Compensation for Moral Damage Caused in the Provision of Medical Services: Problems of Assessing Moral Damage and Legal Literacy of Medical Workers

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ABSTRACT
The issues of legal support and protection of the rights of citizens in the provision of medical services are currently widely discussed in scientific literature, periodicals, scientific conferences and seminars. In case of violation of the patient’s interests, the protection mechanism enshrined in the legislation should provide him with the opportunity to stop these violations, restore his property status by recovering losses, compensating for harm caused to health, and also to prevent such violations in the future. The basis of the moral interests of the citizen - the patient is moral harm.

The authors carry out a comprehensive study of the problems of compensation for moral damage caused by the provision of medical services.

Keywords: medical service, moral damage, compensation for moral damage

1. INTRODUCTION
There is a growing need to increase the level of protection of personal non-property rights and intangible goods in the context of the progressive development of society. The Institute for Compensation for Moral Damage was relatively recently legislated in Russia. However, there are a lot of cases in judicial practice today, in which the subject of the dispute is compensation for moral damage, including damage caused while rendering medical services. Article 2 of the Constitution of the Russian Federation [1] proclaims that a person, his rights and freedoms are the highest value, and their recognition, observance and protection are the duty of the state. The Institute for Compensation for Moral Damage logically fit into the legal model enshrined in the Constitution of the Russian Federation. Article 151 of the Civil Code of the Russian Federation [2] enshrined a citizen’s right to compensation for moral damage caused by actions violating his personal non-property rights or encroaching on his intangible goods. Judicial practice indicates that citizens actively declare both in addition to the requirements for the protection of rights and benefits, and separately the requirement for compensation for moral harm. However, rapidly changing conditions for the development of society and the state dictate the need to improve this legal institution. The objects of legal protection in violation of the rights of the patient are his rights and legitimate interests. Both property and non-property rights of a citizen are subject to legal protection. Therefore, the protection mechanism, which is enshrined in the norms of the law, should provide an opportunity for citizens to suppress violations, restore property status, by recovering losses, compensating for harm caused to health. The basis of the moral interests of the citizen - the patient is moral harm, which is understood as physical and mental suffering caused by the provision of medical services.

2. METHODOLOGY
The methodological basis of the study is a complex of general scientific, private and special methodological methods of cognition of social and legal phenomena. The initial methodological method is the dialectic method, which makes it possible to comprehensively study the object and subject of research. Also, the following particular scientific methods were used in the research process: formal - logical, historical, comparative - legal, technical - legal, system - structural, linguistic and logical analysis method. Comparative - historical and historical methods made it possible to determine the specifics of the impact of specific historical conditions on the development of the institution of compensation for moral harm.
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3. RESULTS AND DISCUSSION

3.1. The concept of “moral harm” in modern Russian law

Starting to consider the concept of “moral harm”, it is important to note that in the legal literature harm is understood as an adverse change in a legally protected good, while the good can be both property and non-property [3].

Currently, the content of the concept of moral damage is disclosed in paragraph 1 of Article 151 of the Civil Code of the Russian Federation [2], where it is defined as physical or mental suffering caused to a citizen by actions that violate his personal non-property rights or infringe on intangible goods belonging to the citizen, as well as in other cases provided by law.

The concept of moral damage is disclosed in more detail in paragraph 2 of the Decree of the Plenum of the Supreme Court of the Russian Federation of December 20, 1994 No. 10 “Some Issues of Application of the Law on Compensation of Non-pecuniary Damage” [4], where moral damage is considered as moral or physical suffering caused by actions (inaction) infringing on intangible goods (life, health, personal dignity, business reputation, privacy, personal and family secrets, etc.) belonging to a citizen from birth or by virtue of law, or violating his personal non-property rights (right to use his name, copyright and other non-property rights in accordance with the laws on the protection of rights to the results of intellectual activity) or violating the property rights of a citizen.

Both definitions given by the legislator are very concise, which has given rise to many different interpretations of the concept in question in the legal literature.

V.S. Romanov interprets the concept of moral harm as a combination of physical and moral suffering caused by experiences associated with the unlawful violation of intangible goods and (or) moral rights or other circumstances that have a personal character for him [5].

G.G. Gorshenkov understands moral harm as the negative consequences of an unlawful act that a person undergoes in the form of moral experiences, physical, mental suffering, discomfort in society, lost profits or caused by direct and indirect derogation of non-property benefits, expenses [6].

