

## Case Note

## PROVISION OF DENTAL CARE: CERTAIN ASPECTS OF COURT PRACTICE SIGNIFICANT FOR MEDICAL LAW

**Oksana Soroka\***, **Nataliia Kozan**, **Oksana Popadynets**, **Nataliia Fedosenko**,  
**Serhii Repetskyi**, **Valentyna Lampel**, **Taras Kotyk**

### ABSTRACT

**Background:** In Ukraine, a notable trend is emerging wherein judicial practice plays an increasingly significant role in regulating medical-legal relations. Recently, our attention has been drawn to a court case on compensation for pecuniary and non-pecuniary damage resulting from improper medical services provided to a patient in a private dental clinic in Ivano-Frankivsk City. After considering this case, the Supreme Court, the highest court in the judicial system of Ukraine, made a decision that, in our opinion, is a landmark in medical law - a complex branch of law that includes a set of legal norms regulating public relations in the field of medical activity.

The purpose of this study is to analyse the court proceedings in a civil case of an action involving a dispute related to the application of the Law of Ukraine 'On Protection of Consumer Rights' on compensation for pecuniary and non-pecuniary damage in the context of the possibility of its further consideration as a landmark case in medical law and as a judicial precedent which provides for the role of an additional regulator of medical-legal relations and the role of a source of medical law.

**Methods:** In the study, a combination of general scientific and special scientific approaches was used, along with analytical, synthetic, complex and generalisation methods.

**Results and Conclusions:** The results of the study indicate that court practice has the potential to demonstrate flexibility, efficiency, connection with everyday life and rapid adaptation to difficult social circumstances, in particular those related to patient access to quality healthcare. The Supreme Court, based on the circumstances of a particular case, the nature of the disputed legal relationship and the content of the claims, may provide not only a model interpretation of a regulatory prescription that is mandatory for lower courts to take into account when resolving similar cases but also has every reason to serve as a guide for healthcare professionals in the course of their professional activities.

**Keywords:** medical law, healthcare, medical-legal relations, case law, Supreme Court, Ukraine.

## 1 INTRODUCTION

According to the World Health Organization (WHO), five patients die every minute as a result of inadequate provision of health care,<sup>1</sup> which in total reaches 2.6 million patients per year in low- and middle-income countries.<sup>2</sup> Patient safety is one of the cornerstone issues of ensuring the quality of the healthcare system, as even in high-income countries, inadequate provision of health care accounts for more than 10% of all hospital admissions.<sup>3</sup> The most common malpractices include inappropriate medication prescriptions, treatment planning errors or deviations from the chosen plan, and incorrect diagnosis. At the same time, diagnostic errors lead to both the choice of incorrect treatment tactics (for example, in surgery, dentistry, traumatology) and prescriptions (family medicine, neurology, etc.).<sup>4</sup> Not only is it a threat to the health and lives of patients, but it also causes significant financial losses for healthcare providers.<sup>5</sup>

The issue of legal assessment of a doctor's actions in criminal or civil proceedings concerning the provision of health care to patients has become particularly relevant. Thus, according to the literary data, the so-called 'medical cases' most often concern obstetricians and gynaecologists, surgeons, and emergency physicians.<sup>6</sup> Legal claims against dentists have also increased in recent years.<sup>7</sup> This is probably due, firstly, to the high cost of dental services. Secondly, poor quality dental care leads to dysfunction of the stomatognathic complex, respiratory and digestive systems, along with aesthetic defects, which affect the quality of life in social and psychological aspects.<sup>8</sup> In addition, the risk of legal claims leads to additional stress and burnout of dentists,

