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## **PATIENT RIGHTS WITHIN THE SYSTEM OF LEGAL AID. A STARTING POINT TOWARDS MEDICAL ANTHROPOLOGY**

### **1. INTRODUCTION**

1 January 2016 saw the commencement of operations of free legal aid centres in Poland, which function under the Act of 5 August 2015 on Free Legal Aid and Legal Education (currently named: the Act on Free Legal Aid, Civic Counselling and Legal Education,<sup>1</sup> hereinafter as “the 2015 Act”). Anyone who files an application representing that they are not in a position to obtain paid advice can benefit from complimentary legal assistance. By including within the catalogue of potential beneficiaries of the 2015 Act any person interested in obtaining legal aid, an opportunity arises to tender help to all those in need – including those patients who face legal problems.

This paper expounds upon the problem of patient rights, taking particular account of the right to information: on one’s state of health, examination, diagnosis, proposed and practicable diagnostic methods, proposed and practicable medical methods, prognosis.<sup>2</sup> The specificity of the relationship between a patient and a doctor shall also be discussed, with due emphasis on the aspect of communication between those two actors. The authors also pinpoint that, in a broader context, free legal aid centres operating under the 2015 Act might face up to issues pertaining to patient rights. An answer is also sought to the question of how

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<sup>1</sup> Official Journal of Laws of 2018, item 1467.

<sup>2</sup> This catalogue was featured for the first time in Article 19 of the Act on Healthcare Institutions, see: Act of 30 August 1991 on Healthcare Institutions (Official Journal of Laws of 2007, No. 14, item 89).

the realization of the right to information could be enhanced, and the authors furnish recommendations on the matter.

## 2. PATIENT RIGHTS AS A PHENOMENON

Development of contemporary societies is underpinned by knowledge. It is a cliché that knowledge is power and that it serves as a guarantee of a relative equilibrium of rights and obligations for an individual in their dealings with a group or a stronger actor. At a time of rapid technical development sociologists, lawyers and political scientists have identified the need to support weaker actors as part of a campaign to counteract exclusion.<sup>3</sup> A myriad of areas of social and everyday life demand narrow specializations. Nowadays, as much as one requires specialist equipment to discover a defect in a car, even more specialized knowledge is necessary to formulate a medical diagnosis or understand a defect of a human organism. Laymen must avail themselves of the services of car repair centres. Not surprisingly, there are many parallels in medicine. However, inasmuch as not everybody is obliged to hold a car, everybody has an organism which must function properly in order to perform other societal functions. Mariola Guzowska has noted that relationships between laymen and professionals are based upon the former's trust towards the latter. This, in her opinion, "gives rise to an absence of balance in a professional-non-professional relationship, with the former dominating. With a view to mitigate this imbalance between the parties, it is necessary to introduce the patient to the intricacies of the doctor's professional actions. This shall enable the individual in question to consciously participate in these actions. As a consequence, the doctor is burdened with a duty to equip the patient with full and accurate information and instructions."<sup>4</sup> Similar concepts are found in the classic works of eminent sociologists of medicine such as Antonina Ostrowska<sup>5</sup> as well as in the entire contemporary notion of patient rights: the right to information is a rudimentary, fundamental right belonging to that catalogue.<sup>6</sup>

Patient rights shall be defined as a set of entitlements whose purpose is protection of human health. In a wider sense, the idea of patient rights pertains to pub-

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<sup>3</sup> M. Foucault, *Trzeba bronić społeczeństwa*, Warszawa 1998 (English title: *Society Must Be Defended*).

<sup>4</sup> M. Guzowska, *Prawo pacjenta do informacji o stanie zdrowia jako jedno z praw przysługujących w procesie leczenia*, „Przegląd Sądowy” 2009, Vol. 9, pp. 91–102.

<sup>5</sup> A. Ostrowska, *Socjologiczne i etyczne uwarunkowania relacji lekarzy z pacjentami*, (in:) J. Hartman, M. Waligóra (eds.), *Etyczne aspekty decyzji medycznych*, Warszawa 2011, pp. 11–23.

<sup>6</sup> For instance, the Act on Patient Rights and the Patient Rights Ombudsman prescribes this right in Chapter 3. For more, see: Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman (Official Journal of Laws of 2009, No. 52, item 417).

lic policies, healthcare institutions and the catalogue of rights related directly to health that an individual has.<sup>7</sup> Interestingly, patient rights in a narrower sense are similarly difficult to pin down as they are regulated by various branches of law. It shall be noted that protection of human health and life has been, since time immemorial, a matter of both public and private law and as such are governed by the norms of criminal and civil law. Furthermore, as a result of rapidly expanding juridification of everyday life, these rights begin to transgress into the scope of other branches of law.<sup>8</sup>

When analysing patient rights one shall note that they attach not only to patients themselves, but also to doctors and nurses (as a dominant thread of the medical law literature dictates). Moreover, other specialists, such as physiotherapists, psychologists, speech therapists, etc., begin to play an increasingly more significant role. It is more proper to talk about medical professions at large.<sup>9</sup> The group also includes, therefore, other experts who work with patients on a day-to-day basis so, for instance, administrative workers employed by hospitals as well as officials who regularly tender advice and support to persons under diagnosis or treatment.<sup>10</sup>

