

## The Right of a Person to Medical Care in Ukraine

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### **Abstract**

*The relevance of the problem considered in the article is caused by the absence of the definition of the legal status of the participants in the relationships between the medical institution and the patient, as well as the object of this relationship, and the content of the “medical error” concept. The aim of the article is to examine the legal status of the participants to the said relations (the medical professional and the patient), to determine the object of such legal relations and to define what constitutes the so-called “medical error”. The article provides a general overview of the legislation regulating the provision of medical services. The main features that characterize the person as a patient under the contract for the provision of medical services are determined. The practice of national courts is analyzed in the article in order to identify common problems with the application of legislation on compensation for damage caused by a “medical error”. Apart from that, the author focuses on the legal status of the parties to the agreement on the provision of medical services. The provision of medical care and services is aimed at the preservation of human life and health, which benefits not only the interests of the patient himself and his family members, but also in the long run the interests of the state and society as a whole. The relations between the medical institution and the patient are governed first and foremost by the norms of civil law, which means that legal disputes arising out of these relations (e.g. if the patient is harmed due to his physician’s failure to exercise due care) are considered as civil cases. The findings propose to determine the legal status of the healthcare professional and the patient, as well as to ensure the mandatory professional representation of patients in cases of “medical errors”.*

**Keywords:** medical law; patient; medical error; contract for medical care.

## Право особи на медичну допомогу в Україні

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### **Анотація**

*Актуальність розглянутої в статті проблеми зумовлено доцільністю визначення правового статусу учасників відносин між медичною установою і пацієнтом, змісту поняття «лікарська помилка» та об'єкта таких правовідносин. Мета статті полягає в дослідженні правового статусу учасників відносин між медичними працівниками і пацієнтами, визначенні об'єкта таких правовідносин та змісту поняття «лікарська помилка». У статті подано загальний огляд законодавства, що регулює надання медичних послуг. Визначено основні ознаки, що характеризують особу як пацієнта за договором про надання медичних послуг. Проаналізовано практику національних судів з метою виявлення типових проблем щодо застосування законодавства про відшкодування шкоди, завданої «лікарською помилкою». Крім того, акцентовано увагу на правовому статусі сторін договору про надання медичних послуг. Зроблено висновок, що надання медичної допомоги і медичних послуг спрямоване на збереження життя та здоров'я людини, що відповідає не тільки інтересам самого пацієнта та членів його сім'ї, а й інтересам держави та суспільства в цілому. Відносини між медичною установою та пацієнтом регулюються насамперед нормами цивільного права, а це означає, що судові спори, що виникають із цих відносин (наприклад, якщо пацієнту завдано шкоди через лікарську помилку), розглядають у порядку цивільного судочинства. Доцільним вбачається визначити правовий статус медичного працівника та пацієнта, а також забезпечити обов'язкове професійне представництво інтересів пацієнтів у випадках «лікарської помилки».*

**Ключові слова:** медичне право; пацієнт; лікарська помилка; договір про надання медичної допомоги.

### **Introduction**

Healthcare is one of the priorities of the state. The activity of the state and the implementation of its policy in the field of healthcare is carried out by approving a system of standards that include state social norms and industry standards<sup>1</sup>. Medical activity is the core concept in the field of healthcare, which is directly related to the practice of treatment and rehabilitation of patients by qualified employees within specially created medical and rehabilitation institutions.

The current Ukrainian legislation does not contain an official interpretation of medical activities. Yet, current legislation does contain the official definitions of the following concepts: "medical care", "rehabilitation care", "health care service", "rehabilitation service".

Article 3 of the Fundamentals defines medical care as the activity of professionally trained medical workers aimed at prevention, diagnosis and treatment for diseases, injuries, poisoning and pathological conditions, as well as in connection with pregnancy and childbirth.

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<sup>1</sup> See: Art. 141 of the Fundamentals of the Legislation of Ukraine on Healthcare (hereinafter – Fundamentals), the Laws of Ukraine "On State Social Standards and State Social Guarantees" and "On State Financial Guarantees of Medical Service to the Population".

The nature of such a relationship is closed in a circle, because, as we can see, if a patient seeks medical help, he receives it exclusively through the provision of medical services. It is the medical service that reflects the legal procedure and organization of its provision and to some extent use, while medical care is a complex of different actions of a medical nature that constitute the profession of a medical professional and are aimed at achieving a specific physiological result.

It should be noted, however, that most scholarly studies of the legal nature of such concepts as "medical care", "health care", "medical service" etc. were carried out before their official consolidation in the legislation and the latest large-scale medical reform. At the same time, the approaches to understanding these concepts were ambiguous and rather contradictory. However, the scholarly studies of these categories led to their official interpretation by law, which simplifies their application in practice, although it does not exclude problems.