- 1 'Five Avoidable Deaths Per Minute Shows Urgent Need for Action on Patient Safety' (*UN News*, 17 September 2019) <<https://news.un.org/en/story/2019/09/1046552>> accessed 5 August 2023.
- 2 'WHO Calls for Urgent Action to Reduce Patient Harm in Healthcare' (*World Health Organization*, 13 September 2019) <<https://www.who.int/news/item/13-09-2019-who-calls-for-urgent-action-to-reduce-patient-harm-in-healthcare>> accessed 5 August 2023.
- 3 'Patient Safety' (*World Health Organization*, 9 March 2019) <<https://www.who.int/news-room/facts-in-pictures/detail/patient-safety>> accessed 5 August 2023.
- 4 Nicole Dimetman, '35+ Medical Malpractice Statistics for 2022' (*JustGreatLawyers*, 26 January 2022) <<https://www.justgreatlawyers.com/legal-guides/medical-malpractice-statistics>> accessed 5 August 2023; Martin Makary and Michael Daniel, 'Medical Error – the Third Leading Cause of Death in the US' (2016) 353 *BMJ* i2139, doi: 10.1136/bmj.i2139.
- 5 Rachel Ann Elliott and others, 'Economic Analysis of the Prevalence and Clinical and Economic Burden of Medication Error in England' (2021) 30(2) *BMJ Quality & Safety* 96, doi: 10.1136/bmjqs-2019-010206.
- 6 Eva Bergamin and others, 'Medical Professional Liability in Obstetrics and Gynecology: A Pilot Study of Criminal Proceedings in the Public Prosecutor's Office at the Court of Rome' (2023) 11(9) *Healthcare* 1331 doi: 10.3390/healthcare11091331; Christina Schumann and Stephanie Wiege, 'Medical Liability and Criminal Law in Emergency Medicine' (2022) 117 *Med Klin Intensivmed Notfmed* 312, doi: 10.1007/s00063-022-00920-w.
- 7 Suliman Alsaied and others, 'Dental Malpractice Lawsuit Cases in Saudi Arabia: A National Study' (2022) 34(8) *The Saudi Dental Journal* 763, doi: 10.1016/j.sdentj.2022.11.002; King-Jean Wu and others, 'Court Decisions in Criminal Proceedings for Dental Malpractice in Taiwan' (2022) 121(5) *Journal of the Formosan Medical Association* 903, doi: 10.1016/j.jfma.2021.09.023.
- 8 Falk Schwendicke and Sascha Rudolf Herbst, 'Health Economic Evaluation of Endodontic Therapies' (2023) 56(S2) *International Endodontic Journal* 207, doi: 10.1111/iej.13757.

which creates a ‘vicious circle’ and increases the risk of medical errors.<sup>9</sup> Therefore, a proper legal assessment of the dentist’s actions is important for all stakeholders in the healthcare system.

According to the Ivano-Frankivsk Regional Bureau of Forensic Medical Examination, the number of forensic medical examinations regarding the quality of dental services has increased from 1-2 to 4-5 per year. The questions posed by the investigating authorities and the court to the experts mainly concern the quality of dental services, the appropriateness of certain interventions, and the assessment of the severity of injuries caused by the doctor.<sup>10</sup>

A distinction should be made between medical malpractice, which is a bona fide act of a doctor that does not involve criminal intent and is associated with certain shortcomings in diagnosis (examination), treatment or organisation of the treatment process, and crimes committed by medical personnel, for which criminal liability is provided for in the Criminal Code of Ukraine (CrC). Quite often, the line between them is very thin, and it is difficult or impossible for investigators or court officials to distinguish between them without the help of forensic medical experts. For this purpose, a forensic medical examination is appointed. Its appointment is preceded by the painstaking work of the investigator to seize all medical documentation related to the case, interrogation of the parties, witnesses, etc. An important document is the Clinical Expert Commission meeting minutes, which contain data on the medical component of the precedent. The final stage is the appointment of a commission forensic medical examination and the formation of a commission of experts, which must include specialists in the field of the case. The conclusion of the commission forensic medical examination is an important piece of evidence in a case, so it is subject to high requirements: objectivity, reliability, scientific validity, and accessibility of presentation. However, even if they reach the court, ‘medical cases’ can usually last for years and often end in either acquittal or closure due to the statute of limitations. However, the number of convictions of doctors has recently increased significantly due to the development of medical law, a complex branch of law that includes a set of legal norms regulating social relations in the field of medical activity.<sup>11</sup>

## 2 JUDICIAL PRACTICE AND MEDICAL-LEGAL RELATIONS

Ukrainian legislation does not contain the term ‘judicial precedent’, as our legal system belongs to the Romano-Germanic (continental) legal system, which provides that laws, not individual court cases, have legal force, unlike the Anglo-Saxon legal system, in which the formal priority belongs to the law, but in fact, everything depends on the discretion of the judge, on how they interpret and apply the law.

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9 Nadya Avramova, ‘Self-Perceived Sources of Stress and Burnout Determinants in Dentistry – A Systematic Review’ (2023) 30(1) Galician Medical Journal E202317, doi: 10.21802/gmj.2023.1.7.

10 Natalia Kozan and others, ‘Analysis of Commission Forensic-Medical Examinations Performed in Cases Concerning the Responsibility of Surgical Professional Doctors’ (2020) 27(2) Galician Medical Journal E2020210, doi: 10.21802/gmj.2020.2.10.

11 Natalia Kozan and others, ‘The Structure of Forensic Examinations Regarding the Prosecution of Surgical Doctors’ (Legal Problems of the Modern Transformation of Health Care: conference, Zaporizhzhia, 27-28 May 2021) 46.