The fundamental differentiation of patient rights is that into negative rights (as in “freedom from”) and positive rights (as in “a right to”). This division is prevalent in the literature although Dorota Karkowska has noted that some of those rights are a right to something and a freedom from something at the same time: “the fundamental right of a patient to psychophysical integrity necessitates not only that the state refrains from any acts that could endanger the life or health of an individual, but also wide-ranging positive measures shall be undertaken to protect those individual goods. Similarly, societal rights, such as the right to health

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<sup>7</sup> K. J. Arrow, *Lecznictwo z punktu widzenia niepewności i ekonomii dobrobytu*, (in:) *Eseje z teorii ryzyka*, Warszawa 1979, pp. 181–215; D. Karkowska, *Zawody medyczne*, Warszawa 2012, p. 30; D. R. Kijowski, A. Miruć, P. J. Suwaj, *Kryzys prawa administracyjnego*, Vol. 1, Warszawa 2012, p. 26.

<sup>8</sup> For more on this, see: B. Kmieciak, *Prawa dziecka jako pacjenta*, Warszawa 2016, p. 46, and M. Safjan, *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998; A. Zoll, *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu*, Warszawa 1988; G. Rejtan, *Odpowiedzialność karna lekarzy*, Warszawa 1991; M. Nesterowicz, *Kontraktowa i deliktowa odpowiedzialność lekarza za zabieg leczniczy*, Warszawa–Poznań 1972; M. Sośniak, *Cywilna odpowiedzialność lekarza*, Warszawa 1989.

<sup>9</sup> By a medical professional we understand a person who is authorized, “pursuant to specific provisions, to provide medical services as well as a person who has professional qualifications to provide medical services within a defined scope or in a defined field of medicine”. Cf. Article 2 section 1 point 2 of the Act of 15 April 2011 on Medical Activity (Official Journal of Laws of 2011, No. 112, item 654). Therefore, we shall refer here to experts who undertake professional actions and interventions for the benefit of patients.

<sup>10</sup> B. Kmieciak, *Problem tajemnicy psychiatrycznej w kontekście dostępu pracowników nie-medycznych do informacji o prawach pacjenta*, „Psychiatria i psychologia kliniczna” 2014, No. 1, pp. 50–55.

protection, have within their scope negative entitlements – health protection or the prohibition on the conduct of medical experiments without the patient’s consent, as well as positive ones – the prohibition on the implementation by the state of a public health policy that would restrict equal access to healthcare services”<sup>11</sup>.

Under Polish law, the most significant patient rights include the right to medical care, the right to information, the right to demand that the doctor withhold certain information from third parties within the scope delineated by the patient, the right to present own opinion as regards the information received, the right to obtain information regarding the doctor’s intention to cease to provide medical care at a properly early stage, the right to confidentiality of information pertaining to the patient, the right to consent to medical treatment, the right to respect for intimacy and dignity of the patient, the right to die in peace and with dignity, the right to treatment that ensures the alleviation of pain and other suffering in a terminal state<sup>12</sup>, the right of access to medical records, the right to raise objections to the doctor’s opinion or report, the right to respect for the patient’s private and family life, the right to pastoral care, the right to have valuable possessions stored in a deposit, the right to seek help from the Patient Rights Ombudsman. A cursory analysis of these rights reveals clearly that the right to know and to be informed is a patient’s rudimentary, fundamental right. In our opinion this is a reflection of the modern concept of the rule of law from which, *inter alia*, the right of access to public information is derived.<sup>13</sup> In this connection, it is pertinent to refer to a judgment of the Constitutional Court where it was held, in no uncertain terms, that the right to provide information, even assuming that it is triggered by a member of the public when they submit a request, obliges relevant authorities to actively make efforts to make such information available to the individual.<sup>14</sup> The right to information being part and parcel of patient rights shall be approached by analogy. For it is a patient that initiates the reaction of healthcare institutions, however doctors and medical entities must actively, as a response, make available information as regards the conduct and outcome of medical examinations, therapies and alternative methods of treatment or available patient rights. This account is predicated upon the existence of a rational legislator and the assumption that no mutually exclusive nor unnecessary norms shall be enacted into law by parliament<sup>15</sup>.

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<sup>11</sup> D. Karkowska, *Prawa pacjenta*, Warszawa, 2018-06-20. Available at: <https://sip.lex.pl/#/monograph/369206719/4> (accessed: 16.07.2018).

<sup>12</sup> Following the latest amendments to the Act on Patient Rights and the Patient Rights Ombudsman, the right to alleviation of pain encompasses all potential medical interventions and not only those which concern terminal situations.

<sup>13</sup> Z. Witkowski, *Prawo konstytucyjne*, Toruń 2006.

<sup>14</sup> Judgment of the Polish Constitutional Court of 20 March 2006 (ref. number K 17/05).

<sup>15</sup> L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2006.

