Methods of pre-judicial defense of the subjects of medical relations

Методи досудового захисту суб'єктів медичних відносин

Sibilla Buleca

Key words:

pre-judicial defense, patient, medical worker, mediation, self-defense, medical self-government.

Ключові слова:

досудовий захист, пацієнт, медичний працівник, посередництво, самозахист, медичне самоврядування.

A profession of doctor is an exploit it requires a selflessness cleanness of the soul and cleanness of thoughts

A.P. Chechov

An appeal in a court is a final link of defense of the broken rights and interests of persons. For the solution of conflict situation it is necessary touse the pre-judicial method of defense, for the rapid, optimum reacting on violation of rights and legal interests of patient or medical worker. Actuality of this article consists in the fact that nowadays the sides are not interested in the use of pre-judicial defense of rights and interests, but instantly apply in judicial institutions, which results in the delay solution of conflict or dispute. The purpose of this article is to analyze the methods of pre-judicial defense of rights and interests of patient and medical worker, exposure of advantages and lacks of these methods.

Different research workers are engaged in this problem among them S.V. Antonov, N.V. Davidova, A.M. Savicka, R.O. Stefanchuk, S.G. Stecenko, I.O Galay, L.V. Krasicka, V.A. Evko.

The pre-judicial level of defense is the best both for a patient and for the representatives of medical organization in which a patient gets medicare (favour). It has voluntarily character of solution of conflict between sides, which means that a guilty side voluntarily acknowledges the violations assumed by it and compensates the harm caused to a patient.

The methods of pre-trial defense of right for the subjects of medical relations are the following:

1. No fault compensation system (pre judicial indemnification without guilt),which takes a place in Sweden, Scotland, Finland, Denmark, New Zealand and some parts of the USA. The system without guilt means that patients who suffer the loss of capacity after treatment do not apply in a court to get indemnification. However it would be necessary for a patient to prove that harm was caused as a result of incorrect treatment is not the result of negligence. It is noted that most cases it can be solved within the framework of this system, and it requires less charges than cost of indemnifications and judicial charges.

The no-fault system has the advantages for patients and health protection:

- Just and adequate compensation of harm to offended side;
- More rapid rehabilitation: it is not needed to wait until court claim will be completed;
- An analysis of medical errors and warning of them is in the future;
- More effective use of time and money;
- More wide access to justice for patients;
- Most patients resolve disputes according to such system rather than through the decision of court – with the same expenses.

S.V. Antonov suggests to create the special insurance fund of compensation of harm to the health in Ukraine (on the example of Sweden), caused by the granting of paid medical services. Commercial medical enterprises

and privately practicing doctors would have to pay certain sums to this fund. The sum of such collection must be calculated depending on the amount of services given and their cost. In the case of infliction of harm (except for moral) to the patient, its compensation will be assuredly carried out due to the facilities accumulated in Fund in accordance with the minimum tariffs ratified by the Cabinet of ministers of Ukraine[1].

In my opinion, nowadays in Ukraine it is impossible to provide complete implementation and realization of this system as a result of the low financing of the system of health protection, low sense of justice and lack of information of subjects of medical activity and citizens.

2. The method of defense of right for a patient and medical worker are addresses to the legal clinics, which render a free legal help and are of interest side in a court[2], to public organizations, independent public association and professional associations. It is effective enough method as such organization operates at every university, for example at "Uzhgorod national university".

3. Mediation – (from French. Concilier – to reconcile). S.F. Zadorozhnya determines mediation as a method of peaceful decision of disputes by the independent third person or establishment which is used by sides[3]. Mediation is the process of negotiations, when the neutral third party – mediator is engaged in the solution of the vexed question, which conducts this negotiation process, listens to the argumentation of sides in relation to essence of dispute and actively helps sides to understand the interests, estimate possibility of compromises and independently make a decision, which will satisfy all of participants of negotiations. Mediation in comparing to the judicial trial owns certain advantages: in the process of mediation the sides play an active role. Obvious confidentiality of process has outstanding weight, in fact some companies equate an address to the public judicial organs with the loss of reputation. The immunity on opening of information is set by mediation. Mediation is a confidential favour, while a judicial trial is public. Application of mediation prevents bringing in of unnecessary attention to the disputes and conflicts which arise up. The following principles are in the basis of mediation: voluntarity; Confidentiality; Sincerity of intentions in relation to the decision of conflicts; Unprejudice of mediator; Legal capacity of sides; Unformality and flexibility of procedure of mediation. Stages of work of mediator are the following: arranging of negotiations between the sides of conflict; adequate interpretation of claims of sides; clarity of the personal interest of sides; search of reason of dispute; development of methods of decision of conflict; signing of agreement about reconciliation[4]. Consequently, it should be noted that acceptance of mutually beneficial decision which in future will be executed by all of sides of conflict provides the solution of disputes by the way of mediation.

