

Criminal and professional liability of medical professionals in Poland – present and future

Odpowiedzialność karna i zawodowa profesjonalistów medycznych w Polsce – teraźniejszość i przyszłość

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KEYWORDS:

- doctors
- liability
- current medical knowledge
- medical error
- malpractice

ABSTRACT

The article presents criminal and professional liability that may be born by persons providing healthcare services, in particular doctors and dentists. The Act on the professions of doctor and dentist containing the basic directives for dealing with patients is of key importance from the point of view of the medical profession. Its provisions imply, first of all, doctor's obligation to pursue his/her profession in accordance with the current state of medical knowledge, using available methods and means. The Act also establishes an obligation to observe the principles of professional ethics and to exercise due diligence in the performance of professional activities. Similar regulations apply to other medical professionals: nurses and midwives, physiotherapists, pharmacists and laboratory diagnosticians. A failure to exercise due diligence by a doctor providing medical services or by another medical professional may constitute grounds for a patient to report a suspected offence or file a complaint with the Screener for Professional Liability. The research method utilized in the present paper is a formal-dogmatic method. Both the regulations and their interpretation are ought to be supported the court practice. The article discusses in a practical way examples of criminal and professional court rulings.

SŁOWA KLUCZOWE:

- lekarze
- odpowiedzialność
- aktualna wiedza medyczne
- błąd

STRESZCZENIE

Artykuł przedstawia odpowiedzialność karną i zawodową jaką mogą ponosić osoby udzielające świadczeń zdrowotnych, w tym szczególnie lekarze i lekarze dentyści. Kluczowe znaczenie z punktu widzenia wykonywania zawodu lekarza ma ustawa o zawodach lekarza i lekarza dentystry zawierająca podstawowe dyrektywy postępowania wobec pacjenta. Z tego przepisu wynika, po pierwsze, obowiązek wykonywania przez lekarza zawodu zgodnie z aktualnym stanem wiedzy medycznej, dostępnymi metodami i środkami. Ponadto przepis ten ustanawia obowiązek przestrzegania zasad etyki zawodowej oraz wprowadza nakaz zachowania należytej staranności przy wykonywaniu czynności zawodowych. Podobne regulacje obowiązują pozostałych profesjonalistów medycznych: pielęgniarki i położne, fizjoterapeutów, farmaceutów czy diagnostów laboratoryjnych. Niedochowanie przez lekarza udzielającego świadczeń lub inną osobę wykonującą zawód medyczny reguł należytej staranności może stanowić podstawę do zgłoszenia przez pacjenta zawiadomienia o popełnieniu przestępstwa lub skargi do Rzecznika Odpowiedzialności Zawodowej. Metodą badawczą stosowaną w publikacji jest metoda dogmatyczna. Zarówno sama treść prawa, jak również jego interpretacja powinna być oparta na praktyce sądowej. W artykule w praktyczny sposób omówione zostały przykłady orzeczeń sądów karnych i zawodowych.

I. Introduction and purpose of the paper

When life or health is at risk, the right to protection derives both from private and public law. From the latter, one should mention, among others criminal and professional liability. Each of them focuses on the obligation to be liable for the conduct, i.e., actions or omissions contrary

to specific standards, and thus negatively assessed from the societal point of view (1).

The purpose of this paper is to present, not only in theoretical terms, but with concrete examples, the medical court rulings and criminal judgments related to the work of doctors and dentists. The environment, in which doctors and other persons participating in the provision of healthcare services