There is also an opinion in the legal literature that the term “moral harm” cannot be attributed to exact legislative concepts as physical and moral suffering.

A.M. Erdelevsky considers the use of the word “moral” to define a legal institution extremely undesirable. A scientist, following the example of foreign practice, following the example of foreign practice [7-9], proposes to use the term “mental harm” instead of the term “moral harm”, since he believes that moral harm is always the negative mental reactions of the victim, which are expressed in physical and mental suffering [10].

Based on the analysis of judicial practice, we can conclude that the courts generally do not distinguish between such components of moral harm as moral and physical suffering and use mainly the legal definition of moral harm, however, there are decisions in which the courts give their definitions of the term “moral harm”, which do not depart much from the position of the legislator on this issue [11]. The concepts of “physical suffering” and “physical harm” are differentiated in most decisions, but they are actually identified in the end, which is not entirely true.

A linguistic analysis of the concept of “moral harm” makes it clear that it is based on the harm done to morality, that is, the generally accepted and enshrined by the culture of society rules of behavior. From this point of view, the application of this concept is incorrect, given the content that the legislator puts into this concept. We believe that we should agree with the authors who propose replacing the concept of “moral harm” with the concept of “mental harm”, which will remove difficulties in interpreting this concept and enable an objective assessment not of society as a whole through the category of “morality”, but of an individual whose personal moral rights were violated.

3.2. Grounds and conditions for the obligation to compensate for moral damage caused by the provision of medical services

In accordance with paragraph 1 of Article 1099 of the Civil Code of the Russian Federation, the grounds for compensation for non-pecuniary damage are determined by Chapter 59 and Article 151 of the Civil Code of the Russian Federation. V.V. Vitryansky believes that the commission of an offense, that is, an act that violates the subjective rights of a citizen, appears as the sole and common ground of civil liability. Indeed, the onset of liability occurs on the basis of such a legal fact as an offense.

The basis for the obligation to compensate for moral damage caused by the provision of medical services is an offense committed in the provision of medical services. On the legal relationship to provide citizens with medical services provided by medical organizations as part of a voluntary (despite the fact that according to paragraph 2 of Article 84 of the Federal Law of November 21, 2011 No. 323-FZ “On the Basics of Protecting the Health of Citizens in the Russian Federation” [12] paid medical services are provided to patients at the expense of personal funds of citizens, employers and other funds on the basis of agreements, including voluntary medical insurance agreements) and compulsory medical insurance, the legislation on the protection of consumer rights is distributed, according to paragraph 9 of the Decree of the Plenum of the Supreme Court of the Russian Federation dated 28.06.2012 No. 17 “On the consideration by courts of civil cases in disputes on the protection of consumer rights” [13].
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rights” [13]; the provision of paid medical services is covered by the concept of paid services, which is regulated by Articles 779-783 of the Civil Code of the Russian Federation [2]. The provisions of the Law of the Russian Federation of February 7, 1992 No. 2300-1 “On Protection of Consumer Rights” [14] apply to relations related to the provision of paid medical services in accordance with Federal Law of 21.11.2011 No. 323-FZ “On the Basics of Protecting the Health of Citizens in Russian Federation” [12]. Thus, the law on consumer protection is applicable to the relations regarding the provision of medical services to citizens provided by medical organizations within the framework of voluntary and compulsory medical insurance, as well as the provision of paid medical services.

Medical organizations and medical workers are responsible not only for causing harm to life or health when providing citizens with medical care, but also for violation of citizens’ rights in the field of health care in accordance with paragraph 2 of Article 98 of Federal Law of November 21, 2011 No. 323-FZ “On the Basics protecting the health of citizens in the Russian Federation” [12].

The court should establish in accordance with part 2 of paragraph 1 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of December 20, 1994 No. 10 “Some issues of the application of legislation on compensation for non-pecuniary damage” [4]:

1) confirmation of the fact of causing the victim moral or physical suffering,
2) circumstances and actions (inaction) in which moral or physical suffering is inflicted,
3) the degree of guilt of the causer,
4) the type of mental or physical suffering suffered by the victim,
5) the amount by which the victim assesses their compensation and other circumstances relevant to the resolution of a particular dispute.

