Ius Novum
3/2020

TIME LIMIT FOR SUBMITTING APPLICATION TO DETERMINE A MEDICAL INCIDENT: ANALYSIS AND COMMENTS *DE LEGE FERENDA*

MICHAŁ BIAŁKOWSKI*

DOI: 10.26399/iusnovum.v14.3.2020.30/m.bialkowski

1. INTRODUCTION**

The provisions of Title 13a of the Act of 6 November 2008 on patients' rights and Patient Ombudsman[1] entered into force on 1 January 2012. These regulate the procedure for the patient or his/her heirs to pursue the claim to determine a medical incident in proceedings before voivodship committees deciding on medical incidents (hereinafter committees). The objective of the newly established system was to introduce, as part of the overall legal system, an independent method to compensate for damage occurring in the course of medical treatment that would be subsidiary to court proceedings. The legislative work undertaken by the legislator aimed at eliminating the difficulties in obtaining compensation in civil proceedings for damage suffered during medical treatment which effectively limited the patient's right to compensation for damage caused.[2] The amended APR sought to simplify and speed up the process of obtaining compensation for personal injury suffered by the patient

* PhD, Assistant Professor at the Faculty of Law and Administration of the University of Szczecin; e-mail: michal.bialkowski@usz.edu.pl; ORCID: 0000-0002-3366-6883

** This article is based on the doctoral dissertation supervised by Professor Jerzy W. Ochmański at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań, entitled *Compensation for Damage Resulting from Medical Treatment.*

1 Dz.U. 2012, item 159, as amended; hereinafter APR.

2 The European Charter of Patients' Rights, prepared in 2002 by Active Citizenship Network in cooperation with 12 organisations from various EU countries, contains a catalogue of 14 patients' rights. One of them is the right to compensation, which provides that 'Each individual has the right to receive sufficient compensation within a reasonably short time whenever he or she has suffered physical or moral and psychological harm caused by a health service treatment.'; see http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf.

and to reduce the costs of proceedings vis-à-vis court proceedings.[3] At this point, it is worth noting that the system adopted in Poland is original and, despite the legislator's assurance, differs from the systems present in other countries.[4]

The purpose of this article is to analyse the legal nature of the time limit for submitting an application to determine a medical incident by a patient or his/her heirs (Article 67c paras 2 and 4 APR) and to identify the consequences of the adopted legal qualification.

2. LEGAL NATURE OF TIME LIMITS UNDER ARTICLE 67C PARA. 2 APR

Pursuant to Article 67c para. 2 APR, a patient or his/her heir may submit an application in order to determine a medical incident within one year following the date on which he/she has learned of an infection, bodily injury or impairment of health or on which the patient's death occurred, as indicated in Article 67a para. 1 APR (*a tempore scientiae* time limit), with this period being limited to three years following the date when the damage occurred (*a tempore facti* time limit). In the case of heirs, the period for submitting the application does not run until the succession proceedings have been completed (Article 67c para. 4 APR).

To begin the discussion, one should note that the time limits for pursuing a claim to determine a medical incident are, in their nature, final under substantive law. In legal scholarship, this view has been expressed by Ireneusz Kunicki[5] and, most likely, by Hanna Frąckowiak.[6] Other scholars only define this period as 'a substantive law time limit'.[7] In a few cases, representatives of the doctrine who address this topic do not classify the time limits set out in Article 67c para. 2 APR.[8] Moreover, according to another

---

[3] See the justification of the judgment of the Polish Constitutional Tribunal of 11 March 2014, K 6/13 (Dz.U. 2014, item 372; OTK-A 3/2014, item 29).

[4] It is widely claimed in the legal doctrine that the system regulated in Title 13a APR is the hybrid of the Swedish system, where the legal design of the system was borrowed from, and the French system, which inspired the development of legal aspects of the committees; see K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu*, 2nd edn, Toruń 2013, pp. 338–339.

[5] I. Kunicki (ed.), *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych. Komentarz do art. 67a–67o ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta*, Warszawa 2016, Legalis, Article 67c, section no. 13.

[6] Hanna Frąckowiak calls the time limit referred to in Article 67c para. 2 APR 'the time limit for pursuing claims' (H. Frąckowiak, *Postępowanie przed Wojewódzką Komisją do spraw orzekania o zdarzeniach medycznych*, 1st edn, Warszawa 2016, p. 252), which is a reference to one of the categories of substantive-law final time limits (B. Kordasiewicz, [in:] Z. Radwański (ed.), *System prawa prywatnego*, Vol. 2: *Prawo cywilne – część ogólna*, 2nd edn, Warszawa 2008, p. 676), or, in other words, time limits for asserting rights (Z. Radwański, *Prawo cywilne – część ogólna*, 9th edn, Warszawa 2007, p. 359).