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work, is currently less and less predictable, which makes it difficult to make rational decisions related to diagnosis and treatment. All the more so, a doctor should know the basic criteria for proper practicing of his/her profession. The knowledge of the rules of practicing the profession and applying them in everyday practice ensures legal security. The knowledge of the procedures before common and medical courts is also an element of this security. The paper aims to present these procedures on the example of rulings of criminal and professional courts. These examples allow for analysis of the fundamental principles of practicing medicine: Article 4 of the Act on the professions of doctor and dentist and Article 8 of the Code of Medical Ethics. These provisions oblige the doctor to practice his/her profession in accordance with the current medical knowledge and with due diligence. The value of being up-to-date means that the medical knowledge possessed by the doctor must be valid at the moment of providing the services. It should be added that a doctor is not allowed to use methods considered by science as harmful, worthless or scientifically unverified. According to Article 8 of the Code of Medical Ethics, a doctor should carry out all diagnostic, therapeutic and preventive procedures with due diligence, devoting the necessary time to them. The assessment of diligence does not require specialist knowledge, but is based on life experience and common sense (2). The discussion of the above mentioned interdependence of the rules of professional practice and the stage of the legal procedure will contribute to the legal security of doctors. Undoubtedly, these are valuable guidelines for building the standard of practicing the profession of doctor and dentist.

II. Criminal liability

1. *The nature of criminal liability*

The criminal liability refers to offenses against life and health defined in the Act – Criminal Code (3). Importantly, the criminal law does not include any separate provision that would refer only and exclusively to the criminal liability of medical professionals in the case of conduct contrary to current medical knowledge. Such conduct may result in criminal liability for: unintentionally causing death (Article 155 of the Criminal Code); causing slight or medium damage to health (Article 157 of that Code); or specified serious bodily harm (Article 156 of that Code); exposing a human being to an immediate danger of loss of life or serious damage to health (Article 160 (2) or (3) of that Code) and failure to provide assistance to a person in a situation threatening an immediate danger of loss of life or serious damage to health (Article 162 of that Code).

The charge of exposing the patient to an immediate danger of loss of life or serious damage to health is often brought in practice. The perpetrator who was under the obligation to take care of the person exposed to danger, is subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. The perpetrator who acts unintentionally, is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. If the perpetrator acts unintentionally, prosecution takes place upon the motion of the victim. The exposure referred to in this provision means that due to action or omission of the perpetrator, e.g., a doctor or another medical professional, the patient, who had not been in the condition of immediate danger of loss of life or serious damage to health, found him/herself in such a condition.

2. *Failure to order basic diagnostic tests – a case report*

As an example, one may mention the charge of committing an offence under Article 160 (2) of the Criminal Code by a doctor, who in the case of a diagnosed head injury of the victim being under the influence of alcohol committed – according to the prosecution – a medical decision-making error by failing to order basic diagnostic tests in the form of a skull X-ray and a head CT scan enabling the correct diagnosis and in this way consenting to the fact that the injured person was not diagnosed with a skull vault bone fracture, subdural haematoma, subarachnoid haemorrhage, extensive contusion of the brain and brain stem, which postponed the surgery for vital reasons, thus exposing the patient to an immediate risk of loss of life. The District Court, by its judgment of 17 May 2013, had found the defendant guilty of the alleged act and had imposed thereon a penalty of 10 months of deprivation of liberty, the execution of which had been conditionally suspended for a trial period of 2 years (4). The judgment has been appealed against by the defense counsel and by the prosecutor. The Regional Court has amended the ruling. The Regional Court considered that the degree of social harm caused by the act committed by the defendant was not significant. The defendant doctor undertook a number of diagnostic activities with the patient, and therefore acted in good faith, which excludes intentionality. Based on current medical knowledge, the doctor performed examinations aimed to diagnose the patient, but failed to leave the patient in hospital, as well as failed to take X-rays and CT scans of the head. However, procedures such as X-ray and CT scan require the patient to remain motionless for the duration of the examination, and in this case the doctor was dealing with a drunk patient who did not want to cooperate therewith in any way. Therefore, in the Court's opinion, the patient was unintentionally exposed to immediate danger of loss of life or serious damage to health, and this unintentionalness also refers to the result, i.e., the patient's death. From the point of view of medical knowledge, the behavior of the defendant was defective only to a certain extent, although this effect could have been foreseen, in the light of the quoted circumstances supported by expert opinion. This concerns, as the experts claimed, the complexity of the differential diagnosis in a patient in a state of intoxication after a head injury. This complexity of diagnosis dictated a non-standard approach, even when the basic examinations by the doctor did not indicate worrying neurological symptoms. Thus, the conduct of the defendant doctor exhausted the elements of the offence under Article 160 (3) of the Criminal Code in conjunction with Article 160 (2) of that Code. However, in the opinion of the Regional Court, the defendant doctor should not bear far-reaching negative consequences for a medical error in a case if a medical examination or other health services without the patient's consent are not allowed and the patient does not want to cooperate with the doctor in achieving the goal of a proper diagnosis and further prevention of deterioration of the patient's health condition, even making it impossible to carry out certain tests with his behavior, as was the case here.