The explanatory dictionary of the Ukrainian language contains a definition of ‘precedent in law - a court decision in a particular case, which is subsequently used as a model for courts in resolving similar cases.’<sup>12</sup> The most common understanding of a judicial precedent is a decision made by a higher judicial authority in a particular case that is binding on other courts when considering a similar case.

However, after the adoption in 2006 of the Law of Ukraine ‘On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights’, the situation in the country began to change. Article 17 of this law states that the courts shall apply the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the case law of the European Court of Human Rights (ECtHR) as a source of law in their consideration of cases.<sup>13</sup>

The significance of the case under consideration in this study is due to the fact that in Ukraine, judgments of the ECtHR, judgments of the Constitutional Court of Ukraine (CCU) and resolutions of the Supreme Court (SC) currently have the status of an additional regulator of social relations, providing judicial precedent with the actual role of a source of Ukrainian law and gradual formalisation of this status. In addition, there is a tendency in Ukraine to increase the importance of judicial practice in regulating social relations in medical-legal relations, and the number of so-called ‘medical’ cases opened in courts based on patients’ claims is growing.

According to the Constitution of Ukraine, every citizen has the right to healthcare, medical care and medical insurance. Part 4 of Article 55 of the Constitution guarantees everyone the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law.<sup>14</sup>

The right to healthcare encompasses a standard of living, which includes access to food, clothing, housing, medical care and social services that are necessary to maintain human health; qualified medical and rehabilitation care, including free choice of a physician and rehabilitation specialist, selection of treatment and rehabilitation techniques in alignment with the recommendations of a physician and rehabilitation specialist, choice of a healthcare provider; accurate and in time data regarding a one's well-being and the well-being of the population; compensation for damage caused to health; appealing against unlawful decisions and actions of employees, healthcare institutions and bodies and other rights provided for in Article 6 of the Law of Ukraine ‘Fundamentals of the Legislation of Ukraine on Healthcare.’<sup>15</sup> ‘The provision of high-quality healthcare

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12 *Academic Explanatory Dictionary of the Ukrainian Language* (2023) <<http://sum.in.ua>> accessed 5 August 2023.

13 Law of Ukraine no 3477-IV ‘On the Execution of Judgements and Application of the Case Law of the European Court of Human Rights’ of 23 February 2006 (as amended of 2 December 2012) <<https://zakon.rada.gov.ua/laws/show/3477-15>> accessed 5 August 2023.

14 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (as amended of 01 January 2020) <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> accessed 5 August 2023.

15 Law of Ukraine no 2801-XII ‘Fundamentals of the Legislation of Ukraine on Health Care’ of 19 November 1992 (as amended of 21 July 2023) <<https://zakon.rada.gov.ua/laws/show/2801-12>> accessed 5 August 2023.

services is important for the whole world, as non-compliance with standards in this area is one of the main causes of injury, other health damage and death not only in the countries of the former Soviet Union but also in the European Community, Asia and the United States of America. Since the inalienable human rights in the medical sphere are subject to encroachment, they require special protection and the involvement of legal liability mechanisms, namely criminal and civil liability.<sup>16</sup>

S. Buleuca and M. Mendzhul noted that

'liability for a civil offence is one of the important issues considered by the theory of civil law, and civil liability in the field of public health is also important. Civil liability is the means of ensuring the protection of personal non-property rights (life and health) of patients in the provision of medical care (services). In case of violation of the right to health, a person may be limited in their actions, need outside support, cannot move without someone else's help, perform work in the usual way, suffer from severe pain, cannot dress or wash themselves, and cannot cope with their daily routine. In most cases, injured patients sue the healthcare facility to obtain compensation for the damage to their health caused by medical malpractice.<sup>17</sup>

In judicial practice, these claims are usually referred to as non-contractual (tort) liability. They are regulated under Article 80 of the Fundamentals of Legislation of Ukraine on Healthcare and the provisions of the Civil Code of Ukraine.

From the perspective of Ukrainian legislation, the interaction between a patient and a healthcare facility or a physician who is an individual entrepreneur is considered a legal relationship between a consumer and a provider of medical services. The consumer has the right to receive quality healthcare services, free elimination of defects, compensation for pecuniary and non-pecuniary damage, and the provider (the healthcare facility where the doctor works or the doctor him/herself if he/she is engaged in entrepreneurial activity) is obliged to compensate for damage caused to the patient as a result of unlawful decisions, actions or inaction.<sup>18</sup>

Legal conflicts play an important role in protecting the rights of subjects of medical-legal relations. The possibility of their occurrence in the field of medical activity is due to the fact that the purpose of a contract for the provision of medical services is to provide the service itself and not to achieve the result of recovery,<sup>19</sup> which is often forgotten by patients, especially when the provision of such services does not result in the expected improvement in their health.

