Selected issues in, civil and labor liability of medical professions in Poland. Analysis of the jurisprudence and proposals for changes

Wybrane zagadnienia z zakresu odpowiedzialności cywilnej i pracowniczej zawodów medycznych w Polsce. Analiza orzecznictwa i propozycje zmian

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KEYWORDS:

- medical knowledge
- medical event
- commission
- mediation
- doctor

ABSTRACT

The article presents the legal liability that may be borne by medical professionals, with particular emphasis on a group of doctors and dentists. The paper discusses the evidentiary and procedural aspects of civil and labor liability, together with relevant courtroom examples. Each of the above-mentioned types of liability has been commented taking into account the fundamental principle for the medical professions: provision of services in accordance with the current medical knowledge.

The systematically increasing number of compensation suits and long-lasting court proceedings, which do not always end in a positive decision for the defendant, i.e., a member of the medical personnel or a healthcare entity, prompts to seek other solutions to the dispute. The authors of the article indicate the need to develop a new, systemic solution to these issues based on a single structure, uniform procedures and premises for determining the right to compensation.

SŁOWA KLUCZOWE:

- wiedza medyczna
- zdarzenie medyczne
- komisja
- mediacja
- lekarz

STRESZCZENIE

Artykuł przedstawia odpowiedzialność prawną jaką mogą ponosić osoby wykonujące zawody medyczne ze szczególnym uwzględnieniem grupy lekarzy i lekarzy dentystów. W materiale omówione zostały aspekty dowodowe i procesowe odpowiedzialności cywilnej i pracowniczej, wraz z podaniem odpowiednich przykładów z sali sądowej. Każdy z powyższych rodzajów odpowiedzialności został skomentowany z uwzględnieniem fundamentalnej dla zawodów medycznych zasady jaką jest udzielnie świadczeń zgodnie z aktualną wiedzą medyczną.

Systematycznie zwiększająca się liczba procesów odszkodowawczych oraz długoletnie postępowanie sądowe, które nie zawsze kończy się pozytywnym rozstrzygnięciem dla pozwanego tj. członka personelu medycznego lub podmiotu leczniczego skłania do poszukiwania innych rozwiązań sporu. Autorzy artykułu wskazują, że istnieje potrzeba wypracowania nowego, systemowego rozwiązania tych kwestii oparte na jednej strukturze, jednolitych procedurach i przesłankach ustalania prawa do rekompensaty.

I. Introduction and purpose of the paper

The aim of this paper is to indicate, using specific examples of court cases, the conditions that must be met for medical professionals, including doctors and dentists, to be held liable for the negative consequences of their actions or omissions. The presented examples of court cases are accompanied with short commentaries, allowing for assessment of a particular case, and with a summary. Additionally, the paper indicates the shortcomings of the applicable regulations and presents proposals for changes.

In our opinion, up-to-date medical knowledge is the very foundation of any medical profession. However, it is increasingly difficult to meet these challenges, as medical

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ISSN 2657-9669/
Published and financed by Centre of Postgraduate Medical Education; https://doi.org/10.36553/wm.135.

knowledge is dynamic and constantly evolving, and the assessment of its validity requires the presentation of objective scientific evidence (according to the principles of Evidence-Based Medicine – EBM) (1).

According to Article 6 (1) of the Act on Patient Rights and Patients Ombudsman (PPR) (2), "the patient has the right to health services that meet the requirements of current medical knowledge". Similar regulations are contained in individual professional acts: Article 4 of the Act on the professions of doctor and dentist (3): "A doctor is obliged to practice his/her profession in accordance with the recommendations of current medical knowledge", Article 11 (1) of the Act on the professions of nurse and midwife (4): "A nurse, a midwife practices his/her profession (...) following the recommendations of current medical knowledge". This requirement eliminates the possibility of using methods that are outdated, non-medical, unproven in medical and health sciences. It should be admitted that this is a kind of standard of conduct, which is aimed to guarantee the patient the highest possible level of services, to provide him/her with a sense of security and to reduce the potential risk of treatment by eliminating methods that reduce the probability of obtaining a positive result (in particular in the form of cure). The most emotional are situations related to the provision of medical services to "minor patients". As any healthcare services, healthcare services provided to hospitalized "minor patients" must be based on current medical knowledge. Sometimes, when the life and health of these patients is at risk, hospitalization is necessary. It is a difficult experience for every person, especially the child and its parents.