4. Self-defense. A self-defense is not very much widespread method of defense, however, can be used at the waiver of conduct of patient who violates the orders of doctor, subject to the condition observance of positions of items of article 19 of the CC. A self-defense are timely conclusions and actions on the basis of complete and the well documented information. Civil code of Ukraine (further – CCU) in article 19 assumes a right of physical personality on the self-defense of the life and defense of life of other physical individual in the conditions of illegal encroachment. Such measures of self-defense must not conflict with a law. A patient independently selects a treating doctor, he must be informed about the state of health, he has a right to ask a question about the state of his health. A patient estimates quality of medicare on providing three constituents – timeliness, accordance to the professional standards, observance of rights of patients. Application of such method of defense as self-defense is acknowledged justified, if violation of subjective right already took place and still proceeds, and a situation eliminates present possibility of appeal after defense to the public competent institutions, or (though an appeal after judicial defense is not eliminates) a person whose rights are violated operates after the "will and in the interest, choosing more operative measures, facilities of the rapid and sensible reacting for a violator"[5]. A self-defense in a civil law is application by a person counteractions which are not forbidden by law and do not

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[1] Антонов С.В. Особливості відшкодування шкоди, заподіяної пацієнтові невдалим медичним втручанням / С.В. Антонов // Управління закладом охорони здоров'я. – 2007. – № 7. – [Electronic resource]. – Access mode : http://www.medlawcenter.com.ua/ru/publications/76.html.

[2] Галай В.О. Юридичні клініки як суб'єкт захисту прав пацієнтів в Україні / В.О. Галай // Право України. – 2009. – № 9. – С. 102 ; Стеценко С.Г. Медичне право України (реалізація та захист прав пацієнтів) : [монографія] / С.Г. Стеценко, В.О. Галай. – К. : Атіка, 2010. – С/ 123–126.

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[5] Стеценко С.Г. Медичне право України (реалізація та захист прав пацієнтів) : [монографія] / С.Г. Стеценко, В.О. Галай. – К. : Атіка, 2010. – С. 134.

conflict with moral principles of society. A person has a right on the self-defense of his or her civil rights and the rights of others from violations and illegal encroachments (article 19 of CCU). The self-defense of civil rights is assumed in the case of the personal trenching upon a right, which a person has on legal grounds, if during its realization there wasn't any obvious disparity of methods of self-defense of character and degree of danger of encroachment, and also were not exceeding of limit of actions, necessary for providing of inviolability of right, stopping of violation and liquidation of consequences of such violation[6]. P.A. Gribanov wrote that self-defense is realization of the actions of actual order, directed on the protection of the personal or property rights and interests, settled by a law by the authorized person, as health is plugged in the concept of unproperty interest, then self-defense is carried out for defense of the personal unproperty favours.

To the measures of self-defense one refers sides of action of subject on the one-sided change of terms of obligation or waiver of his implementation in connection with the violations of duties assumed a contractor based on a legislation or agreement.

The exhaustive list of measures (methods) of self-defense in a civil legislation is not foreseen. They also can be unnknown to the law and order which operates nowadays, but will surely find the expression with subsequent development of economic relations and right. Self-defense cannot be acknowledged legitimate, if it obviously does not answer a method and character of violation and harm caused is more considerable, than the one which was averted.