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16 TM Yamnenko and IF Litvinova, 'Judicial Domestic Practice in Medical Criminal Proceedings and Civil Cases' (2018) 4(62) State and regions, Series: Law 51.

17 SB Buleuca and MV Mendzhul (eds), *Medical Law* (RIK-U 2021) 640.

18 Law of Ukraine no 1223-XII 'On the Protection of Consumer Rights' of 12 May 1991 (as amended of 19 November 2022) <<https://zakon.rada.gov.ua/laws/show/1023-12>> accessed 5 August 2023.

19 Roman Maydanyk, 'The Issue of Civil Liability under the Contract for the Provision of Medical Services' (2011) 11/12 Law of Ukraine 82.

In Ukraine, there is currently a tendency to increase the importance of judicial practice in regulating social relations in general and in the field of medical relations in particular. The highest court in Ukraine's judicial system is the Supreme Court, which ensures the consistency and unity of judicial practice in the order and manner prescribed by procedural law and considers disputes of the most important significance for society and the state.

After analysing the data from the Unified State Register of Court Decisions, it was established that in the period from 2019 to 2022, the Supreme Court considered only one civil case of claim proceedings in disputes related to the application of the Law of Ukraine 'On Consumer Protection' regarding compensation for pecuniary and non-pecuniary damage for the improper provision of medical (dental) services, which became the subject of our study and has grounds to be considered as a landmark in medical law.<sup>20</sup>

There is no doubt that disputes related to the protection of personal non-pecuniary human benefits to life and health, the process of providing health care and the result of its receipt, as objects of medical-legal relations, are of fundamental importance for society and the state in general and the medical law branch in particular. The practice of judicial consideration of the so-called 'medical' cases is riddled with complex practical issues due to its multidisciplinary nature. It requires the search for and implementation of legal innovations in protecting human rights in the healthcare field.

This is confirmed by the fact that in 2021, the Supreme Court published a review of judicial practice in cases of disputes arising in the healthcare field. The review includes several important legal opinions of the Civil Court of Cassation of the Supreme Court, which will be important for forming a unified law enforcement practice.

Among these conclusions, the court singled out disputes related to the application of legislation on information and personal data protection; disputes arising from appeals against decisions of heads of educational institutions on the legality of suspending students who are not vaccinated; disputes arising from contractual relations; disputes regarding the provision of certain types of health care; disputes on compensation for medical services.<sup>21</sup>

Such decisions of the Supreme Court not only form a well-grounded legal position on the application by all courts of a particular substantive law rule or compliance with a procedural law rule that was incorrectly applied in the future but also direct the practice towards uniform and correct application of the law. The Supreme Court explains the content of a legislative act in terms of its understanding and implementation in practice in other cases, indicating the circumstances that must be considered when applying a particular legal provision, using a specific case as an example.

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20 Overview of the data on decisions made by the Supreme Court from 2019 to 2022 in disputes related to the application of the Law of Ukraine 'On Protection of Consumer Rights'. *Unified State Register of Court Decisions* (2019-2022) <<https://reyestr.court.gov.ua>> accessed 25 July 2023.

21 GhS Kolomijecj (ed), *Review of the case law of the Civil Court of Cassation within the Supreme Court in cases of disputes arising in the field of healthcare: Decisions entered into the Unified State Register of Court Decisions for February 2018 – July 2021* (Supreme Court 2021) <<https://supreme.court.gov.ua/supreme/pres-centr/news/1235015/>> accessed 25 July 2023.

According to Judge of the Grand Chamber of the Supreme Court D. Hudyma, with whom the authors team agree,

‘the fact that Ukrainian legislation does not contain a formalised concept of ‘precedent’ does not mean that it does not exist de facto. It is not necessary to consider precedent in the so-called classical sense, linking it to the sources of law in the Anglo-Saxon legal system. The Supreme Court, based on the circumstances of a particular case, the nature of the legal relationship in dispute and the content of the claims, provides a model for interpreting a regulatory provision. There is no consensus in the academic community as to whether such an interpretation creates a new regulatory prescription. However, given that the logical scope of interpretation of regulatory provisions is not only literal, it is possible to justify that the Supreme Court, by giving a narrowing or expanding interpretation of a regulatory provision, creates a new rule that has not been formalised in this way before.’<sup>22</sup>

### 3 JUDICIAL PRECEDENTS SIGNIFICANT FOR MEDICAL LAW

In light of mentioned above, we propose to consider the decision of the Supreme Court adopted on 30 November 2022 in civil case No. 344/3764/21 in a dispute related to the application of the Law of Ukraine ‘On Consumer Protection’ on compensation for pecuniary and non-pecuniary damage for the improper provision of medical (dental) services as a landmark.<sup>23</sup>