Karkowska (who has been cited previously) notes that the notion of “patient rights” may pertain to the relationship between a patient and a public authority as between a patient and a concrete entity authorized to provide medical care.<sup>16</sup> She argues further that in the former scenario these rights are “abstract and general” whilst in the former “patient rights have the character of concrete norms which, on the one hand, point to the obligations of entities providing medical care (...) while, on the other, to patients’ rights related to the protection of their personal rights”<sup>17</sup>.

The foregoing view predominantly embraces the vertical aspect of patient rights. In the centre here is a patient subject to some higher authority which may rest at the level of: booking an appointment (registration), a nurses’ station, a doctor’s office or the office of a director of the healthcare in question, or a decision of a public authority. A horizontal account of patient rights begs the following question: Can a patient violate the rights of another patient? Such a situation is admittedly hardly possible. A beneficiary of medical care would have to be objectively able to have a bearing upon whether, for example, medical care is administered to another person, and this is unlikely. What is likely, however, is that the behaviour and attitude of patients is liable to directly impact the mental welfare of other persons under treatment.<sup>18</sup>

It is in this context that the notion of a patient’s “duty” gains relevance. It may be understood, first, as a formal duty related to following administrative orders related to booking a doctor’s appointment.<sup>19</sup> Alternatively, the concept of “duty” attaches to a patient’s behaviour towards another: another patient, visitors, a medical professional. A reference here is made to a debate, prevalent in the doctrine of human rights law, concerning an individual’s duty towards another person, particularly the duty of respect.<sup>20</sup> This aspect has featured prominently in Polish law and shall continue to do so<sup>21</sup> as it is of special importance in the context of con-

<sup>16</sup> D. Karkowska, *Prawa pacjenta...*

<sup>17</sup> *Ibidem*.

<sup>18</sup> It is perhaps for this reason that the Patient Rights Ombudsman in its 2018 proposed amendment to the Act on Patient Rights decided to include a catalogue of “patient duties” which directly refer to the concept of respect for each and every person.

<sup>19</sup> *Obowiązki pacjenta (wynikające z ustawy o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych)* (Duties of the patient (under the Act on Publicly Financed Medical Care Services, prepared by the Institute for Patient Rights and Health Education)), Warszawa, [http://www.prawapacjenta.eu/var/media/File/Filariski\\_obowiazki%20pacjenta.pdf](http://www.prawapacjenta.eu/var/media/File/Filariski_obowiazki%20pacjenta.pdf) (accessed: 23.07.2018).

<sup>20</sup> J. Kondziela, *Chrześcijańskie ujęcie praw człowieka na tle dyskusji międzynarodowej*, „Chrześcijańskie ujęcie praw człowieka” 1977, nos. 63–64, p. 56, cited after: W. Osiatyński, *Prawa człowieka i ich granice*, Kraków 2011, p. 77.

<sup>21</sup> E.g. paragraph 3 of the Regulation of the Minister of Health and Welfare of 6 May 1983 on the statutes of stationary drug treatment facilities and care homes for people addicted to alcohol (Official Journal of Law, No. 25, item 115) and Article 18a of the Act of 30 August 1991 on Healthcare Institutions (Official Journal of Laws of 2007, No. 14, item 89). In recent months,

flicts between doctors and patients which arise within the healthcare system. It is an increasingly common situation where persons employed in the healthcare system fall victim to aggression. It is emphasized that the language of rights and entitlements, coupled with the overlooking of duties, may conduce to such incidents. This, in turn, may lead to demanding attitudes among patients who have regard only for their rights.<sup>22</sup> Similarly, the authors notice parallels in the case of other total institutions. For relationships between inmates and prison guards, pupils and teachers, students and lecturers have been based on the inequality of the parties, a phenomenon which was particularly observable in Communist Poland. Contemporarily, greater emphasis is put on the need to embolden and bolster the individual in its dealings with authority – which appears by all accounts correct, however this process may occur at the expense of the employees of a total institution (the lack of respect for doctors or medical personnel at large mentioned above is discernible also in other areas, such as higher education).

### 3. PATIENT RIGHTS AND THE THERAPEUTIC RELATIONSHIP

The medical professional-patient relationship is peculiar. A person who books a doctor's appointment is often seriously concerned about the situation they have found themselves in. Therefore, it is not merely a relationship between a trader (service provider) and a client, as is frequently surmised in the literature.<sup>23</sup> Commentators at times revive the idea that a patient is, first and foremost, a service recipient who accepts, under a contractual arrangement, service from a trained professional. This consumer approach, as noted by, inter alia, Georg Annas, has not gained a dominant position in the social and medical debate.<sup>24</sup> The interaction occurring between a medical expert and a person suffering from a condition is unique, also from a legal perspective. For actions directed towards a patient are most often aimed at bettering their situation. Therefore, a person who has booked a doctor's appointment has done so in the hopes that the given professional is able to provide the support needed.<sup>25</sup> This angle has been noted by Talcott Parsons,

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the Patient Rights Ombudsman proposed amendments to the Act on Patient Rights which would restore the statutory language of a patient's duty.