Respecting the right to services in accordance with current medical knowledge was the subject of many scientific studies. Among them, the research conducted by A. Jacek, K. Ożgód (in 2002) (5) and S. Kiełbasa (in 2018) (6). In practice, it is up to the judiciary, i.e., civil and criminal courts and professional responsibility authorities, to assess, but already post factum, the knowledge of the healthcare personnel. Moreover, in the case of medical staff employed in healthcare entities, the assessment is also carried out by the employer, because the violation of the rules for work organization and order is the most common reason for the exposure of other persons (e.g., patients) to danger. In order to analyze this phenomenon, we present and discuss examples of specific court rulings in the further part of the paper.

II. Civil liability

1. The essence of civil liability

Civil liability for a medical error is the financial liability of a healthcare entity or of an individual, associated with damage caused to legally protected goods, such as life or health. As a result, it is necessary to pay damages to the injured patient, such as compensation for damage or non-material damage. It should be mentioned here that a mistake can be committed not only by a doctor, but also by other medical professionals. However, due to the leading role of the doctor in the healthcare system, the medical law literature most often refers to examples where a doctor is the perpetrator of the damage, which is why the further part of the paper deals with the provision of services by a doctor.

It should be emphasized here that committing a medical error itself does not give rise to liability on the part of the doctor (7). As a rule, the obligation to redress the damage may only arise when the error is the fault of the doctor, and at the same time the other prerequisites for the liability for damages provided for in the Civil Code are met (8). The doctor is liable on the basis of fault, which can be attributed to him/her only if there is both an objective and subjective element of malpractice, i.e., lack of due diligence. In civil law, "due diligence" is used to create a model of correct and desirable conduct of a doctor. Article 4 of the Act on the professions of doctor and dentist (3) is the basis for building this standard. This provision requires the doctor 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. From the point of view of civil law, the doctor providing medical services on the basis of a civil law contract will be required to exercise due diligence of a medical professional in accordance with the provisions of the Act on the professions of doctor and dentist, which, according to Article 355 of the Civil Code, means the diligence required in civil law relations of a given type, taking into account the professional nature of the activity. It is worth emphasizing that in civil liability, Article 355 of the Civil Code indicates the generally required diligence, i.e., ordinary professional diligence. In the doctrine of medical law, it is not acceptable to raise the standard to the highest diligence, as one cannot impose too far-reaching requirements on the doctor, which are not feasible in practice (9). It is worth mentioning here the ruling of the Court of Appeals in Warsaw (10), which states that high requirements of diligence expected from doctors cannot be translated into assigning to them duties that are impossible to perform in practice and thus into introducing a specific liability on a strict basis, which particularly refers to activities that involve a risk and the resulting possibility of damage more frequent than usual (11). The doctor's obligation is an obligation to act diligently according to current medical knowledge.

2. Treatment inconsistent with current medical knowledge – a case report

Lack of due diligence, including treatment contrary to current medical knowledge was the subject of a civil court case (12). The patient has filed a lawsuit for adjudication of PLN 55,675, including the amount of PLN 25,000 as reimbursement of the price of a denture and the amount of PLN 30,675 as compensation for damage resulting from improper performance of the prosthetic bridge contract. In justification, the plaintiff stated that the subject of the contract involved the performance of a porcelain bridge, while the respondent doctor performed a composite bridge. In the plaintiff's opinion, current medical knowledge indicated that the porcelain bridge was a very strong material and there was no possibility to break it, quickly rub or crush it without external injury. In addition, it looks extremely natural and matches perfectly in colour to the remaining teeth. Moreover, according to the plaintiff, the prosthetic bridge was improperly made by the defendant and was not fit for normal use, as the teeth placed in the prosthesis fell out and crumbled, making it impossible to use it, and shards of teeth caused injuries to the gums and tongue. According to the plaintiff, the bridge had significant defects that the dentist failed to correct despite repeated repairs. During the proceeding, the respondent dentist showed that

