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**THE ANALYSIS OF PRACTICE OF THE EUROPEAN COURT ON HUMAN RIGHTS  
AND NATIONAL COURTS IN THE SPHERE OF ORGAN TRANSPLANTATION**

**АНАЛІЗ ПРАКТИКИ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ  
ТА НАЦІОНАЛЬНИХ СУДІВ У СФЕРІ ТРАНСПЛАНТАЦІЇ ОРГАНІВ**

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This article is focused on the analysis of judicial practice in the field of protection of organ transplantation in both – within the EU and beyond. In the article the main basic reasons that can serve as a reason for applying to court for protection of the right to transplantation as part of the right to health are characterized. In addition, the article provides examples of court cases in the U.S. and the UK that illustrate the difficulties the courts and applicants faced with in the protection of right to transplantation. The article also notes the need for strict regulation of all aspects of transplantation and the formation of a single instrument (Guideline), which will provide the description of situations, in which a person can apply to the court for protection of violated right.

**Key words:** organ transplantation, protection of the right to transplantation, court practice in the field of transplantation, the applying to the court.

Дана стаття присвячена аналізу судової практики в сфері захисту права на трансплантацію як в рамках Європейського Союзу, так і поза його межами. Охарактеризовано основні підстави, які можуть слугувати причиною звернення до суду за захистом права на трансплантацію як частини права на охорону здоров'я. Крім того, у статті наведено приклади з судових справ США та Великобританії, які наочно показують труднощі, з якими стикаються як суди під час захисту порушеного права, так і самі заявники. В статті також зазначено необхідність чіткого регулювання всіх аспектів проведення трансплантації та формування єдиної Інструкції, в якій необхідно передбачити основні ситуації, при виникненні яких особа може звернутись до суду.

**Ключові слова:** трансплантація органів, захист права на трансплантацію, судова практика в сфері трансплантації, підстави звернення до суду.

Данная статья посвящена анализу судебной практики в сфере защиты права на трансплантацию как в рамках Европейского Союза, так и за его пределами. Охарактеризованы главные основания, которые могут служить причиной обращения в суд за защитой права на

трансплантацию как части права на охрану здоровья. Кроме того, в статье приведены примеры из судебных дел США и Великобритании, которые наглядно показывают трудности, с которыми сталкиваются как суды при защите нарушенного права, так и сами заявители. В статье также указана необходимость четкого регулирования всех аспектов проведения трансплантации и формирования единой Инструкции, в которой необходимо предусмотреть основные ситуации, при возникновении которых физическое лицо может обратиться в суд.

**Ключевые слова:** трансплантация органов, защита права на трансплантацию, судебная практика в сфере трансплантации, основания обращения в суд.

Organ transplantation is a developing branch of medicine, which combines in it various ethical, business, practical, legal, religious, technical and other aspects. The human right to health is guaranteed by all major international instruments. It can be concluded that the right to transplantation is a component of the right to health and also a subject to protection by the competent authorities, and the breach of this right has its consequence the right to appeal for the protection before the court.

One of the problems which occur during the protection of the rights to transplantation is that, that in most cases this protection occurs at the national or federal level, without an issue for discussion in the European Court on Human rights. Thus, within the European Union there is no courts practice which will be helpful for national courts to make the decisions in this sphere. In this article we would like to accent the attention to the practice found not only within the European Union member states, but also in the U.S., Canada, which are acting on a step ahead of EU jurisprudence on matters likely accelerate transplantation, as well as other countries that are not the part of the EU but decisions of national courts of which may serve as an example which can be necessary to create case-law in the future. The lack of court practice on the European Union's level led to the problem of lack of research articles and publication which can highlight the raised problem.

The main tasks of the article are:

- To analyze the reasons for appealing to the courts for protection of the right to transplantation;
- To form the main ideas and problems, which occurs during the appealing to the court by using existing practice within the USA and some other countries;
- To form the understanding of the need to develop jurisprudence in the cases of determination of the brain death (in the cases of using organs for transplantation from dead person); of elimination of discrimination during the allocation of organs.

First of all it is important to outline the most frequent violations of the right to health and to organ transplantation, which serve as the ground for claim before the court. Such questions arise in the cases about provision of organs and lies in following:

**Discrimination.** In adjudicating discrimination claims, courts or human rights tribunals are concerned with unjustified discrimination; if people are treated differently on the basis of legitimate characteristics, discrimination is justifiable and courts or tribunals will not interfere with resource allocation choices. In the organ transplantation context, giving priority to patients on the basis of their medically predicted success as a transplant recipient will clearly be more defensible than allocation on other grounds without medical relevance. For example, the Dutch Minister of Health provoked controversy in 2005 when he suggested that registered organ donors receive priority for organ transplants should they require one. This proposal involved overtones of religious and ethnic discrimination as the Health Minister argued that Muslims often refuse to donate organs because of their religious beliefs. But are willing to receive transplants [1].

