GEORGIAN MEDICAL NEWS

ISSN 1512-0112

No 9 (294) Сентябрь 2019

ТБИЛИСИ - NEW YORK

ЕЖЕМЕСЯЧНЫЙ НАУЧНЫЙ ЖУРНАЛ

Медицинские новости Грузии

საქართველოს სამედიცინო სიახლენი

GEORGIAN MEDICAL NEWS

No 9 (294) 2019

Published in cooperation with and under the patronage
of the Tbilisi State Medical University

Издается в сотрудничестве и под патронажем
Тбилисского государственного медицинского университета

გამოიცემა თბილისის სახელმწიფო სამედიცინო უნივერსიტეტთან
თანამშრომლობითა და მისი პატრონაჟით

ЕЖЕМЕСЯЧНЫЙ НАУЧНЫЙ ЖУРНАЛ

ТБИЛИСИ - НЬЮ-ЙОРК

GMN: Georgian Medical News is peer-reviewed, published monthly journal committed to promoting the science and art of medicine and the betterment of public health, published by the GMN Editorial Board and The International Academy of Sciences, Education, Industry and Arts (U.S.A.) since 1994. **GMN** carries original scientific articles on medicine, biology and pharmacy, which are of experimental, theoretical and practical character; publishes original research, reviews, commentaries, editorials, essays, medical news, and correspondence in English and Russian.

GMN is indexed in MEDLINE, SCOPUS, PubMed and VINITI Russian Academy of Sciences. The full text content is available through EBSCO databases.

GMN: Медицинские новости Грузии - ежемесячный рецензируемый научный журнал, издаётся Редакционной коллегией и Международной академией наук, образования, искусств и естествознания (IASEIA) США с 1994 года на русском и английском языках в целях поддержки медицинской науки и улучшения здравоохранения. В журнале публикуются оригинальные научные статьи в области медицины, биологии и фармации, статьи обзорного характера, научные сообщения, новости медицины и здравоохранения.

Журнал индексируется в MEDLINE, отражён в базе данных SCOPUS, PubMed и ВИНИТИ РАН. Полнотекстовые статьи журнала доступны через БД EBSCO.

GMN: Georgian Medical News – საქართველოს სამედიცინო სიახლენი – არის ყოველთვიური სამეცნიერო სამედიცინო რეცენზირებადი ჟურნალი, გამოიცემა 1994 წლიდან, წარმოადგენს სარედაქციო კოლეგიისა და აშშ-ის მეცნიერების, განათლების, ინდუსტრიის, ხელოვნებისა და ბუნებისმეტყველების საერთაშორისო აკადემიის ერთობლივ გამოცემას. GMN-ში რუსულ და ინგლისურ ენებზე ქვეყნდება ექსპერიმენტული, თეორიული და პრაქტიკული ხასიათის ორიგინალური სამეცნიერო სტატიები მედიცინის, ბიოლოგიისა და ფარმაციის სფეროში, მიმოხილვითი ხასიათის სტატიები.

ჟურნალი ინდექსირებულია MEDLINE-ის საერთაშორისო სისტემაში, ასახულია SCOPUS-ის, PubMed-ის და ВИНИТИ РАН-ის მონაცემთა ბაზებში. სტატიების სრული ტექსტი ხელმისაწვდომია EBSCO-ს მონაცემთა ბაზებიდან.

МЕДИЦИНСКИЕ НОВОСТИ ГРУЗИИ

Ежемесячный совместный грузино-американский научный электронно-печатный журнал
Агентства медицинской информации Ассоциации деловой прессы Грузии,
Академии медицинских наук Грузии, Международной академии наук, индустрии,
образования и искусств США.
Издается с 1994 г., распространяется в СНГ, ЕС и США

Website:
www.geomednews.org

The International Academy of Sciences, Education, Industry & Arts. P.O.Box 390177,
Mountain View, CA, 94039-0177, USA. Tel/Fax: (650) 967-4733

Версия: печатная. **Цена:** свободная.
Условия подписки: подписка принимается на 6 и 12 месяцев.
По вопросам подписки обращаться по тел.: 293 66 78.
Контактный адрес: Грузия, 0177, Тбилиси, ул. Асатиани 7, III этаж, комната 313
тел.: 995(32) 254 24 91, 995(32) 222 54 18, 995(32) 253 70 58
Fax: +995(32) 253 70 58, e-mail: ninomikaber@hotmail.com; nikopir@dgmholding.com

По вопросам размещения рекламы обращаться по тел.: 5(99) 97 95 93

GEORGIAN MEDICAL NEWS

Monthly Georgia-US joint scientific journal published both in electronic and paper formats of the Agency of Medical Information of the Georgian Association of Business Press; Georgian Academy of Medical Sciences; International Academy of Sciences, Education, Industry and Arts (USA).

Published since 1994. Distributed in NIS, EU and USA.

CONTACT ADDRESS IN TBILISI

GMN Editorial Board
7 Asatiani Street, 3th Floor
Tbilisi, Georgia 0177

Phone: 995 (32) 254-24-91
995 (32) 222-54-18
995 (32) 253-70-58
Fax: 995 (32) 253-70-58

WEBSITE

www.geomednews.org

CONTACT ADDRESS IN NEW YORK

NINITEX INTERNATIONAL, INC.
3 PINE DRIVE SOUTH
ROSLYN, NY 11576 U.S.A.

Phone: +1 (917) 327-7732

К СВЕДЕНИЮ АВТОРОВ!

При направлении статьи в редакцию необходимо соблюдать следующие правила:

1. Статья должна быть представлена в двух экземплярах, на русском или английском языках, напечатанная через **полтора интервала на одной стороне стандартного листа с шириной левого поля в три сантиметра**. Используемый компьютерный шрифт для текста на русском и английском языках - **Times New Roman** (**Кириллица**), для текста на грузинском языке следует использовать **AcadNusx.** Размер шрифта - **12**. К рукописи, напечатанной на компьютере, должен быть приложен CD со статьей.

2. Размер статьи должен быть не менее десяти и не более двадцати страниц машинописи, включая указатель литературы и резюме на английском, русском и грузинском языках.

3. В статье должны быть освещены актуальность данного материала, методы и результаты исследования и их обсуждение.

При представлении в печать научных экспериментальных работ авторы должны указывать вид и количество экспериментальных животных, применявшиеся методы обезболивания и усыпления (в ходе острых опытов).

4. К статье должны быть приложены краткое (на полстраницы) резюме на английском, русском и грузинском языках (включающее следующие разделы: цель исследования, материал и методы, результаты и заключение) и список ключевых слов (key words).

5. Таблицы необходимо представлять в печатной форме. Фотокопии не принимаются. **Все цифровые, итоговые и процентные данные в таблицах должны соответствовать таковым в тексте статьи**. Таблицы и графики должны быть озаглавлены.

6. Фотографии должны быть контрастными, фотокопии с рентгенограмм - в позитивном изображении. Рисунки, чертежи и диаграммы следует озаглавить, пронумеровать и вставить в соответствующее место текста **в tiff формате**.

В подписях к микрофотографиям следует указывать степень увеличения через окуляр или объектив и метод окраски или импрегнации срезов.

7. Фамилии отечественных авторов приводятся в оригинальной транскрипции.

8. При оформлении и направлении статей в журнал МНГ просим авторов соблюдать правила, изложенные в «Единых требованиях к рукописям, представляемым в биомедицинские журналы», принятых Международным комитетом редакторов медицинских журналов - http://www.spinesurgery.ru/files/publish.pdf и http://www.nlm.nih.gov/bsd/uniform_requirements.html
В конце каждой оригинальной статьи приводится библиографический список. В список литературы включаются все материалы, на которые имеются ссылки в тексте. Список составляется в алфавитном порядке и нумеруется. Литературный источник приводится на языке оригинала. В списке литературы сначала приводятся работы, написанные знаками грузинского алфавита, затем кириллицей и латиницей. Ссылки на цитируемые работы в тексте статьи даются в квадратных скобках в виде номера, соответствующего номеру данной работы в списке литературы. Большинство цитированных источников должны быть за последние 5-7 лет.

9. Для получения права на публикацию статья должна иметь от руководителя работы или учреждения визу и сопроводительное отношение, написанные или напечатанные на бланке и заверенные подписью и печатью.

10. В конце статьи должны быть подписи всех авторов, полностью приведены их фамилии, имена и отчества, указаны служебный и домашний номера телефонов и адреса или иные координаты. Количество авторов (соавторов) не должно превышать пяти человек.

11. Редакция оставляет за собой право сокращать и исправлять статьи. Корректура авторам не высылается, вся работа и сверка проводится по авторскому оригиналу.

12. Недопустимо направление в редакцию работ, представленных к печати в иных издательствах или опубликованных в других изданиях.

