COMPENSATION FOR MORAL DAMAGE AS A GUARANTEE OF PROTECTION OF REPRODUCTIVE RIGHTS AND OTHER RIGHTS OF THE INDIVIDUAL IN THE FIELD OF HEALTH CARE: LEGAL POSITIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The statute states that the guarantee of an individual's reproductive rights is the right to a fair trial and effective legal protection. Emphasis is placed on the principle of justice and the principle of a fair trial. The authorities of the sovereign power may ensure that the moral delinquency of an individual, the reproductive rights of any violations as a result of the improper completion of professional obligations by a medical practitioner/medical practitioners during the hour of celebration, are strictly corrected.

The legal positions of the European Court of Rights regarding the right of a person to receive copies of his medical documentation are highlighted and analyzed. It is established that this right prevails over the prohibition of making copies of medical documents, if it is established by state law even for the purpose of protecting medical information from abuse. Obtaining relevant evidence in the form of photocopies of medical documentation is essential for the assessment by the person whose reproductive rights have been violated of his own position in the case from the point of view of the effectiveness of the exercise of the right to compensation for moral damage when applying to a national court. It is established that if a person actually makes claims of a civil law nature, then the presence of legal provisions that prevent him from receiving compensation for moral damage by applying this judicial method of protecting his right and interest, or if due to the provisions of the law it will be difficult for a person to receive such compensation - such provisions legislation indicate their incompatibility with the norms of Art. 6 of the Convention, and the state violates the right of an individual, guaranteed by Art. 6 of the Convention.

The legal positions of the European Court of Human Rights regarding compensation for moral damage to a person who has suffered a violation of reproductive rights and other rights in the field of health care are highlighted and analyzed. Attention is also focused on situations of violation of the patient's right to respect for private life during his examination for the purpose of training in the presence of medical education students.

The legal positions of the European Court of Human Rights regarding compensation for moral damage to a person who has suffered a violation of the right to a fair trial and to an effective remedy while defending his violated reproductive right are highlighted and analyzed. It has been established that in cases against Ukraine, the question of ineffectiveness of pre-trial investigation and ineffectiveness of execution of the decision of the national court is systematically raised due to their unjustified excessive duration. The repeated return of the case for additional investigation, as the European Court of Human Rights has pointed out more than once, indicates serious shortcomings in the work of the law enforcement system and justice.

There is an emphasis on the right of the individual to eliminate moral wrongdoing, since it is a trivial matter to undertake a small initiative to eliminate the wrongful wrongdoing, and to pay off the awarded sum is not exorbitant.

Propositions have been developed for the thorough effectiveness of addressing the moral harm of individuals whose reproductive rights have been violated.

Key words: moral damage, principle of justice, principle of fair trial, legal positions of the European Court of Human Rights, reproductive rights, medical documentation, restriction of an individual's right to access medical documentation, moral wrong, history of illness, guarantees of human rights, protection of human rights, human rights in the field of health protection 'I, the effectiveness of national legal protection, the patient, the right to care for a special and family life, the right to special care, the right to a fair trial, the obligations of the state.

Formulation of the problem

The issue of harming human reproductive rights is one of the most sensitive, because the consequences of such violations are both short-term health disorders and possible disability of a person, the inability of a person to give birth to a child, the inability to give life to a healthy child, and others that affect the mental and emotional a person's condition is not short-term, but throughout his life. It is very difficult to measure moral damage in the event of a violation of a person's reproductive rights, because human life and health are priceless. Experiencing mental discomfort, suffering, complications of personal life, reduction of creative activity, deterioration of the results of one's activities, losing or wasting time, a person experiences losses in his career as well, and may take actions or allow inaction in view of his moral suffering, which may destroy her personal life, career, business reputation. Moral damage has a direct relationship with a person's professional activity, it directly affects it, causing, among other things, destructive consequences.