In its judgment of 24 October 2013, the Regional Court amended the appealed judgment in such a way that it found the defendant guilty of an offence under Article 160 (3) of the Criminal Code in conjunction with Article 160 (2) of the Criminal Code and conditionally discontinued the criminal proceedings for the trial period of one year, at the same time awarding a financial benefit in the amount of PLN 2,000

thousand to the Fund for Victims' Assistance and Penitentiary Aid (5).

3. *Other forms of terminating criminal proceedings. Probationary measures*

In our opinion, in the case of unintentional offenses against life and health it is worthwhile to indicate other solutions to the conflict between the patient and the doctor than just issuing the judgment and imposing a penalty. These include probationary measures, i.e., conditional discontinuance of criminal proceedings, conditional suspension of penalty execution and conditional early release. Probationary measures are included in compensation *sensu largo*. When applying these instruments, the court has the possibility to impose obligations and prohibitions on the defendant and to award various compensatory measures (e.g., damage redressing, restitution, compensation for non-material damage, apology to the victim). The need for such measures has long been signalled in Polish criminal law. Compensation is considered as the so-called third track in criminal law, constituting, next to penalties, penal measures and protective measures, a form of reaction to a criminal act taking into account the interest of the victim (6).

The above mentioned judgment is an example of application of these instruments in practice. In the case of conditional discontinuance of proceedings, the court is obliged to impose on the perpetrator the obligation to redress the damage in whole or in part. In the described case, the court conditionally discontinued the proceedings against the doctor accused of medical malpractice under Article 160 of the Criminal Code and imposed an obligation to pay an amount of PLN 2,000 to the Fund for Victims' Assistance and Penitentiary Aid. However, the use of this instrument is possible when the following conditions are met: firstly: the guilt and social harm of the act are not significant (which, in the opinion of the Regional Court, was fulfilled in the case in question); secondly: the circumstances of committing the act do not raise any doubts; thirdly, the attitude of the perpetrator, who has no criminal record for an intentional offence, his/her personal qualities and conditions and lifestyle to date justify the assumption that despite discontinuance of the proceedings, he/she will observe the rule of law, in particular will not commit an offence. The decision on conditional discontinuance of proceedings is the exclusive competence of the court and may be issued both directly upon the prosecutor's motion – drawn up instead of the indictment, as well as after commencement of the court proceedings.

What is important, a judgment conditionally discontinuing the proceeding is not treated as a conviction, so it is not entered in the National Criminal Register. The difference between a conviction and a judgment on conditional discontinuance of the proceeding was indicated by the Constitutional Court in its judgment of 16 May 2000 (7). It is reflected in the content of the ruling, as only the sentences of convictions contain the wording that the court "finds the defendant guilty of the charge" or "finds the defendant guilty....". This recognition of guilt is the result of the evidentiary proceedings conducted by the court in accordance with the provisions of the Code of Criminal Procedure. The content of a ruling on conditional discontinuance of proceedings is different. After describing the act and indicating its legal qualification, the courts most often use the following formula in the sentence of the judgment: "on the basis of Article 66 (1) and (2) of the Criminal Code and Article 67 (1) of the Criminal Code

(the Court) decides to conditionally discontinue the criminal proceedings against the defendant", and in the further content the trial period is indicated. The trial period is from 1 to 3 years and runs from the moment the judgment becomes legally binding. If during the trial period the perpetrator commits an intentional offence for which he/she is validly convicted, the court obligatorily institutes criminal proceedings, and optionally in the situation where the perpetrator grossly violates legal order during the trial period.

