Ондрей Достал

Надання медичної допомоги медичними працівниками під час епідемії: значення, права та обов'язки (порівняльний аналіз)

Метою дослідження є висвітлення та порівняння міжнародних стандартів, законодавства Чеської Республіки та інших держав з точки зору правового регулювання прав та обов'язків медичних працівників під час епідемії. Епідемія — загальносоціальна проблема, під час епідемій інтереси захисту публічного здоров'я можуть переважати над інтересами захисту індивідуальних прав. Попередження та боротьба з епідемією є публічним обов'язком, у виконанні якого важливу роль відіграє професійна діяльність медичних працівників. Основне завдання медичних працівників під час епідемії полягає у максимально можливому збалансуванні публічних інтересів та інтересів окремої людини. Наголошено на важливості неухильного дотримання медичними працівниками вимог Міжнародного етичного кодексу, окремі з яких трансформувались в обов'язки, закріплені національним законодавством.

Проаналізовано положення Конвенції з прав людини та основоположних свобод (1950), Конституційного Закону Чеської Республіки з питань епідемії та Медичного кодексу, а також модель організації професійної діяльності медичних працівників за законодавством Сполучених Штатів Америки з точки зору з'ясування необхідності, ефективності та умов виконання медичними працівниками професійних обов'язків, які передбачені зазначеними актами, в умовах надзвичайних ситуацій.

У статті висвітлено проблемні питання, які стосуються реалізації окремих прав і виконання обов'язків медичними працівниками під час надання медичної допомоги в невідкладних та екстремальних ситуаціях, а також запропоновано можливі шляхи законодавчого вирішення зазначених проблем. У разі виникнення надзвичайних ситуацій, пов'язаних із загрозою здоров'ю населення, медичні працівники, які вживають відповідних заходів, тим самим виконують роботу, що одночасно є обов'язком уряду.

Запропоновано впровадження механізму повної компенсації усіх ризиків, пов'язаних з виконанням професійних обов'язків медичними працівниками в зазначених умовах.

Ондрей Достал

Предоставление медицинской помощи медицинскими работниками во время эпидемии: значение, права и обязанности (сравнительный анализ)

Целью исследования являются освещение и сравнение международных стандартов, законодательства Чешской Республики и других государств с точки зрения правового регулирования прав и обязанностей медицинских работников во время эпидемии. Эпидемия — общесоциальная проблема, во время которой интересы защиты публичного здоровья могут преобладать над защитой индивидуальных прав. Предупреждение и борьба с эпидемией выступают публичной обязанностью, важную роль в выполнении которой играет профессиональная деятельность медицинских работников. Основная задача медицинских работников во время эпидемии состоит в максимально возможном сбалансировании публичных интересов и интересов отдельно взятого человека. Сделан акцент на неуклонном соблюдении медицинскими работниками требований Международного этического кодекса, отдельные из которых трансформировались в обязанности, предусмотренные национальным законодательством.

Проанализированы положения Конвенции по правам человека и основоположных свобод (1950), Конституционного Закона Чешской Республики по вопросам эпидемии и Медицинского кодекса, а также модель организации профессиональной деятельности медицинских работников по законодательству Соединенных Штатов Америки, на предмет выяснения необходимости, уровня эффективности и условий выполнения медицинскими работниками профессиональных обязанностей, предусмотренных указанными актами, в условиях чрезвычайных ситуаций. В работе рассмотрены проблемные вопросы, касающиеся реализации отдельных прав и выполнения обязанностей медицинскими работниками во время предоставления медпомощи в период чрезвычайных ситуаций,

а также предложены возможные пути законодательного решения указанных проблем. В случае возникновения чрезвычайных ситуаций, связанных с угрозой здоровью населения, медицинские работники, принимающие соответствующие меры, тем самым выполняют работу, которая одновременно является обязанностью правительства. Предложено внедрение механизма полной компенсации всех рисков, связанных с выполнением профессиональных обязанностей медицинскими работниками в указанных условиях.

Література

1. When I started to work on this issue in Autumn 2005, the rumors were that the avian flu was spotted in several Eastern European countries. This information was later confirmed. The public authorities in several countries reacted with a good deal of panic. For instance, an information leaked from the Slovak Republic Ministry of Health that the public health authorities are searching for suitable sites for mass graves of future pandemic victims, and that World War II manuals were consulted on how to manage such graves, http://www.novinky.cz/zahranicni/70589-slovensko-pry-pripravuje-masove-hroby-pro-pripad-pandemie.html, last accessed on 11/25/2005
2. Wynia, M.K., Gostin, L.O., *«Ethical Challenges in Preparing for Bioterrorism: Barriers Within the Health Care System»*, Government, Politics and Law 2004
3. Article 19 — Establishment of the Court: „To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as «the Court». It shall function on a permanent basis.“. This Court is usually known and referred to as the Strasbourg Court.
4. Article 34 — Individual applications: „The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.“
5. Article 41 — Just satisfaction: „If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.“