[7] Z. Cnota, G. Gura, T. Grabowski, E. Kurowska, *Zasady i tryb ustalania świadczeń/roszczeń (odszkodowania i zadośćuczynienia) w przypadku zdarzeń medycznych. Komentarz*, Warszawa 2016, Article 67c, section no. 2.

[8] See, e.g. K. Bączyk-Rozwadowska, *supra* n. 5, pp. 354–355; or M. Nesterowicz, M. Wałachowska, *Odpowiedzialność za szkody wyrządzone przy leczeniu w związku z nowym pozasądowym systemem kompensacji szkód medycznych*, [in:] E. Kowalewski (ed.), *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, Toruń 2011, p. 28.

view the time limit set out in Article 67c para. 2 APR is considered formal grounds for the admissibility of pursuing 'a claim to determine a medical incident' before the committee.[9] An analysis of the rules of procedure adopted by individual committees also indicated that this time limit is viewed as a procedural-law time limit since once this limit is exceeded, this excludes the possibility for the case to reach a substantive settlement and results in a decision to reject the application (see, for instance, § 42 para. 1(1) of the Rules of Procedure of the Warmińsko-Mazurskie Committee, § 44 para. 1(1) of the Rules of Procedure of the Podkarpackie Committee, and § 47 para. 1(1) of the Rules of Procedure of the Zachodniopomorskie Committee) or to return it (see, for instance, § 25 para. 2(3) of the Rules of Procedure of the Mazowieckie Committee).[10] However, this is an erroneous view that leads to a contradiction between the rules of procedure of voivodship committees and the content of Article 67c para. 2 APR. The time limit stipulated in Article 67c para. 2 APR sets the boundaries for pursuing a claim to determine a medical incident, and does not merely limit the time for a party in the proceedings to initiate an act of legal procedure (understood as filing an application to institute proceedings before a committee).[11]

In addition to its theoretical importance, the problem raised here is also of practical significance. The mere qualification of the time limits set out in Article 67c para. 2 APR as substantive-law rather than procedural-law time limits excludes the possibility of applying the reinstatement of a time limit upon its expiry (Article 67o APR in conjunction with Article 168 § 1 of the Act of 17 November 1964: Code of Civil Procedure[12].[13] If these time limits are classified as final substantive-law ones rather than time limits for limitation, this gives rise to further consequences related in particular to moderating their duration.

---

[9] D. Karkowska, J. Chojnacki, *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych*, Warszawa 2014, pp. 165–166. According to those authors, submission of an application after the expiry of the time limits set out in Article 67c para. 2 APR should result in 'returning the application without examination'. In line with this view, the legal basis for such a decision should be provided for in the committee's rules of procedure (see Article 67e para. 13 APR). The authors also argue that if an application to determine a medical incident were submitted after the time limit, the committee should issue a decision to discontinue the proceedings (Article 67o APR in conjunction with Article 350 Code of Civil Procedure).

[10] Rules of procedure of voivodship committees for adjudicating on medical incidents are published on the websites of the relevant voivodship offices.

[11] Statutory time limits for a party to civil proceedings to carry out an act of legal procedure temporarily limit the right of a party to carry out a specific act within the ongoing proceedings; see, for example, the time limit for lodging an appeal (Article 369 § 1 and § 2 Code of Civil Procedure), a complaint (Article 394 § 2 Code of Civil Procedure), a cassation (Article 398^5 Code of Civil Procedure), an application for reopening proceedings (Article 407 Code of Civil Procedure), an application to supplement a judgment (Article 351 § 1 Code of Civil Procedure) or an application to restore records that have been lost or damaged (Article 718 § 2 Code of Civil Procedure); for more on this subdivision of procedural time limits, see W. Broniewicz, *Postępowanie cywilne w zarysie*, 10th edn, Warszawa 2008, pp. 92–95; H. Pietrzkowski, *Metodyka pracy sędziego w sprawach cywilnych*, 7th edn, Warszawa 2014, pp. 337–339. These time limits, however, do not limit the competence to initiate civil proceedings in order to pursue a procedural claim, which is restricted by substantive-law time limits (either the limitation period or the final time limit).