При нарушении указанных правил статьи не рассматриваются.

REQUIREMENTS

Please note, materials submitted to the Editorial Office Staff are supposed to meet the following requirements:

1. Articles must be provided with a double copy, in English or Russian languages and typed or computer-printed on a single side of standard typing paper, with the left margin of **3** centimeters width, and **1.5** spacing between the lines, typeface - **Times New Roman** (**Cyrillic**), print size - **12** (referring to Georgian and Russian materials). With computer-printed texts please enclose a CD carrying the same file titled with Latin symbols.

2. Size of the article, including index and resume in English, Russian and Georgian languages must be at least 10 pages and not exceed the limit of 20 pages of typed or computer-printed text.

3. Submitted material must include a coverage of a topical subject, research methods, results, and review.

Authors of the scientific-research works must indicate the number of experimental biological species drawn in, list the employed methods of anesthetization and soporific means used during acute tests.

4. Articles must have a short (half page) abstract in English, Russian and Georgian (including the following sections: aim of study, material and methods, results and conclusions) and a list of key words.

5. Tables must be presented in an original typed or computer-printed form, instead of a photocopied version. **Numbers, totals, percentile data on the tables must coincide with those in the texts of the articles.** Tables and graphs must be headed.

6. Photographs are required to be contrasted and must be submitted with doubles. Please number each photograph with a pencil on its back, indicate author's name, title of the article (short version), and mark out its top and bottom parts. Drawings must be accurate, drafts and diagrams drawn in Indian ink (or black ink). Photocopies of the X-ray photographs must be presented in a positive image in **tiff format**.

Accurately numbered subtitles for each illustration must be listed on a separate sheet of paper. In the subtitles for the microphotographs please indicate the ocular and objective lens magnification power, method of coloring or impregnation of the microscopic sections (preparations).

7. Please indicate last names, first and middle initials of the native authors, present names and initials of the foreign authors in the transcription of the original language, enclose in parenthesis corresponding number under which the author is listed in the reference materials.

8. Please follow guidance offered to authors by The International Committee of Medical Journal Editors guidance in its Uniform Requirements for Manuscripts Submitted to Biomedical Journals publication available online at: http://www.nlm.nih.gov/bsd/uniform_requirements.html
http://www.icmje.org/urm_full.pdf
In GMN style for each work cited in the text, a bibliographic reference is given, and this is located at the end of the article under the title "References". All references cited in the text must be listed. The list of references should be arranged alphabetically and then numbered. References are numbered in the text [numbers in square brackets] and in the reference list and numbers are repeated throughout the text as needed. The bibliographic description is given in the language of publication (citations in Georgian script are followed by Cyrillic and Latin).

9. To obtain the rights of publication articles must be accompanied by a visa from the project instructor or the establishment, where the work has been performed, and a reference letter, both written or typed on a special signed form, certified by a stamp or a seal.

10. Articles must be signed by all of the authors at the end, and they must be provided with a list of full names, office and home phone numbers and addresses or other non-office locations where the authors could be reached. The number of the authors (co-authors) must not exceed the limit of 5 people.

11. Editorial Staff reserves the rights to cut down in size and correct the articles. Proof-sheets are not sent out to the authors. The entire editorial and collation work is performed according to the author's original text.

12. Sending in the works that have already been assigned to the press by other Editorial Staffs or have been printed by other publishers is not permissible.

Articles that Fail to Meet the Aforementioned Requirements are not Assigned to be Reviewed.

ავტორთა საყურადღებოდ!

რედაქციაში სტატიის წარმოდგენისას საჭიროა დავიცვათ შემდეგი წესები:

1. სტატია უნდა წარმოადგინოთ 2 ცალად, რუსულ ან ინგლისურ ენებზე,დაბეჭდილი სტანდარტული ფურცლის 1 გვერდზე, 3 სმ სიგანის მარცხენა ველისა და სტრიქონებს შორის 1,5 ინტერვალის დაცვით. გამოყენებული კომპიუტერული შრიფტი რუსულ და ინგლისურენოვან ტექსტებში - **Times New Roman (Кириллица)**,ხოლო ქართულენოვან ტექსტში საჭიროა გამოვიყენოთ **AcadNusx.** შრიფტის ზომა – 12. სტატიას თან უნდა ახლდეს CD სტატიით.

2. სტატიის მოცულობა არ უნდა შეადგენდეს 10 გვერდზე ნაკლებს და 20 გვერდზე მეტს ლიტერატურის სიის და რეზიუმეების (ინგლისურ,რუსულ და ქართულ ენებზე) ჩათვლით.

3. სტატიაში საჭიროა გაშუქდეს: საკითხის აქტუალობა; კვლევის მიზანი; საკვლევი მასალა და გამოყენებული მეთოდები; მიღებული შედეგები და მათი განსჯა. ექსპერიმენტული ხასიათის სტატიების წარმოდგენისას ავტორებმა უნდა მიუთითონ საექსპერიმენტო ცხოველების სახეობა და რაოდენობა; გაუტკივარებისა და დაძინების მეთოდები (მწვავე ცდების პირობებში).

4. სტატიას თან უნდა ახლდეს რეზიუმე ინგლისურ, რუსულ და ქართულ ენებზე არანაკლებ ნახევარი გვერდის მოცულობისა (სათაურის, ავტორების, დაწესებულების მითითებით და უნდა შეიცავდეს შემდეგ განყოფილებებს: მიზანი, მასალა და მეთოდები, შედეგები და დასკვნები; ტექსტუალური ნაწილი არ უნდა იყოს 15 სტრიქონზე ნაკლები) და საკვანძო სიტყვების ჩამონათვალი (key words).

5. ცხრილები საჭიროა წარმოადგინოთ ნაბეჭდი სახით. ყველა ციფრული, შემაჯამებელი და პროცენტული მონაცემები უნდა შეესაბამებოდეს ტექსტში მოყვანილს.

6. ფოტოსურათები უნდა იყოს კონტრასტული; სურათები, ნახაზები, დიაგრამები - დასათაურებული, დანომრილი და სათანადო ადგილას ჩასმული. რენტგენოგრამების ფოტოასლები წარმოადგინეთ პოზიტიური გამოსახულებით **tiff** ფორმატში. მიკროფოტოსურათების წარწერებში საჭიროა მიუთითოთ ოკულარის ან ობიექტივის საშუალებით გადიდების ხარისხი, ანათალების შეღებვის ან იმპრეგნაციის მეთოდი და აღნიშნოთ სურათის ზედა და ქვედა ნაწილები.

7. სამამულო ავტორების გვარები სტატიაში აღინიშნება ინიციალების თანდართვით, უცხოურისა – უცხოური ტრანსკრიპციით.

8. სტატიას თან უნდა ახლდეს ავტორის მიერ გამოყენებული სამამულო და უცხოური შრომების ბიბლიოგრაფიული სია (ბოლო 5-8 წლის სიღრმით). ანბანური წყობით წარმოდგენილ ბიბლიოგრაფიულ სიაში მიუთითეთ ჯერ სამამულო, შემდეგ უცხოელი ავტორები (გვარი, ინიციალები, სტატიის სათაური, ჟურნალის დასახელება, გამოცემის ადგილი, წელი, ჟურნალის №, პირველი და ბოლო გვერდები). მონოგრაფიის შემთხვევაში მიუთითეთ გამოცემის წელი, ადგილი და გვერდების საერთო რაოდენობა. ტექსტში კვადრატულ ფჩხილებში უნდა მიუთითოთ ავტორის შესაბამისი N ლიტერატურის სიის მიხედვით. მიზანშეწონილია, რომ ციტირებული წყაროების უმეტესი ნაწილი იყოს 5-6 წლის სიღრმის.

9. სტატიას თან უნდა ახლდეს: ა) დაწესებულების ან სამეცნიერო ხელმძღვანელის წარდგინება, დამოწმებული ხელმოწერითა და ბეჭდით; ბ) დარგის სპეციალისტის დამოწმებული რეცენზია, რომელშიც მითითებული იქნება საკითხის აქტუალობა, მასალის საკმაობა, მეთოდის სანდოობა, შედეგების სამეცნიერო-პრაქტიკული მნიშვნელობა.

10. სტატიის ბოლოს საჭიროა ყველა ავტორის ხელმოწერა, რომელთა რაოდენობა არ უნდა აღემატებოდეს 5-ს.

11. რედაქცია იტოვებს უფლებას შეასწოროს სტატია. ტექსტზე მუშაობა და შეჯერება ხდება საავტორო ორიგინალის მიხედვით.

12. დაუშვებელია რედაქციაში ისეთი სტატიის წარდგენა, რომელიც დასაბეჭდად წარდგენილი იყო სხვა რედაქციაში ან გამოქვეყნებული იყო სხვა გამოცემებში.