The content of the claim established that in March 2021, the applicant (patient) appealed to the court with a claim against the dentist (as an individual entrepreneur) for compensation for pecuniary and non-pecuniary damage for the improper provision of medical services. She motivated her claims by the fact that from February to August 2020, she received dental services at the ‘Lichnytsia Tkachuka’ (‘Tkachuk’s medicine cabinet’) in Ivano-Frankivsk City, but the doctor performed the prosthetics poorly, which resulted in pain and facial appearance defects. The applicant paid 64,930 UAH (€ 1,995) for the services received, but the doctor-entrepreneur did not issue her any payment documents. Subsequently, the applicant had to see another dentist and spent additional funds of 35,430 UAH (€ 1,047) for further treatment and prosthetics. She estimated the non-pecuniary damage at 400,000 UAH (€ 11,819). In addition, she asked to recover another 133,000 UAH (€ 3,930) from the defendant for repeated prosthetic treatment.

In support of her claims, the applicant submitted to the court correspondence between her and the defendant via mobile messenger ‘Viber’ in March and August 2020 regarding the provision of medical services. At the same time, the defendant’s mobile phone number

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22 ‘Ukrainian Legislation Does not Enshrine the Concept of Precedent, but this Does not Mean that it Does not Exist de Facto’ – Dmytro Hudyma’ (*Supreme Court*, 4 March 2019) <<https://supreme.court.gov.ua/supreme/pres-centr/news/659262>> accessed 25 July 2023.

23 Case no 344/3764/21 Court proceedings no 61-2466sk22 (Civil Cassation Court of the Supreme Court of Ukraine, 30 November 2022) <<https://reyestr.court.gov.ua/Review/107878096>> accessed 25 July 2023.

corresponds to the one listed on the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organizations website.

The applicant also submitted to the court the conclusion of a clinical expert assessment conducted by the commission in accordance with the order of the Department of Health of the Ivano-Frankivsk Regional State Administration of 18 September 2020 No. 335, which established the diagnosis and recommended removing the bridges from the upper and lower jaws and repeating prosthetic treatment with aesthetic fixed prostheses. The witness, who was the chairman of the Clinical Expert Commission, was interrogated at the court hearing and confirmed that it was the defendant who provided the applicant with dental services. In particular, the witness explained that the defendant had personally asked them to meet at the university department to discuss the situation. During the meeting, the defendant admitted that he had provided dental prosthetics services to the applicant. At the same time, the defendant noted that he did not have the relevant qualifications in 'Prosthetic dentistry'.

In its turn, the defendant denied the existence of contractual relations between the parties and did not refute the fact that he provided poor-quality dental services to the applicant.

*The decision of the Ivano-Frankivsk City Court of Ivano-Frankivsk Region on 5 October 2021 dismissed the claim.*<sup>24</sup>

In dismissing the claim, the court of first instance proceeded from the fact that the applicant had not proved that the defendant had provided her with poor quality dental and prosthetic services, their cost, the fact of payment, and had not proved the causal link between the defendant's actions and the damage caused to her. From the evidence examined at the court hearing, it is impossible to establish the person who caused the applicant's damage and, accordingly, the causal link between the unlawful behaviour of such a person and the damage caused to the applicant. At the same time, the court considered that the fact of payment for services could not be confirmed by witnesses' testimonies and screenshots of the phone screen showing the correspondence between the applicant and the defendant.

On 11 January 2022, the Ivano-Frankivsk Court of Appeal overturned the decision of the first instance and issued a new judgment, which partially satisfied the claim.<sup>25</sup> 64,730 UAH (€ 2080) of pecuniary and 10,000 UAH (€ 321) of non-pecuniary damages were recovered from the defendant in favour of the applicant. This amount of pecuniary damage was correlated with the prices set by 'Lichnytsia Tkachuka' ('Tkachuk's medicine cabinet') in accordance with the clinic's price list. In determining the amount of non-pecuniary damage, the court proceeded from the fact that the defendant did not refute the presumption of his guilt in the negative consequences of the applicant's health deterioration and was guided by the principles of reasonableness, deliberation and fairness. In addition, the defendant was ordered to pay the court fee and legal aid costs. According to the Court of Appeal, the parties had a contractual relationship on the merits of the dispute, confirmed by witnesses'

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24 Case no 344/3764/21 Court proceedings no 2/344/2294/21 (Ivano-Frankivsk City Court of Ivano-Frankivsk Region, 5 October 2021) <<https://reyestr.court.gov.ua/Review/100211355>> accessed 25 July 2023.