At the same time, given the sensitivity of human reproductive rights, a person who has suffered violations of his/her reproductive right/rights in the future is not alone in facing the fact that he suffers even greater moral damage when he cannot protect his rights. Similar to a snowball, the moral damage suffered by a person from the violation of reproductive rights/rights is also layered with the moral suffering that a person suffers when using national remedies. As evidenced by the practice of the European Court of Human Rights, a person often defends his violated reproductive right in national courts for years, defends unsuccessfully, and then, having exhausted all national remedies, turns to the European Court of Human Rights. In this international judicial institution, cases are not considered quickly either – the number of individual applications submitted by individuals to the European Court of Human Rights is increasing and increasing. Not alone, the European Court of Human Rights, making a decision in a case, states a violation of the norms of the Convention on the Protection of Human Rights and Fundamental Freedoms due to the shortcomings of national legislation or the practice of its application [1; 2]. In order to implement the final decision of the European Court of Human Rights in the case, the state is obliged to take measures of a general nature (amend the national legislation and/or the practice of its application, etc.) and measures of an individual nature.

Analysis of the decisions of the European Court of Human Rights in cases where there was a violation of human reproductive rights, and collectively the rights guaranteed by Article 6, Article 9 of the Convention, where there was a violation of freedom from discrimination under Art. 14 of the Convention, – they all testify that the root of the problem is that during the professional training of investigators, prosecutors, and other categories of law enforcement officers whose professional activities are related to law enforcement, the issues of studying the Convention and the practice of the Court were not given due attention . Among other things, this resulted in the fact that in their professional activities they committed actions that led to the violation of the rights guaranteed by Art. 6, 13 of the Convention. Attention is drawn to cases in which during the pre-trial investigation there were violations of Article 6, Article 13 of the Convention, including due to improper procedural management of the case.

Therefore, the topic of this article is relevant from a practical point of view.

State of problem research

In legal science, civil scientists, constitutional scientists, and scientists whose field of scientific interests is international human rights law paid attention to the issue of moral damage. The change in social relations [3-6], the development of the practice of the European Court of Human Rights, the national legislation of the member states of the Council of Europe [1-6] prompt an analysis of the legal positions of the European Court of Human Rights regarding the compensation of moral damage as a guarantee of the protection of reproductive rights and other rights of a person in the field of health care in order to develop recommendations for their real application in practice in Ukraine by law enforcement and judicial officers whose professional activities are related to law enforcement.

The purpose of this article is to reveal the legal positions of the European Court of Human

Rights regarding compensation for moral damage to a person who has suffered a violation of reproductive rights and other rights in the field of health care, to suggest directions for improving the legislation of Ukraine and the practice of its application.

Presenting main material

In the case of „K.H. and others against Slovakia" the applicants were 8 women, citizens of the Republic of Slovakia, who are Roma by ethnic origin. They were treated in the obstetrics and gynecology departments of two hospitals in eastern Slovakia during pregnancy and childbirth, which were performed by caesarean section, and after that, none of the applicants, despite their desire and efforts, managed to get pregnant [7]. The applicants suspected that the reason for their infertility could be the sterilization performed by the medical staff during the caesarean section operation, and several applicants remembered that before giving birth or after being discharged from the hospital, they signed some documents without reading them and not knowing the content of these documents. All eight applicants tried to obtain photocopies of their medical documentation with the assistance of their authorized lawyers at the respective hospitals, but the medical institutions refused to provide them with the documents.

The original documents contained information that the applicants considered important from the point of view of their moral and physical integrity. In particular, the applicants suspected that their reproductive status was affected by the doctor's intervention. The medical records could not only contain information about any such intervention, but also whether and under what conditions the applicants consented to this intervention. Reprinted or handwritten copies of documents cannot truthfully reflect the features of the original documents, considering that some of them contained the signatures of the applicants. Photocopies of the documents would allow the applicants not only to form the basis for the legal process in the civil case, but also to help convince loved ones, if necessary, and the community that their infertility is not the result of their own deliberate actions (§39 Decision of the European Court of Human Rights in the case «K.H. and others v. Slovakia») [7].

In this case the applicants were granted court orders allowing them access to the full medical records, but these court orders did not allow the applicants to make copies of their medical records as this was prohibited under the provisions of the Health Care Act 1994 At the same time, Article 8 of the Convention guarantees everyone the right to receive copies of their own medical documentation. If the state restricts this right, such restriction must meet the three-pronged test. In particular, such a refusal to grant a person the right to make a copy of the medical records regarding him must be sufficiently justified.