6. Furthermore, the rights described in the Rome Treaty have been taken over to the prepared Constitutional Treaty of the European Union. When this so-called European Constitution gets approved by the EU member states, also these human rights guarantees will have legal precedence over any other legislation on the territory of the European Union.
7. Article 15 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.
8. Article 2 — Right to life: „Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or in action lawfully taken for the purpose of quelling a riot or insurrection."
9. Article 3 — Prohibition of torture: „No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
10. Article 4 — Prohibition of slavery and forced labour: „1) No one shall be held in slavery or servitude."
11. Article 7 — No punishment without law: „No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."
12. Article 15 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms
13. Article 15 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms.
14. Act 2/1993 Coll., Charter of Basic Rights and Fundamental Freedoms
15. Article 3 of the Act 118/1998 Coll. on Security of the Czech Republic
16. Article 5 ibid.
17. Article 6 ibid.; For instance, in summer 2002, when over one third of the country including the capital city of Prague was flooded after a heavy rain in the mountain regions caused overflow of the dams on major rivers, the Government issued series of emergency declarations for several regions which followed the teritorial incidence of the flooding. These declarations temporarily limited freedom of movement, inviolability of place of residence, and right to own property17. Due to this, the emergency authorities and the Czech Army were able to effectively evacuate large housing areas and get under control any separated attempts of looting. The overall results were positive. Although the extent of the 2002 flood was considerably greater compared to a similar natural disaster that occured in 1997, before the existence of the emergency legislation, only a very small number of people lost their lives in connection with the flood and, despite large property damage, the help for victims could be organized quickly and effectively.
18. Act 240/2000 Coll.

19. Annas, G.J.: *«Bioterrorism, Public Health, and Civil Liberties»*, The New England Journal of Medicine 2001
20. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
21. The Model State Emergency Health Powers Act: as of October 23, 2001, Centers for Disease Control and Prevention, 2001.
22. ACLU, *„Q&A On the Model State Emergency Health Powers Act"*, 2005 http://www.aclu.org/privacy/medical/14857res20020101.html
23. Ibid.
24. Ibid.
25. Ibid.
26. Similarly in Wynia, M.K., Gostin, L.O., *«Ethical Challenges in Preparing for Bioterrorism: Barriers Within the Health Care System»*, Government, Politics and Law 2004
27. In a hospital case from Canada, Lucy Smith, a nurse with 17 years' experience who works in St. Michael's Hospital in Toronto at a dialysis unit, rebelled when she was «drafted» into St. Michael's special SARS team. She refused, claiming measures to protect her, and by extension her 3 children and immunocompromised mother, who is recovering after a kidney transplant, were inadequate. «Maybe I could pass something to her,» says Smith. «If it was just myself, I would [join the team]. But can the hospital guarantee that I [won't] get sick, or my kids and mother?» About 100 staff volunteered to be part of the hospital's SARS team, but another 65 were needed. Smith was selected, and says her director implied that her refusal to join the team might lead to dismissal; her union advised her to obey the order. While attending the June 9 orientation meeting, however, Smith announced that she would not join the team. Barbara Sibbald , *„Right to refuse work becomes another SARS issue", CMAJ* July 22, 2003.
28. Rothstein, M.A., *„Are Traditional Public Health Strategies Consistent With Contemporary American Values?"* Temple Law Review 2004
29. Huber, S.J., Wynia, M.K.: *„When Pestilence Prevails…Physician Responsibilities in Epidemics"* The American Journal of Bioethics, 2004
30. Ibid.
31. Huber, S.J., Wynia, M.K.: *„When Pestilence Prevails…Physician Responsibilities in Epidemics"* The American Journal of Bioethics, 2004
32. Rothstein, M.A., *„Are Traditional Public Health Strategies Consistent With Contemporary American Values?"* Temple Law Review 2004; The refusal to care for infected patients might be even more widespread in the United States than in Asia and Canada. During the 1980s and 1990s, many physicians, nurses, dentists, and other health care providers refused to treat patients with HIV, even though the routes of transmission were known and there was much less risk of infection than with SARS. According to Dr. Daniel Bausch of Tulane University's School of Public Health and Tropical Medicine: "If you have an outbreak of, say, Ebola, most of the medical staff heads for the hills."
33. *Prevention of needlestick injuries*; EUCOMED Press Release 10/04
34. In a case involving a monkeypox infection34, the problems that have arised included not only the unwillingness of the health care workers to provide care to an infection victim and possible negative economic effects on a practice of a "willing provider", but also the problem of health care providers being reluctant to get vaccinated in advance, in order

not to be the "first line" of response when any contagious disease emergency arises in future.

