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TÍTULO: Análisis de la estructura y contenido de la relación médica.

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RESUMEN: Una característica distintiva de los servicios médicos es la atención a la salud y la vida humana; eso visto desde las relaciones legales de ciudadano como paciente y una institución médica y profesional de la salud. Una prestación inadecuada de servicios médicos puede dañar la vida y la salud, por lo que los legisladores deben prestar especial atención a su protección, aunque no hay investigaciones exhaustivas en la ciencia del derecho civil sobre regulación legal y protección civil de los derechos de los consumidores de servicios médicos, ni tampoco un análisis detallado de la estructura y esencia de sus relaciones legales. El presente trabajo aborda estos temas y la valoración existente en la Constitución de la Federación de Rusia y su Código Civil.

PALABRAS CLAVES: Servicios médicos, relación médica, derecho a la vida y la salud, estado legal del paciente, estado legal del consumidor de servicios médicos.

TITLE: Analysis of the structure and content of the medical relationship.

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ABSTRACT: A distinctive feature of medical services is attention to health and human life; that seen from the legal relationships of citizen as patient and a medical institution and health professional. An inadequate provision of medical services can damage life and health, so legislators should pay special attention to their protection, although there is no exhaustive research in the science of civil law on legal regulation and civil protection of the consumer rights of medical services, nor a detailed analysis of the structure and essence of their legal relationships. The present work addresses these issues and the assessment existing in the Constitution of the Russian Federation and its Civil Code.

KEY WORDS: Medical services, medical relationship, right to life and health, legal status of the patient, legal status of the consumer of medical services.

INTRODUCTION.

In this study, we have set the following tasks: to sum up a definition for the medical service that discloses its essence, specific features and types; to specify the ratio of the notions of the medical service and the medical assistance; to disclose the legal nature, the structure and contents of the legal relations when providing medical services; to define the specific features of the legal status of the performer in the legal relations when providing medical services, and to substantiate the legal status of the consumer as the weaker party in the legal relations when providing medical services.

The subject of the research is social relations formed in regard of providing the medical services.

The topic of the research is provisions of the Russian legislation governing the relations regarding the medical services provision and the protection of consumers' rights, case materials, as well as works of national and foreign researches in the field of the civil law, medical law and the protection of consumers' rights.

The framework of the study is represented with general scientific methods of obtaining knowledge by means of which the research was conducted such as: dialectical method, and systematic and comparative analysis method. Some others specific scientific methods were systematic functional method, formal logic method, and historic legal method that made it possible to consider the phenomena in their interrelation and interdependence.

As a result of the study, the author formulated the definition of the medical service and relations when providing the same, they have been stated and their legal nature have been disclosed; specific aspects of legal statuses of the primary subjects of legal relations regarding the provision of medical services have been proved.

DEVELOPMENT.

Methods.

The author analyzed Russian legislation, domestic and foreign scientific literature [Barinov, S.A., 2012; Maleina, M.N., 2014; Hall, Mark A., 1955; Edward P. Richards, 2007; Drahonets J., P. Hollender, 1991; Endang Kusuma Astuti, 2017] and established distinguishing features (properties) of medical services, which condition the specific features of the protection of rights of the medical services consumers:

- Professional activities that require a special knowledge in the medical science (as a specific knowledge system).
- Focus of the effect on the human health (which, in its turn, is an intangible value protected under the civil law).
- Activities entailing risks of inflicting harm to the health due to an intervention with biological processes in the human organism.

- Difficulties with evaluating the medical services quality, probability of a failure to achieve the advantageous effect of the service, which preconditions the application of Chapter 39 of the Civil Code of the Russian Federation (which does not preclude the possibility of applying the regulations as per §1 and §2 Chapter 37 on quality, in particular, Articles 721, 722, 723, 724 of the Civil Code of the Russian Federation, where applicable) [The Civil Code of the Russian Federation (Part Two) of January 26, 1996].

- Use of special means such as medicines, instruments, equipment, etc., while providing the medical services.

- The purpose of such activities in diagnostics, prevention, treatment of diseases, rehabilitation, assistance under certain conditions (pregnancy, delivery); however, such feature as violation of the integrity of the human organism or another intervention in the biological processes of its operation should also be considered.