Within the framework of civil legal relations, the service is one of the objects of civil rights (Art. 177 Civil Code of Ukraine, hereinafter – CC). The service is the object of a group of civil law agreements on the provision of services, a characteristic feature of which is the consumption of the service in the process of performing a certain action or carrying out certain activities (Part 1, Art. 901 CC). Thus, based on the said provision, any service is a set of certain actions or certain activities. It can also include a certain result, which is achieved through the implementation of a set of actions, including for a long time.

At the same time, in practice, there are often problems with the application of these provisions of the legislation and determining the nature of the relationship between the patient, the healthcare professional and the quality of the medical service provided.

Especially acute is the problem of holding the medical care provider responsible for the harm caused to the patient. The issue is being analyzed through the prism of the "medical error" concept [1–3]. Recent monograph by M. Saks and S. Landsman specifically addresses the issue [4]. More broadly the legal aspects of the patient's safety are examined by B. R. Furrow [5] J. Healy [6], N.M. Ries [7] K. Zeiler and G. Hardy [8]. The enlightening approach concerning the application of human rights law to the realm of medical care is offered by J. Cohen and T. Ezer [9].

The complex issues revolving around the right of a person to medical care has been analyzed by a number of prominent Ukrainian legal scholars. Among them there are: S.V. Antonov [10], R.A. Majdanik [11], S.V. Mykhailov [12],

I.Y. Senyuta [13], M.Y. Shchyrba [14], S.G. Stetsenko [15] and others. Particular issues concerning the application of tort law to damage caused to patients were analyzed by B.P. Karnaukh [16–18]. However much of concepts, and especially the concept of "medical error" remain to be underdeveloped in the domestic legal doctrine. Therefore, this article seeks to contribute to the discourse on interrelation of law and complex sphere of medical services.

## **Materials and Methods**

The article provides a general overview of the legislation regulating the provision of medical services. The provision of medical and/or rehabilitation care is carried out through the organization of medical care, which is defined by law as the activities of healthcare institutions, rehabilitation institutions, departments and individual entrepreneurs who have registered and received the appropriate license in accordance with the procedure established by law in the field of health care, which is not necessarily limited to medical care and/or rehabilitation assistance, but is directly related to their provision.

First, it focuses on the definition of the two core participants of the legal relations for providing medical care, namely healthcare institution and patient. With regard to healthcare institutions the article contains a comprehensive analysis of the provisions defining the legal status of healthcare services providers. We also examine the relation between the healthcare institution and its employees (doctors, physicians, nurses etc). In this regard it is important to understand that although the contract for the provision of healthcare services is concluded between the patient and the institution, the actual manipulations are made by the institution's employees. And according to Art 1172 of the Civil Code of Ukraine (hereinafter CC) the employer is liable in damages for the harm caused by its employee while performing the job functions.

The paper scrutinizes the legal status of a patient in legal relations for the provision of health care services. In particular, we focus on the constitutive features that form the very essence of the term "patient". Special attention is, then, paid to the problem of interrelation between legal definitions of patient and consumer, in other words, whether a patient can be considered as a consumer. This problem has many practical implications, since if patient is a consumer, then the special legislation on consumer protection applies to relations between patients and medical institutions or other providers of health care services. In this context we will resort to Ukrainian jurisprudence and analyze the position of the courts on the issue.

The third part of the article is dedicated to the concept of medical error. The concept is approached both from the perspective of law and medicine. And

meanwhile medicine usually treats medical error as occurring without fault of medical professional (due to some unpredictable turn of events), legal writers split on the issue of whether medical error is necessarily an accident or rather a result of negligence. The issue of fault is crucial for the purposes of imposing civil (tort) liability since as a general rule, to claim damages one has to prove four elements of tort, namely: wrongfulness, damage, causation and fault. However, in cases specifically provided for by law tort liability may be imposed regardless of fault (strict liability regime).

The burden of proof in tort cases concerning medical malpractice may appear to be especially hard to discharge for a layperson. Therefore, it seems reasonable to set a rule, requiring obligatory representation of person by a professional attorney in cases concerning compensation for damage caused by the defective provision of healthcare services.

## **Results and Discussion**

### ***Who is the healthcare professional?***

First of all, it is worth starting with the fact that the legislation of Ukraine does not contain the definition of a medical worker. Its legal status is mainly determined by the application of labor law and medical legislation. At the same time, as we demonstrate on specific examples of judicial practice, determining their status directly affects the protection of patient's violated rights.