The European Court of Human Rights emphasized that «the applicants believed that the mere possibility of producing handwritten extracts of medical documents did not provide them with effective access to documents related to their health. The original documents, which cannot be reproduced by hand, contained information important to the applicants from the point of view of their moral and physical integrity, because they suspected that they had undergone an intervention that affected their reproductive status» (§50 of the decision in the case «K.H. and others against Slovakia») [7].

Medical documentation is one of the pieces of evidence in a case where a person who believes that their reproductive rights have been violated exercises their right to apply to a national court for compensation for moral and material damage caused to them. Without giving the person whose reproductive rights have been violated the opportunity to make photocopies of their medical documentation, it is impossible for an independent expert to prepare a comprehensive opinion, which deprives the person of providing adequate evidence to the court.

In the decision of the European Court of Human Rights in the case «K.Kh. and others v. Slovakia» The Court expressed the following legal positions that can be applied when considering the issue of compensation for moral damage to a person whose reproductive rights have been violated: from §52-54 it follows that the right of a person to receive copies of his medical documentation prevails over the prohibition of making copies of medical documents that

were established by state law to protect medical information from misuse; protection of medical information is extremely important for a person to exercise his right to respect for personal and family life, which is guaranteed by Art. 8 of the Convention; ensuring the confidentiality of health information is an extremely important principle of the legal systems of the states that are parties to the Convention; it follows from §65 that if persons are in a state of uncertainty regarding their own health and reproductive status after treatment – obtaining relevant evidence in the form of photocopies is essential for assessing one's own positions in the case from the point of view of the effectiveness of exercising the right to compensation for moral and material damage by appeal to the national court regarding deficiencies in treatment); it follows from §66 that the guarantees of Art. 6 Conventions apply to persons whose reproductive rights have been violated: if a person actually makes claims of a civil law nature, then the presence of legal provisions that prevent them from effectively exercising their right to compensation for damage (moral damage, material damage) by applying to court, or if due to these provisions of the law, it will be difficult to obtain such compensation – such provisions of the law indicate their incompatibility with the norms of Art. 6 of the Convention, and the state violates the guaranteed Art. 6 of the Convention on the right of a person; it follows from §67 that even if the statutory restriction on the production of copies of medical records does not deprive a person who believes that his reproductive right has been violated, the opportunity to file a civil lawsuit based on the information obtained during the review of his medical records, it does not less, such restrictions should be proportional to the person's ability to properly substantiate his claims for compensation for moral damage caused to him, material damage; original documents, the content of which cannot be manually reproduced and which, according to national legislation, may not be known to the person whose reproductive rights have been violated, or may not be known to the court; preventing the state from obtaining copies of medical documentation by a person whose reproductive rights have been violated is not justified, and the reasons for such a restriction cannot be considered compatible with the person's effective exercise of his or her right to access the court.

In the case «Tsmokalov v. Ukraine», which was considered by the European Court of Human Rights, the applicant was registered as a person with a disability since childhood. He suffered from a number of chronic diseases. While being treated in three state hospitals, he complained of feeling unwell. He was misdiagnosed with Behçet's syndrome because he actually had tuberculosis.

Accordingly, he was treated not for his real disease, but for a disease that was wrongly diagnosed (in fact, he did not have it). He received inadequate treatment for about three months. Among other things, he was provided with unregistered medicinal products, which, combined with treatment based on a false diagnosis, caused a significant deterioration in his health, increased progression of his real disease – tuberculosis. In addition to an incorrectly established diagnosis and, as a result, improper treatment, which led to serious damage to health, there was also a situation, according to the patient, when his examination was carried out in the presence of third parties without his permission. For example, during treatment in one of the hospitals, he was undressed against his will, and then he was shown to medical applicants and clinical residents as a «patient with a rare disease» (§2) [8].

We emphasize that this situation is not unique in other member states of the Council of Europe: during the examination of patients for the purpose of training, medical education students are allowed to such examinations. The patient submitted a statement about the hospital staff committing a criminal offense. But at least four times during 5 years, the prosecutor's office of the Zakarpattia region refused to open a criminal case based on the applicant's complaints, citing the fact that no evidence of wrongdoing by medical workers was found. Subsequently, these resolutions were canceled by higher prosecutors, who established that the investigation conducted based on the applicant's complaint was not comprehensive and objective.