[12] Dz.U. 2018, item 1360, as amended; hereinafter CCP.

[13] Differently, upon the assumption that the time limit under Article 67c para. 2 APR is a procedural-law time limit, see D. Karkowska, J. Chojnacki, *supra* n. 10, p. 207.

When justifying the assertion formulated herein, one should begin by establishing the meaning of the 'final substantive-law time limit'. In the doctrine, final substantive-law time limits are distinguished by applying the negative method, where the set of debarring time limits include all time limits which restrict the pursuance of a claim or other exercise of a right but are not limitation periods, while the norms which shape subjective rights are previously excluded from this set as they have an inherent in-built time limit (the latter include, e.g. proprietary copyrights or patent rights which expire after the lapse of the period specified in the law, regardless of the right holder's conduct).[14]

Therefore, in order to correctly classify a particular time limit as final, it is necessary to define a 'limitation period' first. According to Jerzy Ignatowicz, the limitation period is a period which restricts the time for pursuing a property claim, and once this period expires, the claim can no longer be pursued but does not expire as such.[15] The aforementioned characteristics of a limitation period must be fulfilled jointly.[16] Consequently, the absence of even one of the aforementioned characteristics prevents a time limit from being classified as a limitation period.

Apart from the method described above, legal scholarship admits a simplified method to distinguish between the 'limitation period' and the 'final time limit'. This method is based on the assumption of the legislator's linguistic consistency, where the legislator who formulates a final time limit in a provision of law and introduces a temporal restriction on the ability to pursue a right at court does not use the phrase 'the claim is subject to the statute of limitations'.[17]

Another argument in favour of the adopted classification of the time limit set out in Article 67c para. 2 APR can be found by looking at the subject matter of the proceedings before the committee. The content of the application and, at the same time, the purpose of the proceedings (Article 67i para. 1 APR) is to determine whether the event resulting in material or non-material damage is a medical incident. This should be viewed as a request which is similar to the claim for determining an entitling fact[18] provided for in Article 189 CCP.[19] In this context, it is important to

---

[14] B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, pp. 570–571.

[15] J. Ignatowicz, *Bieg terminów zawitych w obrocie podlegającym orzecznictwu sądów powszechnych*, Zeszyty Naukowe Instytutu Badania Prawa Sądowego 5, 1976, p. 8 et seq.

[16] *Ibid*.

[17] B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, p. 571.

[18] See the justification of the resolution of the seven-judge panel of the Supreme Court – Civil and Administrative Chamber, legal principle of 17 December 1987, III CZP 68/87, OSNCP 1988, No. 6, item 74. There is no doubt in the judicature that apart from establishing a right or a legal relationship, the claimant in an action brought under Article 189 CCP may demand that an entitling fact be established. The said category of entitling facts includes, inter alia, establishing that the claimant's statement of will to terminate an agreement was ineffective (the ruling of the Supreme Court – Civil Chamber of 10 June 2011, II CSK 568/10, OSNC 2012, No. B, item 40), determining that an agreement was concluded (e.g. the ruling of the Supreme Court – Civil Chamber of 11 September 1953, I C 581/53, OSNCK 1954, No. 3, item 65), establishing effective evasion of the effects of a declaration of will (the decision of the Supreme Court of 3 September 1945, I C 241/45, OSNC 1945, No. 1, item 3), or determining a legal fact which resulted in the cessation of a legal relationship (the ruling of the Supreme Court of 13 March 1984, I PRN 23/84, OSP 1985, No. 6, item 120).

[19] Likewise, J. Jarocha, *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych*, Studia Prawa Publicznego 1, 2013, pp. 43–49.

bear in mind that the claim under Article 189 CCP is not subject to the statute of limitations as it does not constitute 'pursuance of a claim' within the meaning of Article 117 § 2 of the Act of 23 April 1964: Civil Code,[20] and the lapse of time as such may be examined by the court when analysing if the conditions for the effectiveness of the claim are fulfilled and, in particular, when analysing the existence of a legal interest in instituting an action.[21] Therefore, the statute of limitations does not apply, for instance, to a request for determining the entry into a lease relationship,[22] a request for determining the existence of a right or a legal relationship,[23] and a request for determining the liability of a perpetrator of personal injury[24].

