vital processes inside their patients' bodies. The introduction of new diagnostic and therapeutic methods, considered impossible for a long time, into clinical practice resulted in the emergence of a number of typical complications. They differ in their impact on the pathogeny and the course of disease and this may result in patient's death. These devices, substances and technologies may be classified under the statement of increased danger as sometimes they can cause more harm than the illness itself. They are widely used in medical science. Damage caused by strong medications (morphine, cocaine and other), X-ray and laser examinations and treatments, new medical technologies tested in medical experiments, in accordance with the article 1187 of the CC of Ukraine is compensated regardless of guilt. The responsibility, stipulated in the article 1187 of the CC of Ukraine, is responsibility «without guilt» or responsibility «for an accident» – for the harm caused by an accident. There is a great number of medical activities and they cannot be all attributed to the statements of the increased danger, although some therapeutic methods fit the definition⁹. A person cannot be charged guilty for consequences that were not, and could not have been, predicted by this person – such consequences are considered

⁶ АНТИМОНОВ, Б. С. *Гражданская ответственность за вред, причиненный источником повышенной опасности*. Киев 1952, pp. 71–72.

⁷ ЯРОШЕНКО, К. Б. *Специальные случаи ответственности за причинение вреда*. Киев 1977, pp. 5–9.

⁸ РОШЕНКО, К. Б. *Жизнь и здоровье под охраной закона. Гражданско-правовая защита личных немущественных прав граждан*. Киев 1990, p. 34.

to be accidents (casus)¹⁰. Accidental injuries may incur during any activities. According to V.T. Smirnova and A. A. Sobchak if accidental injury was inflicted as a result of extraordinary coincidence (extraordinary in the sense that such coincidences are irregular and non-repetitive) and a culprit did not and could not have predicted their occurrence and taken them into account in his activity, in such situations accidental injury is the responsibility of the owner of the property, where it took place. If an accidental injury has a foreseeable and repetitive or statistical character and it takes place during a situation of increased danger, there is a real possibility of implementing measures to prevent such accidents in the future. The responsibility for accidental injuries in similar cases requires both, the injurer and other persons carrying out such activities, to apply additional measures, aimed to prevent accidental injuries¹¹. For example, while giving medicine to the patient – antibiotics or other medications containing antibiotics, it is obligatory to carry out sublingual test on the individual's sensitiveness to this medication 25 minutes prior to the injection; with the purpose of diminishing the risk of medical complications for patients, who are prescribed medications with a high potential of possible complications. In such cases it is recommended to administer them with a «protection»; for example, antibiotics are often taken with antihistaminic medicine. Thus, T. B. Mal'cman while explaining the concept of increased responsibility mentions the culpability of the offender. In her opinion, the complexity of the activity itself enables the offender to claim the absence of his guilt. She also adds that an activity is under an absolute control if there is the possibility to immediately and fully remove errors and change this activity as necessary¹².

Prof. Fleysch supports this view, specifying that «Under the statement of increased danger one understands the properties of things or forces of nature that are not fully under the control of man, considering the current level of technological development. Such properties thus dramatically increase the likelihood of harm to life and health of persons»¹³. Activities with an increased level of danger are legitimate and their harmful consequences are more likely an undesirable exception, than a rule. Activities with increased danger typically contain uncontrolled actions, risk of accidental infliction.¹⁴

Any medical action carried out on organs not immediately accessible may lead to subsequent injuries and side effects. In addition, a medical action may be insufficient to cope with the degree of the pathological process and consequently the harm to one's health is increased by the progress of pathology. Or the medical action may be superfluous and the harm resulting from such action may be greater than from the illness itself. Thus, while carrying out a medical activity there is a certain risk of adverse consequences for the health and life of the patient. This inspires some authors to speak out about the inevitable harmfulness of medical aid¹⁵.

⁹ БЕЛЯКОВА, А. М. *Возмещение вреда причиненного источником повышенной опасности*. Издательство Московского университета: Москва, р. 15; ГЛАДУН З. С. *Адміністративно-правове регулювання охорони здоров'я населення в Україні*. Киев 2007, pp. 185–186.

¹⁰ ТАРХОВ, В. А. *Гражданские права и ответственность*. Киев 1996, pp. 100–101.