Only in the 6th year, the prosecutor's office initiated a criminal case against hospital officials for improper performance of professional duties by a medical worker, forgery of documents. The prosecutor's office referred, in particular, to

the results of the forensic medical examination conducted within the framework of civil proceedings on the applicant's claim against hospital officials. The applicant complained about the inaction of the investigator, but to no avail. In August 2004, the applicant filed a civil action against the hospitals, claiming 300,000 Ukrainian hryvnias (approximately EUR 45,500 at the time) in moral damages and certain amounts in pecuniary damages (§5). The proceedings ended with the issuance of a final decision by the Supreme Specialized Court of Ukraine for consideration of civil and criminal cases after 8 years – on September 5, 2012. During this proceeding, the national courts, referring to the conclusion of the forensic medical examination prepared by the Main Bureau of Forensic Medical Examination of the Ministry of Health of Ukraine in Kyiv, established the fact of improper performance of professional duties by medical workers in connection with the treatment of the applicant in all three hospitals , which could lead to the deterioration of the applicant's health and increase the period of his recovery from tuberculosis, and awarded him the amount of 10,000 hryvnias (about 965 euros at that time) as compensation for moral damage (§5). He was paid the full amount of compensation for non-pecuniary damage awarded to him in accordance with this decision.

Therefore, a person has the right to compensation for moral damages, if the fact of improper performance of professional duties by medical workers in connection with the treatment of a patient, which led or could lead to a deterioration of the patient's health and/or an increase in the period of his recovery from the disease, is established.

A person has the right to compensation for non-pecuniary damage, if the duration of the proceedings, which the person had to initiate in order to obtain compensation for the damage, and subsequently to pay the awarded amount, is excessive. The right to a fair trial and an effective means of legal protection, the prohibition of discrimination are guarantees for the realization of human reproductive rights.

A legal assessment of the effectiveness of legal remedies used by a person whose reproductive rights have been violated is mandatory to determine whether the judicial system has in practice ensured proper compliance with the regulatory provisions designed to protect the rights of patients. This task includes a mandatory check of whether these actions really allowed the applicant to obtain consideration of his claims and prosecution for violating the rules of professional activity of medical workers (§68 Judgment of the European Court of Human Rights in the case «Ibrahim Keskin v. Turkey» (Ibrahim Keskin v. Turkey) dated March 27, 2018) [9].

Therefore, in practice, the judicial system must ensure proper compliance with the regulatory and legal provisions designed to protect the rights of patients, which includes a mandatory check of the following: 1) whether the patient's actions really allowed him to achieve consideration of his claims in court; 2) whether the patient's actions allowed the medical worker to be prosecuted for violating the rules of professional activity.

Persons whose reproductive rights have been violated can use at once two means of legal protection, which are available to them in the national court system: 1) civil law means of legal protection; 2) criminal legal means of legal protection.

The repeated return of the case for additional investigation, as the European Court of Human Rights has repeatedly noted, indicates serious shortcomings in the work of the law enforcement system and criminal justice (§64 of the decision in the case «Kiryakov v. Ukraine» dated January 12, 2012 p. [10]).

When carrying out a legal assessment of the effectiveness of the means of legal protection used by a person whose reproductive rights have been violated, a documentary analysis of the case materials and a reasonable, non-formalistic conclusion about whether the quality of the action and the circumstances exist that could justify the duration of the proceedings without any what results Civil proceedings are a means of legal protection that can not only establish the possible liability of medical personnel, but also allow the patient to receive compensation for damages – moral and material.

It is not the patient, but the state that must organize its judicial system in such a way that the activities of its courts meet the requirements of the Convention. This includes the implementation of the final decision of the national court,

because the presence of the court decision itself does not indicate that the patient has fully exercised his right to a fair trial.