In German civil code of law a whole section is devoted to self-defense where they mark the difference between self-defense ("Notwehr" (227 NCU) and self-protection "Notstand" (228 NCU) the emergency state) and self-help ("Selbsthilfe") assumed thus, that taking advantage of self-help, it is possible to apply even force (item 229 NCU). It is named "Right of a fist" ("Faustrecht"). However for the citizens of Germany practically there is no necessity to use this or that measure of self-help because of surprising efficiency of activity exactly of judicial bodies in the questions of defense of civil laws. Within the framework of the so-called "speed process" which exists in Germany, a citizen can get judicial defense practically in any day and hour, even on Saturday and Sunday, when judges and are called from home, and they are under an obligation to come to a court and solve the case. In the process of the simplified procedure of consideration of the case the special judicial order is issued very rapidly, which appears in the hands of a person offended within 2 hours and are passed to the bailiff. For this reason in Germany there is no necessity to the person, whose right is broken, to come running to the "self-help", to the direct actions of actual order unlike Ukraine, where civil cases delay.

A medical worker has a right to carry out a self-defense from a patient by disconnecting of number of patient who daily disturbs him by phone calls requiring a new diagnosis. A self-defense is an unjurisdiction form of defense of right for health, that is defense of civil law by the own actions of the authorized person without an address to state and other authorized institutions. It is considered that self-defense of civil laws according to its legal nature is a form, but not method of defense of right and must be examined as the subinstitution of civil law and acknowledged as an independent subjective right of a person. It is suggested to enter in a scientific field an agreement about the granting of life-guard with the purpose of warning of trenching upon life and health. However, we agree with O.I. Antonyuk, that these are measures of guard, but not of defense. During realization of medical activity the subjects of medical legal relationships have a right to protect the right on health, by the use of those methods of self-defense, which are not foreseen by a civil legislation. For example, a patient can take away a dropper, if he is feeling bad and there is no nurse nearby. It is one the methods of self-defense by suppression of violation. The signs of right on a self-defense are: 1) possibility to independently carry out defense, not appealing to the jurisdiction institution; 2) arises up in the case of violation or creation of the real threat of violation of rights or interests; 3) can be realized by measures, which answer the general criteria of legitimacy, which distinguishes a self-defense from an arbitrariness which is accomplished with violation of the set order; 4) it is a having a special purpose right and is carried out with the purpose of warning, stopping of violation of right or liquidation of consequences of violation, which distinguishes a self-defense from a mob law, directed on punishment; 5) harm caused is less considerable, than the one that threatened; 6) a danger which threatened civil laws under the circumstances could not be removed by other facilities; 7) directing of self-defense to the removal of violation and consequences of such violation.

The object of self-defense are civil rights (article 135) and unmediated through the interest of "regulatorty" right social need of person in the certain favours, taken under a legal safeguard by granting to its transmitter the

[6] Стеценко С.Г. Медичне право України (реалізація та захист прав пацієнтів) : [монографія] / С.Г. Стеценко, В.О. Галай. – К. : Атіка, 2010. – С. 149.

right of defense. Signs for the self-defense of equitable civil rights are: 1) fact of violation of equitable civil right; 2) or by an agreement measures which the authorized person has a right to avail for direct influence on a violator are statutory; 3) is carried out by forces of a victim; 4) the applied measures keep indoors outside necessary actions for stopping of violation and must refer to it (article 137). The condition of self-defense is knowledge. It is an interesting statement as absence of knowledge results in impossibility of defense, however for a man defense of his rights and interests is taken subconsciously.

The forms of self-defense is a necessary defensive and implementing of harm in a state of absolute necessity. A necessary defense in medical activity can show up from the side of patient in the case of indifference of doctor, if he wants to inject with solution, to which a patient is allergic which can result in the comatose state or erroneous treatment in psychiatric establishment. However, fact of implementing of harm present, and such harm is not subject of a compensation, as it was inflicted in a state of necessary defense[7]. In accordance with a legislation medical and pharmaceutical workers are under an obligation to render a timely and skilled medical and medical help, and also gratis to render the first urgent medical aid in the case of accident and in other extreme situations with no charge (natural calamities, catastrophes, epidemics, contaminations of environment and others like that), and medical workers, besides, – and with urgent diseases. Medicare in exigent and extreme situations is provided by service of medical first-aid or nearest medical establishments regardless of department subordination and pattern of ownership. Thus, if a doctor blows off a lock, takes a car and rides to rescue a patien it is an absolute necessity. A self-defense disconnects a telephone as a patient daily disturbs a doctor by fictitious diagnoses.