The list of actors in the field of medical services provision include medical care providers, executors of medical services and their consumers (their representatives, family members, etc.). Providers of medical services are health care institutions of all forms of ownership and individual entrepreneurs who received a license to conduct economic activities in medical practice and concluded an agreement on medical care of the population with the main managers of the budget funds.

The provision of medical services can be carried out by medical institutions of all types of ownership.

I.Y. Senyuta notes that medical institutions as subjects of legal relations for the provision of medical services, mediate the process of medical care, organize the functioning of a medical service system, are participate in informational relations [13, p. 156].

The provision of medical services under the program of medical guarantees is carried out by state, municipal and private healthcare institutions, including individual entrepreneurs. The National Health Service of Ukraine acts as the only national purchaser of medical services and medicines under the program of

medical guarantees, functioning on the basis of the Regulation on the National Health Service of Ukraine.

Concluding, changing and terminating the contracts on medical care for the population and agreements on the reimbursement are the main functions of the National Health Service of Ukraine.

The mechanism of conclusion, amendment and termination of the agreement on medical care of the population under the program of medical guarantees is determined by the "Procedure for concluding, changing and terminating the contract on medical care under the program of medical guarantees".

Depending on the form of ownership, healthcare institutions can be divided into: public, municipal, private or based on a mixed form of ownership. State and municipal healthcare institutions are not subject to privatization. Health care institutions in private ownership are not limited in the choice of organizational and legal form.

The form of ownership and the organizational and legal form of a medical institution can to some extent affect the quality and volume of medical services provided to the population, but the main condition for the functioning of any medical institution is licensing (Art. 17 of the Fundamentals), which ensures and maintains a standardized level of quality of medical services.

The procedure for licensing economic activity in medical practice is primarily governed by the Law of Ukraine "On Licensing of Economic Activities Types" and Licensing conditions for conducting economic activities in medical practice which set the requirements with regard to organizational issues, personnel and technologies in possession, material and technical base of the licensee. Those requirements must be fulfilled by all legal entities, regardless of their organizational and legal form and individual entrepreneurs who carry out economic activities in medical practice.

Licensing of economic activity in medical practice warrants the compliance with the material, technical and personnel requirements set forth by the current legislation. Thus, medical services (medical care) must meet all the requirements of its standardization, including, if necessary, accreditation and certification, etc.

It should be noted that special attention is paid to personnel requirements when licensing medical activities. As already noted, medical services are provided exclusively on a professional basis, that is, medical care should be provided by persons who meet the unified qualification requirements approved by law. Since the main content of the relationship for the provision of medical services is medical care, one has to pay close attention to the subjects of the relevant

relationship – these are direct providers of medical care – medical workers (professionals and specialists).

As noted by researchers of the legal status of medical professionals, the proper performance of professional duties is one of the main tasks of any given professional activity and one of the main problems complained about by consumers, including consumers of medical services. Qualification is the category that determines the professionalism, competence and ability of the employee to perform specific work within a certain profession. The consequences of unprofessional and unqualified provision of medical care (services) can be: persistent or temporary injuries, loss of ability to work, death; pecuniary losses in the form avoidable expenditures on treatment; psychological trauma, etc. [19, p. 134].

Medical workers are not parties to an agreement for provision of medical services, but, as subjects of labor law, they are direct subjects of relations for the provision of medical care, which is their professional duty and part of the labor function. The current legislation, as have been already mentioned, clearly indicates that medical institutions (individual entrepreneurs) are the providers of medical services and a party to the agreement on their provision. Thus, the medical institution, as a provider of medical services and a party to the contract, will bear civil liability for the damage caused to the patient, despite the fact that the causing of such damage is very often associated with the actions or omissions of the medical worker (Art. 1172 CC).

In judicial practice, there are cases where the plaintiff is wrong in determining the defendant, but the court does not correct the specified error. In one case concerning the invalidation of the contract, the guardian alleged that the contract for the provision of medical services was concluded between her incapacitated husband and legal entity. The plaintiff insisted in court that the defendant was the director of the said legal entity, and categorically refused to apply to the court with a statement about the replacement of the inappropriate defendant, as was indicated in the court ruling on leaving the claim without consideration [20].

Of course, in this case, the person's helplessness and hopelessness in the appeal proceedings to review the court decision without a professional representative is fully found, since the applicant appealed to the court with a request to invalidate the worthless transaction. At the same time, as stated in the court decision, "the plaintiff could not explain to the court the application of the requirements for the recognition of the transaction as invalid, since under the Part 1 of Art. 226 CC, it is void, unless it is approved by the guardian," i.e. the plaintiff herself.