In this case, other solutions leading to a consensual end of a dispute between a doctor and a patient are also worth mentioning. In recent years the Polish legislator departed from the classic model of criminal proceedings in favor of allowing the victim to be compensated for the damage he/she has suffered (8). The trend which can be observed with subsequent amendments of the criminal law, both substantive and procedural, is the desire to end the proceedings by means of an arrangement between the defendant and the prosecutor or the victim, which is often accompanied by compensation instruments (6). Consensual forms of ending the proceeding should be understood as the forms of sentencing without court proceedings (Article 335 of the Code of Criminal Procedure) and voluntary submission to punishment (Article 387 of the Code of Criminal Procedure) (9). The common feature of the above instruments is that their application depends on the lack of opposition from the victim and on the agreement between the defendant and the victim on redressing the damage or compensation for the harm suffered.

Mediation proceedings (Article 23a of the Code of Criminal Procedure) may also be included in the broadly understood compensation. The mediation is based on a move away from the traditional notion of administering justice or criminal liability on behalf of society to individually administered justice, directed to and intended for the victim of an offence (10).

III. Professional liability – doctors and other medical professions

1. *Pillars of professional liability*

Healthcare services should be provided with due diligence, including in accordance with current medical knowledge and by medical professionals. In the case of professional liability, this refers to medical professions with professional self-governance, as only here can one speak of professional liability bodies and professional misconduct. This liability is based on two pillars: legal regulations related to practicing a given medical profession and ethical standards.

When analyzing the concept of professional misconduct, it is worth referring to the historically oldest solutions concerning the profession of doctor and dentist, which is a model for other medical professions. In accordance with Article 53 of the Act on Chambers of Physicians (11), a doctor is obliged to comply with the principles of medical ethics and regulations related to practicing the medical profession under pain of professional liability. Similar solutions are found in the regulations concerning other medical professions. Pursuant to Article 36 of the Act on the professional self-government of nurses and midwives (12), the assessment in terms of potential professional liability covers situations where the rules of professional ethics or regulations concerning the practicing of the profession are violated, i.e., not only the provisions of this Act but also many others Acts governing the professional activities

and competences of nurses and midwives (13). The Act refers to these violations as the "professional misconduct", but without indicating their specific catalogue. The prerequisites of physiotherapists' professional liability (Article 85 of the Act on the profession of physiotherapist) (14), as well as the rules, stages and the course of proceedings concerning professional liability are mainly modelled on the regulations concerning nurses, midwives and doctors. In many provisions of the Act these solutions are identical. The professional liability of members of the pharmaceutical self-government is also defined in a very similar way (Article 45 of the Act on Pharmaceutical Chambers) (15). In this case, the conduct deemed to be contrary to the principles of professional ethics and deontology and the legal provisions on practicing the profession of pharmacist is subject to the assessment of the pharmaceutical court. On the other hand, persons practicing the profession of a laboratory diagnostician are subject to disciplinary liability for culpable, improper performance of laboratory diagnostics and for acts contrary to the principles of professional ethics or the legal regulations on the performance of laboratory diagnostic activities (Article 56 (1) of the Act on laboratory diagnostics) (16). Although the professional liability of diagnosticians is based on a different statutory concept, its prerequisites, as in the case of other medical professions, include violation of professional ethics and legally defined rules of practicing the profession.

It is worth noting here that in 2021 the legislator conditionally expanded the professional powers of diagnosticians, pharmacists and physiotherapists by including the performance of COVID-19 vaccination (17) and the qualification tests to exclude contraindications to COVID-19 vaccination (18). Although these operations do not fall within the concept of, respectively, "laboratory diagnostic activities" in relation to diagnosticians; and in relation to pharmacists: "exercising pharmaceutical care", "providing pharmaceutical services", as well as professional tasks [listed in Article 4 (4) of the Act on the profession of pharmacist "ZawFarmacU"] (19) and other forms of practicing the profession of pharmacist [defined in Article 4 (5) of the Act on the profession of pharmacist "ZawFarmacU"]; and with regard to physiotherapists in the detailed list of professional activities of a physiotherapist – the assessment of professional liability will directly refer also to the performance of these medical activities.