Responsibility is carried by medical workers regardless of their education (doctors, medical sisters, medical assistants and others like that, in thereby workers of service of medical first-aid and government service of medicine of catastrophes), and in what establishment of health protection they work or are engaged in medical practice as variety of entrepreneurial activity.

In a criminal right we run into a problem the "collision of lives" at an absolute necessity, that is whether it is possible to rescue the life or life of relative, sacrificing the life of other. In a civil law it doesn't talk about infliction of death to other person, but however there can be a situation, when it is necessary for a doctor to choose whom to rescue, for example at a car accident. A doctor in accordance with a situation must define the level of injury of every victim and taking into account the most difficult condition of health of patient give a help, if it will appear that the state of a victim is hopeless he should immediately begin treatment of the next patient. An absolute necessity must be purposeful, rationally grounded, taking into account the moment of origin. It is considered that right for health cannot be protected by itself but only a right for safe life and health of environment can be protected by a necessary defense (an obstacle to work of equipment from the upcast of poison in water) and others like that. It is difficult to consent with it, as self-defense can take place from any direction of subject of medical activity. It should be marked that a duty of compensation of harm which arose up as a result of legitimate actions which was done in a state of absolute necessity, is not responsibility. Subjects operate legitimately and innocently. There is a category of subjects which are under an obligation to turn away a danger, accomplishing actions, related to the risk. They could not avoid their duties in relation to the distraction of danger as a result of orders of law, which not only puts on them not certain duties but also authorities were given for the implementation of harm[8]. Consequently, ch. 1171 CC foresees that a court can fully release from the compensation of harm a person who inflicted it in the state of absolute necessity. It mostly refers to medical workers, as they always, no matter where they are execute the oath of Hippocrates.

In connection with imposition of property obligations on persons, a subject in a greater measure is inclined to hold back from actions, than to carry out the proper actions. Harm is compensated taking into account the circumstances of infliction of harm. And it mostly refers to medical workers. There are three types of the special obligations which arise up on the basis of decision of court, as a result of infliction of harm in the state of absolute necessity: 1) a person, on behalf's of whom a person who inflicted harm in a state of absolute necessity acted, compensates harm; 2) to certain extent harm is compensated both by a person who inflicted harm and a person whose interests were protected; 3) partly harm is compensated both by a person who inflicted harm and a person whose interests were protected rid of compensation of harm person which accomplished harm, and person, actions were accomplished in interests of which (partly harm remains on a victim). An absolute necessity regulates the conflicts of legitimate interests of their participants, that is it concerns distributing of harm, inflict-

[7] Галай В.О. Юридичні клініки як суб'єкт захисту прав пацієнтів в Україні / В.О. Галай // Право України. – 2009. – № 9. – С. 104.

[8] Боброва О.М. Відновна справедливість. Особливості впровадження процедури медіації: європейський досвід / О.М. Боброва, А.О. Горова, В.В. Землянська, Н.М. Прокопенко. – К. : Наш час, 2006. – С. 35.

ed in default of signs of legacy, that is by legitimate actions (article 183). For example, a neighbor on a chamber throws off the oxygen mask of patient, in case if he strangles. Even, if it will result in negative consequences, at that moment he operated legitimately. It should be marked that at an absolute necessity in medical activity has two ways of its infliction, depending on circumstances: 1) on the consent of patient; 2) without the consent of patient. If he is in the unconcious state, a doctor decides how to operate.

At a necessary defense harme is inflicted to the one, who encroaches, at an absolute necessity harm is inflicted the third persons a conduct of whom is legitimate. Self-defense is one of ways of rescuing of life and health of physical person. Besides it refers, mainly, the order of defense of civil laws, but not character of obligations which arise up and examined as a "secondary right", that is the second right to the broken right and realized in quality a competence in protective legal relationships. Where there is no offence there is no self-defense[9].

Thus, a self-defense during realization of medical activity takes place by agreement as well as by a law. For example, at the conclusion of treaty on the grant of medical favour medical establishment or doctor which is engaged in medical practice are under an obligation to keep a medical secret, if they do not execute this debt, a patient has a right not to pay medical services. Self-defense is a right of a patient, that possibility properly to react in the case of disparity of conditions of the concluded agreement or situation, which threatens his health as a result actually executable actions from the side of performer, medical worker.