¹¹ СМІРНОВ, В. Т., СОБЧАК, А. А. *Общее учение о деликтных обязательствах в гражданском праве: Учебное пособие*. Ленинград 1983, р. 188.

¹² МАЛЪЦМАН, Т. Б. *Ответственность за вред, причиненный источником повышенной опасности*. Киев 1948, р. 31.

¹³ ФЛЕЙШИЦ, Е. А. *Обязательства из причинения вреда и из неосновательного обогащения*. Киев 1951, р. 132.

¹⁴ БОЛДИНОВ, В. М. *Ответственность за причинение вреда источником повышенной опасности*. Киев 2002, р. 29.

We attribute the following items to the statements of increased danger in the field of medical activity: x-ray photography units, radon baths, cobalt cannons, heart stimulators, laser devices, ultrasound devices, poisonous, narcotic, strong medicine, explosive and inflammable medications, the use of electric current; high speeds of dental drill; procedures carried out by specialists in bioenergetics; vaccination¹⁶.

Certain medical activities (for example, the ones involving the use of x-ray photography or laser tools) may involve the statement of increased danger. However, there is another exception. In accordance with the item 1209 of the Civil Code of Ukraine, a salesman – manufacturer of commodity – bears the responsibility for harm, inflicted to a person as a result of technological services, and also unreliable or insufficient information about them. Compensation does not depend on the manufacturer's guilt or the existence of any contractual relations with the victim.

3. ACTIVITY THAT CREATES THE INCREASED DANGER FOR LIFE AND HEALTH OF PATIENT.

In our opinion, one may include, for example, medical therapy and vaccination as activities that create increased danger for life and health of patients.

The problem of side effects of medicinal substances attracts more and more attention acquiring medical-social value in connection with the increasing volume of prescriptions of new medications and the increasing number of complications due to their use. Side effects are caused by various factors and the attributes of the pharmacological preparations in therapeutic doses do not always explain them. Certain combinations of several medical preparations may have negative consequences for the organism of the patient. It is necessary to take into account that while writing the prescription for a medication the doctor, as a rule, is guided only by the instructions given by the pharmaceutical firm, and these do not always objectively provide true information about the side effects of the preparation. During a medicinal therapy (application of antibacterial, antiviral and antihelminthic medicine, analgetics, anastetics, barbiturates, cardiovascular medications, preparations influencing the nervous system, antispasmodic preparations, vaccines) the risk of undesirable effects is always present. An example of this was the vaccination of a 12-years-old boy against measles. After the vaccine was administered the boy experienced a side effect that resulted in a complete paralysis of the lower half of his torso; afterwards the following diagnoses was given: «vaccinal myelities at breast-lumbar part»¹⁷.

According to medical literature, vaccination always involves the increased danger of unforeseeable, uncontrolled complications, related to the special properties of the vaccine. For example, 25% of persons vaccinated against measles and German measles develop arthralgia – pain in joints (for every 8 million vaccinated it is 1–2 million cases), 10% arthritises – inflammations of joints (for 8 millions vaccinated it is between 400 and 800 thousand people). In addition, there can be plateletophilia – coagulation disorders (1 case in 300 thousand vac-

¹⁵ ТИХОМИРОВ, А. В. *Организационные начала публичного регулирования рынка медицинских услуг*. Киев 2001, р. 135.

¹⁶ АНТОНОВ, С. В. *Цивільно-правова відповідальність за заподіяння шкоди здоров'ю при наданні платних медичних послуг*. Киев 2006, р. 4.

¹⁷ From the reported data of the chief physician of Uzhgorod Clinical Hospital.

cinated, for every 8 million vaccinated persons there are 26 cases), measles encephalitis (1 case in 1 million vaccinated, in every 8 millions vaccinated – 8 persons)¹⁸. Reactions to vaccines may be local or general. Obscure local reactions are more frequent, but sometimes infiltration, swelling, pain reactions are developed. The patient's body temperature rises, patient experiences pain in joints, nettle rash, rhinitis, bronchial spasm and in severe cases even anaphylactic shock. There was a case in the clinic, when a female patient with pneumonia had already been taking different antibiotics with no allergic reactions prior to being diagnosed with pneumonia. After commencing therapy using erythromycin the patient died from anaphylactic shock. The most frequent culprits are additives, for example: egg whites, present in vaccines, preservatives, added in whey material (for example, antibiotics). On average, modern medical therapy leads to complications in 19–33 % patients, less than 8 % of patients are hospitalized because of medical complications, in 2–3 % of patients with medicinal complications wrong treatment may result in death¹⁹. Taking this into account, medicinal therapy fully complies with the definition of a statement of increased danger as an activity that leads to an increased likelihood of harm resulting from the fact that it is impossible for the medical staff to have a complete control over the activity²⁰. For example, the National Council on Patient Information and Education in the USA reported that annually 125,000 patients die because of adverse reactions to medications that should not have been prescribed²¹.