<sup>22</sup> Cf. in this context: M. Dziewiecki, *Pedagogika integralna*, Warszawa 2010, pp. 129–130; D. Mechanic, D. D. McAlpine, *Sociology of Health Care Reform: Building on Research and Analysis to Improve Health Care*, "Journal of Health and Social Behavior" 2010, No. 51, pp. 149–150.

<sup>23</sup> E. Krajewska-Kułak, M. Sierakowska, J. Lewko, C. Łukaszuk, *Wstęp*, (in:) *Pacjent podmiotem troski zespołu terapeutycznego*, Vol. 1, Białystok 2005, pp. 12–13.

<sup>24</sup> J. Bujny, *Prawa pacjenta. Między autonomią, a paternalizmem*, Warszawa 2007, pp. 10–16.

<sup>25</sup> *Ibidem*, p. 68. See also: R. K. Merton, *Paradygmat analizy funkcjonalnej w socjologii*, (in:) A. Jasińska-Kania et al. (eds.), *Współczesne teorie socjologiczne*, Warszawa 2006, pp. 367–375.

among others, who underscores that a patient seeking the assistance of a doctor has the right to expect the undertaking of actions aimed at bettering their state of health.<sup>26</sup> Conversely, doctors in their everyday work are authorized to interfere with patients' intimacy, which is why the latter are obliged to comply with procedures imposed by medical professionals, who, in turn, must at least showcase respect for the patient's dignity.<sup>27</sup>

An analysis of the debate surrounding patient rights reveals that the low degree of public awareness in this respect is not a phenomenon of the recent times. The Polish government is fully conscious of the low level of medical and legal knowledge of its citizens<sup>28</sup>.

Polish citizens struggle with differentiating facts from opinion. When extracting information from the Internet by means of search engines, they fail to sift through this sizable volume of data and classify it according to source or time of publication. It is these two variables that possess the most significance in the study of law. The foregoing explains why the authors, who in their everyday life work in legal practice, deal with patient rights or teach at university level, are not taken aback by citations of legislation derived from Wikipedia. Increasingly more often the recipients of our services (educational or legal) confront the information we provide with *dr Google* rather than with the letter of the relevant legislation. Further, the reliability derived from the number of online visits (or hits) often trumps observations based on a careful study of the official database of legislation. Where beneficiaries are referred to the Act on Patient Rights and the Patient Rights Ombudsman, questions often arise whether the patients' rights charter can serve as the basis for legal rights and obligations. This document, although it has no binding force, still remains a popular source of knowledge about patient rights.<sup>29</sup> Both the first and the second version of the charter comprised only several pages of text. Patients could familiarize themselves with relevant rights expeditiously, according to the situation at hand. On the other hand, the Act on Patient Rights is a voluminous piece of legislation, one that features not only an enumeration of patient

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<sup>26</sup> For more, see: *Choroba jako dewiacja i „profesjonalna” rola lekarza; relacja pacjent – lekarz w funkcjonalnej teorii Talcotta Parsonsa*, available at: <http://www.h-ph.pl/pdf/hyg-2012/hyg-2012-4-398.pdf> (accessed: 17.08.2018).

<sup>27</sup> L. Marszałek, *Spoleczny kontekst niepełnosprawności*, „Seminare” 2007, No. 24, pp. 344–345, and T. Żólkowska, *Osoba z niepełnosprawnością intelektualną w społeczeństwie. Koncepcje a rzeczywistość*, (in:) I. Ramik-Mażewska, G. Leśniewska (eds.), *Aktywizacja społeczno-zawodowa osób niepełnosprawnych ruchowo*, Szczecin 2008, p. 13.

<sup>28</sup> The low level of awareness as regards patient rights is also evidenced by a statement made by the then Minister of Health in 2011 who, during a conference devoted to patient rights, misguidedly referenced the European Charter of Patients' Rights which is not, strictly speaking, legally binding. See: <http://www.rynekzdrowia.pl/Prawo/Unia-Europejska-o-nas-w-przestrzeganiu-praw-pacjenta-zrobiliscie-postep,108296,2.html> (accessed: 21.08.2018).

<sup>29</sup> Similar corollaries are reached by A. Łaska-Formejster, *Pacjent w sieci zależności. Społeczny kontekst praw i autonomii pacjenta*, Łódź 2015.

rights, but also spells out the procedures governing the election of the Patient Rights Ombudsman, the Voivodeship Medical Events Commissions and the inner workings of a commission to which patients may submit their objections.<sup>30</sup>

The myth of “*abuse of medical care*”<sup>31</sup> is common in everyday parlance, however our field research tends to suggest that Polish citizens resort to medical help too late.<sup>32</sup> It is surmised that the Polish society refrains from availing itself of professional help – and just like legal advice is sought as late as during enforcement proceedings,<sup>33</sup> the same situation is observable in the field of medicine. Polish citizens use medical services late where illnesses have reached advanced stages, which is borne out, inter alia, by the number of doctor’s appointments. The reason for this, it is suggested, is the low level of awareness when it comes to medicine and the availability of medical services.