5. Arbitration is an appeal to the constantly operating court of arbitration during Allukrainian public organization "Fund of medical right and tickets of Ukraine", registered 15.07.2009. The court of arbitration must carry authority and be independent, the person who provides services must persuade the patient of advantages of the court of arbitration. Its advantages consist in operativeness of consideration of businesses (not more than 2 months), confidentiality of consideration of the court of arbitration, cutting of costs of sides, simplified procedure of consideration, provided implementations taken by sides on itself obligations. For today – it is an uneffective method, not utilized in Ukraine in general, not even one case has been examined.

6. Administrative defense: address to the leader of medical establishment (verbal and in writing):

- appeal to the higher organ of management of health protection;
- an appeal to a licensed accreditation commission;
- appeal to ethics council, if such takes place;
- appeal in licensed – accreditation commission;
- handling a complaint to the organs of office of public prosecutor;
- to the administrative worker on human rights at VRU.

For providing of defense of rights for a patient it is necessary to adhere to such rules: a) to treat oneself under the supervision of professional doctors; b) to choose medical establishment with the best recommendations; c) in the case of amateurish grant of medical services, to appeal to the that doctor for the immediate removal of pain effects; d) in the case of refuse a patient writes a statement about a grant him a low-quality medicare on the name the leader of establishment in two copies. On the second copy (what will remain for a patient), he must put a signature, notarizing, that a statement is accepted; e) a patient addresses another clinic, requiring to conduct a complete inspection, give recommendations and to begin treatment without delay; f) if all of documents are about the low-quality medical service (wrong order of doctor, non-committal answer of guidance, new diagnosis of other doctor, examination etc.), that at presence of all of evidential material on hands (writing documents are a hospital chart) for a patient he can appeal to the Statutory broker of Ukraine in matters of defense of customers or in the Ukrainian association of customers with a demand that a doctor must carry complete responsibility for the harm inflicted as he was attracted in a pre-judicial order or through a court.

For defense of rights for a patient, when harm is inflicted in medical establishment, he must appeal with the correctly expressed claims against a manager by a separation. Thus, if in verbal conversation it was not succeeded to solve the problem, it is needed to send a writing statement the leader of medical establishment, in 2 copies: one is passed to through a secretary the main doctor; on the second copy (what patient abandons itself) a secretary does a mark, that a statement is accepted (date, signature). By general rule – an answer for the statement of patient must be sent during one month. In a statement a patient has to shortly and clear express the essence of the problem, and also suggestions in relation to solution of this conflict. It is necessary to be sure if there actually was violation from the side of medical establishment and what size of harm was inflicted (it is

[9] Стеценко С.Г. Медичне право України (реалізація та захист прав пацієнтів) : [монографія] / С.Г. Стеценко, В.О. Галай. – К. : Атіка, 2010. – С. 25–27.

desirable, that all of it was confirmed by written or material proofs). To the charges on treatment charges belong medications, rehabilitation, proper maintenance, food.

If the answer of medical guidance doesn't content the patient, the next stage will be conducting of independent pre-judicial examination by the estimation of hospital chart, and after these actions – appeal to the court.

And in the end, for warning of violation of rights for a patient in Ukraine it is necessary to create independent institution on questions of medical ethics, the functions of which must be expert work from the analysis of problems, which arise up in industry of the gene engineering, reproductive medicine, transplantology, initiating of development of legal and ethic-professional norms in the field of medicine, consideration of cases of abuse of medical services and creation of terms for prevention to them, informatively counseling work with the experts of Council of Europe on questions of observance of human rights in the sphere of medicine. Right behind France which created the National committee the first on the problems of medical ethics, analogical committees are created in Italy and Denmark, and now such institutes exist almost in the entire countries of Europe (Hungary, Slovakia, Czech Republic) and America. For example, in Hungary in every hospital the representatives of the rights of the sick operate from the year 2000. Their task consists in that, to help in the study of rights for patients, writing of complaints, informing of medical workers about rights for patients, access to the document of patient and others like that. A representative is not in labor legal relationships with a hospital, but with the management of health protection. Thus, he is an independent person and benefits to the correct decision of the vexed questions between a patient and doctor. However, in Hungary in psychiatric hospitals, a doctor does not address to such representative, because considers that the decision of all of questions touches only him personally. The representative constantly needs to promote his qualification representatives. A patient must know about the working hours of representative, his telephone, postal address, that he has a right to personally appeal to him and get the necessary information for presentation of his interests. There are cases, when a patient wishes to remain anonymous, and at that rate it is also needed to consider his solicitor. It is necessary, in each medical establishment of health protection to create ethics committees which would protect rights for patients, deciding ethics questions between a patient and doctor (for example, violation of medical secret, ethics problems in relation to clinical experiments, and others like that), with an obligatory report about their existence by the patient of hospital by announcing on the board of announcements of such information. A committee must consist of three members, two doctors and one lawyer.