Is it possible to classify the activities of surgeons, gynecologists, anesthesiologists under the statements of increased danger? No, because their activities do not always meet two conditions required by the definition of the statement of increased danger, namely: harmfulness and impossibility of human control. These conditions must always come together. Harmfulness in itself, when controlled by a man, does not necessarily mean increased danger. The presence of such potential harmfulness strengthens the responsibility for the harm caused. The absence of unforeseeable harm in general nullifies the question of the increased responsibility. Maleina M. N. notes that the surgical method of treatment does not eliminate a danger (risks) for the patient, but the use of surgical instruments is carried out under the control of human will and consciousness and, consequently, surgical activity can not be classified as a statement of increased danger²².

Certainly, classifying some types of medical activities under the statements of increased danger may lead to certain objections following from the fact that medical activities as such aim primarily to save and improve the health of people, diagnose and treat illnesses. This is why, according to 1187 of CC of Ukraine, such activities can not be qualified as activities, related to the increased danger for patients. K. B. Yaroshenko claims that it is impossible to assign responsibility to a hospital for harm, caused by the hospital as a result of using the statements of increased danger while providing treatment for patients (for example, at X-ray therapy), as the purpose of the treatment is to remove danger for the organism. The author further claims that the principle of responsibility regardless of guilt in medical establishments would lead hospitals to greatly increase the usage of medical

¹⁸ Масова вакцинація від кору і краснухи загрожує життю українців. <http://www.pravda.com.ua/articles/2007/11/2/3312861/>.

¹⁹ ЗМУШКО, Е. И., БЕЛОЗЕРОВ, Е. С. *Медикаментозные осложнения*. Киев 2001, pp. 297–298; p. 301.

²⁰ КОЗЬМИНЫХ, Е. В. *Обязательства вследствие причинения вреда здоровью при оказании медицинских услуг*. Российская юстиция. Москва 2002, No. 2, pp. 32–34.

²¹ SMITH, T. The most underreported crime of the century. http://www.allnaturalinfo.com/medical_danger.htm.

²² МАЛЕИНА, М. Н. *Человек и медицина в современном праве*. Киев 1995, p. 272.

rays that are currently some of the most perspective methods of treatment²³. But A. N. Savicka, on the contrary, claims, and we also support this point of view, that «responsibility for harm, caused by an activity under the statements of increased danger, is not attached by the law to the purpose, for which it is utilized, nor to the terms of its use»²⁴.

While carrying out certain medical activities harm may be inflicted one-time or repeatedly. However, it does not matter for the patient whether the injury was caused by a certain type of activity under the statement of increased danger or by a one-time activity of another type. We believe that the harm caused by a one-time medical activity under the statement of increased danger may sometimes be greater than harm caused by a frequent or protracted activity under the statement of increased danger. There we believe that it is necessary to clearly differentiate between a non-harmful medical activity as a whole and its alternatives, as well as actions contained within the medical activity, that in many cases may be classified under the statement of increased danger. In addition, while examining this problem, it is necessary to take into account the opinion of O. A. Krasavchikov, who states that the «danger is not a subjective and artificial sign, but phenomenon of objective order, independent of the level of how adequate to it are our subjective presentations, ideas and experiencing. It is only an objective possibility arising from proper circumstances, and nothing more. A possibility and reality are not identical, although the last one assumes the existence of the first. In order for this possibility to turn into reality certain facts have to take place, namely: facts of inflictions, with which the proper danger remains potential»²⁵. Indeed any danger in one or another measure is relatively specified and does not exist «in general».