აღნიშნული წესების დარღვევის შემთხვევაში სტატიები არ განიხილება.

Содержание:

OBLIGATIONS TO INDEMNIFY DAMAGES INFLICTED BY MAIMING AND OTHER PERSONAL INJURIES INCLUDING DEATH: THEORETICAL AND PRACTICAL ISSUES (REVIEW)

Buletsa S., Zaborovskyy V., Chepys O., Badyda A., Panina Yu.

[1]State Institution Of Higher Education «Uzhhorod National University», Ukraine

Obligations to indemnify damages inflicted by maiming and other personal injuries including death are not contractual in nature, and regulatory management of such obligations has its roots far back in Roman law. The civilized world puts the highest value on human life and death, hence, inflicting of personal injury is considered to be a breach of absolute rights. Accordingly, the duty to indemnify for damages is imposed on a wrongdoer due to his failure to fulfil an absolute obligation of the passive type in absolute legal relations.

In spite of the fact that most law-governed states place particular emphasis on seeking legislative action to solve issues dealing with indemnification for damages inflicted by maiming and other personal injuries including death, there are a large number of both civil and criminal cases in this field. In particular, numerous difficulties arise in personal injury cases when injury to the patient was caused by the doctor's treatment or the denial of medical care. The healthcare environment is a priori fraught with increased risks of inflicting injuries; moreover, the procedure for establishing medical negligence is complicated and involves the combination of the law and medical science field. The assessment of damages the injured patient is entitled to also presents considerable difficulties.

A set of issues connected with the regulatory management of indemnification for damages inflicted by maiming and other personal injuries including death as well as personal injury arising from the doctor's treatment or the denial of medical care has been studied by a number of scholars including S. Antonov, S. Buletsa, D. Hrymm, S. Hrynko, U. Hryshko, Yu. Danysheva, K. Drishliuk, A. Mamushkina, O. Ruban, O. Chernilevska and others.

The article aims to provide a comprehensive review of the legal basis for and special features of indemnification for damages inflicted by maiming and other personal injuries including death, in particular, due to the doctor's treatment or the denial of medical care. The present research involves critical analysis of civil legislation of Ukraine and practice of European Court. It also employs the legal framework governing out-of-court and in-court settlement of disputes with regard to inflicting personal injury to patients due to the provision of medical assistance or failure to provide medical assistance and some aspects of the assessment of damages to be awarded to the injured patient. In order to identify common trends relating to court decisions on damages in personal injury and wrongful death cases in the healthcare setting, some high-profile cases are considered, in particular 8 decisions made by domestic national courts of Ukraine as well as 17 decisions made by the European Court of Human Rights.

The present research employed the comparative legal research method in order to compare the features of the regulatory management of indemnification for damages inflicted by maiming and other personal injuries including death in Ukraine and other countries. The integrated system-wide approach was used to examine the reasons for placing the liability for inflicting personal injury to the patient on subjects providing medical care. The method of analysis and the inductive method were applied to make generalisations providing useful practical precedents relating to compensation for damages in medical malpractice cases. The method of modelling was applied to study the content of legal relationship with regard to indemnification for damages inflicted by maiming and other personal injuries including death that is the subject of the court cases under consideration.

In spite of the fact that obligations to indemnify damages inflicted by maiming and other personal injuries including death belong to non-contractual (delictual) obligations, the Civil Code (hereinafter CC) of Ukraine provides for cases when rules that regulate non-contractual relations extend to some particular obligations that arise from contracts. Then, rules of delictual responsibility are applied regardless of whether an act that caused an injury is necessary for the performance of a contract. Specifically, Article 928 of the CC of Ukraine provides that liability for personal injury or death in respect of passengers is delineated according to Chapter 82 of the CC of Ukraine "Indemnification" unless the contract or the law provides for strict liability of the carrier. More specifically, although this refers to the losses connected with the performance of the contract, the rules of delictual responsibility are applied due to the respective statutory reference [5].

In addition, if more than one person causes a personal injury, tortfeasors and the victim may enter into an agreement to ensure joint and several liability. The essential terms of such an agreement shall set a time period for compensation payment, as well as a procedure for and a method of providing indemnity for an injury inflicted jointly by several people. The parties may also agree on the procedure for defining compensatory damages. Although these provisions will duplicate generally recognized civil law regulations, a contract for compensatory damages may contain provisions for liability for non-performance or unsatisfactory performance of contractual obligations [ECHR Case of Asiye Genç v. Turkey (Application № 24109/07)].

However, it is understood that in spite of the existence of the contract that provides for the liability of the parties to pay full compensation for a personal injury caused to the other party or the contract that sets the procedure for paying compensatory damages inflicted by more than one person, the obligation itself to indemnify damages is delictual, i.e. non-contractual in nature. These relations always fall under the mandatory provisions of Chapter 82 of the CC of Ukraine. The terms that are provided for by the contract for compensatory damages cannot worsen the situation or limit or diminish any rights of the indemnitee as compared with his rights under the CC of Ukraine.

It should be emphasized that the categories "obligation to indemnify" and "liability for damages" that are often used interchangeably in law books differ in meaning. In research literature, indemnification is proved to be a method of the performance of an obligor's obligation and the fulfilment of his duty rather than a sanction for a tortious act. Reasons for an obligation to indemnify damages are the tortious actions themselves that cause an injury, while reasons for delictual liability is an act of law enforcement. Tortious actions serve only as a reason for rendering a decision on imposing liability (given the right circumstances) but not a reason for liability [15].

Damages inflicted by death and damages inflicted by maiming and other personal injuries are different in content.

If damages are inflicted by the death of a person, the actual loss of the affected individuals is funeral and burial expenses and gravestone installation costs. In this case, the loss of benefit is the amount of maintenance that the survivors specified by Article 1200 of the CC of Ukraine and maintained by the deceased worker received in his lifetime and lost due to the breadwinner's death.

A special feature of the relationship arising from indemnification for damages inflicted by maiming and other personal injuries including death is a possibility for the victim to establish consequential property and non-property damages that may occur even over a significant time interval following the day on which the accident occurred [15].

According to the CC of Ukraine, if damages are inflicted by health injuries, the actual damage of the victim must be considered to be health recovery and/or rehabilitation costs. These costs are associated with the necessity of nourishing diet, health resort treatment, purchase of medicine, prosthetic repair, nursing care, etc. [15]. However, this list is indicative, hence, in cases when the victim has suffered other damages that are connected with the relevant personal injury, he has the right to claim their compensation as well. The Roman jurists used the same approaches by granting the victim the right to claim compensation for treatment and loss of earnings according to *legis Aquiliae utilis* [3].

In addition, the loss of benefit is damages in the form of unreceived income which an individual would receive under ordinary conditions had his right to full-time work not been violated. When the amount of income is estimated, an important factor is whether the individual was in work. More specifically, if maiming or other personal injuries was caused to a person who worked under an employment contract, the amount of lost income that is subject to compensation shall be calculated as a percentage of the average monthly income the victim received before being injured taking into account the percentage of loss of both professional and general working capacity or general working capacity if there is no professional working capacity (Section 1 of Article 1197 of the CC of Ukraine).

Should loss of earning capacity be permanent, the victim must be sent for medical examination to estimate the degree to which earning capacity has been lost; should the level of disability be high, the victim may be assigned a disability category and granted a pension by a social safety net. Based on these facts, the amount of caused material damage is estimated. Reimbursement for lost income or its part does not include the following: disability benefit that was granted to the victim due to maiming and other types of pensions that were awarded preceding health injury as well as following it on account of the compensation for damages. Neither does it include income the victim receives after being maimed [2].

Loss of earnings (income) includes all the types of remuneration under an employment contract that are subject to tax in both full-time and part-time positions in the amounts of pretax earnings. However, lost earnings (income) do not include single payments, compensation for unused vacation, severance package, maternity benefits, etc. (Section 3 of Article 1197 of the CC of Ukraine). A similar rule is provided in item 4, Section 13 of resolution of the Plenum of the Supreme Court if Ukraine No 6 dated March 27, 1992 [13].

The CC of Ukraine contains the rule according to which "damage inflicted by maiming and other personal injury should be indemnified regardless of the pension assigned to an individual due to disability or the pension the individual received before the injury or other income» (Section 3 of Article 1195). This means that the victim is entitled to obtain both: 1) reimbursement in full from the tortfeasor according to delictual obligations; and 2) pensions or aid under social insurance according to the rules of social insurance. Accordingly, a social insurance agency has no right of subrogation against a tortfeasor in respect of benefits paid from the social insurance schemes due to the fact that relations under the right of subrogation are regulated according to the rules of delictual obligations (item 1 of Section 1191 of the CUV) rather than social insurance rules. This approach to the reimbursement procedure is progressive. It was implemented in Ukrainian legislation only following the entry into force of the Civil Code of Ukraine of 2004.

