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Medical Malpractice Liability: Kazakhstan Law and Practice

Liability for medical malpractice in Kazakhstan remains poorly regulated.

The Kazakhstan healthcare system has recently undergone a crucial transformation, with pending reforms designed to improve the quality of medical services by promoting competition in the healthcare system. While significant changes are being introduced to healthcare management and financing, liability for medical malpractice remains poorly regulated and inefficient in practice.

In this LawFlash, we provide a general overview of the current landscape in relation to malpractice liability for medical specialists and recommend certain changes that may be introduced.

Existing Legal Remedies for Medical Malpractice

Depending on the severity of the harm caused, medical malpractice may result in administrative or criminal liability. In addition, a medical specialist may have to pay damages and may be subject to disciplinary sanctions.

Administrative Liability

Administrative liability of medical specialists covers nonperformance or improper performance of professional duties due to negligence as well as noncompliance with the procedures and accepted standards of medical assistance.

Administrative sanctions may be utilized only when there is minor damage to a patient's health or if the malpractice could have potentially led to (but did not actually lead to) minor, moderate, or serious damage to a patient's health. Sanctions may include a monetary penalty (up to USD1,120), withdrawal of a specialist's certificate to practice, or suspension or cancellation of the medical licence. The medical specialist and/or the healthcare organization for which the specialist works may be held liable.

Recent legislative initiatives suggest stricter liability for medical malpractice that results in minor damage to a patient's health by way of reclassifying the malpractice from an administrative offense to a criminal offense.

Criminal Liability

If medical malpractice results in moderate to serious damage to a patient's health or a patient's death, criminal liability may be imposed on the guilty medical practitioner. Under Kazakhstan law, only individuals (not legal entities) may be subject to criminal liability. The fault of the medical specialist must be in the form of negligence (without intent). Possible criminal sanctions range from a fine (up to USD2,380) to imprisonment (up to three years).

Civil Liability

Any injured patient is entitled to bring a civil medical malpractice action under which he or she may potentially claim compensation for real damage (actual costs incurred in connection with the injury), loss of profit, and compensation for moral harm.

Disciplinary Liability

Under the umbrella of Kazakhstan's employment law, a healthcare organization may impose disciplinary sanctions on a guilty medical specialist (e.g., a demotion or dismissal from the job).

Issues with Medical Malpractice Liability

While the existing legislation provides for a general legal framework for addressing the problems associated with low-quality medical services, official statistics show that, despite the growing number of malpractice claims, only a few claims actually result in the medical specialist being held liable. The inefficiency of the national malpractice liability system is due to a number of factors, the most important of which are discussed below.

Complexity of Malpractice Claims

Malpractice claims remain one of the most complex and expert-dependent types of legal claims. First, a claim's complexity is determined by the specific nature of the medical activity. Thus, death or damage to health occurring during medical care, unlike in other professional activities, is not always the result of professional malpractice and may occur without the practitioner's fault. Second, the official regulations applicable to medical activity cannot fully cover the full range of diseases and medical professionals' activities. Third, examinations into malpractice claims require special knowledge of both the relevant area of medicine and the applicable law.

Gaps in the Legal Regulation

National legislation does not address a number of key terms that are required for proper legal qualification of medical misconduct, which presents difficulties for the successful investigation and adjudication of malpractice claims.

For example, there are no legal concepts of "medical error" and "incident" or criteria for their differentiation from "medical malpractice", which creates legal uncertainty. Generally, any medical interference is associated with a risk of adverse consequences for a patient. However, a bad outcome of medical care is not always a result of medical malpractice; it may also occur due to "incident" or "medical error", which should not result in liability for the medical specialist.

An incident occurs when a medical specialist acts in compliance with medical standards and objectively could not foresee or prevent the negative impact of his or her actions. A medical error, like malpractice, is associated with erroneous actions of the medical specialist; however, it lacks negligence. If the medical specialist's actions were reasonable based on the circumstances, he or she could be found not guilty. However, if the injured patient has evidence that the medical specialist was negligent and therefore failed to meet the professional standards expected, the specialist may be held liable for malpractice.

Further, there is no developed unified doctrine of compensation for poor-quality medical services in civil legislation. For instance, there is still a debate over the legal nature of civil liability for medical malpractice (tort vs. contractual) as well as the applicability of strict (no-fault) liability for medical specialists under the laws on consumer protection.

In addition, the legislation does not clearly provide for limitations on professional medical liability (e.g., when a patient cannot make a full recovery or when a patient's actions contributed to the harm). Legal regulation is also required for compensation of damages caused by "incidents", i.e., when actions of medical specialists result in personal injury but are not per se erroneous and negligent.

Low-Quality Medical Examination

Another major reason for the inefficient malpractice liability system is the underdevelopment of forensic medical examination in Kazakhstan. Medical examination is crucial for adequate legal qualification of professional medical

misconduct. It may essentially prove the wrongfulness of a medical specialist's actions and the cause and effect between his or her actions and a patient's injury or death.

The shortcomings of medical examination become particularly evident when there are personal injuries resulting from omissions or negligence in medical treatment as opposed to more straightforward medical offenses (e.g., failure to render aid to a patient). Forensic medical practice demonstrates that, in many cases, adequate medical and legal evaluation of healthcare quality poses serious issues. The key reasons for this are that experts do not have the appropriate qualifications and that there are outdated technical facilities, low-quality medical records, and a lack of approved examination techniques.

Lack of Special Expertise

The investigating authorities and judges lack the specific knowledge, dedicated investigative techniques, and adequate evidence collection methods that are required for successful investigation of malpractice claims. This may result in a low level of protection for injured patients and may eventually have a negative impact on the quality of healthcare services provided.

In addition, since some important legal terms that are required for adequate legal qualification of medical misconduct are not provided or are poorly defined in the legislation, there is no common approach to the interpretation of such terms by medical specialists, law enforcement authorities, or courts. As a result, law enforcement practice is less predictable and reliable.

Compensation of Damages

During the Soviet era, malpractice liability systems were mainly based on administrative measures (criminal, administrative, and disciplinary sanctions). Today, the regulatory framework is moving slowly toward market mechanisms. However, in most cases, it is still possible to see the application of the Soviet heritage tools, rather than a market approach, which is generally based on compensation of damages.

Possible Options for Development

In addition to overcoming the existing shortcomings, the other options discussed below should be considered.

Professional Liability Insurance

As market relations spread over the healthcare industry, it is necessary to remember that the professional activity of medical specialists is associated with a high level of risk and responsibility. Therefore, the introduction of mandatory insurance for professional liability of medical specialists appears to be an essential tool for protecting specialists and patients in the event of a tragic incident or medical error. It should be noted that, as a general rule, professional liability insurance covers acts of medical specialists that result in personal injury, provided there is no negligence.

Alternative Dispute Resolution

As adjudication of medical claims requires special expertise, the creation of specialized courts within the public court system for handling medical malpractice claims seems justified. Such courts would consist of specially trained judges and would interact with independent expert witnesses. This may make justice more efficient and fair for injured patients and may decrease litigation time and costs. In addition, alternative dispute resolution options could be allowed. As the courts become more overcrowded, an injured patient may be entitled to go to arbitration or mediation.

As a final note, the difference between the provision of quality healthcare and medical malpractice is often the difference between life and death. As the key goal of the ongoing healthcare reform is to improve the quality of medical services, such a makeover should also address the underlying liability for medical malpractice.

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