The patient has the right to compensation for non-pecuniary damage in the presence of a set of conditions of liability for non-pecuniary damage established by law that characterize the act as an offense. These conditions include the following:

1) causing moral harm to the patient;
2) the unlawfulness of actions (inaction) of a medical organization and (or) medical workers violating the patient’s non-property rights or encroaching on his intangible benefits;
3) a causal relationship between the wrongfulness of the act and the onset of moral harm;
4) the fault of the medical organization and (or) medical workers.

The combination of these conditions forms the corpus delicti.

The norms of the law on consumer protection and the provisions of the Decree of the Plenum of the Supreme Court of the Russian Federation dated December 20, 1994 No. 10 “Some issues of the application of the legislation on compensation for moral harm” [4] trace the position according to which there is a principle of “presumption of moral harm”. This conclusion is confirmed by judicial practice. So, in paragraph 2 of the “Review of the practice of court review of cases of consumer protection disputes related to the sale of goods and services”, approved by the Presidium of the Supreme Court of the Russian Federation on 10.17.2018 [15] it is noted that the fact of violation of consumer rights presumes the defendant's obligation to compensate for moral damage within the meaning of the Consumer Protection Act. At the same time, the law establishes a presumption of the guilty party of the harm, which suggests that the defendant must provide evidence of the absence of his guilt [16]. The victim presents evidence confirming the fact of harm (physical and moral suffering - if it is moral harm), as well as evidence that the defendant is the inflicter of harm or a person obliged by law to compensate for the harm [17-18].

Based on the foregoing, it can be concluded that the current legislation makes it incumbent on the causer to prove the absence of moral harm to the victim and the absence of his own guilt, while moral harm is supposed to be inflicted by medical workers.

3.3. Methods of compensation for non-pecuniary damage caused by the provision of medical services

According to Article 1101 of the Civil Code of the Russian Federation [2], non-pecuniary damage is paid in cash. Thus, the only way to compensate for non-pecuniary damage, defined today in the legislation, is monetary compensation. Most authors note that this method can and does serve as the only way to compensate for moral harm, due to the absence of another that can give the victim a greater degree of satisfaction.

Many authors use the concept of “compensation”, which is also found in the legislation. This term is repeatedly used in the Decree of the Plenum of the Supreme Court of the Russian Federation of December 20, 1994 No. 10 “Some issues of the application of the legislation on compensation for moral harm” [4], which, in our opinion, distorts its terminological meaning, since according to the meaning of civil law, compensation is bringing the violated good to the state that took place before the violation. If a patient as a result of improper provision of medical services loses any organ, then it will be impossible to compensate for it in monetary terms, but there is the possibility of monetary compensation for physical and moral suffering.

According to S.A. Belyatskina, money serves as a general criterion and measure of values and rights, and therefore can be a means of satisfying the victim and, if the monetary reward is not restitution, it will serve as compensation at least [19].
Monetary compensation for non-pecuniary damage is optimal. However, some scholars note that it cannot be denied that in some cases compensation for moral damage in a different material expression may be preferable to the victim than in monetary form. As an example of the relationship under study, we can cite a situation in which the patient is harmed and more significant for him would be free medical care for him, the search and purchase of a thing that has property value for the victim and can alleviate his physical and moral suffering (for example, wheelchair) than a small monetary compensation [20]. However, judicial practice today is on the way to determining compensation for non-pecuniary damage caused by the provision of medical services, in a larger amount than has occurred previously [21].

In fact, most likely there is no more preferable way of compensation for the patient than monetary compensation in the case of inadequate provision of medical services, which led to moral harm to the patient. Meanwhile, the assessment of physical and moral suffering in monetary or other material form is impossible. The monetary compensation for non-pecuniary damage stipulated by law is intended to provoke positive emotions in a person who has suffered such harm in order to smooth out as much as possible the negative changes in his mental sphere caused by suffering.

### 3.4. Criteria for determining the amount of compensation for non-pecuniary damage caused by the provision of medical services

The conditionality of the nature of compensation for moral damage determined the refusal of the legislator to directly regulate its specific size and leave this issue to the discretion of the court.