25 Case no 344/3764/21 Court proceedings no 22-c/4808/27/22 (Ivano-Frankivsk Court of Appeal, 11 January 2021) <<https://reyestr.court.gov.ua/Review/102616292>> accessed 25 July 2023.



testimonies and screenshots of the phone screen showing the correspondence between the applicant and the defendant.

On 30 November 2022, the Supreme Court dismissed the cassation appeal and upheld the Ivano-Frankivsk Court of Appeal decision.<sup>26</sup>

The court noted that in the case under review, the subject of the dispute is compensation for pecuniary damage and non-pecuniary damage for the improper provision of medical services, which involves a set of necessary, sufficient, bona fide, appropriate professional actions of a medical professional (contractor) aimed at meeting the needs of the patient (customer, consumer of services). Failure to provide or improper provision of medical care may result in injury, other damage to health, pecuniary or non-pecuniary damage, which will trigger the tort mechanism. Damages caused to the customer by non-performance or improper performance of the agreement for the provision of services for a fee shall be reimbursed by the contractor if the contractor is at fault, in full, unless otherwise provided by the agreement. A contractor who has breached a fee-for-service agreement in the course of carrying out its business activities is liable for this breach unless it proves that proper performance was impossible due to force majeure unless otherwise provided by the agreement or law (Article 906 (1) of the Civil Code of Ukraine).

*Regarding causation.* The Court noted that if a patient suffers harm and claims that it is the result of the responsible person's failure to fulfil the duty of professionalism and care, the failure to fulfil the duty of professionalism and care, as well as the causal link between this breach and the resulting harm, are presumed. The impossibility of establishing a causal link 'with the emergence of complaints after the provision of dental treatment and prosthetics due to the lack of primary medical documentation' was indicated in the conclusion of the commission forensic medical examination, which was appointed by a court order.

*Regarding medical records.* The court stated that considering the principle of reasonableness, it is evident that the medical services provider is obliged to maintain appropriate medical records of treatment. According to Art. 39 of the Law of Ukraine 'Fundamentals of the Legislation of Ukraine on Health Care', a patient who has reached the age of majority has the right to receive reliable and complete information about his or her health, including to review relevant medical documents relating to his or her health. Such documentation should include, in particular, information collected from previous conversations with the patient, research or consultations, information about the patient's consent and information related to the services provided.

*Regarding contractual legal relations.* The court noted that if the parties have not concluded a transaction in writing and one of the parties denies the fact of its conclusion, the party seeking to prove the fact of the transaction (agreement) may do so with the help of written evidence, audio, video recording and other evidence. Evidence is formed on any relevant data upon which the court determines the existence or absence of facts that support the claims and objections made by the parties involved in the case and other relevant circumstances important to the case's resolution. The testimony of witnesses cannot be

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26 Case no 344/3764/21 Court proceedings no 61-2466sk22 (n 23).

background for the court's decision. Since the defendant denied the fact that it had a contractual relationship with the applicant (patient), the defendant was obliged to prove the absence of such a relationship by means of evidence (written evidence, audio and video recording, etc.).

*Regarding the specifics of the burden of proof in such cases.* The court noted that patients cannot be expected and required to have precise medical knowledge. They do not have an accurate understanding of the treatment processes and the necessary qualifications to analyse and provide the circumstances of the case in dispute. To properly participate in civil proceedings, a party does not need to have professional medical knowledge. In this regard, a party to the proceedings, who is a patient, has the right to limit him/herself to a report that will allow assuming violations on the part of the medical staff due to the consequences that have occurred for the patient. Therefore, taking into account the principle of reasonableness, a patient who has applied to the court for protection of violated rights, which consist of causing damage to health, should only point out the violation, and then the burden of proof is on the medical institution or doctor. At the same time, this does not violate the principle of discretionary judicial process but rather serves to ensure procedural equality of the parties.

*Regarding contradictory judicial practice.* The Court found the cassation appeal's arguments that the conclusion of the court of appeal contradicts the legal position of the Supreme Court set out in the resolutions (a list of resolutions was provided) to be unfounded since the legal relations in the said cases and the case under review are not similar, and the factual circumstances in these cases are different from the circumstances in the case under review; therefore the conclusions on the consideration of the cases are different. The Court emphasised that similarity of legal relations means, in particular, the identity of the object and subject of legal regulation, as well as the conditions for applying legal norms. The content of legal relations to determine their similarity in different decisions of the court of cassation is determined by the circumstances of each case. Thus, the Supreme Court introduces a practice when, in the text of the resolution, it demonstrates the differences between the case under consideration and the case in which a particular conclusion was previously formulated and does so to make it clear why different decisions were made.