Once both of the aforementioned methods have been applied to distinguish the final time limits and once the subject matter of the proceedings before the voivodship committee has been considered, it should be concluded that the time limits specified in Article 67c para. 2 APR are final substantive-law time limits. The literal interpretation of this provision must lead to the conclusion that this is not a limitation period, and that the purpose of proceedings before the committee is to determine an entitling fact rather than to pursue a property claim[25] referred to in Article 117 § 1 Civil Code.[26] Therefore, it is possible to classify the analysed time limit into the category of debarring time limits for pursuing the discussed determination claim.[27]

3. CONSEQUENCES OF CLASSIFYING THE TIME LIMIT FOR SUBMITTING AN APPLICATION TO DETERMINE A MEDICAL INCIDENT AS A FINAL SUBSTANTIVE-LAW TIME LIMIT

Once the legal qualification of the time limit has been established, the rules that affect its expiry or inhibition can be identified. Unfortunately, this task of the interpreter is not facilitated by the legislator that decided not to regulate the overall

---

[20] Dz.U. 2018, item 1025, as amended; hereinafter Civil Code.

[21] See A. Zieliński, K. Flaga-Gieruszyńska, *Kodeks postępowania cywilnego. Komentarz*, 8th edn, Warszawa 2015, Legalis, Article 189, section no. 69; K. Piasecki (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1–366*, 6th edn, Warszawa 2014, Article 189, section no. 64–66; A. Góra-Błaszczykowska (ed.), *Kodeks postępowania cywilnego*, Vol. 1: *Komentarz. Art. 1–729*, Legalis, Article 189, section no. 32.

[22] Ruling of the Supreme Court – Civil Chamber of 12 February 2002, I CKN 527/00, OSNC 2002, No. 12, item 159.

[23] Ruling of the Supreme Court – Civil Chamber of 1 March 1963, III CR 193/62, OSNCP 1964, No. 5, item 97. The Supreme Court rightly notes that an objection of limitation may result in the dismissal of a claim only if the subject-matter of proceedings involves 'a claim'. On the other hand, where a lawsuit is not aimed at satisfying the claimant, the allegation of the statute of limitations is irrelevant. Thus, if the claimant does not pursue a claim and the subject-matter of the proceedings is to determine the invalidity of an agreement, i.e. to establish the non-existence of the rights that would arise from the agreement, then the validity of allegation regarding the statute of limitations is a logical impossibility.

[24] Ruling of the Supreme Court – Civil Chamber of 6 October 2006, V CSK 183/06, Legalis.

[25] Likewise, D. Karkowska, J. Chojnacki, *supra* n. 10, pp. 165–166.

[26] See also B. Ziemianin, *Prawo cywilne. Część ogólna*, Poznań 1999, p. 286.

[27] See a broad discussion of the classification of final time limits by B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, pp. 576–577.

problem of final time limits in the Civil Code, despite having appropriate models in place under the Act of 18 July 1950: General Provisions of Civil Law[28]. In Articles 114 to 117 GPCL, the legislator introduced a legal definition of a final time limit. The legislator provided that the lapse of such a final time limit is taken into account by the court *ex officio*, and indicated that the course of a final time limit is suspended only in the case of suspension of the administration of justice or force majeure, and that the recognition of the claim resulted in the interruption of its course if made in writing. The legislator also allowed, to the extent not expressly regulated in law, that the provisions on the statute of limitations would apply accordingly to final time limits.

The absence of regulations, as well as the multitude of final time limits provided for in the Civil Code and other laws, and the number of their subdivisions means that it is difficult to draw general conclusions in the legal doctrine as to the nature of such time limits. However, scholarship indicates that it is possible to attempt to define final time limits by referring to the effect of their expiry, the possibility of moderating their duration, the way in which their expiry may be taken into account by court, and the assessment of the petrification of a request, given the expiry of the final time limit from the perspective of the rules of social coexistence (Article 5 Civil Code).[29]

Firstly, according to the prevailing view, the expiry of a debarring time limit results in a claim being extinguished.[30] Secondly, despite existing doubts,[31] scholarship[32] admits that the course of final time limits can be regulated by certain provisions on the statute of limitations for property claims aimed at extending the debarring time limit, i.e. Article 121(4) and Article 123 § 1(2) Civil Code.[33] The Polish Supreme Court has been quite unanimous in its opinion in the matter, ruling in favour of the possibility to apply the aforementioned provisions by analogy.[34] Thirdly, as regards the possibility

---

[28] Dz.U. 1950, No. 34, item 311, as amended; hereinafter GPCL.