due to the anatomical conditions, i.e., the patient's occlusal system, there were contraindications to fitting a porcelain bridge, and that the correct effect would be achieved by fitting a bridge made of composite. The plaintiff has been informed about this fact and did not raise any objections. In the opinion of the civil court, the correct performance of the prosthetic bridge in accordance with the medical practice was confirmed by opinions of expert witnesses appointed at the request of the plaintiff and the respondent and in the testimony of witnesses. The defects that arose after the initial performance of the bridge were minor and insignificant, largely attributable to the plaintiff himself, who had not consented to the fixed cement, and to faulty oral hygiene. The indicated defects were promptly remedied under the warranty. In these circumstances, the Court has dismissed the claim as it was not proven by the plaintiff. The evidence presented by the plaintiff was unreliable and unrelated to the case, and the facts presented in the statement of claim were largely inconsistent with reality. The patient filed an appeal against this ruling, which was also dismissed (13).

3. Conciliation and mediation route

In our opinion, many civil cases of medical malpractice should not be resolved in court, but through mediation and conciliation, which was supposed to be the task of voivodeship commissions for medical events (14). This way should be used to reach an arrangement between the doctor and the patient in the above-described case concerning a defectively made prosthetic bridge. The benefits are mutual, as an arrangement between the conflicting parties may be reached quickly and without involving significant financial resources.

Voivodeship commissions for adjudicating on medical events have been functioning in the Polish legal system since January 2012. This type of proceedings is optional. The entitled entity may file an application to the commission for adjudicating on medical events or use another way to pursue its claims, e.g., by filing a case in court. This special compensation procedure, alternative to the court route, was introduced to streamline and simplify pursuing compensation claims by patients for damages resulting from the so-called medical events. This model refers to damages caused to patients only in a hospital, in connection with the provision of healthcare services within the meaning of the provisions of the Act on medical activity within the framework of health care in Poland. In its assumptions, the legislator aimed to improve the legal situation of injured persons by introducing convenient solutions of organizational and procedural nature in comparison with court proceedings. It was expected that thanks to the modification of the earlier traditional rules of redressing damages by means of court proceedings, obtaining compensation for the damage would be easier.

It should be emphasized that the proceedings before the voivodeship commission are aimed to determine whether the event which resulted in material or non-material damage was a medical event. Thus, the voivodeship commission only rules on the existence or non-existence of a medical event (15). It should be stressed that the voivodeship commission does not deal with fault, which in the extrajudicial system of compensation for damages "is an irrelevant circumstance" (16). The voivodeship commission issues a ruling on the medical event or its absence, with justification. The ruling is made by a qualified majority of votes (at least three-quarters) in the presence of all members of the adjudicating panel. The commission should issue its ruling no later than 4 months from the date of the application. Within 14 days from the date of delivery of the ruling with justification, the applicant, the manager of the medical entity running the hospital and the insurer have the right to submit a reasoned application for reconsideration of the case. It is not the task of the commission to award compensation for damage or non-material damage. The proposal of compensation for damage or non-material damage is presented to the entity submitting the application by the insurer, through the voivodship commission.

The insurer has 30 days (from the date of receipt of a notice on the ineffective lapse of the time limit for submitting the application for reconsideration of the case or from the date of delivery of the ruling of the voivodeship commission on the medical event issued as a result of the application for reconsideration) to present the applicant with a proposal for compensation for damage or non-material damage. Failure to present such proposal is tantamount to acceptance of the application in terms of the circumstances indicated therein and the amount. The proposed amount may not be higher than the maximum amount of compensation, i.e., the maximum amount of compensation for one medical event in relation to one patient, which in the case of infection, bodily injury or health disorder of the patient is PLN 100,000, while in the case of patient’s death it is PLN 300,000.

It should be however emphasised that experience and statistics show that the aim of introducing these procedures has not been fully achieved. In the majority of cases, once the commission has decided that a medical event had occurred, the applicant decides to pursue his/her claims in a civil court. This is mainly due to low amounts of compensation proposed by the insurer and the hospital, which grossly deviate from the maximum amounts provided for in the Act (PLN 100,000 and PLN 300,000 in the case of the patient’s death).