V. Krat, judge of the Civil Court of Cassation of the Supreme Court, drew attention to certain aspects faced by courts when considering cases on the provision of medical services at the scientific and practical conference dedicated to the 30th anniversary of the adoption of the Law of Ukraine 'Fundamentals of Healthcare Legislation of Ukraine'.<sup>27</sup> Using the example of the court case that is the subject of our study, he pointed out that the court of first instance proceeded from the fact that the applicant had not proved that she had entered into a contract with the business entity for the provision of medical services, and this made it impossible to protect her interests in a civil law manner. Since there was no contract, the court considered the case under tort liability. Instead, the appellate court considered evidence such as the witness's explanations and screenshots of the applicant's phone screen

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27 'Vasyl Krat Spoke about the Contract and Tort in the Provision of Medical Services' (*Supreme Court*, 21 November 2022) <<https://supreme.court.gov.ua/supreme/pres-centr/news/1348838/>> accessed 25 July 2023.

showing the correspondence between the applicant and the defendant. It concluded that the parties had a contractual relationship and that the applicant suffered damage due to the defendant's fault. The panel of judges further qualified the relationship as a tort relationship and ruled to recover pecuniary and non-pecuniary damage from the defendant in favour of the applicant.

As for the combination of contract and tort, the judge proposes to distinguish between the spheres: the contract should be the first, and in exceptional cases - the tort, and noted that it would be logical to provide a contract for the provision of medical services in the relevant chapter of the Civil Code of Ukraine. The judge believes that such a contract has a civil nature and can be subject to separate rules, with more requirements for a doctor or a medical institution, for example, regarding the maintenance of medical records. In his opinion, the patient is always the weaker party in such relationships, so it is necessary to create mechanisms that will help protect the patient's rights in case of improper performance of the contract or even a transition to tort. The judge suggests that the contractor should be obliged to keep appropriate medical records of treatment. Such documentation should include, *inter alia*, information collected from previous conversations with the patient, research or consultations, information on the patient's consent and information relating to the services provided.<sup>28</sup>

Highlighting certain issues related to pre-trial investigation and court proceedings in medical cases, I. Senyuta notes that

'the field of health care is vulnerable due to both the risks associated with medical practice, the complexity of the human body, and the permanent transformations of the healthcare sector, which give rise to new challenges, conflicts and gaps: from lawmaking to law enforcement and law application. The study on the healthcare sector is very illustrative, reinforced by the severity of the consequences, the sensitivity of values and the complexity of restoring justice.'<sup>29</sup>

The range of issues highlighted with a focus on medical cases, where human rights are particularly relevant, as the most important values - life and health - balance on the scales of justice demonstrates the need for systemic and comprehensive changes in Ukrainian legislation and professional law enforcement.<sup>30</sup>

## 4 CONCLUSIONS

The analysis suggests that today, lawmaking cannot objectively foresee all the nuances that require legal regulation in the healthcare sector and will arise while providing medical care. Instead, the Supreme Court, based on the circumstances of a particular case, the nature of the disputed legal relationship and the content of the claims, can provide not only a sample interpretation of a regulatory prescription, which is mandatory for lower courts to take into

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28 *ibid.*

29 Iryna Senyuta, 'Selected Issues of Pre-Trial Investigation and Court Proceedings in Medical Cases' (2020) 3 *Law of Ukraine* 11, doi: 10.33498/louu-2020-03-011.

30 *Ibid.*

account when resolving similar cases but also has every reason to serve as a guide for healthcare professionals in their professional activities aimed at preventing, diagnosing and treating patients. The court focused on several key responsibilities of a healthcare professional, such as demonstrating professionalism and care for the patient, proper medical records, and obtaining informed consent for medical intervention.

Thus, judicial practice has the potential to demonstrate flexibility, efficiency, connection with everyday life and rapid adaptation of law to changing social circumstances. There are circumstances when judicial practice shapes law enforcement practice and indirectly influences rulemaking practice. Such mechanisms have been used to protect human rights not so long ago but are gradually gaining ground. Each decision in such a case becomes a precedent and plays a prominent role in the progressive movement for human rights and developing a relatively young branch of law - medical law.

The analysis of the court dispute concerning compensation for pecuniary and non-pecuniary damage for improper provision of medical services gives grounds to consider the decision of the Supreme Court - the highest court in the judicial system of Ukraine - in civil case No. 344/3764/21 in the context of a landmark case in medical law, as an additional regulator of medical-legal relations and as a judicial precedent that responds to important problems in society and the state and puts on the agenda the issue of applying precedent in Ukraine as a source of law.

In the authors' opinion, the National Health Service of Ukraine will become one of the parties in court disputes over the improper provision of medical care to patients as a newly created central executive body that implements state policy regarding the state financial guarantees of healthcare and manages budget funds for the purchase of medical services (in the interests of patients). Perhaps, then, society will observe a completely different picture, which will likely be of interest to scholars and practitioners and will be the subject of further scientific research.