At the same time, this example demonstrates the peculiarity of medical disputes and the need to take this into account when regulating the relevant relations.

Article 74 of the Fundamentals states that qualification requirements for persons who carry out certain types of medical and pharmaceutical activities, provide rehabilitation assistance, are established by the central executive body that ensures the formation of state policy in the field of health care. Qualification requirements include first of all the definition of the educational qualification level of the employee, the direction and specialty of his training, advanced training, work experience.

The heads of healthcare institutions, as well as bodies that have the right to issue a license to conduct relevant types of economic activity, are responsible for compliance with these qualification requirements.

Thus, medical professionals with higher medical education and specialists with medical education who are directly involved in the provision of medical care are considered to be medical workers. The main professionals in the relevant activities are doctors. The main specialists are nurses.

The doctor is a professional in the field of medicine, who has a specialty in the field of medical science, pediatrics, dentistry, medical and preventive care and in other fields, provides medical care aimed at prevention, diagnosis and treatment for diseases, injuries, poisonings and pathological conditions, as well as in connection with pregnancy and childbirth.

The nurse is a specialist in the field of medicine, who has a specialty in the field of medical, obstetrics, preventive medicine, laboratory diagnostics, dentistry and other fields, is a doctor's assistant in the provision of medical care, fulfills his appointment and carries out the nursing process aimed at prevention, diagnosis and treatment of patients.

All other health care workers, if they do not provide medical care, do not belong to medical professionals, although they are health care workers. Healthcare technicians also cannot be considered medical professionals, taking into account their labor functions, level of education and job responsibilities [19, p. 141].

### ***Patient or consumer?***

The central subject of relations concerning the provision of medical services is the patient. Such relations are contractual, that is, arise between the patient and the medical institution and are implemented in the process of obtaining medical care. But the greatest number of problems arises in the event of disputes, harm, prosecution and in the process of consideration of cases in courts.



Patients in the relationship for the provision of medical services, based on the essence of such relationships and the nature of services, shall be considered as consumers. According to many researchers, the legal status of the consumer of medical services plays a significant role, because it is the exercise of consumer's rights that is the basis for the commencement, alteration and termination of these legal relations, and causes the rights and obligations of other participants in the said relations and at the end of the day the very functioning of the entire healthcare sector [21, p. 52].

In accordance with the Law of Ukraine "On Consumer Rights Protection", the consumer is an individual who purchases, orders, uses or intends to purchase or order products for personal needs not directly related to entrepreneurial activity or fulfillment of the duties of an employee. At the same time, in the above definition of the consumer, there are traits that are inherent in consumers of medical services, firstly, they are always individuals; secondly, the service is used to meet personal needs.

Based on the norms of the current legislation, when it comes to the consumer of medical services, that is, the patient, basically the legal status of such a person is associated with an individual receiving medical care.

For example, in accordance with Article 3 of the Fundamentals, a patient is an individual who seeks medical care and/or to whom such care is provided. Similar abstract definitions of the concept of "patient" are also contained in most scholarly sources, which for a long time do not acquire specific legally significant features.

In the scientific literature of various periods one can encounter the following definitions:

- 1) a patient is an individual who, in the prescribed manner, receives medical care (preventive, therapeutic, rehabilitative) or is subjected to medical and biological experiments (clinical trials) by medical professionals [22, p. 301];
- 2) patient – a person who has applied to a medical and prophylactic institution for diagnostic, therapeutic or preventive medical care, or a person who participates as an investigated in clinical trials of medicines [15];
- 3) a patient is an individual who acquires the status of a consumer of medical services as a result of applying for diagnostic, preventive, medical or rehabilitative medical care or by exercising the right to be a participant in a medical and biological experiment [21, p. 54];
- 4) and among the latest studies – "patient" is a person (in special cases, the fetus) who has entered into legal relations regarding his health care with the health authority or a person engaged in private medical practice, applying personally (except in cases specified in the law) for medical care or other

medical services, or uses them, regardless of the presence of a disease, or participates in a medical experiment [14, p. 21].

It should be noted that the focus of medical services on a specific object – the human body, causes the need for the existence of trust of the patient to his doctor, who is the direct executor of the obligations under the contract. R.A. Maidanyk notes that the obligations to provide medical services are based on trust, which is due to the personal character of the obligations and the openness of relations between the patient and the doctor. The trust, in his opinion, is a leading and necessary condition for ensuring openness in the relationship between the patient and the doctor. Trust is a prerequisite for establishing good relations between the patient and the doctor. Therefore, the relevant relationship can to some extent be called trust-based – the patient trusts his life and health to the doctor [11, p. 65].