Based on the hitherto activity of commissions for adjudicating on medical events, one can formulate a thesis that the rulings of the commissions are in many cases preliminary findings, used later in the proceedings before civil courts. There would be nothing wrong with that, but for the fact that it is connected with shifting the costs of the evidentiary proceedings, which would normally be borne by the losing party before a civil court, and in this configuration they are borne entirely by the State Treasury. This situation is related to the fact that the fees for filing an application with the commission are very low (PLN 200), while the costs of the evidentiary proceedings (in particular related to the testimony of witnesses, collecting documentation on the course of medical treatment, and ordering specialist opinions), as well as the costs of operation of the commission itself, covered by the budget appropriations, are very high (17).

In view of the above, it is proposed, first of all, to make the amount more realistic, so that there is a chance of satisfying the victim at least in some cases.

Besides, it should be pointed out that in the proceedings before the commission no determination is made regarding the nature and extent of the damage. There is practical freedom in determining the proposal of benefits by hospitals, with a very strong economic incentive not to conclude settlements, which results from the current legal construction. Civil courts do not treat commissions’ rulings as prejudications, therefore in cases in which a medical event has been previously adjudicated, they conduct full evidentiary proceedings.

The statistical data show that the percentage of settlements is very low. For example in 2018 – 252 rulings on medical event were issued, and a settlement was concluded only 34 cases (i.e., 13.5% of cases), which means an average of 2.125 settlements per commission and low cost-effectiveness: according to the data of the Supreme Chamber of Control (NIK) for 8 commissions for the years 2012-2017, the total expenditure amounted to PLN 11,076,100; during this period, 2,203 applications were filed and 1,341 rulings were issued – which gives PLN 5,028 per application and PLN 8,260 per one ruling. In 2018, 2719 meetings were held (17).

In summary, the current model of the extrajudicial procedure for pursuing claims for medical events requires remodelling in order to improve its efficiency. The authors of the study share the opinion of the Supreme Medical Council that the damages suffered in connection with the provision of healthcare services should be compensated under a single, coherent system, free from the need to identify the guilty parties. The financial burden of such a system should fall primarily on the State, with additional support from the manufacturers of medicinal products. Such a system should cover damages suffered in connection with the provision of healthcare services irrespective of the type of healthcare services or the organizational and legal form of the entity providing them.

In the opinion of the Supreme Medical Council (18), instead of creating, beside the existing, imperfect system of compensation for damages resulting from medical events in hospitals, another system for compensation for damages resulting from post-vaccination complications, a new, systemic solution of these issues needs to be developed. The systemic solution, based on a single structure, uniform procedures and premises for establishing the right to compensation, is in practice more convenient than several separate systems or institutions, operating under different rules and financed in a different way.

III. Employee liability

1. The nature of financial and disciplinary liability

Doctors, like other employees of healthcare entities, are also subject to employee liability. According to the Labor Code (19), this liability is basically composed of two types – financial liability (as a consequence of causing damage) and disciplinary liability (as a consequence of breaching duties). And in a broader sense, employee liability can also include termination of the employment contract without notice (as a consequence of his/her culpable behavior), as well as deprivation (or at least limitation) of the benefits due thereto. The employee liability is sometimes extended to the possibility of imposing other sanctions, which, however, are not provided for by the generally applicable law (and especially the labor law).

An employee who, due to his/her fault (even unintentional), breaches his/her employee obligations [listed in Article 108 (1) of the Labor Code: “failure to observe the organization and order established in the process of work, the provisions on health and safety at work, the provisions on fire protection, or the procedure of confirming the arrival and the presence of employees at work, including the procedure of justifying an absence from work"] is held disciplinarily liable, even if the employer does not suffer any damage for this reason.

In the case of the disciplinary liability, the employee may be punished with an admonition or a reprimand, but also with a fine. A fine, however, may only be imposed for failure to observe the provisions on health and safety at work or the provisions on fire protection, for leaving work without justification, appearing at work drunk or drinking alcohol at work. Since the disciplinary liability does not have a compensatory function (other functions are assigned thereto: preventive, repressive and educational), the proceeds of fines may only be used to improve health and safety conditions at work. Other penalties are prohibited.