Moreover, the medical services can be classified using various grounds. In terms of using items in the process of providing the medical services, the latter are subdivided into services using items (or “services under mixed contracts” as defined by D.I. Stepanov [2004]), and those without using any items (“pure services”). The use of an item (a prosthetic, a pacemaker, an artificial joint, etc.; i.e., a thing that remains in the human organism after the respective medical service has been provided) in the process of providing the medical service results in a material result thereof, therefore, such classification is relevant when selecting a legal form of relations regarding the provision of the respective services. In the first case, a mechanism of the mixed contract is used (Chapters 37 and 39 of the Civil Code of the Russian Federation), while in the second case, it is a service contract (Chapter 39 of the Civil Code of the Russian Federation).

The next classification criterion is whether the medical service provision is voluntary or not. In this point of view, the medical services can be subdivided into voluntary and involuntary ones. The value of the said classification is that while providing the involuntary medical services, some of the rights of the patients are restricted, in particular, the most relevant one, which is the right for a voluntary informed consent. In this case, regulations of the special law enter into effect.

In general, it can be noted that the specified relations are similar in their properties to those governed with Chapter 50 Civil Code of The Russian Federation. However, in accordance with item 2 Article 980, the provisions of Chapter 50 are not applicable to acts on behalf of other persons implemented by government or municipal bodies for which such acts are one of the purposes of their activities.

The next classification criterion can be the use of special means in the activities. In such a case, the medical services can be subdivided to those provided by the strength of the performer (massage, etc.), and those provided using technical appliances (diagnostics, physiotherapeutic apparatuses, etc.). However, the classification of the medical services by using sources of special danger and without those has a greater legal relevance.

Recently, ideas have been expressed to refer certain means used when providing medical services to sources of special danger; for instance, medicines are acknowledged as not fully tradable items featuring injurious properties; i.e., as sources of special danger. A special danger is contained in services regarding transplantation of organs, those using X-ray plants, thiocyanogen baths, laser equipment, cobalt guns, electric currents, anesthetics, conducting vaccination, medical experiments, etc.

Therefore, the medical service is a variety of services being publically relevant due to its special object that is the citizens' health. If an object possesses the features considered above, it should be acknowledged as a medical service.

The author examined the structure (objects, subjects, contents) of legal relations regarding the provision of medical services, which results in a conclusion of the necessity to distinguish the relations directly connected to the medical services provision, and the relations connected thereto by which effect the medical services provision is arranged, they are paid for, etc. (“organizational” or auxiliary relations).

Certain specific features are inherent with the legal relations regarding the medical services provision. First, their subject is medical services; second, the subjects of the relations in question can only be performers (medical institutions or individual private practitioners) and citizens as patients. Third, the legal relations regarding the medical services provision can emerge, be amended and terminated as a result of various legal facts, including contracts, unilateral deals or administrative and judicial acts.

The gratuitousness (non- gratuitousness) of the relations, voluntary or forced service provision (but for certain exceptions) do not affect the contents of the primary legal nexus between subjects of the legal relations (rights and obligations).

The author investigated the requirements that are applied by performers in the relations regarding the provision of medical services, which can be classified in the following way: general requirements applied to all subjects of civil transactions; requirements applied to persons continuously engaged in manufacture of products, sales of goods, performance of works, and provision of services; special requirements applied to subjects of medical activities.

The special requirements can be referred to as the availability of a license to a subject of medical activities, accomplishment of a certain education by, and availability of a proficiency certificate, passing of an accreditation to, employees of a medical entity or a private practitioner.

The situation is analyzed where a medical service is provided by a person not in compliance with such requirements. Are the provisions of the medical law applicable in this case? What would be the liability of the organization on whose grounds such situation occurs? What liability would such “man in a white coat” bear – whether as a professional or on the same basis as everyone else? Another variant of such situation is possible where instead of the “man in a white coat” there may be, for instance, a nurse that gives herself as doctor with her act or behavior, or a doctor with a different specialization.

It is noted, that in such cases, it is necessary to apply the presumption of proficiency similar to item 4 Article 23 of the Civil Code of The Russian Federation. The specified provisions states that if there are signs of entrepreneurship, a citizen is recognized as an entrepreneur irrespective of whether the citizen has been registered as such or not.