Generally, the reformed medical system is burdened with overflowing administration. Further, it is difficult to expect a citizen to know how to benefit from medical care where they are often oblivious to what is actually available. The relationship between a patient and a doctor is one of administrative power and authority. A person faced with pain is not in a position to act rationally, their lack of self-dependence resembles that of people deprived of their liberty (this is, admittedly, a simplification). It is from this perspective that Michel Foucault’s analyses of individuals and their relations with public authority appear especially momentous<sup>34</sup>; the same applies to Erving Goffman’s research on total institutions<sup>35</sup>. Błażej Kmiecik has also referred to the classic sociological account which attempts to analyse relations between authority and an individual by arguing that the knowledge possessed by medical professionals is highly peculiar and,

<sup>30</sup> Cf. Ł. Hajduk, M. Binkowska-Bury, A. Jacek, *Informowanie o prawach pacjenta przez personel medyczny*, p. 1, <http://www.kpg-steczowska.com/wp-content/uploads/2012/04/Prawa-Pacjenta.pdf> (accessed: 27.07.2018).

<sup>31</sup> This kind of fetishization of individuals’ actions is observable also in public discourse concerning the right to access to public information. See: A. S. Bartnik, *Organizacje strażnicze – partnerzy czy piniacze? Kontrola i rekomendacje jako zewnętrzny audyt ekspercko-obywatelski*, (in:) M. Trybull-Piotrowska (ed.), *Spoleczeństwo, gospodarka, siły zbrojne – relacje i wyzwania*, Warszawa 2014.

<sup>32</sup> As part of research for the purposes of this paper, the authors conducted interviews with 10 patients changing their preferred doctors (the patients were selected using the snowball method, therefore the findings of this paper are not representative). We also have lodged a petition to the Patient Rights Ombudsman asking for disclosure of statistics regarding the volume of complaints and proceedings, however we have not received a response.

<sup>33</sup> A hypothesis put forward by A.S. Bartnik and K. J. Kowalska, *Poradnictwo prawne i obywatelskie w kontekście świadomości prawnej i potrzeby edukacji prawnej Polaków. Wybrane problem*, „Studia Iuridica” 2018, Vol. 78, pp. 40–60.

<sup>34</sup> We refer here to both *Discipline and Punishment* and *Society Must Be Defended* where the author proffers a novel account of the subordination of an individual to administrative or state authority.

<sup>35</sup> E. Goffman, *Instytucje totalne. O pacjentach szpitali psychiatrycznych i mieszkańcach innych instytucji totalnych*, Gdańsk 2011.

to an extent, insular. This puts them in a position of “authority” which is hardly comparable with any other profession.<sup>36</sup>

#### 4. RIGHT TO INFORMATION

Building upon the above, the legal concept of patient autonomy and self-determination appears to be a Weberian model, an ideal through which the state, by means of its policies and legal institutions, shall ensure patients agency. Similar concepts are found in the works of economists, as noted by Dorota Karkowska who writes that “Economists have pointed to the limits of the behaviour of patients acting as sovereign service recipient – patients do not know what good (medical service) is able to satisfy their needs. In these situations medical professionals perform the role of not only a creator of services but also they decide on the content of the services to be tendered. The effect of such information imbalance is the medical professionals’ traditional domination over patients, and patient rights are aimed at mitigating this state of affairs”<sup>37</sup>. The recent years have seen, however, a new facet which is liable to meaningfully affect this disproportion – the notion of so-called health management. A relatively novel concept, it focuses on perceiving the patient as “an expert when it comes to own medical condition” and applies primarily to patients suffering from chronic conditions as they possess concrete knowledge concerning, inter alia, the effects of drugs. Their opinion may also be invaluable in the process of formulating a diagnosis and proposing methods of treatment on account of the fact that such patients have the option of monitoring the state of their bodies/organisms on an on-going, permanent basis.<sup>38</sup>

It is pertinent to refer in this connection to Article 68(2) of the Polish Constitution whose construction has generated controversy as regards the positive versus the negative package of guaranteed benefits, i.e. equal access to publically financed medical care. The controversy overlaps largely with the right to information prescribed in Article 9 of the Act on Patient Rights and the Patient Rights Ombudsman. For since the concepts of a positive and negative package of benefits are not helpful in determining the services which are publically financed (reimbursed by the state), it is difficult to expect patients/laymen to be in the know as regards availing themselves of their rights. Sylwia Jarosz-Żukowska has noted that Polish regulations and case law with regard to patient rights is convoluted and unambiguous although “the Supreme Court has emphasized that a beneficiary of medical

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<sup>36</sup> B. Kmieciak. *Czy szpital psychiatryczny jest (nadal) instytucją totalną?*, „Psychiatria i Psychologia Kliniczna” 2017, Vol. 17, pp. 142–151.