Hence, judicial decision-making in respect of awarding damages inflicted by maiming or other personal injuries should be driven by the fact that the victim is entitled to reimbursement of damages inflicted by maiming or other personal injuries in full according to Article 1166 of the CC of Ukraine. First, estimating the amount of damages involves both actual damage and loss of benefit. Second, defining the types of expenses that are subject to reimbursement should ensure that these expenses will make the victim's recovery to the fullest extent possible. Moreover, Yu. Danysheva argues, compensation for additional costs should be provided with respect to the optimal medical treatment without limiting reimbursement to a particular amount [5].

When dealing with the extent of compensation for damages, it is necessary to emphasize that there is a distinct difference between the notions *extent of compensation for damages* and *amount of compensation for damages* inflicted by maiming or other personal injuries including death. Article 1166 of the CC of Ukraine sets forth the basic principle of the civil law according to which damage caused to the victim is subject to indemnification in full, in other words, the victim is entitled to indemnification for all the types of possible damages caused to him including both property damage and non-property damage. In this regard, A. Mamushkina assumes that the extent of compensation is a value that encompasses the types of the damage that can be caused to an individual. While the amount of compensation for damages is closely related to the extent of compensation, they do not coincide because the former must be estimated in monetary or other terms, thus being a quantitative description of inflicted damages [8].

Pursuant to the general rule, any act that causes personal injury is assumed to be illegal. A causal connection between an illegal act and inflicted damage has specific features. In regard to these delictual obligations, it is complicated in nature, which is due to the specific character of inflicted damage. In other words, it is necessary to prove that there is a causal connection between illegal acts and an inflicted personal injury as well as a connection between the personal injury and incurred material expenses. However, it should be noted that in Ukraine there are judicial precedents for compensation for damages due to an indirect causal connection. For example, a technically imperfect surgical procedure (which resulted in leaving a retained foreign body inside the patient's body) necessitated repeated surgery to retrieve the foreign body. However, the medical expert review points out that this was not the only cause of the development of postsurgical complications in the victim, hence, it should be plausible to suggest that there is an indirect causal connection between them and the deterioration of the victim's health condition. Nevertheless, the victim was awarded 20 000 UAH (833$) compensation for moral damages [Рішення Шевченківського районного суду м. Києва від 24 червня 2016 року. Case № 2610/25254/2012].

The Roman legal tradition is also manifest in the fact that the obligation to indemnify for damages inflicted by a personal injury arises in case a tortfeasor is at fault (Section 1 of Article 1166 of the CC of Ukraine). In this regard, the form of fault is of no importance for the creation of obligation. That is why the Roman jurist Paul's maxim is still relevant today: «With respect to a lawsuit, under the lex Aquilia, malice and gross negligence are punishable » [4].

Similarly to general rules, the tortfeasor's fault under this delict is presumed until the tortfeasor proves that he has no fault in it. However, in cases provided for by law, a personal injury is indemnified regardless of the tortfeasor's fault (Article 1173 –1176, 1187 of the CC of Ukraine). In some cases that are directly stipulated for by law, damages inflicted by maiming or other personal injuries including death due to force majeure also may be subject to indemnification (Section 3 of Article1166 of the CC of Ukraine from 16.01.2003, № 435-IV).

In judicial practice, a special procedure for indemnification for damages has been established for cases relating to personal injuries inflicted to individuals under the age of majority (minors). This is due to the fact that compensation for damage inflicted by a minor's injury in respect of its part connected with the loss of earnings is impossible to estimate according to the general criteria. This is why special rules for estimating the amount of inflicted damages have been elaborated.

Under the CC of Ukraine, minor victims are entitled to indemnification for damages due to the loss or diminution of future earning capacity upon reaching the age of fourteen (students upon reaching the age of eighteen) based on the minimum salary set by law. If by the time ofinjury, a minor had an income, damages should be indemnified based on his earnings but not less than the minimum salary set by law (Article 1199).

There is also a special procedure for indemnification for damages caused by a criminal offence. Under Article 1207 of the CC of Ukraine, damages inflicted by maiming or other personal injuries including death due to a criminal offence are indemnified to the victim or other individuals who are entitled for indemnification by the state unless an individual who committed a crime is identified or is solvent. The terms and procedure for indemnification for damages inflicted by maiming or other personal injuries including death by the state are established by law. However, at present, there is no special law which regulates the terms and the procedure for such indemnification. This is why filing a suit and exercising the right to indemnification for damages by the state is impossible. Legislative inefficiency of the rule provided for by Article 1207 of the CC of Ukraine is unacceptable with regard to a difficult economic situation of Ukraine. The procedures implemented in the USA and Great Britain, in particular, indemnification rates set by law, the mechanism for fund raising, etc., may serve as examples of the development of compensation mechanisms in the criminal process [6].

Damages inflicted by a personal injury are indemnified in monthly instalments (Article 1202 of the CC of Ukraine). This is due to the fact that the person who must compensate for damages obtains his income predominantly on a monthly basis. In civil law, there is a precedent for another regime for making compensatory payment. Specifically, under the Code of civil laws of the Russian Empire of 1832 the tortfeasor was obliged to make an annual payment in the amount set by court (Article 661) [4].

Providing there are reasonable grounds and taking into consideration the tortfeasor's financial situation, compensation may be paid in one lump sum but not more than for three years in advance (item 2 of Section 1 of Article 1202 of the CC of Ukraine). The court may also take into account the defendant's concern to make a lump sum payment and determine the defendant's intention with regard to obtaining a one-time compensation payment. In certain circumstances, like those involving the recovery of additional costs, such a payment may be made in advance within time limits imposed on the basis of a relevant medical expertise report as well as in order to pay bills or for property (health resort package, transport fares and special transport expenses, etc.) if advance payment is required (Section 2 of Article 1202 of the CC of Ukraine).

Therefore, a special feature of obligations to indemnify for damages inflicted by personal injuries including death relates to the object of offence and harmful effects. The object of offence is non-property rights and benefits, hence, it is non-property damage having no cost value that is caused to an individual. However, this offence involves the emergence of additional costs incurred by the victim or the loss of any material benefits and perks, hence, compensation for non-property damage acquires material attributes. Therefore, cases involving personal injuries including death may be associated with the possibility of the existence of non-property damage connected with property. A similar approach was adopted by Roman jurists who made decisions on cases on indemnification for damages inflicted by personal injuries including death according to the rules for indemnification for damages caused to property associated with the delicts of *furtum* and *damnum iniuria datum.* Hence, both in Ukraine and in other countries of the Commonwealth of Independent States, rules for indemnification for damages inflicted by personal injuries including death have been developed under the influence of the Roman private law [4].

Particular attention should be paid to the issue of indemnification for damages inflicted by maiming or other personal injuries including death due to medical malpractice. When seeking medical advice, an individual expects to be provided with high quality medical care to be able to make a quick recovery. However, it is often the case that medical or healthcare professionals make a medical error, thus, causing harm to the patient's health, which can even result in the patient's death. In such cases, the patient or his relatives try to seek justice in court. Yet, in Ukraine, very few cases are decided in patients' favour because it is very difficult to prove a medical error or medical negligence. Litigation in such cases can last for several years since investigation into the negative effects on the patients' health or causes of his death involves special knowledge in medicine, which means assigning a forensic medical examination, or more than one examination if experts' views do not coincide or there are still disputable issues to settle for the parties.

The fact that medical malpractice cases are a common category of cases heard by the European Court of Human Rights (hereinafter ECHR) is yet more proof of its complex nature. Although the right to health does not belong to the rights that are guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter the Convention), the issues dealing with the civil liability for damages inflicted by maiming or other personal injuries including death that were caused by a medical or healthcare professional are considered under Articles 2, 3 and 8 of the Convention, which means these issues are regarded as the violation of the right to life, prohibition of torture and the right to respect for private and family life.

For example, the ECHR in its judgments has pointed out a number of times that in respect of medical negligence it is necessary that there should be proper procedural tools for bringing a medical or healthcare professional to criminal, civil or

disciplinary liability in order to ensure the exercise of fundamental human rights (in particular, patients' rights) [ECHR Case of Mehmet Günay et Güllü Günay v. Turkey (Application № 52797/08)]. Regardless of the type of trial, litigation should involve all significant elements in order to shed light on the circumstances involved in the case [Case of Asiye Genç v. Turkey (Application № 24109/07)].

However, with regard to medical negligence, in order to ensure the proper protection of the patient's right it may be sufficient to provide a possibility to appeal against medical negligence in a civil court and impose any relevant civil sanctions such as indemnification for damages [ECHR Case of Benderskiy v. Ukraine (Application № 22750/02)].