In the author’s opinion, such situations should be treated as provision of medical services by a professional performer. The liability in such cases where due to behavior or acts of a counterparty, a person believes to be dealing with a professional in certain field of activities, should be based on the principle of *culpa in contrahendo*. The person that has created an appearance with its willful or negligent acts should bear the responsibility as if such person was the professional. Such provision arises from the principle of good faith (item 3 Article 10 of the Civil Code of The Russian Federation). The civil law development perspective highlights the necessity to establish this principle as one of the major principle, including its coverage and application at the stage of establishing of the legal relations (including by means of applying the pre-contractual liability – *culpa in contrahendo*).

In this case, the proficiency of the performer should be regarded continuous activities meeting the aggregate of features and requirements as stated above. As special activities in relation to the life and health of the human (as the most valuable benefit), the provision of medical services require

that the performer meets special requirements of the law and requirements of the medical science. At the same time, the quality of both the process of the service provision and its effect should be evaluated from the point of view of the performer's meeting the specified requirements (among other things).

Therefore, if a person provides medical services but actually does not meet the requirements applied by the law to the performers, such person should be responsible for his/her acts to the same extent as a professional performer. In this case, the presumption of proficiency should be applied similar to item 4 Article 23 of the Civil Code of the Russian Federation and item 4 Article 12 of the Law on protection of consumers' rights [On the Protection of Consumer Rights: Law of February 7, 1992]. Based on the definition of the "performer" as provided for in the Law on Protection of Consumers' Rights, persons providing medical services are recognized as performers under the legislation on protection of consumers' rights. It is relevant because the Law on Protection of Consumers' Rights applies an extra liability on the performers (Articles 12-15, item 5 Article 28, and Article 29 of the Law on Protection of Consumers' Rights).

Rights and obligations of the consumer of medical services as provided for with the civil law, with the legislation on protection of consumers' rights, and with special (medical) legislation can be highlighted. In addition to the above, rights and obligations provided for with the healthcare legislation can be subdivided to general (common for all the patients) and special (for certain groups of patients).

In accordance with the Civil Code of The Russian Federation, the consumer of medical services is entitled to enter into a contract or to refuse to do it (by implications of Articles 426 and 428); to refuse to perform under the contract (item 1 Article 782); to demand that the contract should be terminated or amended under item 2 Article 428 (if the executed contract is a contract of adhesion); to refuse to pay for a service not provided for with the contract (item 1 Article 731). The obligation

to pay for the services provided is vested in the consumer in case is the patient himself (Article 781), and to cooperate with the performer (Article 718).

In accordance with the Law on protection of consumers' life, the consumer of a medical service has the right to receive a quality (Article 4) and safe (Article 7) service; for information on the performer, its working hours and the service itself (Articles 8 to 11); for the provision if the service within the agreed time (Article 27); to charge a penalty for a delay in providing the service (item 5 Article 28); to recover losses incurred with an improper performance under the contract (item 1 Article 28, item 1 Article 29); for a compensation of moral harm (Article 15); for a judicial protection of any violated rights (Article 17); for a recession from the contract (Article 32). The consumer is obliged to pay for the services provided (Article 37). Moreover, in case of a violation of the time frame, the consumer in its own discretion is entitled to appoint a new term for the service provision; to demand a reduction of the price of the service provided; to demand that the service should be provided by another professional; to terminate the contract and to demand indemnification of losses (Articles 28 to 29 of the Law on Protection of Consumers' Rights).

The general rights of patients are provided for with Articles 18 to 23 of the Federal Law" On the Basics of Protection of the Health of Citizens of the Russian Federation" [On the Basics of Protection of the Health of Citizens of the Russian Federation: the federal law of November 21, 2011]. The rights of certain categories of citizens in the field of the protection of health are stated in Articles 24 to 26, 43, 44, 47, and 51 to 57 of the Law.

The rights and obligations of the consumer can be classified in accordance with stages of providing the medical service: from the moment of visiting a doctor to the beginning of a medical intervention; from the moment of expressing the consent for the medical intervention to the end of the process of the medical service provision; after the completion of the process of the medical service provision. They are the patient's rights that exist throughout all the above three stages and

the rights that arise in case of a violation of the consumer's rights (as a part of protective legal relations along with the right for protection).

Results and discussion.

When a citizen possesses the legal status of the medical services consumer (patient), such status is to ensure a proper protection for its rights. Such status is based on the rights secured in a special (medical) legislation and should enable the patient to affect the process of the service provision.