The right to medical care is a personal non-pecuniary right. An individual who has reached the age of fourteen and who has applied for medical care has the right to choose a doctor and choose methods of treatment. In this case, treatment is carried out with his or her consent (Article 284 CC).

However, anyone up to that age may be a patient as well. Thus, up to 14 years of age, minors (children) receive medical care with the participation of legal representatives (parents, adoptive parents, guardians). Upon reaching the age of 14, minors have certain rights in the field of medical relations, but most important issues of medical care provision and conclusion of contracts for the provision of medical services are carried out with the participation of their legal representatives (parents, adoptive parents, guardians). Upon reaching the age of maturity, individuals become independent in decision-making concerning the provision of medical services.

The importance of the sphere of health and preservation of life and health of each person calls for additional guarantees, for example, in the implementation of certain medical actions, in certain circumstances, medical workers, in addition to legal representatives, can apply for permission from the guardianship authorities (Art. 43(5) of the Fundamentals).

Incapacitated patients and persons with limited legal capacity in accordance with civil law also have legal representatives (guardians). In accordance with the norms of certain legislative acts, family members of the patient can act as additional subjects of relations for the provision of medical services.

Thus, patients are always individuals who need medical care (medical intervention), regardless of age and capacity; their representatives are persons

who can legally participate in the process of initiating the legal relations for the provision of medical services to the patient.

The legal status of patients as subjects of relations for the provision of medical services and as consumers of these services can be determined in the process of researching the grounds for the emergence and content of the relevant relationship. Taking into account all the peculiarities of the field of medical activity, medical care and medical services it should be noted that there are various legal facts that generate relations for the provision of medical services.

At the same time, the judicial practice in treating patients as consumers is inconsistent and ambiguous. In particular, in one court decision recognizing certain terms of the contract as unfair and thus invalid, it was underlined that the patient is a consumer, therefore, the relevant legislation on consumer protection applies [23].

Yet, there might be a different view of the situation. Thus, in one case, the court of first instance described the legal relations of the parties for the provision of dental services as subject to the general norms of civil legislation on the compensation for pecuniary and non-pecuniary (moral) harm [24] and the legislation on consumer protection. At the same time, the court of appeal decided that in this case there is a contractual liability, since the relations on the provision of dental services belong to the contracts for the provision of services [25; 26].

In recent years, national courts have changed the approach, and the patient is recognized as a consumer under the contract for the provision of medical services [27].

### ***The concept of "medical error" and peculiarities of litigation of medical disputes in Ukraine***

In the process of receiving medical care (or afterwards) patients sometimes have to sue doctors and medical institutions. The entailed conflict situations are called "medical" disputes. Conflict situations are mainly related to: violation of the basic rights of patients by healthcare providers; non-fulfillment by the medical institution of obligations assumed under the agreement on the provision of medical services; the inclusion of such terms of the contract by providers of medical services that do not take into account the interests of the patient and limit him in the exercise of his rights; causing pecuniary and/or moral non-pecuniary damage, etc.

Legal liability for damage caused to the consumer of medical services may take different forms. Although Art. 80 of the Fundamentals notes that persons guilty of violating health care law are subject to civil, administrative or criminal liability, we note that all these types of liability, first of all, do not exclude each other.

Since, as already noted, the contract for the provision of medical services is a risky contract, and the object is the human body, which has its own subjective characteristics, which can vary under the influence of different circumstances, most of the claims of patients are groundless. But there are cases when the claims are not groundless, but the patient simply cannot prove the presence of a defect in the provision of medical care or the presence of negative results of medical intervention or a causal nexus between the actions of the healthcare professional and the relevant results. Scholars, attorneys, judges and other legal practitioners persistently point out the complexity of proving certain facts that determine the possibility of bringing the perpetrator to legal liability in legal relations for the provision of medical services. Usually, defects in medical care are considered, the term "medical error" is used.

Intricate questions revolving around the "medical error" are constantly paid attention by legal writers; it is an issue that also worries medical professionals, since they are the authors of the actions that make up the subject of such an error. The analysis of academic publications on "medical error" indicates its dual nature, namely the presence of medical and legal aspects within this concept.

The very term "medical error" was used by the world-famous doctor M.I. Gyrogov, who defined it as false conclusions and actions of the doctor during the diagnosis, determination of tactics and methods of treatment of the patient.