The law establishes the right to compensation for non-pecuniary damage, but neither the minimum nor the maximum compensation has been determined. Paragraph 2 of Article 151, paragraph 2 of Article 1101 of the Civil Code of the Russian Federation [2] establishes the criteria according to which the amount of compensation for moral damage should be determined. It is established that, when determining the amount of compensation for non-pecuniary damage, the court must take into account the degree of guilt of the offender, the degree of physical and moral suffering associated with the individual characteristics of the citizen who was harmed and other circumstances worthy of attention, taking into account the requirements of reasonableness and justice.

The Supreme Court of the Russian Federation on the amount of compensation clarified that the amount of compensation for non-pecuniary damage must be proportionate to the harm caused [22].

It follows from this that the principle of full compensation for harm, how fully and accurately it can be established, must be present in relations for compensation for moral harm, which should not be understood in the sense that compensation returns the victim to its original position, completely eliminates the consequences of the violation, and in that that compensation should fully smooth out, level the suffering caused by the derogation of non-property rights and benefits.

Based on the individual characteristics of the perception of the individual, the smoothing of suffering through monetary compensation is conditional.

Today, there is the problem of developing clear criteria for determining the amount of compensation for non-pecuniary damage, and the courts are not limited to the methodology for determining the specific amount of compensation by the upper and lower limits of compensation, formulas and tables, court practice on the amount of compensation for non-pecuniary damage is quite contradictory [23], and there is no the very possibility of objectively and reliably assessing the degree of suffering.

At the same time, many authors consider it appropriate and propose to consolidate the methods for determining the amount of compensation, basic levels in regulatory legal acts, by analogy with the legislation existing in many countries. A.M. Erdelevsky became the first domestic civilist to offer a complete methodology for determining moral harm [24].

A.M. Erdelevsky recommends the use of a formula that combines all these criteria in order to facilitate the consideration of the above criteria in determining the amount of compensation for actual moral damage:

\[
D = d \times f_v \times i \times c \times (1 - f_s),
\]

Where:
- **D** is the amount of compensation for actual moral harm;
- **d** is the amount of compensation for presumed moral harm (the suffering that some “average”, “normally” reacting to unlawful acts committed against him must experience);
- **f_v** is the degree of fault of the inflicter of harm, while 0 \(\leq f_v \leq 1\);
- **i** is the coefficient of the individual characteristics of the victim, while 0 \(\leq i \leq 2\);
- **c** is the coefficient of accounting worthy of the actual circumstances of the harm, with 0 \(\leq c \leq 2\);
- **f_s** is the degree of guilt of the victim, with 0 \(\leq f_s \leq 1\).

A.M. Erdelevsky proposes to make the following assumptions regarding the degree of fault of the inflicter of harm when using the formula:

- **f_v = 0.25** in the presence of simple negligence;
- **f_v = 0.5** in the presence of gross negligence;
- **f_v = 0.75** in the presence of indirect intent;
- **f_v = 1.0** in the presence of direct intent.

The issue of establishing at the legislative level clear criteria for determining the amount of compensation for moral harm is controversial. On the one hand, non-formally calculated non-pecuniary damage is compensable; it is necessary to take into account the individual characteristics of the victim and specific circumstances. On the other hand, the definition of such criteria would limit subjectivity and facilitate the work of judges.
The Supreme Court of the Russian Federation has already taken a definite step in this direction, recommending in the Decree of June 27, 2013 No. 21 [25] to the courts to focus on the fair amounts of compensation awarded by the European Court for similar offenses. That is, the Courts have quantitative values from which they can be based.

Thus, today the court should be guided by the criteria established by Paragraph 2 of Article 151, Paragraph 2 of Article 1101 of the Civil Code of the Russian Federation [2] to determine the amount of compensation for moral damage in each specific case, and the freedom of discretion of the court regarding the amount of compensation should be consistent with the law enforcement practice; and if the amount awarded compensation is very different from the average values by district, city, region), then the decision should include a special indication of the individual characteristics of the person and the specific factual circumstances of which the court proceeded. In any case, it should be understood that the smoothing of suffering through monetary compensation is conditional based on the individual characteristics of the perception of the person. We believe that it is advisable to legislate general recommendations and formulas for the calculation by the courts of the amount of compensation for moral damage, which would reduce the risk that the courts in similar cases will significantly differ in the amount of monetary compensation for moral damage. The courts establish completely different amounts of compensation for moral damage, in similar cases, without substantiating for the most part the determination of such amounts.