<sup>37</sup> D. Karkowska, *Prawa pacjenta...*

<sup>38</sup> Cf. M. Gałązka-Sobotka (ed.), *Stwardnienie rozsiane: zarządzanie chorobą*, Warszawa 2016.

services has no claim to the National Health Fund to establish whether they have a right to a medical service which is not covered by a contract for the provision of medical services”<sup>39</sup>. Further, she writes that “the Supreme Court in its resolution of 24 January 2007 (III UZP 4/06) – LEX No. 209081 answered the question: ‘If a given medical service is not covered by a contract to provide medical services [...], can a patient demand that the National Health Fund establish whether they have a right to that medical service?’ The Supreme Court’s answer was negative. For the insured have the right to all of the medical services which are not excluded by statute, as long as they align with the current requirements of contemporary medical knowledge based on scientific evidence and medical practice, ‘however the right to all non-excluded medical services is subject to the provisions of the Act (at the time it was the 1997 Act on Public Health Insurance [authors’ comment]), which envisaged that medical services were provided to the insured subject to the availability of funds had by branches of the National health Fund, which perform their functions in accordance with the principles of fairness, purposefulness and efficiency’, cited after: D. E. Lach, *Zasada równego dostępu...*, pp. 250–251. Cf also the judgment of the Polish Supreme Court of 7 August 2003, in which it was held that the National health Fund is not obliged to reimburse treatments not covered by a contract with a given medical service provider”<sup>40</sup>.

Considering the above, the paper argues that it would be reasonable to oblige the Ministry of Health to publish, on an annual basis, a list of basic medical services, i.e. the scope of access to doctors and treatments available – perhaps every doctor’s appointment should be evidenced by means of a certificate and/or diagnosis. For today a patient is generally oblivious as to what information to expect, how to obtain it, and, even more so, who is competent to provide it. Although the right to information is a fundamental patient right, there is no unambiguous legal basis for a person suffering from a condition to demand information of such a condition’s specifics. Granted, one has an unconstrained right to familiarize oneself with any and all information concerning one’s state of health, however this general rule is not aided by means of practical executive provisions of law. For instance, the right to information on an administered medical intervention was first recognized under Polish law in the 1991 Act on Healthcare Institutions. The legislation used the term “information on one’s state of health” which is ambiguous. Although no legislative restrictions were prescribed in this respect, practical use of the right faces tremendous obstacles. Although the need to obtain consent and the right to understandable and clear information has been accepted as a patient right for decades – see, for instance, the rather unequivocal judgment of the Polish Supreme Court of 14 November 1972, I CR 463/72 (unpublished), patients face problems

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<sup>39</sup> S. Jarosz-Żukowska, *Prawo do ochrony zdrowia i dostępu do świadczeń opieki zdrowotnej*, [http://www.repozytorium.uni.wroc.pl/Content/53682/36\\_Sylwia\\_Jarosz\\_Zukowska.pdf](http://www.repozytorium.uni.wroc.pl/Content/53682/36_Sylwia_Jarosz_Zukowska.pdf) (accessed: 21.08.2018).

<sup>40</sup> *Ibidem*.

with obtaining information as regards complications. The case law of the Supreme Court fails to address the gravity of interpretative controversies because the majority of patient rights cases is settled out of court and, on the other hand, it has been held that “doctors are not obliged to provide information on all potential complications of given treatment, especially where such complications were impossible to foresee”<sup>41</sup>. This begs the question: how should complications be documented and what complications should the doctor inform the patient about (if at all)?

In this context, it should be emphasized that following the obtaining of such information the patient has the right to present their own opinion on the matter. At the same time, the information made available to the patient shall be understandable thereto.<sup>42</sup> Karkowska has surmised that “a patient had the right to obtain information expressed in words and terms which are clear and understandable for them. To this end, many an aspect of a patient’s situation must be taken into account, such as psychophysical maturity, state of awareness, age, education, etc. Insular, professional medical language, grounded in scientific terms, shall be avoided. One consequence of providing information in an improper manner may be the grant of ‘uninformed consent’. This is to say that consent granted in response to information provided in an unclear manner, where no adjustment was made to the intellectual capacity of the patient or their statutory representative, is ineffective and as such legally irrelevant.”<sup>43</sup>

Here resides a peculiar paradox related to patient rights. Alicja Łaska-Formejster has inferred from her research that even where patients declare that they are aware of their rights, they are unable to name them nor can they pinpoint where and how they may be found. She goes on to argue that patients are typically only capable of naming up to four rights from the extensive catalogue<sup>44</sup>. The lack of real knowledge or legal awareness as regards patient rights coupled with the low level of legal awareness among Polish citizens makes it so that the volume of court cases and complaints made to relevant institutions is low compared to other European countries. And although the number complaints to the Patient Rights Ombudsman gradually increases year after year, this testifies more to the fact that the level of legal awareness in this respect is rising rather than that the quality of medical services has slumped. Interestingly, statements filed with the Patient Rights Ombudsman often have the form of questions rather than complaints<sup>45</sup>. The foregoing shall serve as a backdrop against which we shall now zero in on legal aid.

<sup>41</sup> LEX No. 2000500 – judgment of 26 January 2016.

<sup>42</sup> Article 13(2) of the Doctor’s Medical Code of 2 January 2004 (uniform text, incorporating the changes enacted on 20 September 2003 by the VII Extraordinary National Congress of Doctors), Warszawa 2004.