In Ukraine in 2011 the project of law "On medical self-government" was given, which offers creation of self-governing organization named Allukrainian Medical Society – national independent organization of professional self-government, that on principles of professional corporateness unites the doctors of Ukraine. Unfortunately, this law foresees in essence the forced bringing into the complement of Allukrainian Medical Society of all of doctors who carry on professional medical activity, and including them to the Register of the proper regional department of Allukrainian Medical Society as actual (permanent) members of Allukrainian medical society (part two of the article 6 of the given bill). It is thus foreseen in a bill that by the unique document which gives a right to carry out professional medical activity in Ukraine there is "Testifying to the right on realization of medical activity on territory of Ukraine", which is given out by Allukrainian Medical Society together with the certification of member of this self-governing organization (part three of the article 6, part two of the article 39 of a bill). However, such approach conflicts with Constitution of Ukraine and decision of Constitutional Court of Ukraine from 13.12.2001, according to which a right on freedom of association is guaranteed (legal and actual possibility voluntarily, without a compulsion or previous permission to form the association of citizens or enter them), that nobody can be compelled to entering into any association of citizens, whether limited in rights for belonging or unbelonging to public organizations. According to a project Allukrainian Medical Society will have monopolistic position and actually do impossible implementation of analogical functions by other associations of citizens, which exist already, or can be created in the future which again conflicts with part three of article 22, to part one and fifth article 36 of Constitution of Ukraine in relation to freedom of association in public organizations, equality of all of associations of citizens before a law, impermissibility's of narrowing of maintenance and volume of existent rights and freedoms. Thus, the project of Law does not answer today's realities of law creation of the state.

In the case when it refers the solution the of conflict "doctor-patient", it is necessary to take into account conditions that resulted as a conflict. Solution of the conflict is carried out by the conduct of negotiations between sides, to attain a compromise[10]. More frequently all patients or their relatives use an appeal to the main

[10] Гола Л.В. Медіація як метод досудового врегулювання господарських спорів / Л.В. Гола [Electronic resource]. – Access mode : http://www.rusnauka.com/10_NPE_2010/Pravo/63120.doc.htm.

doctor of medical establishment, leader of director of commercial medical establishment, and leaders mostly solve the conflict through the repeated grant of medical favour, the same or by other specialist, without payment. But not always leaders try to settle a conflict situation. If, for example, establishment of health protection has plenty of patients, a lot of conflict situations arise up. Leaders not always have a desire understand to settle a conflict (to be sorry), and suggest a patient to appeal to the court immediately.

In that time the extra-judicial level of defense of right for patients is not deprived of failings, namely: it is predominance of department interests in the field of medical activity; it is absence of practice and experience in legal medical relations of great number of judicial associations and advocates; it is a lack of development of the system of independent examination of quality of medicare; it is a low level of legal culture and sense of justice in parts of leaders of medical establishments of organs of management of health protection.

None the less, in my opinion, more effective method nowadays is prejudicial one which will provide rapid solution of the conflict.

Summary

5 methods of pre-judicial defense of rights for and medical worker and patient are examined in this article. Failings and advantages of this method are analyzed.

Анотація

У статті розглядаються 5 методів досудового захисту прав медичного працівника та пацієнта. Аналізуються недоліки й переваги цих методів.

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Sibilla Buleca,
Candidate of Judicial Sciences, Associate Professor,
Associate Professor of the Chair of Civil Law
Uzhgorod National University