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## AUTHORS INFORMATION

### Oksana Soroka

\* Cand. of Public Administration (Equiv. Ph.D.), Assoc. Prof., Department of Forensic Medicine, Medical and Pharmaceutical Law, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine

oksoroka@ifnmu.edu.ua

<https://orcid.org/0000-0002-9510-2936>

**Corresponding author**, responsible for investigation, methodology and writing.

**Competing interests:** The author, on behalf of the Authors Team, declares that there are no potential conflicts of interest related to financial support, commercial, legal, professional, or any other relationship with organisations, institutions, state bodies, or with individuals collaborating alongside the Authors Team, that could influence the views and opinions of the Authors Team as presented in this manuscript.

**Disclaimer:** The author declares that her opinions and views expressed in this manuscript are independent of any influence from organisations.

### Nataliia Kozan

Dr. Sc. (Medicine), Prof., Head of the Department of Forensic Medicine, Medical and Pharmaceutical Law, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine

nkozan@ifnmu.edu.ua

<https://orcid.org/0000-0003-1017-5077>

**Co-author**, responsible for conceptualisation, project administration and supervising.

**Competing interests:** No conflicts to declare.

**Disclaimer:** The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

### Oksana Popadynets

Dr. Sc. (Medicine), Prof., Head of the Department of Human Anatomy, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine

opopadynets@ifnmu.edu.ua

<https://orcid.org/0000-0002-2093-5984>

**Co-author**, responsible for formal analysis, conceptualization, and supervising

**Competing interests:** No conflicts to declare.

**Disclaimer:** The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

### Nataliia Fedosenko

Assist. Prof., Department of Forensic Medicine, Medical and Pharmaceutical Law, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine

nfedosenko@ifnmu.edu.ua

<https://orcid.org/0000-0001-5071-8457>

**Co-author**, responsible for writing, formal analysis, review and editing.

**Competing interests:** No conflicts to declare.

**Disclaimer:** The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

### **Serhii Repetskyi**

PhD in Law, Assoc. Prof., Department of Law and Public Administration at the King Danylo University, Ivano-Frankivsk, Ukraine

repetskyi.serhii@ukd.edu.ua

<https://orcid.org/0000-0003-0683-659X>

**Co-author**, responsible for writing, formal analysis, review and editing.

**Competing interests:** No conflicts to declare.

**Disclaimer:** The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations.

### **Valentyna Lampel**

Deputy Director at the Scientific and Research Expert-Criminalistic Center of the Ministry of Internal Affairs of Ukraine, Ivano-Frankivsk, Ukraine

ndekc\_ifr@ukr.net

<https://orcid.org/0000-0002-7838-4716>

**Co-author**, responsible for resources, data curation, formal analysis and validation.

**Competing interests:** No conflicts to declare.

**Disclaimer:** The author declares that her opinions and views expressed in this manuscript are independent of any influence from organizations, including the affiliated SRECC of the Ministry of Internal Affairs of Ukraine.

### **Taras Kotyk**

MDent, Cand. of Medical Science (Equiv. Ph.D.), Assoc. Prof. at the Department of Human Anatomy, Ivano-Frankivsk National Medical University, Ivano-Frankivsk, Ukraine

tkotykt@ifnmu.edu.ua

<https://orcid.org/0000-0002-3585-2356>

**Co-author**, responsible for writing, data curation and formal analysis.

**Competing interests:** No conflicts to declare.

**Disclaimer:** The author declares that his opinions and views expressed in this manuscript are independent of any influence from organizations.

## **ABOUT THIS ARTICLE**

### **Cite this article**

Oksana Soroka, Nataliia Kozan, Oksana Popadynets, Nataliia Fedosenko, Serhii Repetskyi, Valentyna Lampel and Taras Kotyk, 'Provision of Dental Care: Certain Aspects of Court Practice Significant for Medical Law' (2024) 1(22) Access to Justice in Eastern Europe. <https://doi.org/10.33327/AJEE-18-7.1-a000103>

Submitted on 18 Aug 2023 / Revised 11 Oct 2023 / Approved 12 Nov 2023

Published ONLINE: 1 Dec 2023 / Last Published: 1 Feb 2024

DOI <https://doi.org/10.33327/AJEE-18-7.1-a000103>

**Managing editor** – Mag. Polina Siedova. **English Editor** – Julie Bold.

**Summary:** 1. Introduction. – 2. Judicial practice and medical-legal relations. – 3. Judicial precedents significant for medical law. – 4. Conclusions.

**Keywords:** *medical law, healthcare, medical-legal relations, case law, Supreme Court, Ukraine.*

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