Maleina M. N. noted also that as medical activity is heterogeneous, it can not be assigned as a whole the statement of increased danger, but the separate methods (methods) of treatment may be classified under the statement of increased danger, produced by legal science and practice²⁶. The criterion of «danger» must be determined objectively, that is: in the very activity of certain kind. The objective notion of a «danger» as a known possibility of an accident cannot be based on a single instance of infliction of harm. In every single case it is possible to name a concrete reason and causal connection that really exists in the actions carried out in this case²⁷, but at the same time there is no doubt that the provision of medical aid in certain cases may result in harm. In the process of carrying out a medical activity concrete medical actions may be attributed to the statement of increased danger. In our view, one should not talk about the entire medical activity as an activity that is classified under the increased danger, but rather about a concrete harmful action. A. N. Savicka shares this point of view to a certain extent, she attributes the X-ray treatment to the statement of increased danger. She asserts that it is not a medical activity as a whole is the statement of increased danger, but specifically X-rays, gamma-rays, radium. Thus, the issue here concerns only the part of medical activity that is linked with the use of objects classified under the

²³ ЯРОШЕНКО, К. Б. *Имущественная ответственность лечебных учреждений за вред, причиненный их работниками*. Минск 1970, 2nd issue, p. 197.

²⁴ САВИЦКАЯ, А. Н. *Возмещение ущерба, причиненного ненадлежащим врачеванием*. Львов 1982, pp.71–72.

²⁵ КРАСАВЧИКОВ, О. А. *Возмещение вреда, причиненного источником повышенной опасности* издательство. Москва 1966, p. 21.

²⁶ МАЛЕИНА, М. Н. *Человек и медицина в современном праве*. Киев 1995, p. 146.

²⁷ АНТИМОНОВ, Б., С. *Гражданская ответственность за вред, причиненный источником повышенной опасности*. Киев 1952, pp. 47–48.

statement of increased danger²⁸. But at the same time the author asserts that radiation therapy is not dangerous for an organism in itself, but under certain circumstances, through some specific properties, it is capable of producing radioactivity in amounts dangerous for the human life. However, O. A. Krasavchikov, claims that the «concept of infliction of harm in the Soviet civil law cannot be separated from the category of the subject, his actions and the circumstances of the inflicted harm. In this concept the actions of the injurer cannot be contrasted to tools that were «in the hands» of the one who operated. Any form of motion (mechanical, chemical et cetera) is unthinkable without a matter, without a certain material substance²⁹. However, in our view, carrying out radiation therapy to a certain extent always involves the increased danger of unforeseeable complications because it is impossible for the medical staff to completely control the process.

4. CONCLUSION

From the above we may draw the following conclusions:

Firstly, the scientific and technical progress in the medical science broadened the diagnostic possibilities and increased the number of medical methods. Consequently, doctors may now surgically work with the deep vital processes of the human organism. Introduction of the new diagnostic and therapeutic methods, previously considered impossible, into the clinical practice, brought about a number of typical complications. These complications influence the pathogeny and the course of disease and eventually may lead to patient's death. Certain medical activities (for example, involving the use of the X-ray photography or laser devices) may involve the statement of increased danger and in certain cases this may lead to responsibility without guilt in medicine.

Secondly, in our opinion, one may refer to, for example, medicinal therapy and vaccination as activities constituting an increased danger for life and health of the patient.

Thirdly, prescription of few medicinal preparations that do not cooperate well may lead to negative consequences for patient's organism.

Fourthly, it is impossible to attribute the activity of gynaecologists, anaesthetists to the statements of increased danger.

Fifthly, the harmfulness of a non-permanent medical action – statement of increased danger – may sometimes be more than the frequent fulfillment of an activity with increased danger. Therefore, as it seems to us, it is necessary to differentiate between a medical activity as a whole, that does not carry harmful character, and its separate kinds and concrete actions of the subjects of medical activity that, in a number of cases, may be attributed to the statement of increased danger. Indeed, any danger in one or another measure is relatively specified and does not exist «in general».

Sixthly, radiation therapy to a certain extent always contains the increased danger of unforeseeable complications because it is impossible for the medical staff to completely control it. Therefore it would be reasonable to attribute this activity to the statement of increased danger.

²⁸ САВИЦКАЯ, А. Н. *Возмещение ущерба, причиненного ненадлежащим лечением*. Львов 1982, pp. 71–73.

²⁹ КРАСАВЧИКОВ, О. А. *Возмещение вреда, причиненного источником повышенной опасности* издательство. Москва 1966, p. 22.