The effect of the public status on that of the consuming patient is subject to the specific features of the medical service itself. In this case, the terms "medical services consumer" and "patient" should be used as synonyms but for the only difference: the consumer can be a patient (a person seeking medical attention) only in case of a voluntary provision of medical services.

A specific feature of the legal status of the patient as a consumer of medical services in the acknowledgement of the consumer as a "weaker" party of the legal relations.

The "weakness" of the consumer of medical services is manifested as follows:

First, in the course of the relations, the patient is opposed by a professional performer as a professional market player for the medical services. The patient ends up in an unequal position compared to the performer in the material (proprietary) regard.

Second, the type and volume of the medical intervention are selected by the performer by virtue of its professional expertise, while the patient can only agree to the service or to decline the service.

Third, the disproportion of the information in the said relations is exceptionally vivid compared to other relations as the patient, in the absolute majority of cases of providing the medical services, does not possess the respective knowledge [Kenneth Joseph Arrow, 1963].

Fourth, any harm inflicted to the patient in the course of providing the medical services affects the benefits most valuable for the individual and the public that is the health and the life.

Fifth, normally, medical services are provided in relation to certain health problems; i.e., at the moment when the consumer is especially vulnerable. The patient applies to the performer with a credit of trust by actually granting it with the right to select the type and the volume of the medical intervention. It is this trust and hope that the performer acts exclusively in the best interest and to the benefit of the consumer that make the latter especially vulnerable.

It is incident for the present-day civil law to strive to protect the weaker party of legal relations [Vavilin, E.V., 2009]. In regard to consumers of medical services, the following ways of equaling the subjects of the legal relations in question can be noted:

First, the consumer is granted with the right for the information (in the broader meaning), while the presumption prevails that the consumer is not in possession of any special knowledge (item 4 Article 12 of the Law on Protection of Consumers' Rights).

Second, a privileged procedure is established for the consumer when executing, amending or terminating a contract (Articles 426, 428, 782 of the Civil Code of the Russian Federation).

Third, the patient is granted the right to refuse a medical intervention (with certain restrictions).

Fourth, in case of inflicting harm due to deficiencies of medical services, failure to provide the information on such service, such harm is compensated by the performer in full irrespective of the guilt (Articles 1095 to 1097 of the Civil Code of the Russian Federation, item 3 Article 12, items 1 to 4 Article 14 of the Law on Protection of Consumers' Rights).

Fifth, the consumer is granted the right to demand a compensation of moral damages in case of violations of his rights (including proprietary ones) irrespective of a recovery of material damages or losses incurred by the consumer (where at fault of the performer).

Sixth, the legal status of the consumer includes certain procedural privileges. Those may include the right of the consumer to select the jurisdiction, a release from paying the state duty, inadmissibility

of a refusal to accept the legal claim on the grounds of a failure to meet the preliminary prejudicial procedure for the dispute settlement, etc.

However, it should be noted that the above ways (except for the third one) are incident for consumer contracts in general; i.e., they are general means to reinforce the position of the weaker party in the said circumstances. The legislation does not provide for any special means considering the specific features of the medical activities to equal the subjects of the legal relations when providing medical services.

The legal status of the consumer is related to the legal status of the medical service performer. The assumption of qualification is to be applied to any person providing medical services (based on the contents of the service) irrespective of whether such person is vested with the status of the performer or not, similar to item 4 Article 23 of the Civil Code of the Russian Federation and item 4 Article 12 of the Law on protection of consumers' rights.

In summary, while the relations in the field of the health protection in general can be referred to the area of the public regulation with elements of the private law, the relations connected to the field of providing medical services should be considered as a part of the civil law with elements of the public law. Such conclusion arises from the analysis of the ratio of imperative and dispositive regulations governing the provision of medical services.

In general, the regulation of relations regarding the medical services provision features the dispositive method mostly, while in certain cases it gives its way to the imperative method. However, the latter can be observed not only in relation to medical services. Such situation is caused with the necessity of protection of the weaker party of the relations (the patient), a high risk of inflicting harm to the citizen's health, which is not only a personal benefit but it features social elements too; thus, the special significance of the relations regarding the medical services provision arises for the public and the government.

CONCLUSIONS.

A conclusion can be made that while seeking medical attention from the performer, the citizen automatically becomes a patient, and therefore, is granted a special legal status of a consumer of medical services (including by means of reinforcing its position as a weaker party of the relations) for the purpose of protection and defense of its personal intangible rights such as life and health.

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