<sup>43</sup> D. Karkowska, *Prawa pacjenta...*

<sup>44</sup> For more, see: A. Łaska-Formejster, *Pacjent...*

<sup>45</sup> Own observation based on the information disclosed on the website of the Patient Rights Ombudsman. Professor Jakub Palikowski has analysed the proportion between complaints and questions and concluded that complaints represent only several per cent of all statements lodged

## 5. THE PATIENT AND LEGAL AID

The Act of 5 August 2015 on Free Legal Aid and Legal Education<sup>46</sup> permitted the provision of free legal aid to persons who represent that they are not able to afford paid legal advisory. More than 1500 centres operate around the country, providing legal advice, civic counselling and mediation services. As the healthcare system becomes increasingly digitalized<sup>47</sup>, thus amplifying the risk of patients being disoriented within the intricacies of the medical process of treatment, it is crucial to strengthen and embolden the message conveyed to patients and their families even as early as before treatment actually commences. For it is only information – as noted by Bączyk-Rozwadowska – “conveyed properly as regards its scope, manner and form” may “enable the patient to assess the benefits and risks that may flow from proposed treatment, formulate a ‘therapeutic profit and loss account’, and ultimately grant or refuse consent to a medical intervention”<sup>48</sup>. It is our estimation that a patient’s right to information may be fully realized only with systemic support not only for patients themselves, hence it is necessary to educate the society, devise topical informational brochures<sup>49</sup>, whilst supporting representatives of the healthcare system who must comply with patient rights on a daily basis. Sizable difficulty lies in adjusting a message to a given patient and selecting a form of communication that corresponds with the addressee’s perceptive abilities. Doctors, nurses and other persons employed in healthcare institutions should be able to impart information in a manner that familiarizes the patient fully with the state of their health and potential available methods of treatment, but also affords patients an opportunity to understand the wider context surrounding their conditions – that is the position of a given patient within the healthcare system, and the intricacies of the system itself. The foregoing is best exemplified by situations faced by people active in the hospice environment in Poland. Doctors, nurses, psychologists and physiotherapists not only proffer assistance, but they also often converse with both patients and their families regarding the complexity of the healthcare system in our country, which generates constraints in their

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(see: J. Pawlikowski, *Pytania o urząd Rzecznika Praw Pacjenta*, „Medycyna Praktyczna”, source: <https://prawo.mp.pl/wiadomosci/156756.pytania-o-urzed-rzecznika-praw-pacjenta>.

<sup>46</sup> Official Journal of Laws of 2015, item 1255.

<sup>47</sup> For more, see: <http://www.rynekaptk.pl/komunikaty-urzedowe/dziennik-ustaw-opublikowano-ustawe-o-e-recepcie,25461.html> (accessed: 25.07.2018), <http://www.politykazdrowotna.com/29895,internetowe-konto-pacjenta-mz-wskrzesza-projekt> (accessed: 25.07.2018).

<sup>48</sup> K. Bączyk-Rozwadowska, *Prawo pacjenta do informacji według przepisów polskiego prawa medycznego*, „Studia Iuridica Toruniensia” 2011, Vol. 9, p. 60.

<sup>49</sup> A brochure as an educational form is highly regarded in the field of healthcare. For more on this, see, *inter alia*: P. Michalski, A. Kosobucka, M. Nowik, Ł. Pietrzykowski, A. Andruszkiewicz, A. Kubica, *Edukacja zdrowotna pacjentów z chorobami układu sercowo-naczyniowego*, „Folia Cardiologica” 2016, Vol. 11, No. 6.

everyday work (queues to hospices, the necessity of obtaining a referral), and explain to them the duties of attending doctors or doctors discharging their duties for the benefit of patients in hospitals. Therefore, we can talk about two elements constitutive of the right to information, i.e.:

- 1) access to information regarding own state of health;
- 2) access to information regarding the operation of the healthcare system.

Inasmuch as the first aspect can only be actualized by medical professionals, the latter one could be entrusted to a centre of free aid and fittingly complement the helplines operated by the Patient Rights Ombudsman and the National Health Fund (this would require the incorporation of strictly patient rights-oriented provisions into the Act). That there is a multitude of entities from which patients and their families could obtain information would only be beneficial, thus bettering the standard of life for citizens. A commendable example of provision of complimentary aid is offered by medical law sections run by Law Clinics at the Jagiellonian University and the University of Warsaw. These centres, which are supervised by legal scholars and representatives of lawyers' professional associations, are operated by students who are also responsible for providing substantive advice. Their potential, engagement and experience could be e.g. for the purposes of preparing educational brochures (workshops on how to formulate the content of brochures, what elements to incorporate could be included in law clinic programmes<sup>50</sup>, which founded upon active methods of learning)<sup>51</sup>. All these endeavours shall be undertaken as soon as possible and have a complex character – it is only in such a manner that patients' constitutional rights can be realized at a time of rapid computerization of the healthcare system. It would also beneficially impact the situation of elder patients – persons living alone and infirm persons, inching closer towards the fulfilment of the ideal of equality as regards access to the healthcare system and particular medical services.