The imposition of the disciplinary penalty is a managerial competence of the employer, however it is limited in time, i.e., the penalty may not be applied more than two weeks after the employer's learning about the breach of the employee's duty, and also after the lapse of 3 months from this breach. These time limits are preclusionary (i.e., non-irreversible), but employee’s absence from work resulting in the inability to carry out the procedure of clarifying the circumstances of the employee's breach and, subsequently, the possible punishment, causes that the course of these time limits does not run, and if it has started to run it is suspended for the time of the employee's absence. According to this procedure, the employee must be heard by the employer or a person authorized thereby.

In addition, this procedure provides for the obligation to notify the employee in writing of the penalty applied, with information on the type of penalty, the type of breach of duty and the date of the breach, as well as an instruction on the possibility of filing an objection within a specified period. In such a situation, if the employer has applied the penalty in violation of the relevant laws, the employee should, within 7 days of being notified of the penalty, file an objection with the employer. After obtaining an opinion from the enterprise trade union representing the employee, the employer decides whether to accept the objection. The employer may either accept or reject the objection. If the employer is inactive for more than 14 days (fails to reject the objection within this period) the objection is considered as having been upheld. And if the objection is rejected, the employee, within 14 days after he/she has been informed of this fact (i.e., after exhausting the internal procedure) may apply to the labor court to revoke the penalty for breach of order. The court examines whether the penalty has been imposed in breach of law, i.e., whether the substantive and legal time limits have been met, whether the employer has heard the employee, whether the penalty applied is provided for by law and whether there has been any culpable breach of the employee's obligations. A copy of the letter with the notification concerning the penalty should be included in the employee's personal file. When imposing the penalty, the principle of proportionality shall be applied, taking into account the type of infringement, the degree to which the employee is at fault and his/her previous attitude to work. According to Article 113 (1) of the Labor Code, the penalty is treated as of no effect, and the copy of the notification concerning the penalty is removed from the employee's personal file after one year of impeccable work. It is worth noting that the employer may earlier, on his own initiative or at the request of an enterprise trade union representing the employee, consider the penalty to be of no effect.

In the case of medical personnel of healthcare entities, the most common reason for the disciplinary liability is the breach of the principles of work organization and order. Of course, it may have further consequences, such as, for example, exposing other persons (e.g., patients) to danger

or damaging property (e.g., medical equipment), and, as a result, may cause financial consequences, i.e., damage to the employer.

In such a situation, if an employee, as a result of failing to perform or improperly performing his/her duties, causes damage to the employer through his/her fault, he/she will be held financially liable. It is a compilation of contractual and tort liability (characteristic of civil law). The financial liability plays mainly the compensatory role, with the employer obtaining the compensation for the damage sustained in the property. However, if the employee has unintentionally caused the damage, the financial liability will have a protective function. All employees are subject to financial liability regardless of the basis of their employment relationship.

The premises of liability on general terms (for damage caused to the employer) include the unlawful conduct of the employee (i.e., non-performance or improper performance of his/her duties, regardless of whether it is the result of an act or omission), his/her fault in causing the damage (intentional when he/she acted with direct or potential intent, and unintentional in the form of recklessness or negligence), the damage (actual loss or lost profits), the causal link (between the culpable breach of duty and the damage sustained by the employer). It is worth noting that acting within the limits of permissible risk and in a state of higher necessity will exclude unlawfulness. Moreover, an intentional act will result in full liability, while an unintentional one will result in limited liability. In this case, the employee will be liable for the damage itself, but not for lost profits. Finally, the employee may not be held liable to the extent that other persons or the employer have contributed to the damage. Although the compensation from an employee who has unintentionally caused the damage will be determined in the amount of the damage caused, but it may not exceed three months' remuneration due on the day the damage was caused.

The burden of proving that these prerequisites are met lies with the employer, who should also determine the amount of the damage sustained. The claim for damages is pursued through the courts, and the employer may not deduct the amount of compensation from the employee's remuneration without the employee's written consent or a writ of execution.