Under Article 1195 of the CC of Ukraine, indemnification for damages inflicted by maiming or other personal injuries including death is provided by a legal body (a medical facility) or a physical person (a physician who practices medicine under a license). It should be noted that the patient is entitled to compensation for his lost earnings (income) due to loss or diminution of professional or general working capacity as well as additional expenses incurred by the need for a high calorie diet, health resort treatment, purchase of medicine, prosthetic repair, nursing care, etc. Under Article 1172 of the CC of Ukraine a legal body or a physical person indemnifies damages caused by their employee during the course of the performance of his employment duties, which means that compensation for damages will be withdrawn from the employer (a medical facility or a private entrepreneur if damage was caused by an individual employed by him). In case damage was caused by the entrepreneur himself who has a license for medical practice, the means will be withdrawn from him. In addition, the patient is entitled to indemnification for moral damage under Article 23 of the CC of Ukraine. This damage consists of both physical pain the individual suffered from due to incorrect treatment in hospital and physical pain that resulted from improper medical care as well as pain caused while "correcting" the medical error.

In addition, moral damage involves emotional suffering an individual experiences due to the physicians' actions that is manifested by health anxiety, concerns that prescribed treatment does not work, etc. However, one of the complexities associated with patients who suffered from doctor's negligent treatment is the necessity to prove the causal connection between doctor's actions and an inflicted personal injury. Most often, this is done by assigning a forensic medical examination. In this category of cases, the expert opinion is given *de facto* high priority as evidence. At this stage, litigation often involves the so-called medical ethics which is nothing more than a cover-up. As a result, it is often not possible for a forensic medical examination to evaluate doctor's actions / negligence with regard to causing harm to the patient. In the end, it is often the case that the patient doesn't receive any indemnification for damages due to the dismissal of a case on the ground that there is no evidence of causal connection between doctor's actions / negligence and effects.

Legal remedies for the violation of personal non-property rights of patients in the course of and due to receiving medical care include the right to indemnification for damages as well as other methods of reimbursement for material damage. In the healthcare sector, the liable party is healthcare facilities as well as medical and healthcare professionals who run a private medical practice. Civil liability is divided in two types:

1) contractual; and

2) delictual [1].

Contractual and delictual liabilities are differentiated by the rule according to which should there be reasons for contractual remedies, non-contractual remedies are dismissed: contractual remedies require pre-emption of non-contractual ones. This, of course, does not mitigate liability established by law. A decision on contractual liability is made provided the parties have a contractual obligation. If there is no contractual obligation, it is acceptable to consider imposing delictual liability. If medical care is provided based on a repayable contract, contractual liability is invoked. In this case, its extent cannot be less than that of delictual liability. On the contrary, the level of compensation for damage may be raised as compared to the general rules. In such cases, the role of the contract consists in the fact that through the contract an obligation to indemnify for damages stipulated for by law can be realised with respect to: reasons for an obligation; parties involved; and its content. While looking into the issues connected with contractual obligations, it should be noted that, under section 2 of Article 901 of the CC of Ukraine, the rules of Chapter 63 of the CC of Ukraine "Services. General provisions" may be applied to all service supply agreements (including medical services) provided this does not contradict the essence of the obligation. Civil legislation of Ukraine involves the principle of presumed guilt of the tortfeasor in the course of the provision of medical care, which puts the burden of proving innocent on the tortfeasor. Under the general rule that is provided for by Section 2 of Article 1166 and Section 1 of Article 1167 of the CC of Ukraine, the tortfeasor is exempted from the obligation to indemnify for property and moral damages if he proves that the damage did not occur through his fault.

In the healthcare sector, property damage consists of:

a) actual damage that is loss an individual incurred or has to incur in order to restore the right that has been infringed (costs associated with drug purchase, prosthetic repair, the performance of diagnostic tests, treatment and rehabilitation, health resort treatment, nourishing diet, nursing care, funeral and burial, and gravestone installation (Item 1 of section 2 of Articles 22, 1195 and 1201 of the CC of Ukraine)); and

b) loss of benefit that is income an individual could have received under ordinary conditions had his right not been violated (lost earnings (income) due to loss or diminution of professional or general working capacity (Item 2 of section 2 of Articles 22 and 1195 of the CC of Ukraine from 16.01.2003 p. № 435-IV).

The extent to which professional working capacity was lost (expressed as percentage) and the need for additional types of assistance are determined by forensic medical examination. In personal injury cases, should additional costs arise due to the need for health and social care, they must be indemnified by the tortfeasor. Moreover, the need for such costs and their duration must be proven by the conclusion of forensic medical examination. Additional costs may be charged in advance within a time period set forth in the conclusion of the disability determination agency or forensic medical examination. When charging costs associated with prosthetic repair and health resort package, the court must indicate in the decision that awarded amounts are liable for transfer to a relevant organization which must provide the victim with these services. In the event of the victim's death, the tortfeasor (either an organization or an individual) are entitled to indemnify funeral and burial expenses (including ceremonial services and funeral arrangements) to the individual that incurred these expenses. This is why a claim for funeral and burial expenses may be filed by individuals who are entitled to indemnification for damages due to the breadwinner's death as well as individuals and organizations who are not related to the victim, yet, actually incurred these expenses. Gravestone

and gravestone fences installation costs are determined based on their actual cost, but not higher than the upper limit cost of standard gravestones and fences in the location in question [13].

Any legal remedy must be effective in practice in respect of the protection of the rights of an individual (including a patient) [ECHR Case of Calvelli and Ciglo v. Italy (Application № 32967/96)]. Specifically, indemnification for damages seems to be simple and easy in theory. But how does this work in practice and how can medical malpractice be proven?

First, it is necessary to prove medical negligence which consisted in misdiagnosing the patient's condition or administering the wrong treatment. The guidelines for healthcare delivery were approved by the order of the Ministry of Healthcare of Ukraine. They set forth which tests and diagnostic procedures must be performed to confirm a primary diagnosis and make a decision on treatment. Specifically, order No 602 dated August 3, 2012, provides for the execution of medico-technological documentation with regard to the standardization of healthcare procedures for stroke [9].

These standards are set forth in medico-technological documents which were developed according to the multi(inter-)disciplinary (hereinafter multidisciplinary) approach to a specific issue, i.e. a medical issue (a disease or another pathological condition, living a healthy lifestyle, etc.) rather than a medical specialty [14]. This is why before taking legal action it is necessary to identify what the patient was diagnosed with in a healthcare facility. Under Articles 34 and 49 of the Constitution, Article 285 of the CC of Ukraine and Article 39 of the Fundamentals of the Legislation of Ukraine on Healthcare, the patient has the right to request any document that is available in a healthcare facility (in particular, a patient's chart, all test results and a treatment card. For example, mandatory diagnostic tests and procedures for ischaemic stroke are as follows:

- brain imaging which is performed in patients with acute cerebrovascular accident (ACA) as a matter of priority (within 24 following the onset of the disease);
- laboratory and instrumental diagnostic tests which are performed in order to clarify a patient's clinical picture, assign treatment, and identify the type of stoke to assign stroke secondary prevention services (a detailed classification of stroke types is given in adapted clinical guidelines);
- patients with stroke and transitory ischaemic attack (TIA) are recommended to be scheduled 24-hour Holter monitoring to check their electrocardiogram (ECG) following the acute period provided the patient has arrhythmia and stroke type has not been identified.

The following treatment is assigned: 1) provided the possibility of haemorrhagic stroke has been eliminated based on brain imaging, within 48 hours following the disease onset patients with ischaemic stoke must be administered acetylsalicylic acid (ASA) with a dose of 160–325 mg (for patients with no dysphagia per os, and for patients with dysphagia into the nasogastric tube, intramuscularly or per rectum); 2) ASA therapy with the dose indicated should be continued until two weeks when the dose can be reduced to preventive (usually 75–100 mg/day). Instead of ASA, for the purpose of secondary prevention other clot-busting drugs can be prescribed (Clopidogrel or a combination of aspirin plus extended-release dipyridamole); 3) patients with TIA must be administered 160–325 mg/day as soon as possible provided there are no contraindications.

Quality criteria (expected treatment outcomes): 1. The length of in-hospital treatment depends on the level of stroke severity and is from 7 to 28 days (of them 7–14 days in a specialist stroke unit). 2. Early discharge of the patient from a stroke care unit is possible if the level of stroke severity is either minor or moderate and providing the rehabilitation recommended by a multidisciplinary team is continued in a healthcare facility which provides outpatient secondary healthcare. 3. After discharge, patients must be under constant surveillance of a neurologist in a healthcare facility which provides outpatient secondary healthcare and a general practitioner in their home area to continue following the prescriptions of the multidisciplinary team [9].