A structural element of the right to a fair trial is the right to enforce the final decision of a national court. When the judgment of the national court is executed, the defendants have the opportunity to voluntarily execute the decision on the payment of moral damages to the patient, because they know both about the court's decision and the fact that the patient must receive the amount of moral damages determined by the court. In this case, for the effectiveness of the execution of the decision of the national court, voluntary payment of compensation is, of course, appropriate. The situation when the executor (public or private) does not take effective measures to ensure that the court's decision has been executed also indicates that there is a violation of Art. 6 of the Convention, and the patient may suffer moral damage due to non-implementation of the decision. Also, if there was no proper judicial response to the patient's statements, which would meet the requirements of protecting the right to personal integrity, this is assessed by the European Court of Human Rights as a violation of Art. 8 of the Convention.

When determining whether the duration of the proceedings on the claim for moral damages was excessive, not only the period of the court's consideration of the case, but also the period of enforcement of the court's decision is taken into account.

Conclusions

1. A person has the right to compensation for non-pecuniary damage, if the fact of improper performance of professional duties by medical workers in connection with the treatment of a patient is established, which led or could lead to a deterioration of the patient's health and/or an increase in the period of his recovery from the disease.

Persons whose reproductive rights have been violated can use at once two means of legal protection, which are available to them in the national court system: 1) civil law means of legal protection; 2) criminal legal means of legal protection.

A person has the right to compensation for non-pecuniary damage if the duration of the proceedings, which he had to initiate in order to obtain compensation for the damage, and subsequently to pay the awarded amount, is excessive.

In practice, the national judicial system must ensure proper compliance with the legal provisions designed to protect the rights of patients, which includes mandatory verification of the following: 1) whether the patient's actions really allowed him to have his claims heard in court; 2) whether the patient's actions allowed the medical worker to be prosecuted for violating the rules of professional activity. It is not the patient, but the state that must organize its judicial system in such a way that the activities of its courts meet the requirements of the Convention.

2. Civil proceedings are a means of legal protection, which can not only establish the possible responsibility of the medical staff, but also allow the patient to receive compensation for damages – moral and material.

3. Regarding the access of a person whose reproductive rights have been violated to his medical documentation, the legal positions of the European Court of Human Rights are as follows:

- the right of a person to receive copies of his medical documentation prevails over the prohibition of making copies of medical documents, which was established by state law in order to protect medical information from abuse;

- the protection of medical information is extremely important for a person to exercise his right to respect for personal and family life, which is guaranteed by Art. 8 of the Convention;

– ensuring the confidentiality of health information is an extremely important principle of the legal systems of the states that are parties to the Convention;

- if persons are in a state of uncertainty regarding their own health and reproductive status after treatment – obtaining relevant evidence in the form of photocopies is essential for evaluating one's own positions in the case from the point of view of the effectiveness of exercising the right to compensation for moral and material damage by applying to a national court in treatment deficiencies);

- guarantees of Art. 6 Conventions apply to persons whose reproductive rights have been violated: if a person actually makes claims of a civil law nature, then the presence of legal provisions

that prevent them from effectively exercising their right to compensation for damage (moral damage, material damage) by applying to court, or if due to these provisions of the legislation, it will be difficult to obtain such compensation – such provisions of the legislation indicate their incompatibility with the norms of Art. 6 of the Convention, and the state violates the guaranteed Art. 6 of the Convention on the right of a person;

- even if the statutory restriction on the production of copies of medical records does not deprive a person who believes that his reproductive right has been violated, the opportunity to file a civil lawsuit based on the information obtained during the review of his medical records, nevertheless such restrictions must be proportional in terms of the person's ability to properly substantiate their claims for compensation for moral damage caused to them, material damage;

- it is the original documents, the content of which cannot be reproduced manually, and which, according to the norms of national legislation, may be unknown to the person whose reproductive rights are violated, and may not be known to the court;

- preventing the state from obtaining copies of medical documentation by a person whose reproductive rights have been violated is not justified, and the reasons for such a restriction cannot be considered compatible with the person's effective exercise of his or her right to access to court.