This definition indicates the essence of the phenomenon under study, but does not contain indications of the causes that lead to such false conclusions and, as a result, harm to the patient. In most cases, patients and ordinary citizens perceive medical error as a negative phenomenon, which is generated solely by the guilty actions of medical workers.

However, in legal science, "medical error" is considered as a negative phenomenon, but is not always interpreted as guilty activity. The specified term is not officially fixed in any normative act, which means that the legislation does not indicate characteristic features that turn physician's actions into medical error.

Depending on the author of such an error, a medical error may be committed not only by doctors, but also nurses and other medical workers, including those who carry out laboratory and other studies [28, p. 54].

In the scientific literature there were a number of attempts to define different types of medical errors. For example: diagnostic errors (errors in the recognition of diseases and their complications, such as a false diagnosis of a disease or complication); tactical errors (as a rule, are the result of diagnostic miscalculation); organizational errors (errors in the organization of certain types of medical care, creating the necessary conditions for the functioning of a particular service); technical errors (errors in diagnostic and medical procedures, manipulations, methods of operations); deontological errors (errors in the doctor's behavior, his communication with the patient and his relatives, colleagues, nurses); errors in filling out medical documentation, etc. [29, p. 54]. Similar classifications of medical errors in Ukrainian law are not new and were proposed in Soviet medical law (medical science).

The medical aspect of the medical error, from the point of view of the medical professionals and scientists themselves, consists in the absence of negligence, recklessness, irresponsibility or ignorance in the actions of the healthcare professional, that is, medical error is not part of the crime. From the point of view of doctors, medical scientists and some lawyers, the prerequisite for its occurrence is the imperfection of medical science, technology, the complicated course of the disease, accidental circumstances that the doctor could not foresee, etc [10, p. 11-12; 12, p. 9].

For example, S.V. Antonov defines the content of a medical error as "lawful and reasonable actions or omissions of the person providing medical services (assistance), the adverse consequence of which is associated with imperfection and limitation of methods and means of modern medical science, severe objective conditions of medical intervention, atypical structure of the body or functioning of individual organs, non-standard reactions of the patient's body to the use of medicines or procedures; it occurs regardless of the attentiveness and professionalism of the provider of medical services in the absence of fault in his actions (inaction) or other elements of a civil offense" [10, p. 96].

Objective reasons mean the absence of illegality in the actions of the doctor, since the onset of harmful (negative) consequences for the patient is associated with external factors, such as imperfections in medical science (technology), individual characteristics of each person's body, etc.) and so on. Objective reasons also include inappropriate behavior of the patient, if it is conscious, e.g., it can be a violation of the recommended treatment regimen, non-compliance with the diet, violation of the regimen of medication, unauthorized treatment, etc.

In contrast, subjective reasons are associated with the person of the medical worker and his/her attitude to professional duties.

Such errors are possible, for example, in case of careless examination, inadequate evaluation of clinical and laboratory data, failure to take into account or reassess the results of consultations of other specialists, as well as in case of negligent performance of operations and other therapeutic and preventive measures, care and observation of the patient, general unsatisfactory organization of various stages of medical care in a medical institution, in particular, when maintaining documentation, in case of violation of deontological and other requirements [10, p. 96].

The presence of objective and subjective factors influencing medical errors is difficult to deny, that is, we can definitely conclude that there are medical errors that are made in connection with the guilty actions of the healthcare professional and those that arise without such guilty behavior of the healthcare service provider.

Different approaches to understanding and interpreting medical error in recent years have not led to the unity of scientific positions on the matter, but it can be clearly noted that in the medical literature the term "medical error" is used to denote the innocent mistake of the doctor, which excludes responsibility.

In the legal literature on this subject, most studies are dominated by a completely opposite approach. "Medical professionals, trying to avoid moral and legal liability for the harm caused to the patient's health, position their mistake as a natural phenomenon" [30, p. 92].

It can definitely be stated that the result of a medical error is to cause harm and the onset of negative consequences for the patient and/or his family members. Of course, you can find cases when the damage after committing a medical error was not caused, negative consequences for some reason did not occur, but, in any case, a "medical error" is a negative phenomenon. In this regard, the term "medical error" in jurisprudence is used in all cases of adverse (harmful) consequences for the patient, regardless of what reasons they were due to (accidental or as a result of guilty illegal actions of a medical professional).

Thus, in legal science there are two positions on the definition of medical errors and the role of doctors (medical workers) in their commission.

According to the first position, the actions of the doctor (executor of medical services) are legitimate, professional and justified; negative consequences are the result of unforeseen circumstances associated with the imperfection of medical science (technology), individual characteristics of the living organism, the type of disease and the integrity of the patient himself.