3.5. The importance of legal literacy in order to ensure the effective protection of non-property rights violated by moral damage

Conscious exercise of the rights established by law and fulfillment of obligations within a separate company is connected with the presence of a certain legal consciousness. It is known that the completeness of the exercise of citizens' rights in the provision of medical services enshrined in the current legislation, largely determines the level of social satisfaction of the population. Studies aimed at conducting a detailed analysis of the level of legal literacy of patients and a subjective assessment of consumers of medical services show that the level of legal literacy of patients and medical workers is low. A.S. Chumakov and other authors associate the occurrence of negative consequences when seeking medical help in the form of a violation of the rights of a patient with questions of the quality of professional activity, which are influenced by both objective and subjective factors [26].

Factors that may affect the quality of the provision of medical services and the observance by health workers of legislation in the field of health care, of course, include such factors as legal literacy of the patient and medical workers [27].

Analytical studies of defects in the provision of medical care showed that one of the fundamental causes of conflict situations, and later conflicts and litigation, including with the aim of recovering compensation for moral harm, is an insufficient level of ethical and legal knowledge of the fundamental concepts of observing the rights of the patient [28-30].

Medical workers in the current conditions for the provision of medical care and services should include the medical and legal component in their professional responsibilities, correlate their behavior with the basic legal norms, and patients should be interested in their rights in the field of healthcare.

Today, there is a problem of lack of interest on the part of medical workers in legal knowledge that goes beyond their specialization, as evidenced by data obtained during a sociological survey of dentists specializing in implantology and orthopedics (150 doctors) [27].

4. CONCLUSION

Intangible goods and personal rights are becoming increasingly important with the consolidation of the principles of priority of universal values, recognition and protection of rights and freedoms; their unlawful derogation is unacceptable. It seems that at the moment, the main, universal way of protecting intangible benefits and non-property rights of an individual is to compensate for moral harm, which is designed to restore mental well-being, smooth out experiences by monetary compensation, which can be used by victims to level their suffering, feelings, and evoke positive emotions. The legislator justifiably applies the term “compensation” to these relations, because moral damage cannot be repaired, the principle of equivalent compensation is not applied here, moral damage is compensated, that is, the provision to a certain extent is conditional and supposed to smooth out the negative consequences. The rules on compensation for moral harm organically fit into various branches of law; however, the institution of compensation for moral damage has a civil law nature, since no matter what branch of law regulates relations related to causing moral harm, compensation for moral harm is always carried out on the basis of civil law.

The author proposes to replace the concept of “moral harm” with the concept of “mental harm”, which will remove difficulties in interpreting this concept and enable an objective assessment not of society as a whole through the category of “morality”, but of an individual whose personal non-property rights have been violated. The paper substantiates that the provisions of the Civil Code of the Russian Federation and the provisions of the Law of the Russian Federation “On the Protection of Consumer Rights” are applicable to the relationship with the provision of medical services to a citizen-patient.
medical service is always reimbursable, since payment for services is made by insurance companies that provide compulsory or voluntary medical insurance, i.e. not free for the artist. We come to the conclusion that there is a need for further work to detail the rights of the patient, to develop mechanisms for their guarantee and protection. It is concluded that the current legislation makes it incumbent on the causer of harm to prove the absence of moral harm to the victim and the absence of his own guilt, while the infliction of moral harm by the unlawful act of medical workers is assumed. It has been established that the current civil legislation of the Russian Federation provides the only way to compensate moral damage in cash. There are no strictly established criteria and methods for assessing the amount of monetary compensation for moral harm in Russian law and law enforcement practice. This issue is referred to the competence of the court. In this regard, the patient does not have a subjective right to claim non-pecuniary damage in a predetermined amount; he can only demand that the court determine this amount and decide on the appropriate recovery from the defendant. In this case, the plaintiff is not deprived of the opportunity to indicate the desired amount of compensation (as usually happens), but this amount is nothing more than his opinion on the amount of compensation that does not have legal significance for the court. The paper substantiates the expediency of fixing the criteria and methods for determining the amount of compensation for moral harm at the level of recommendations of the Supreme Court of the Russian Federation. Every year, there is an expansion of citizens' capabilities to compensate for moral damage caused by the provision of medical services, an increase in the claims submitted to the courts, an increase in the amount of awards; however, the institution of compensation for moral harm as one of the effective mechanisms for protecting the rights of the patient requires its further improvement.

REFERENCES


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