35. Reynolds, G.: „*Why Were Doctors Afraid to Treat Rebecca McLester?",* The New York Times, April 18, 2004
36. American Medical Association Code of Medical Ethics declares that a physician *must recognize responsibility, not only to patients, but also to society, to other health professionals, and to self.*
37. Huber, S.J., Wynia, M.K.: *„When Pestilence Prevails…Physician Responsibilities in Epidemics"* The American Journal of Bioethics, 2004; The reason for this is probably that treating physicians did not perceive patients to be «infectious», since the medical science of that times did not recognize the transmission of an infection as a cause of disease.
38. Ibid.; Even medical heroes fled; both Galen and Sydenham famously fled plagues in their respective eras, following the prescription then commonly given to patients — *cito, longe, tarde*: «leave fast, go far, and return slowly» Very few doctors seem to have expressed any sense of profession-wide duties, but exceptions exist. At the Great Plague of London, in 1666, while many upper-class physicians fled with their rich patients, one humble but now much-quoted apothecary, William Boghurst, wrote that: Every man that undertakes to bee of a profession or takes upon himself an office must take all parts of it, the good and the evil, the pleasure and the pain, the profit and the inconveniences all together and not pick and choose; for Ministers must preach, Captains must fight and Physicians attend upon the sick.
39. Clark, C.C.: *«In Harm's Way: AMA Physicians and the Duty to Treat»*, Journal of Medicine and Philosophy 2005
40. Ibid.; a further problem, is that not only has the language been removed from more recent codes, but a study by Alexander and Wynia warns that "both preparedness and the sense of professional obligation to treat patients during epidemics may be declining". The study finds that while 80% of physician respondents reported they would continue to treat patients in the event of an outbreak of an unknown but potentially deadly illness, only 33% reported a willingness to treat if left unvaccinated against a highly contagious and lethal illness like smallpox.
41. AMA Principles of Medical Ethics (2001), Principle IV., http://www.cirp.org/library/statements/ama/,accessed 11/25/2005
42. *Declaration of Professional Responsibility: Medicine's Social Contract with Humanity*, Declaration section 4, http://www.aaaai.org/members/resources/medical_ethics/declaration_responsibility.stm, accessed 11/25/2005
43. For closer reference, see Starr, P.: *„Social Transformation of the American Medicine",* Basic Books, New York 1982.
44. 2005 *Health Systems in Transition (HiT) Czech Republic report* by the WHO European Observatory on Health Care Systems; *Czech Health Care System — Delivery and Financing, Czech Association for Health Services Research*, OECD Study 1999.
45. The ratio of public to private health care spending in the Czech Republic is 90:10, a highest ratio amongst the European Union countries.
46. The low respect for patient authonomy and privacy rights allowed the „old" health care system to be quite effective in communicable diseases prevention. Only limited concerns

about patient choice and privacy, and universal access to health care, made it possible to establish a directive system of organized preventive examinations, compulsory vaccinations and disease monitoring. The outcome indicators of the pre-1989 system started to get worse after 1970s because of its inability to innovate and react to the growing problem of civilisation diseases, but in the post-war period the results were well comparable to rich Western health care systems, and the system still ranks well in epidemics prevention and neonatal mortality.[6] Especially the current health care codex, Act Nr. 20/1966 Coll., but the same is true for general legislation such as the 1964 Criminal Code. It is perhaps good to note that during the Cold War, the Czechoslovak Republic was in the most probable war-zone, bordering with Western Germany and Austria, and since late 1960s hosted large Warsaw Pact forces. The country had therefore an extensive program of civilian protection against any kind of nuclear, chemical or biological attacks, in which the health care sector played an important role, so the social obligations of the health care workers have been most probably legislated in accordance with regard to this necessity.

47. Act 220/1991 Coll.
48. For more reference on the duty to treat under U.S. law, see White, C.C.: *„Health Care Professionals and Treatment of HIV-Positive Patients: Is There an Affirmative Duty to Treat Under Common Law, the Rehabilitation Act, or the Americans with Disabilities Act?“* The Journal of Legal Medicine, 1999
49. The Model State Emergency Health Powers Act: as of October 23, 2001, Centers for Disease Control and Prevention, 2001.
50. Annas, G.J.: *«Bioterrorism, Public Health, and Civil Liberties»*, The New England Journal of Medicine 2001.
51. In the Czech Republic, the health care personnel working in areas in which they might come in contact with infected patients receive a risk bonus in addition to their salary. This risk bonus is however unreasonably low, currently less than 2% of the standard salary51. In case of an emergency, no other surplus payments are considered. Furthermore, the risk bonus applies only to employed health care workers.; Kubek, M.: *„Hepatitida za Ctyri Stovky“,* Tempus Medicorum 2001
52. Wynia, M.K., Gostin, L.O., *«Ethical Challenges in Preparing for Bioterrorism: Barriers Within the Health Care System»*, Government, Politics and Law 2004.
53. *„Ethics and SARS: Learning Lessons From the Toronto Experience“,* a report by a working group of the University of Toronto Joint Centre for Bioethics, Toronto, Canada, Revised 13th August 2003
54. Fleck, L.M.: *„Clinicians' Fears, High-Risk Patients & the Duty to Treat; Point — Are There Moral Obligations to Treat SARS Patients?“* Medical Humanities Report 2003
55. Ibid; maybe a historical analogy exists here. In the end of the 14th Century, a devastating plague swept through the Czech Kingdom. Many of the priests who took their duties seriously and visited the dying got infected and died, whereas the bad priests survived. Two decades later, the Church faced a great crisis, which led to reformation wars. Perhaps one of the reasons of the crisis was that only the immoral, risk-averse clergy survived the plague?