According to the second, more common position – the actions of the doctor (executor of medical services) are unscrupulous, unprofessional, careless; negative consequences are the result of such negligent guilty actions.

If there is a medical error as a result of the lawful actions of the doctor, he must first acknowledge it and tell the patient. In the future, to establish trust the doctor with the involvement of other specialists, shall adjust treatment and achieve maximum benefit for the patient [31, p. 38].

In science and practice, the question of qualification of medical error remains open, despite a significant number of studies in the relevant field, the results of research in many cases are contradictory and diametrically opposed. Scientists, in most cases, are inclined to consider as medical error any actions of medical professionals that lead to negative consequences and harm. As a result, medical errors were divided into less severe (temporary disability, unnecessary hospitalization, etc.) and more severe (unnecessary treatment, disability, patient's death, etc.).

From our point of view, a medical error does not imply unlawful behavior (actions or omissions) of a healthcare professional and does not imply the fault of the harm causer, that is, a medical error is not an offense.

Bringing to civil liability in the field of professional medical activity is possible provided that the following elements are proven: 1) unlawful behavior (action or failure to act); 2) damage (pecuniary or non-pecuniary); 3) causal nexus between harm and unlawful acts; 4) the fault of the tortfeasor.

According to the Letter of the Ministry of Justice of Ukraine of 20.06.2011 "Responsibility of medical workers", it is a type of legal liability that arises as a result of violations of rights concerning health care and which consists mainly in the need to compensate for damages. For this reason, it can be argued that civil liability is a kind of means of ensuring the protection of personal non-pecuniary rights (life and health) of patients in the provision of medical care.

Thus, from our point of view, the basis for bringing medical workers civil (tort) liability for causing damage is a professional offense in the field of medical activity. However, it should be noted that the liability for the harm caused without fault may occur in cases specifically provided for by law.

There is no procedure established by law to determine a medical error, while there are quite a few patients affected by such errors. In court, patients usually seek compensation for damages or invalidation of the contract for the provision of medical services. At the same time, proving the presence of a certain amount of damage, unlawful behavior of the tortfeasor, the presence of the fault, as

well as the fact that the unlawful action or omission was the actual cause of the harm is a too complicated task for an average citizen. In particular, courts usually rely on forensic examination, but there are cases when courts have not considered other evidence in the case, which led to the cancellation of their decisions.

In our opinion, the examples we used in cases on the definition of a medical error clearly indicate the need to involve a professional representative – a lawyer, as well as a special procedure for consideration of these types of cases.

## **Conclusions**

Based on the fact that the concept of "medical service" has become officially enshrined in the legislation during the last large-scale medical reform, its definition should indicate a precisely defined content. The characteristics of these relations should be transparent and understandable for all actors involved. On the one hand, these include medical professionals with higher medical education and specialists with medical education who are directly involved in the provision of medical care (medical services), viz doctors and nurses. On the other hand, the legal status of patients as subjects of relations for the provision of medical services and as consumers of these services must be determined in the process of concluding a contract and the emergence of relevant relations. The judicial practice in treating patients as consumers should be unified and sustainable. In particular, it would be logical to establish by law a special procedure for determining a medical error, as well as mandatory participation in the case of a professional representative – lawyer.

## **Recommendations**

The article could be useful for the legal scholars and law students as well as for practicing lawyers that deal with the issues of medical law. The main conclusions of the article concerning the status of the patient, interrelation between medical institution and its employees and the concept of medical error may also be of interest for the medical workers seeking to better understand the legal aspects of their profession.

## **References**

- [1] Gonzalez, B. (2019). When tort falls short: crisis, malpractice liability, and women's healthcare access. *Columbia Law Review*, 119(4), 1099-1132.
- [2] Iizuka, T. (2013). Does Higher Malpractice Pressure Deter Medical Errors? *The Journal of Law & Economics*, 56(1), 161-188.
- [3] Sanger, C. (2018). The lopsided harms of reproductive negligence. *Columbia Law Review*, 118(1), 29-47.