If the damage is caused to a third party (regardless of whether it is another employee, a customer, e.g., a patient, or an outsider, e.g., a person visiting someone in hospital), the employer is the only party obliged to compensate for the damage, and the employee does not bear any liability towards that party (unless the damage occurred with no connection with performing his/her duties as an employee, which, however, happens quite exceptionally). On the other hand, the employer is entitled to so-called recourse from the employee, i.e., the right to demand from the employee reimbursement of the value of the compensation paid, but on the same principles as if the employee had caused the damage to the employer. In the healthcare system, we will have such a situation in particular when a medical professional working in a healthcare entity commits a so-called medical error resulting in civil liability of that entity.

2. Exposing the employer to risk – a case report

A doctor, being an employee of a hospital within the meaning of the Polish Labor Code, has performed microinvasive laser vascular coagulation on a patient with a twin pregnancy in which one of the fetuses was an acardiac twin. The procedure has been performed with the assistance of a resident physician. The operator of the procedure, although highly experienced in invasive interventions such as amniocentesis or cordocentesis, had not yet performed the procedure of microinvasive laser vascular coagulation in a fetus being an acardiac twin. Also, the assisting resident had never been involved in performing this type of medical procedure before. The procedure has proved unsuccessful and both fetuses died.

The hospital did not have the medical equipment needed to perform the procedure of micro-invasive laser vascular coagulation in a fetus being an acardiac twin. The doctor, acting without the knowledge of the employer and the head of the ward, and disregarding the procedures applicable in the workplace, has borrowed the equipment necessary to carry out the above-mentioned medical procedure. This equipment had all the necessary certificates and approvals, but the hospital has not concluded any lending agreement in connection with its rental and use for the procedure, and no supporting documentation for the use of the apparatus has been drawn up (including the report on installation and collection of the equipment).

The doctor has not notified the intention to carry out that medical intervention to the head of the ward, who became aware of the procedure performed in connection with the patient's detention in hospital for the induction of miscarriage of an abortive twin pregnancy. In view of the fact that an atypical, risky procedure, characterized by an almost experimental nature, had been performed without his knowledge, the head of the ward informed the hospital's deputy director for treatment issues.

The hospital's deputy director for treatment issues, having carried out an internal investigation to establish the circumstances of the microinvasive laser vascular coagulation procedure performed on a fetus being an acardiac twin, notified the executive director of these events. Acting on behalf of the hospital, the executive director imposed a reprimand on the doctor. Being a non-medical person, the executive director relied on the assessment of the doctor's conduct made by the hospital's deputy director for treatment issues (the doctor) and the appointed doctors of the hospital involved in the internal investigation. Taking into account all the circumstances of the procedure, i.e., the lack of experience of the persons performing the procedure, the unauthorized lending of the necessary medical equipment by the doctor, the performance of the procedure without the knowledge of the head of the ward, the conclusion was reached that the doctor's conduct exposed the employer to the risk of legal liability and was a manifestation of a breach of the rules applicable in the workplace, which justified the imposition of the penalty of a reprimand against him.

Conclusion

Summing up, it should be stressed that despite the fact that a doctor has the broadest competence among medical professions, in his/her relations with the employer he/she is subject to the same liability as other employees. Legal regulations on civil liability also do not provide for a special procedure for civil cases concerning errors in diagnosis and treatment. In principle, as in other compensation proceedings, it is a matter of redressing the damage.

However, court practice shows that the same event may form the basis of two or more proceedings. The evidence

gathered in the proceedings on breach of employee duties may be valuable for the pending civil proceedings. In the opinion of the Supreme Court, only specific material collected in another case, and not the files of another case, may constitute evidence, nevertheless, as an exception to this rule, it cannot be excluded that a generally formulated request for taking evidence from the files of another specific case, e.g., from the regulations concerning employee duties, may also be taken into consideration. Compliance by doctors and other medical professionals with the rules applicable in the workplace is undoubtedly of key importance both for patient safety and for proper relations between colleagues, which is important from the point of view of the employer's potential financial liability. Due to the increasing number of claims related to the violation of patient safety, attention should be paid to the implementation of solutions aimed at improving the situation, such as staff training or information for employees and patients.

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