**Mental illness.** Another area that has generated controversy is denial of organs for patients diagnosed with mental illness

(patients with schizophrenia, borderline personality disorder, and history of suicide attempts) – some commentators have argued these practices violate anti – discrimination law [1].

**Age discrimination.** Age related organ allocation may also be criticized as unjustifiable discrimination, particularly considering that «various forces – such as improved surgical techniques, immunosuppressive drugs, competition among new transplant centers, and the challenges to surpass existing limits – have weakened age based limits» (Hackler & Hester, 2005. 130). However, it has been suggested that organs from older donors be matched with older recipients to satisfy principles of both equity and fairness (Hackler & Hester, 2005) [1].

**Incompetent organ donors.** The main problem in this case is the possibility of organ transplantation from a person who is not a close relative of the recipient. Since most countries require blood relationship for transplantation, courts must create a practice that would allow to carry out transplants from other persons, which due to all health indicators are suitable for surgery. An example of such a case can be *Strunk V Strunk* (445 S.W.2d 145 (Ky. CT.App.1969), where the child was transplanted a kidney from another person, as the organs of relatives were not well suited to medical criteria [2, p. 354].

**Conceiving of the Child** as a purpose to have tissues to transplantation. (*Ayala case* – in which a couple conceived a child to serve as a bone marrow donor for their daughter) [2, p. 362].

**Redefining Death.** As was mentioned into previous chapter – the legislation of the EU does not give clear understanding of the process of making the diagnosis of the brain death, which is the main issue to concern the person dead. Very good example of case which can show problems of using organs while person is still alive is case «*In Re T.A.C.P.*». Main points of following case is that, the parents of the child T.A.C.P. on the eighth month of pregnancy were informed that the child will be born with anencephaly. This is a birth defect invariably fatal, in which the child typically is born with only a «brain stem» but otherwise lacks a human brain. The problem with such diseases is that the child can survive several days after birth because the brain stem has a limited capacity to maintain autonomic bodily functions such as breathing and heartbeat. In analyzing case the child survived only a few days after birth. Physicians recommended the parents to continue pregnancy and after the cesarean procedure organs of a born child will be used for transplantation for other children. The parents filed the petition to the circuit court asking for a judicial determination of the question about the determination of death, due to the fact that health care providers of the T.A.C.P refused out of concern that they might incur civil or criminal liability. Court on the basis of Florida Statutes dined the request of the parents to determine the death of the child so long as the child's brain stem continued to function [2, p. 375].

**Ownership and control on the body.** Problems of determination of the ownership of the organs and problems about the control of the body frequently arise when it comes about the transplantation of organs from the persons who have died. The solution of the determination can be solved by fixing the position that clearly establishes defini-

tion of the transplant and its legal nature. Some scientist are defying transplants as things, that have it certain value and can be an objects of purchase and sale. For example, the USA expands the scope of the possible use of the object transplantation, establishing criminal prohibition on commercial donation. Judicial practice recognizes the object transplant as a thing, which, however, does not find support among lawmakers [3].

**Allocation of organs.** It is a well-known fact that organs should be allocated due to special so called «waiting list» of the recipients. Persons that need organ for transplantation must be confident that they equal opportunities to be tapped into the system of allocation of organs: «in selecting a system of allocation, it would be wise to choose one «that favored those most likely to benefit from a transplant. Rational planners [behind the veil of ignorance], ignorant as to whether or not they will ever need a transplant or retransplant, would increase their own chances of benefiting from a transplant by setting up a system that, all else equal, distributed scarce organs to those most likely to gain long-term survival from a transplant» [4].

**Medical negligence.** First of all it is necessary to determine the definition of the medical negligence. Such a conduct of the specialist can be defined as non-performance or improper performance by medical or pharmacist his professional duties as a result of negligent or careless attitude toward them that caused serious consequences for the patient. The example of case where doctors admitted negligence during the procedure of transplantation can be the case *Kelly v New York Organ Donor Network, Inc.* Main issue of the case lies in that, that «that the New York Organ Donor Network, Inc. was negligent in failing to properly evaluate the suitability of the donor's organs for transplantation, failing to promptly review the donor's medical records before approving transplantation of his organs, approving and facilitating the harvesting of cancerous and diseased organs for transplantation into the recipient plaintiff's body, accepting organs from a donor with reported bacterial meningitis without identifying the organism or verifying the diagnosis, and failing to learn the true cause of death before the donation occurred» [5]. As a result, Court decided to dismissed the compliant due to the fact that the parties acted responsibly when it became obviously that donor of the kidney had cancer, affording the recipient plaintiff all possible care and treatment possible to reverse the unfortunate circumstances. Moreover, medical practice does not envisages a conduction of the biopsy upon a donor organ prior to transplantation, and as a result this cannot concern as a medical negligence [5].