- [4] Saks, M.J., & Landsman, S. (2021). *Closing Death's Door: Legal Innovations to End the Epidemic of Healthcare Harm*. New York: Oxford University Press. Retrieved from <https://doi.org/10.1093/oso/9780190667986.001.0001>.
- [5] Furrow, B.R. (2011). Regulating patient safety: the patient protection and affordable care act. *University of Pennsylvania Law Review*, 159(6), 1727-1775.
- [6] Healy, J. (2017). Patients as regulatory actors in their own health care. In P. Drahos (Ed.). *Regulatory Theory: Foundations and applications*. (pp. 591-610). ANU Press.
- [7] Ries, N.M. (2017). Choosing Wisely: Law's Contribution as a Cause of and a Cure for Unwise Healthcare Choices. *Journal of Law and Medicine*, 25, 210-228.
- [8] Zeiler, K., & Hardy, G. (2019). Law, Technology and Patient Safety. *DePaul Law Review*, 68(2), 459-479.
- [9] Cohen, J., & Ezer, T. (2013). Human Rights in Patient Care: A Theoretical and Practical Framework. *Health and Human Rights*, 15(2), 7-19.
- [10] Antonov, S.V. (2006). *Civil liability for harm to health in the provision of paid medical services*. PhD Thesis. Kyiv: Koretsky Institute of State and Law of National Academy of Science of Ukraine.
- [11] Majdanik, R.A. (2010). Contract for provision of medical services. *Medical law*, 5(1), 52-66.
- [12] Mykhailov, S.V. (2010). *Civil liability in the field of medical services*. PhD Thesis. Kharkiv: Kharkiv National University of Internal Affairs.
- [13] Senyuta, I.Y. (2018). *Civil law regulation of relations in the field of medical care: issues of theory and practice*. Lviv: Publishing House "Medicine and Law".
- [14] Shchyryba, M.Yu. (2021). *Legal status of the patients: theoretical and legal research*. PhD Thesis. Lviv: Lviv Polytechnic National University.
- [15] Stetsenko, S.G. (2004). *Medicine Law*. Saint-Petersburg: Juridical Center Press.
- [16] Karnaukh, B.P., & Shymko, A.R. (2020). Side Effects of Diethylstilbestrol (DES) from the Perspective of Tort Law. *Wiadomosci Lekarskie*, 73(12), part 2, 2946-2950.
- [17] Karnaukh, B.P. (2021). Loss of a chance doctrine in English law: in search for justification of differentiated approach. *DePaul Law Review*, 2(45), 114-129.
- [18] Karnaukh, B.P. (2021). Loss of a chance doctrine in american case-law. *Uzhhorod National University Herald. Series: Law*, 65, 112-117.
- [19] Vakhoneva, T. (2021). Qualification requirements for medical workers as subjects of labor law. In I. Sakharuk (Ed.). *Kitchen of labor rights: essays on important ingredients: a collection of articles*. (pp. 133-143). Kyiv: Dakor.
- [20] Decision of the Kyiv Court of Appeal, 30 September 2020, case no. 761/39380/17. Retrieved from <https://reyestr.court.gov.ua/Review/92079432>.
- [21] Stratonov, V., & Havlovska, A. (2020). Concept and content of the legal status of a consumer of medical services. *The Journal of V.N. Karazin Kharkiv National University. Series: Law*, 30, 51-56.
- [22] Bolotina, N.B. (2004). Patient: definition, rights and responsibilities. *Legal State*, 14, 301-309.
- [23] The decision of the Pischansky district court of Vinnytsia region, 25 April 2019, case no. 134/845/18. Retrieved from <https://reyestr.court.gov.ua/Review/81402504>.
- [24] Decision of the Severodonetsk City Court of Luhansk Oblast as of February 12, 2015, case no. 428/6742/13-ts. Retrieved from <https://reyestr.court.gov.ua/Review/42796832>.

- [25] Decision of the Court of Appeal of Luhansk Region, 20 July 2015, case no. 428/6742/13-ts. Retrieved from <https://reyestr.court.gov.ua/Review/47721348>.
- [26] Separate opinion by judge Avalian N.M. in case no. 428/6742/13-ts, July 20, 2015. Retrieved from <https://reyestr.court.gov.ua/Review/48904687>.
- [27] The decision of the Mykolaiv Court of Appeal as of February 28, 2020 case no. 490/8813/14-ts. Retrieved from <https://reyestr.court.gov.ua/Review/87911220>.
- [28] Maykut, H.V. (2017). Problems of legal assessment of medical error. *Actual problems of domestic jurisprudence*, 3, 54-57.
- [29] Dyolog, M.I. (2014). Medical Errors. *Radiological Bulletin*, 2(51), 53-56.
- [30] Onishchenko, O.V., & Erzaulova, V.V. (2013). Medical error: legal aspect. *Legal bulletin*, 2(27), 92-96.
- [31] Kravchuk, I.I., & Kotyuk, A.S. (2020). Compensation for damage caused to a person by failed medical intervention. *Academic notes of Vernadsky TNU. Series: legal sciences*, 31(70), 6, 36-41.

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