## 6. FINAL REMARKS AND RECOMMENDATIONS

The arrival of a practice of providing legal aid to people in need of medical assistance shall be a catalyst for an analysis of an important question. First, a legal expert deals with a person in a difficult position who requires assistance. Provision

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<sup>50</sup> For more, see: B. Namysłowska-Gabrysiak, *Studencka poradnia prawna: kompendium dla Studentów*, Warszawa 2008.

<sup>51</sup> For more on clinical education and the entrusting of preparation of educational brochures to students, see, for example: K. J. Kowalska, *Potencjalna rola klinik prawa w przeciwdziałaniu zjawisku korupcji na Ukrainie – edukacja jako element strategicznych działań antykorupcyjnych*, „*Studia Iuridica*” 2017, Vol. 69, p. 43.

of information in and of itself may trigger a positive or a negative result. Second, a legal professional who agrees to impart to a given person information they require may have a negative or positive bearing upon the client's state (with the client often being a medical patient). David Wexler and Bruce Winick have put forward the concept of *therapeutic jurisprudence*, the centrepiece of which is the therapeutic or anti-therapeutic attitude that a lawyer may adopt.<sup>52</sup> For, on the one hand, they may only be in a position to convey information pertaining to e.g. patient rights, and this may be conducted in a fully professional manner, that is using expert language, adopting serious posture and referencing concrete pieces of legislation. Such a situation may, however, be considered an example of jurigenesis. Conversely, iatrogenesis ensues where a patient-client sustains harm as a result of non-professional behavior of the "helper".<sup>53</sup> Antoni Kępiński, adopting the same perspective and using his psychiatric background, has noted that an interference in another's difficult situation may make us don the mask of an expert, a professional or a judge. In practice, however, each of those disguises pushes us away from the person we intend to assist.<sup>54</sup> It is imperative that persons involved in providing legal aid adopt a so-called therapeutic attitude – it consists primarily in, Czesław Czabała has written, eliciting hope, showcasing empathy, generating trust as well as (in some cases) imploring the patient to consent to treatment.<sup>55</sup> This resembles Antoni Kępiński's account, under which it is the mere attitude of the intervening person in its relationship with the person being helped that could serve as the "initial medicine".<sup>56</sup> It is worth recalling that it appears especially reasonable to adopt a degree of balance, especially in positive legal aid, between concern eliciting hope and "indifference" which facilitates an analysis of a given person's situation.<sup>57</sup>

The most important recommendations flowing from the foregoing discussion, which suggest potential ways forward for deciding bodies, are as follows:

- 1) maintenance by the Patient Rights Ombudsman or the Ministry of health of a public list of publicly financed (reimbursed) treatments – as an element of the right to information;
- 2) introduction of compulsory training sessions on communication skills for lawyers (including trainee lawyers) and advisors proffering aid in the area of health as well as for public officials engaged in similar endeavours within the framework of the National Health Fund, the Ministry of Health and the Patient Rights Ombudsman;

<sup>52</sup> W. G. Schma, *Therapeutic Jurisprudence*, Williamsburg 2000, p. 2.

<sup>53</sup> W. G. Schma, *Therapeutic Jurisprudence*, "Michigan Bar Journal" 2003, No. 1, p. 25.

<sup>54</sup> A. Kępiński, *Rytm życia*, Kraków 2001, pp. 340–342.

<sup>55</sup> J. Cz. Czabała, *Czynniki leczące w psychoterapii*, Warszawa 2010, pp. 176–180.

<sup>56</sup> A. Kępiński, *Poznanie chorego*, Warszawa 1989, pp. 8–9.

<sup>57</sup> G. Epstein, *Detachment, hope, and spirituals understanding: A comment on Bernie S. Siegel's Prescriptions for Living*, "Advances in Mind – Body Medicine" 2000, No. 16, pp. 150–151.

- 3) introduction of compulsory training sessions for the officials mentioned above and representatives of legal professions as regards the foundations of psychology and psychopathology;
- 4) introduction of a duty to improve legal qualifications among medical professionals;
- 5) increase of the number of class hours in the field of interpersonal communication and medical law for medical students.

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## **PATIENT RIGHTS WITHIN THE SYSTEM OF LEGAL AID. A STARTING POINT TOWARDS MEDICAL ANTHROPOLOGY**

### **Summary**

Paper expounds upon the problem of patient rights, taking particular account of the right to information: on one's state of health, examination, diagnosis, proposed and practicable diagnostic methods, proposed and practicable medical methods, prognosis. The authors also pinpoint that, in a broader context, free legal aid centres operating under the 2015 Act might face up to issues pertaining to patient rights. An answer is also sought to the question of how the realization of the right to information could be enhanced, and the authors furnish recommendations on the matter.

### **KEYWORDS**

patient's rights, medical information, therapeutic relationship, the medical professional-patient relationship, Patients' Rights Ombudsman

### **SŁOWA KLUCZOWE**

prawa pacjenta, informacja medyczna, relacja terapeutyczna, relacja pacjent-lekarz, Rzecznik Prawa Pacjenta