Some countries fix in their legislations provisions about the main issues that should be taken into account by court. For example, the United Kingdom approved in March 2013 the Code of practice 2 «Donation of solid organs for transplantation», in which in Annex 1 «Guidance on requirements for court approval» fixes the most important issues, which should be taken into account by the Court when the questions dealing with organ transplantation, arise. For instance, in the rare case where a child (a person under 18) is being considered as a potential organ donor, case law suggests that the case should be referred to court for a ruling on whether the proposed intervention is lawful. (In cases involving 16-17 year olds who may lack capacity under the terms of the MC Act that is lacking capacity due to an impairment of, or disturbance of, the mind or brain, whether permanent or temporary the requirements of the MC Act code of practice apply [6].

Person, whose rights were violated can appeal to a court into two directions – as suffered party in criminal case and

as a party for compensation in civil case. Speaking directly about crimes in the field of organ transplantation and human tissue and blood donation we can divide them into next groups:

- Criminal attempt on the life, health and rights of the recipient for transplantation;
- Criminal attempt on the life, health and rights of the donor for transplantation.
- Crime in the circulation of organs and tissues intended for transplantation.

Such crimes must meet specific requirements to be defined by court as unlawful: they must violate the law of transplantation of human tissues; removing a person's organs are made by coercion or deception, illicit trade in human organs or tissues, participation in multinational organizations involved in such activities (not necessarily).

When it comes about possibility of compensation as separate way of appealing to the court, acutely raises the question about evidence of guilt. The patient, in order to receive a payment, must first prove that there has been negligence on the part of the physician. The analysis of the court practice has shown that the courts, in decisions on such claims often refer to the doctrine of *res ipsa loquitur* [7]. The claimants sometimes use the doctrine of *res ipsa loquitur* in view of the fact that, in many cases, it can be very difficult to prove that the injury was caused by the fault of the doctor. It is the most effective in cases where the damage is caused by accidents involving special technical means or if the damage was caused to the applicant at the time when he took a complicated process. Such procedure is the best for applying in the case of transplantation of organs due to the complexity of its procedure. The doctrine applies only when the applicant cannot accurately determine the nature of the criminal negligence, as a result of which he was suffered damage. In such cases courts are authorized to approve the restitution in the form of compensation or compensation for moral damages.

As it was mentioned, one of the claims to the courts can be the claim which deals with trafficking of human beings with the purpose for using their organs for transplantation. For example, Kosovo court gives 3 prison terms in organ-trafficking case involving kidneys from poor donors. The trial began in December 2011 and included more than 100 witnesses. All the donors and recipients were foreign nationals. At least 24 kidney transplants, involving 48 donors and recipients, were carried out between 2008 and 2009, the period the case covered. The donors «were alone, did not speak the language, uncertain of what they were doing and had no one to protect their interest,» the court's reasoning read. «Some donors had severe second thoughts at the clinic, but were given no opportunity to back out and were psychologically pressured into going forward with the surgery» [8].

Moreover, sometimes cases about transplantation of organs raise lacks in the activity not only physicians and medical institutions, but other legal authorities. As the example can be used case of Roseline Akhalu, Nigerian university graduate, came to the UK in 2004 on a Ford Foundation scholarship to do a Masters degree in Development and Gender Studies at Leeds University in the UK. After she arrived to the UK she was diagnosed with renal failure and began treatment. In 2009 she had a successful kidney transplant. As the part of the postoperative rehabilitation the girl needs to take immunosuppressant drugs for the rest of her life or the transplant will fail. The problem was that such drugs are prohibitively expensive in Nigeria and in the case of her deportation from the UK Roseline would be unable to afford them and she will die within four weeks [9].

When the case came into a court, Judge Saffer found that Akhalu's removal would indeed breach her right to a private and family life protected by Article 8 of the European Convention on Human Rights, that Roseline had established a private life of value to her, members of the Church and the wider community. According to Akhalu's lawyers Judge Saffer «took note of the fact that Roseline came here legally, was diagnosed whilst here legally, that the cost of her ongoing treatment was not excessive and that she would die quickly in distressing circumstances if returned. After considering all the evidence he found that the Home Secretary should have granted Roseline leave to remain and allowed the appeal» [9].

Thereby, it can be concluded that court's decision had impact into the further activity of the Home Office and the UK Border Agency and can be as a precedent for future possible cases.

From the analysis of the existing problems in the sphere of possibility to apply to court for protection of

the right to transplantation, it can be concluded that:

- Gaps in the existing legislation of transplantation cause a lot of problems, especially ethical nature, and leave a lot of points that could serve as the cause of medical negligence;

- Absence common court practice in the sphere of transplantation do not allow to form possible ways of solving problems, that arise during the conducting of the procedure of transplantation;

- One of the main weakness is that transplantation raises a lot of issues of business character, commercialization; trafficking, which, as follows, is regulating by criminal law. Thus, there is only a small number of cases, which were decided by court and have totally civil nature (fixing consent for transplantation, agreement between donor, recipient and medical institution, etc.)

To solve these problems it is necessary to create a common Guideline, which will include all possible situation in which person can apply to the court.

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