When the claimant obtains all the documents, he can compare the diagnosis and assigned treatment with the medical standard of care that establishes the doctor's mandatory conduct. Only in case the claimant identifies any irregularities, it can be said that doctors failed to provide competent care and made diagnostic error and/or tactic error (for example, when a diagnosis is inappropriately delayed, which resulted in the development of a disease [ECHR Case of Lopes de Sousa Fernandes v. Portugal (Application № 56080/13)].

However, when it is impossible to identify the negative consequences for the patient's health and life, or there is a probability that a chosen method of treatment will have a negative impact (for example, due to medication administered to the patient), there are no reasons for indemnification for material and moral damages [ECHR Case of Mehmet Günay et Güllü Günay v. Turkey (Application № 52797/08)].

Under the Constitution of Ukraine everyone has the right to health care (Article 49) [Constitution of Ukraine from 20.06.1996 p. № 254к/96-ВР], which the state realizes through healthcare facilities. In such a case, a failure to provide medical treatment or denial of medical care by medical and healthcare professionals, who are aware of the health and life risks an individual faces, may be a reason for compensation for damages [ECHR Case of Elena Cojocaru v. Romania (Application № 74114/12)]. Based on the practice of ECHR, it should be noted that, in particular, the reasons may be as follows: denial to provide proper medical care and transfer to another hospital owing to the patient's inability to pay medical fees [ECHR Case of Mehmet Sentürk and Bekir Sentürk v. Turkey (Application № 13423/09)]; failure to provide the patient with expensive anticancerous medication for free in spite of the fact that under the current legislation he is entitled to it [ECHR Case of Panaitescu v. Romania (Application № 30909/06)]; doctor's refusal to terminate pregnancy despite the certificate issued by a general practitioner stating that the pregnancy constituted a threat to the patient's health [ECHR Case of Tysiąc v. Poland (Application № 5410/03)].

Second, prove the fact of a resulting injury to the patient. Having obtained hard evidence that diagnostic tests or treatment assigned by the doctor deviated from the accepted medical standard of care, the applicant (claimant) must prove the fact of a resulting injury to the patient. The injury may be proven by the following: facts of consulting other doctors (who assigned treatment); facts of disclosing other diseases or the development of a chronic form of the disease, which might have resulted from improper treatment; written opinions of other doctors who examined or treated the patient provided the opinions have the effect of expert medical report. For example, order of the Ministry of Healthcare of Ukraine № 110 of 14 February 2012 "On approval of primary medical record documentation which is used in healthcare facilities, public or private, and instructions on recording information" approved form № 043/o for dental patients "Dental patient record card" [10]. According to the Instruction on recording information in primary medical record documenta-

tion № 043/o "Dental patient record card", the patient record card contains an entry "Complaints". This entry should record complaints stated in patient's or his relatives' words that describe the patient's condition in the most accurate way. A special section of the patient record card is designed for planning dental examination of the patient and treatment of the patient with specialist consultation records. The section of the patient record card under the title "Diary" is designed for recording subsequent patient encounters in connection with the given condition or any other conditions. It is followed by the epicrisis which contains a brief description of treatment outcomes and practical procedures recommended by the doctor. After the treatment finishes, the patient record card is signed by both the doctor who administered the treatment and the head of the department, while after each particular stage of treatment finishes it is signed by the doctor who is actually treating the patient [7]. In case any of the sections of the patient record card is missing, it can be assumed that doctors failed to fill it in in an accurate way owing to their negligent attitude towards their duties or that part of the medical record documentation was altered to cover up medical malpractice.

Third, it is necessary to establish a causal connection between medical or health care professional's actions and the patient's resulting injury. Specifically, a failure to establish a causal connection between medical or health care professional's actions and an injury caused to the patient results is the violation of the right to a fair trial (Article 6 of the Convention) and fair hearing rather than the right to physical integrity as an element of the right to respect for private and family life protected by Article 8 of the Convention [ECHR Case of Benderskiy v. Ukraine (Application № 22750/02)].

In this case, the claimant must prove that it was doctor's action that caused harm to the patient rather than other objective reasons such as medical care as an imperfect science at its present stage, objective diagnostic challenges, atypical clinical course and consequences, late diagnosis caused by patient's late presentation, etc. For example, in the case of Trocellier v. France the victim claimed damages inflicted by an injury to her health based on the fact that the doctors failed to inform her about a risk of negative consequences of the surgery. The expert report confirmed that the paralysis occurred immediately after the operation and disappeared within three months. However, the symptoms of paralysis that the patient experienced were of a psychosomatic nature. The ECHR pointed out that a body of medical research into psychosomatic symptoms had been scarce and that the data available were still based on hypothesis, which had made it difficult to include them as a matter of principle while providing the information to patients. Du to this, the victim was declared to have no reasons for getting the compensation for damages [ECHR Case of Trocellier v. France (Application № 75725/01)]. An imperfect regulatory framework that governs medical practice and may cause medical malpractice [ECHR Case of Arskaya v. Ukraine (Application № 45076/05)] and irreparable harm constitutes a completely different situation. For example, in the case *Asiye Genç v. Turkey*, a causal connection between the death of the new-born baby and the facts that there was a lack of space in the neonatal intensive care unit and the baby had to be transferred to another hospital to subsequently die in the ambulance was proven by the forensic medical examination on the national level. In its judgment, the ECHR held that the baby was the victim of the improper functioning of the public hospital service. A situation is different when doctors admit that there are shortcomings (for example, a lack of necessary equipment) in a healthcare facility. In this case, resulting consequences will result from both medical malpractice and structural shortcomings of a healthcare facility that in their combination made the delivery of urgent medical care impossible, which is equivalent to the denial of medical care resulting in putting life at risk [ECHR Case of Aydoğdu v. Turkey (Application № 40448/06)]. A lack of coordination between medical facilities or shortage of medical staff in a particular hospital unit [36] may be yet more proof of improper functioning of health care providers.

Although a physician must apply his skills to save life and act in a patient's best interests [ECHR Case of Arskaya v. Ukraine (Application № 45076/05)], with such factors available, it is unreasonable and against the principle of justice to put the blame for negative consequences on the physician.

Third party fault should be taken into consideration too. For example, the patient sought medical advice in another hospital or applied to alternative medicine or practiced self-treatment. However, home delivery may be considered an exception. For example, even provided home delivery is allowed by law, it is inadmissible to refuse to provide medical care because under no circumstances a baby should be devoid of the right to medical care based on the fact that it was born out of hospital [ECHR Case of Kosaitė-Čypienė and others v. Lithuania (Application № 69489/12)].

If an individual is certain to be able to prove all the above mentioned elements, he can file a lawsuit. However, it must be borne in mind that under item 7 of Section 1 of Article 1 of law of Ukraine of 01 December 2005 No 3161-IV "On Consumer rights protection", a contract is a juristic act, either oral or written, between the consumer and the seller (performer) about the quality, time period, price and other terms under which products are managed. An oral contract is performed by executing a receipt, a sales or cash voucher, a ticket, a coupon or any other documents (hereinafter payment document) [14]. Hence, when seeking medical advice, an individual enters into an oral contract with a hospital for medical services, thus, being their consumer. This is why the relationships that arise from such a contract are subject to the law "On Consumer rights protection". In this respect, the consumer's right to information on goods should also be considered (Article 15 of the law). In the healthcare sector, it is important that individuals whose health has been put at risk (even if these have been singular cases) should have access to information which allows taking an unbiased look at risks, since if the anticipated risk of this kind materializes without the patient being duly informed in advance, the right to physical integrity as an element of the right to respect for private and family life protected by Article 8 of the Convention may be violated [ECHR Case of Trocellier v. France (Application № 75725/01)].