In the context of extending these powers, it is worth emphasizing that, first of all, the purpose of this liability is primarily to ensure the proper exercise of the profession. Secondly, the professional liability does not depend on the effect, although the effect in the form of damage may be relevant when the penalty is imposed. Thirdly, the codification of the professional misconduct of doctors and other medical professionals is not possible, because in the case of professional liability, these persons are obliged to observe two systems of standards: ethical and legal norms [the *nullum crimen sine lege* principle does not apply (20)]. Fourthly, the catalogue of penalties in medical professions has been defined by law, but each of these penalties may be imposed for any professional misconduct (e.g., the penalty of an admonition, reprimand, fine, suspension of the right to practice the profession or, in certain situations, deprivation of this right).

2. Ordering tests and their interpretation – a case report

Due to advanced osteoarthritis, the victim underwent a total left shoulder joint endoplasty in July 2015 at a hospital in W.

(data anonymized). During the trial reposition of the endoprosthesis, an intraoperative fracture of the shaft of the left humerus occurred, which was operated simultaneously with a cerclage loop. The patient was discharged home in good general condition, with recommendations for pain relief treatment with Transtec patches.

On 19 September 2015, the patient called the NPL (Night Medical Aid) doctor because of very severe pain in the left shoulder. The doctor diagnosed pain syndrome and applied Transtec patch in the earlier prescribed dose. However, the pain persisted and the NPL doctor was called again to see the patient. Since the possibilities of therapy with the above-mentioned painkillers had been exhausted, the patient was taken to the nearest hospital – the hospital in P. The doctor on duty in the admission room was the defendant doctor, who examined the patient, ordered additional tests, including an ECG and an anaesthetic consultation, but did not take an X-ray. After an hour, the patient was discharged home with the recommendation of an orthopaedic consultation at a hospital in W. and analgesic treatment with Transtec patches and pyralgine. Two days later, the patient came to the emergency room of the hospital in W., where she was diagnosed with a recurrent peri-prosthetic fracture of the shaft of the left humerus with radial nerve palsy, and was operated on 22 September 2015. After rehabilitation, the patient was discharged home in good general condition with recommendations.

In these circumstances, the patient filed a complaint with the Regional Screener for Professional Liability in Warsaw. In the course of the proceedings, the Regional Screener for Professional Liability appointed an expert in orthopaedics and traumatology of the motor organ. After completing the investigation, the Screener filed a motion to the Regional Medical Court for punishment. The motion was based on the expert's opinion, which indicated that, under the circumstances, the patient should have an X-ray performed, and if the image could not be interpreted, she should be transferred to a hospital in W. or possibly to a hospital in GM., where the trauma and orthopaedic wards are located.

At the hearing, the defendant did not admit the charge against her and gave explanations. She emphasised that, first of all, the patient had not informed her of the recent injury. In the interview, she complained of severe pain in the left shoulder and provided information about a recent operation, i.e., shoulder joint endoplasty, complicated by an intraoperative fracture of the shaft of the left humerus. For this reason, the defendant doctor called an anaesthetist for a consultation. Secondly, the defendant did not order an X-ray because, in her opinion, it was not possible to reliably assess the image. There was no orthopaedist on duty that day, and the radiologist's assessment via the Internet in the absence of comparative photographs would not have given a clear answer and could even be misleading.

The Regional Medical Court fully shared the expert's opinion that the defendant doctor could have taken the X-ray and initially assessed it. In case of doubt, she should have sent the patient for an orthopaedic consultation to another hospital. The court has imposed the penalty of an admonition (21).