4. In order to increase the efficiency of compensation for moral damage to a person whose reproductive rights have been violated, as well as to increase the efficiency of pre-trial investigation and the execution of national court decisions, the state is proposed to take the following measures: inclusion in educational programs of training investigators, prosecutors, other categories of law enforcement officers whose professional activities related to law enforcement, mandatory training courses on the right to a fair trial (Article 6 of the Convention), the right to effective remedies (Article 13), qualification assessment of the above-mentioned categories of employees on the subject of their knowledge of the legal positions of the European Court of human rights and the ability to apply the practice of the European Court of Human Rights; the introduction of individual responsibility and regressive compensation for damage by the abovementioned persons in proportion to the fault of each of them in the event of a decision by the European Court of Human Rights in the case against Ukraine, which established a violation of the Convention by the state.

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ВІДШКОДУВАННЯ МОРАЛЬНОЇ ШКОДИ ЯК ГАРАНТІЯ ЗАХИСТУ РЕПРОДУКТИВНИХ ПРАВ ТА ІНШИХ ПРАВ ОСОБИ У СФЕРІ ОХОРОНИ ЗДОРОВ'Я: ПРАВОВІ ПОЗИЦІЇ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

У статті зазначається, що гарантією репродуктивних прав особи є право на справедливий суд та на ефективний засіб правового захисту. Акцентується увага на принципі справедливості та принципі справедливого суду. Органами державної влади має бути надано належне відшкодування моральної шкоди особі, репродуктивні права якої були порушені в результаті неналежного виконання професійних обов'язків медичним працівником/медичними працівниками під час лікування.

Виділяються та аналізуються правові позиції Європейського суду з прав щодо права особи отримати копії своєї медичної документації. Робиться висновок, що це право переважає над забороною виготовлення копій медичних документів, якщо воно встановлюється законом держави навіть з метою захисту медичної інформації від зловживань. Отримання відповідних доказів у формі фотокопій медичної документації є істотним для оцінки особою, репродуктивні права якої були порушені, власних позицій у справі з точки зору ефективності реалізації права на відшкодування моральної шкоди при зверненні до національного суду. Встановлено, що якщо особа фактично висуває вимоги цивільно-правового характеру, то наявність законодавчих положень, які перешкоджають їй отримати відшкодування моральної шкоди, застосовуючи цей судовий спосіб захисту її права та інтересу, або якщо через положення законодавства особі буде важко отримати таке відшкодування – такі положення законодавства свідчать про їх не сумісність з нормами ст. 6 Конвенції, а держава порушує право особи, гарантоване ст. 6 Конвенції.

Виділяються та аналізуються правові позиції Європейського суду з прав людини щодо відшкодування моральної шкоди особі, яка зазнала порушення репродуктивних прав та інших прав у сфері охорони здоров'я. Акцентується увага і на ситуаціях порушення права пацієнта на повагу до приватного життя при його огляді з метою навчання в присутності здобувачів медичної освіти.

Виділяються та аналізуються правові позиції Європейського суду з прав людини щодо відшкодування моральної шкоди особі, яка зазнала порушення права на справедливий суд та на ефективний засіб правового захисту, захищаючи своє порушене репродуктивне право. Встановлено, що в справах проти України систематично підіймається питання неефективності досудового розслідування та неефективності виконання рішення національного суду через невиправдану надмірну їх тривалість. Неодноразові повернення справи на додаткове розслідування, як уже не раз зазначав Європейський Суд з прав людини, вказують на серйозні недоліки в роботі правоохоронної системи та правосуддя.

Акцентується увага на праві особи на відшкодування моральної шкоди, якщо тривалість провадження, яке вона мала ініціювати для отримання відшкодування шкоди, і згодом сплати їй присудженої суми – є надмірною.

Розроблено пропозиції щодо вдосконалення ефективності відшкодування моральної шкоди особі, репродуктивні права якої порушено.

Ключові слова: моральна шкода, принцип справедливості, принцип справедливого суду, правові позиції Європейського суду з прав людини, репродуктивні права, медична документація, обмеження права особи на доступ до медичної документації, відшкодування моральної шкоди, історія хвороби, гарантії прав людини, захист прав людини, права людини в сфері охорони здоров'я, ефективність національних засобів правового захисту, пацієнт, права на повагу до особистого та сімейного життя, право на особисту недоторканість, право на справедливий судовий розгляд, обов'язок держави.