Yet, legal action is not the only way to settle a dispute in a positive way. The individual concerned may present his demands in writing as a complaint to healthcare facilities. A response to the complaint must be given in writing within the timeframe established by the law of Ukraine "On citizens' appeals" [12]. Then, in case of failure to settle a dispute in such a way, the response to the complaint will serve as evidence in court. If the demands are rejected by a healthcare facility, the complaint should be lodged to the executive authorities which ensure the realization of the national policy in the healthcare sector. In case of failure to settle a dispute without resort to court, a lawsuit should be filed. Sometimes, it is easier to prove a medical error in a criminal case, especially if doctors' actions caused grave consequences for the patient such as the patient's death, suicide or personal

injuries (grave or medium grave injuries). Although with regard to medical malpractice the possibility of taking proceedings for civil liability is sufficient in principle [Case of Yardimci v. Turkey (Application № 25266/05)] and characterizes the state as ruled by law [ECHR Case of Trocellier v. France (Application № 75725/01)], in exceptional circumstances when the fault, which is assigned to a healthcare provider, is far beyond a medical error or negligence the mechanism for criminal prosecution is necessary [ECHR Case of Vlase v. Romania (Application № 80784/13)]. Specifically, Article 140 of the Criminal Code of Ukraine establishes doctors' liability for failure to perform or improper performance of their professional duties owing to negligent or unconscientious attitude to them providing this caused grave consequences for a patient [Criminal Code of Ukraine from 05.04.2001 p. № 2341-III]. In this case, it is reasonable to appeal to law-enforcing bodies and after proving doctor's fault by the court bringing in the verdict of guilty to file a lawsuit within the framework of a civil case. In these circumstances, the facts a claimant refers to will have been proven in a criminal case, thus, there will be no need to prove them. However, if a relative of a deceased patient accepts compensation within a civil medical negligence case, he cannot act as a victim in other proceedings, in particular criminal proceedings [ECHR Case of Powell v. the United Kingdom (Application № 45305/99)].

It should be noted that it is impossible to prove negative consequences for the patient's health or establish causes of the patient's death without special knowledge in medicine, which means assigning a forensic medical examination or more than one examination in case experts have different opinions or the parties still have unsettled issues. Provided the expert conclusion is deemed incomplete or ambiguous, the court may assign additional expertise to be provided by the same or another expert (or other experts). This is due to the fact that impartiality of expert opinions in such cases may be automatically challenged since experts are practicing doctors who have ethical duty not to criticize their colleagues [Case of Vasileva v. Bulgaria (Application № 23796/10)]. However, if the expert opinion was deemed groundless or such that contradicts the other materials in the proceedings or causes doubt with regard to its accuracy, according Section 2 of Article 113 of the Civil Procedure Code of Ukraine from 03.10.2017, № 2147-VIII, the court may assign repeated expertise to be provided by another expert (other experts).

The evidence from judicial proceedings shows, that the court considers carrying out an expertise necessary. To illustrate the point, let us consider the decision in case №463/3653/14-ц which granted a compensation claim for moral and material damages to a regional clinical hospital in part and awarded 160 000 UAH compensation for moral damages to claimants (parents of a deceased baby). The claimant gave birth to the baby by caesarean section which was performed by an operating surgeon. The baby was a full-term newborn, postnatal condition was satisfactory. However, within 15 minutes after the birth, the baby's condition deteriorated and the baby was transferred to the neonatal intensive care unit where it died of encephalopathy caused by traumatic brain injury. According to the conclusion of forensic medical examination by the panel of doctors, the cause of death of the newborn baby was a birth brain injury in the form of massive brain haemorrhage accompanied by cerebral blood flow failure with secondary permanent brain damage and impaired function of the vitals. The cause of death was confirmed by the autopsy and pathohistological examination.

The court noted that under Section 1 of Article 1172 of the CC of Ukraine a legal person shall indemnify for the damages caused by their employee during the course of the performance of his employment duties and the claimants had suffered damage caused by the employee's illegal actions during the course of the performance of his employment duties. Hence, the court held that the damage was subject to compensation by the regional clinical hospital.

In respect of the amount of compensation for moral (non-property) damage, the court determines it depending on the nature and extent of sufferings (physical, emotional, psychological, etc.) claimants experienced, the nature of non-property losses (its duration, recovery capability, etc.) and other circumstances. In particular, the following factors are considered: the victim's health condition, seriousness of forced changes in his life and working circumstances, extent of prestige and reputation loss, time and efforts that are necessary to require to the best of the victim's abilities.

In addition, the court must use sound judgement and bear the hallmarks of equity and reasonableness in its proceedings. When determining the amount of compensation for moral (non-property) damage, the court must provide the relevant motives in its judgment. For example, the court found that in connection with the death of the newborn baby caused by medical negligence the claimants suffered moral damages that manifested themselves as moral pain, caused by the fact that the claimants had been looking forward to the baby's birth but after its death they experienced constant anxiety, worries about their future and the grief of losing a child. Taking into account the nature and extent of the sufferings the claimants experienced, their length of more than four years, the depth of moral pain and impossibility to restore things to the previous state regardless of time and efforts as well as the fact that the baby's mother suffered moral pain caused by an injury to her health, the court held that the defendant was to pay the mother of the deceased baby 100 000 UAH in respect of moral damages and pay the father 60 000 UAH [Рішення Личаківського районного суду м. Львова від 23.02.2015 р., Case № 463/3653/14-ц].

In another case, the extent of moral pain caused by medical negligence which resulted in giving birth to a group I disabled child (the causal connection between the medical negligence and disability was confirmed by the forensic medical examination) with a length of 11 years was assessed by the court to be equal to 4 807 296 UAH [Рішення Красногвардійського районного суду м. Дніпропетровська від 01.04.2019 р. Case № 204/5773/14-ц].

Focusing attention on the judicial proceedings of Ukraine with respect to this category of cases, it should be noted that, apart from the fact that cases when claims have been satisfied are rare, the compensation amount can also be challenged. For example, the court awards compensation for the damage caused to the patient's health by a medical or healthcare professional in the amounts of 60 000 UAH (2 000 Euros) [Рішення Дзержинського районного суду м. Кривого Рогу Дніпропетровської області від 27.04.2011 р. Case № 2-14/11], 20 000 UAH (860 Euros) [Рішення Шахтарського міськрайонного суду від 18.02.2011 р. Case № 2-1/11], 20 000 UAH (690 Euros) [Рішення Шевченківського районного суду м. Києва від 24 червня 2016 року. Case № 2610/25254/2012], 10 000 UAH (345 Euros) [Рішення Ленінського районного суду м. Луганська від 21.12.2007 р. Case № 2-658-2007], 2 000 UAH (69 Euros) [Рішення Красногвардійського районного суду м. Дніпропетровська від 01.04.2019 р. Case № 204/5773/14-ц].

In addition, there is also a precedent for moral compensation

in the amount of 1 UAH. Specifically, apart from non-property claims (the adjudication of acts illegal and the protection and restoration of rights) the victim claimed and was awarded 1 (one) UAH moral compensation from the hospital for failure to provide him with medical assistance and untimely forced discharge of the victim from the hospital without administering the necessary treatment (which caused grave consequences to the victim's health such as total vision loss (the causal connection between the indicated circumstances was confirmed by the forensic medical examination)) [Рішення Вінницького міського суду Вінницької області від 20.05.2016 р. Case № 212/2-4174/11].

It should also be noted that the realization of guarantees with regard to the protection of victims against medical negligence also involves considering contradictions that may arise, in particular, a risk of unjustifiably imposing liability on medical and healthcare professionals, which can cause harm to their professional morale and encourage them to provide medical practice to the bad of patients, i.e. the so called "defensive medicine" [ECHR Case of Vasileva v. Bulgaria (Application № 23796/10)].

Conclusions.

Hence, summing up everything that is mentioned above the following conclusions can be drawn:

1) liability of a healthcare facility or a private doctor for causing a personal injury to a patient emerges under a contract about providing medical assistance which can be concluded both in oral and written forms;

2) a reason for compensation for material and moral damages inflicted by maiming and other personal injuries including death of a patient is the whole of wrongful act (an act or a failure to act) attributed to a medical or healthcare professional, and consequences in the form of material and/or moral damages inflicted to a patient as well as the causal connection between doctor's wrong-doing and damage caused to a patient;

3) Wrong-doing of a medical or healthcare professional is failure to meet or deviation from the medical standard of care which is established in the relative regulations. Moreover, an act by which damage was caused to a patient might be an intentional act or negligence;

4) Crime of omission committed by a medical or healthcare professional is denial of medical assistance without good reason, for example: failure to provide medical assistance or transfer to another hospital due to incapability of the patient to pay bills; failure to provide the patient with expensive anti-cancerous medication for free in spite of the fact that under the current legislation he is entitled to it; doctor's refusal to terminate pregnancy despite the certificate issued by a general practitioner stating that the pregnancy constituted a threat to the patient's health, etc.

5) the causal connection between acts or failure to act of a medical or healthcare professional and consequences in the form of inflicting maiming or other personal injuries is determined based on a careful study of medical documentation related to a particular patient as well as conducting forensic medical examination. Reasons for compensation for damages caused by medical malpractice should be determined based on direct and indirect causal connection;

6) during hearing a medical malpractice case, a failure to establish the causal connection between doctor's acts/failure to act and damage inflicted to a patient by the national courts leads to the violation of the right to a fair trial and fair hearing rather than the right to physical integrity as an element of the right to respect for private and family life protected (Article 6 of the Convention).