It should be reminded here that the Act on professions of doctor and dentist in Article 4 imposes on a doctor the obligation to act according to the principle of due diligence. This means that the doctor has to practice his/her profession in accordance with the current medical knowledge, available methods and means of prevention, diagnosis and treatment of diseases, in accordance with the principles of professional ethics and with due diligence. The conduct

of the defendant, which was confirmed in the case, lacked actions that would meet such requirements of the medical procedure. At the same time, the defendant culpably departed from the requirements of practicing the profession, mentioned in Article 8 of the Code of Medical Ethics, which formulates an ethical imperative to carry out all diagnostic, therapeutic and preventive procedures with due diligence, devoting the necessary time to them.

3. From penalties to mediation

In the opinion of the authors of the publication, the medical profession is a profession of public trust. The functions and purposes of penalties in the professional liability of public trust professions are consistent with those fulfilled by the criminal law (22), although the emphasis is different here. In professional liability, the penalty is an expression of negative assessment and condemnation by the professional community.

In the case of professional liability of doctors, penalties have been included in Article 83 (1) of the Act on Chambers of Physicians, which sets the catalogue of penalties and their sequence (11). This provision corresponds to the general philosophy of punishment, according to which if the type of penalty may be chosen, the possibility to apply a less severe penalty should be considered first, and only when it is established that such a penalty is not sufficient in terms of the goals of professional liability, a more severe penalty should be imposed (23). Also worth mentioning is the justification of the judgment of the Constitutional Court of 29 June 2010, issued in case file No P 28/09 (24), where the Court stated: "There is no doubt that any disciplinary penalty for a member of a professional self-government is painful, as it implies a negative assessment of the manner in which he/she practices his/her profession, and thus means a loss of public trust, which is indicated by Article 17 (1) of the Constitution as an immanent feature of this type of profession. For members of a public trust professions, the conviction of a disciplinary offence itself discredits them in the eyes of the public, irrespective of the type of penalty imposed. It is indisputable that a doctor must enjoy the trust of patients who entrust him/her with the protection of their most precious goods, i.e., human life and health. Finding him/her guilty of a disciplinary offence may undoubtedly result in the loss of patients' confidence in him/her and his/her competence. The type of penalty imposed on the doctor by the disciplinary court is of secondary importance from this point of view. The severity of the punishment has no direct bearing on the degree of loss of trust in the penalised doctor. Therefore, any disciplinary penalty, including the penalty of a reprimand, may have negative consequences in relations between the doctor and his/her patients."

It seems that in order to maintain this link with the patient, which is most important from the point of view of the medical profession, other forms of terminating the procedure relating to professional liability of doctors should also be considered. The institution of mediation is such a form. In 2010, the Act on Chambers of Physicians has been supplemented with a provision regulating mediation (Article 113 of the Act.) (11), in which the legislator limited itself to indicating the bodies referring the case to mediation, indicating the time limit and the person of the mediator. In addition, the statutory reference to the Code of Criminal Procedure allows for the application of Article 23a of that Code (25). In the opinion of the Authors of this publication, there is no doubt that this does not solve the problems faced by professional liability

bodies and that mediation is used sporadically in practice. This issue requires urgent intervention of the legislator.

Conclusion

The need of defining the content of crucial norms from the perspective of providing healthcare by the medical professionals is yet the first step. Nowadays, doctors do not only need information about the applicable legislation, but also relatively detailed guidance that takes into account the daily medical practice. The case law of criminal and medical courts is undoubtedly such a signpost in relation to the standards of practicing the profession of doctor and dentist. The interpretation of regulations of law with the use of jurisdiction is the second step. The paper discusses in detail two frequent practical situations: one related to a head injury in a patient under the influence of alcohol, and the other related to a patient complaining of severe pain in the left shoulder, who reported a recent complicated shoulder joint endoplasty operation. In our opinion, first of all, more such examples are needed for educational purposes, because it is important to ensure that the awareness of existing risks is a stimulus for particularly careful diagnostics and therapy. In addition, in case of unintentional criminal act against life and health as well as professional misconduct one should utilize other ways of patient – medical professional conflict solving other than the sentence or the punishment. They also include consensual modes such as mediation. According to the Authors, the model based on resolving conflicts by handing them over from the state to the interested parties is a model that will be the foundation for the resolution of the conflict between the patient and the medical professional in the future.

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