7) in particular cases, medical negligence as a well as other forms of causing personal injuries due to the provision or failure to provide medical assistance must involve both civil and criminal liability;

8) due to the fact that the amount of compensation awarded by court is not often proportionate to caused damage, it is considered reasonable that a compensation rate system be introduced in Ukraine to assess the amount of compensation for damages inflicted by maiming or other personal injuries including death owing to medical malpractice. This system should take into account the special nature of inflicting of damages in medicine, in particular, the nature of doctor's wrongdoing and negative consequences (both material and moral) the patient has experienced or members of his family or relatives in the event of his death.

REFERENCES

1. Булеца С.Б. Способи досудового захисту прав медичного працівника та пацієнта. Науковий вісник Ужгородського національного університету: Серія ПРАВО. 2011;15:141-147.
2. Булеца С.Б. Цивільні правовідносини, що виникають у сфері здійснення медичної діяльності: теоретичні та практичні проблеми. [Дисертація на здобуття вчен. ступ. д-ра юрид. наук]. Одеса: Національний університет «Одеська юридична академія»; 2016. 437 с.
3. Гримм Д. Д. Лекции по догме римського права. Москва. 2003. 496.
4. Гринько С. Д. Зобов'язання, що виникають внаслідок завдання шкоди особі. Часопис цивілістики. 2014;17:148-153.
5. Даньшева Ю. А. Обязательства вследствие причинения вреда жизни и здоровью работника. [Диссертация на соискание ученой степ. д-ра юрид. наук]. Москва: Всероссийская государственная налоговая академия; 2004. 154 с.
6. Дрішлюк К. В. Відшкодування шкоди, завданої кримінальним правопорушенням як завдання кримінального судочинства України. Порівняльно-аналітичне право. 2017;3:217-219.
7. Інструкція щодо заповнення форми первинної облікової документації № 043/о «Медична карта стоматологічного хворого»: Затверджено Наказом Міністерства охорони здоров'я України від 14.02.2012 № 110 [Електронний ресурс]. URL: https://zakon.rada.gov.ua/laws/show/z0678-12#n2 (дата звернення: 17.07.2019).
8. Мамушкіна А. Визначення розміру відшкодування шкоди, заподіяної внаслідок вчинення терористичного акту. Підприємництво, господарство і право. 2018;6:35-40.
9. Про затвердження та впровадження медико-технологічних документів зі стандартизації медичної допомоги при ішемічному інсульті: Наказ Міністерства охорони здоров'я України від 03.08.2012 р. № 602 [Електронний ресурс]. URL: http://search.ligazakon.ua/l_doc2.nsf/link1/MOZ16323.html (дата звернення: 26.06.2019).
10. Про затвердження форм первинної облікової документації та Інструкцій щодо їх заповнення, що використовуються у закладах охорони здоров'я незалежно від форми власності та підпорядкування: Наказ Міністерства охорони здоров'я України від 14.02.2012 р. № 110 (у ред. від 13.03.2018 р.) [Електронний ресурс]. URL: https://zakon3.rada.gov.ua/laws/show/z0661-12 (дата звернення: 17.07.2019).
11. Про захист прав споживачів: Закон України від 01.12.2005 р. № 3161-IV (у ред. від 01.01.2019 р.). Відомості Верховної Ради України. 2006;7:84.

12. Про звернення громадян: Закон України від 02.10.1996 р. № 393/96-ВР (у ред. від 11.10.2018 р.). Відомості Верховної Ради України. 1996;47:256.
13. Про практику розгляду судами цивільних справ за позовами про відшкодування шкоди: Постанова Пленуму Верховного Суду України від 27.03.1992 р. № 6 (у ред. від 24.10.2003 р.) [Електронний ресурс]. URL: https://zakon.rada.gov.ua/laws/show/v0006700-92 (дата звернення: 12.06.2019).
14. Про створення та впровадження медико-технологічних документів зі стандартизації медичної допомоги в системі Міністерства охорони здоров'я України: Наказ Міністерства охорони здоров'я України від 28.09.2012 № 751. URL: http://zakon2.rada.gov.ua/laws/show/z2001-12 (дата звернення: 26.06.2019).
15. Рубан О. О. Відшкодування шкоди, завданої здоров'ю або життю фізичної особи на виробництві за цивільним законодавством України. [Автореферат дисертації на здобуття наук. ступ. канд. юрид. наук]. Харків: Національний юридичний університет імені Ярослава Мудрого; 2017. 21 с.

SUMMARY

OBLIGATIONS TO INDEMNIFY DAMAGES INFLICTED BY MAIMING AND OTHER PERSONAL INJURIES INCLUDING DEATH: THEORETICAL AND PRACTICAL ISSUES (REVIEW)

Buletsa S., Zaborovskyy V., Chepys O., Badyda A., Panina Yu.

State Institution Of Higher Education «Uzhhorod National University», Ukraine

The present article aims to provide a comprehensive review of the legal basis for and special features of indemnification for damages inflicted by maiming and other personal injuries including death, in particular, due to the doctor's treatment or the denial of medical care.

The fulfilment of the aim involved critical analysis of civil legislation of Ukraine, with regard to indemnification for damages inflicted by maiming and other personal injuries including death. It also employs the legal framework governing out-of-court and in-court settlement of disputes with regard to inflicting personal injury to patients due to the provision of medical assistance or failure to provide medical assistance and some aspects of the assessment of damages to be awarded to the injured patient. In order to identify common trends relating to court decisions on damages in personal injury and wrongful death cases in the healthcare setting, 8 decisions made by domestic national courts of Ukraine as well as 17 decisions made by the European Court of Human Rights were considered. The present research employed the comparative legal research method, the integrated system-wide approach, the method of , the inductive method, the method of modelling , etc.

Based on the conducted research, both out-of-court and in-court ways of the settlement of disputes with regard to inflicting personal injury to patients due to the provision of medical assistance or failure to provide medical assistance were identified as well as and some aspects of the assessment of the amount of compensation for damages to be awarded to the injured patient. The article provides a critical description of the reasons for liability of healthcare facilities or private doctors for causing maiming or other personal injuries including death to patients as well as the special features of this liability in criminal proceedings. It also outlines common tendencies of making decisions on personal injury cases involving the healthcare sector by the European Court of Human Rights. The article examines the role and special features of forensic medical examination as a sound basis for determining the fact of causing a personal injury.

Keywords: damage, health, medical care, European Court of Human Rights, indemnification, treatment.

РЕЗЮМЕ

ОБЯЗАТЕЛЬСТВА ПО ВОЗМЕЩЕНИЮ ВРЕДА, ПРИЧИНЕННОГО УВЕЧЬЕМ, ДРУГИМ ПОВРЕЖДЕНИЕМ ЗДОРОВЬЯ ИЛИ СМЕРТЬЮ: ТЕОРЕТИЧЕСКИЕ И ПРАКТИЧЕСКИЕ АСПЕКТЫ (ОБЗОР)

Булеца С.Б., Заборовский В.В., Чепис О.И., Бадида А.Ю., Панина Ю.С.

Государственное высшее учебное заведение «Ужгородский национальный университет», Украина

Целью статьи является комплексный анализ правовых оснований и особенностей возмещения вреда, причиненного увечьем, другим повреждением здоровья или смертью вследствие предоставления или безосновательного отказа в предоставлении медицинских услуг.

Проведено комплексное исследование гражданского законодательства Украины по вопросам, регулирующим возмещение вреда, причиненного увечьем, другим повреждением здоровья или смертью, а также нормативной базы Украины по регламентации внесудебных и судебных способов урегулирования споров о причинении вреда жизни или здоровью пациентов в результате предоставления или не предоставления медицинских услуг, отдельных аспектов определения размера возмещения за такой ущерб. С целью обобщения судебной практики в части рассмотрения дел о возмещении вреда, причиненного увечьем, другим повреждением здоровья или смертью в сфере оказания медицинских услуг, проанализированы 8 решений, вынесенных внутренними национальными судами Украины, а также 17 решений Европейского суда по правам человека. При проведении исследования использован сравнительно-правовой, системно-комплексный метод, методы анализа, индукции и моделирования.

На основании проведенного исследования определены внесудебные и судебные способы урегулирования споров о причинении вреда жизни или здоровью пациентов в результате предоставления или не предоставления медицинских услуг, отдельные аспекты определения размера возмещения за такой ущерб. Охарактеризованы основания для возникновения ответственности медицинских учреждений или частных врачей за причинение увечья, иного повреждения здоровья или смерти, а также особенности такой ответственности при наличии уголовного производства. Определены общие тенденции в принятии Европейским судом по правам человека решений по делам, касающимся причинения вреда жизни или здоровью лица в сфере медицинских услуг. Охарактеризована роль и особенности судебно-медицинской экспертизы как ключевого основания для установления факта причинения вреда жизни или здоровью пациента.