[29] See a broad discussion *ibid.*, pp. 682–696.

[30] See J. Gwiazdomorski, *Terminy zawite do dochodzenia roszczeń*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 3, 1968, p. 100; B. Ziemianin, *supra* n. 27, p. 286; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, p. 360.

[31] See a broad discussion in S. Grzybowski (ed.), *System prawa cywilnego*, Vol. I: *Część ogólna*, Warszawa–Wrocław 1974, p. 651 et seq.

[32] B. Ziemianin, *supra* n. 27, p. 287; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, pp. 360–361; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1966, pp. 339–341; J. Ignatowicz, *Glosa do orzeczenia SN z 10.3.1992*, OSP 1993, p. 74 et seq.

[33] It is important to note a certain inconsistency on the part of the legislator, namely in Article 124 § 3 of the Act of 16 September 1982: Law on cooperatives (Dz.U. 1982, No. 30, item 210, as amended), the legislator explicitly indicates that if the loss adjuster recognises a claim, this will interrupt the course of the statute of limitations and the final time limit whenever such recognition is made in writing (cf. Article 117 GPCL), whereas no similar general regulation is contained in the Civil Code. This way of regulating the issue concerned could be seen as an argument against recognising that the Polish civil law includes a principle whereby the recognition of a debt interrupts the course of a final time limit. However, the opposite view prevails in scholarship (B. Kordasiewicz, [in:] Z. Radwański (ed.), *supra* n. 7, p. 682).

[34] The resolution of the Supreme Court – Civil Chamber of 10 March 1992, III CZP 10/92, OSP 1993, No. 2, item 30 (the restrictions of the martial law and initiation of criminal proceedings on account of political activity, preventing the concerned member of a cooperative from returning safely to the country, justify the application of Article 121(4) Civil Code by analogy to final time

of applying Article 5 Civil Code to the expiry of the final time limit, there is some discord among scholars: some of them are sceptical about this possibility,[35] while others believe that the allegation of abuse of a right may affect the expiry of the final time limit.[36] Fourthly, according to a view that has been undisputed in the doctrine, the court takes into account the expiry of a time limit in the case of time limits which are final *ex officio*.[37] This means that the committee is obliged *ex officio* to consider the expiry of the final time limit set out in Article 67c para. 2 APR. It should be assumed, however, that the committee is entitled to examine whether or not the consequences of the expiry of a final time limit will undermine the rules of social coexistence in a given situation.[38] Such cases tend to be rare, especially since the loss of the right to pursue a claim in the proceedings before the committee does not preclude the patient[39] from going to court to seek redress for damage caused by medical treatment. Consequently,

---

limits under Article 42 Act of 16 September 1982: Law on cooperatives, Dz.U. 1982, No. 30, item 210, as amended); the decision of the Supreme Court – Civil Chamber of 5 November 1976, III CRN 202/76, OSNCP 1977, No. 10, item 186 (the time limit for submitting documents justifying the so-called preemptive right of an invention to a foreign entity is a final (debarring) time limit under substantive law; this time limit is provided for in § 3 para. 3 of the Ordinance of the President of the Patent Office of the Polish People's Republic of 21 December 1972 on the protection of inventions and utility models, M.P. 1973, No. 1, item 4; this time limit sets the time frame for the exercise of the right, and this exercise is excluded upon the ineffective expiry of this time limit; by analogy, Article 121(4) Civil Code on the suspension of the course of the limitation period due to force majeure is applicable to that time limit); or the resolution of the full Civil Chamber of the Supreme Court of 20 May 1978, III CZP 39/77, OSNCP 1979, No. 3, item 40.

[35] A. Szpunar, *Nadużycie prawa w dziedzinie przedawnienia*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4, 1969, p. 43. The view that Article 5 Civil Code is not applicable to the expiry of a final time limit in substantive law is also presented in more recent case law (see, in particular, extensive discussion in the justification of the resolution of seven judges of the Supreme Court of 20 June 2013, III CZP 2/13, OSNC 2014, No. 2, item 10).

[36] B. Ziemianin, *supra* n. 27, p. 288; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, p. 360. On the basis of the legal situation following the entry into force of the Act of 28 July 1990 amending the Civil Code (Dz.U. No. 55, item 321), which repealed Article 117 § 3 Civil Code, one must, in particular, refer to the resolution of the Supreme Court – Civil Chamber of 10 March 1993, III CZP 8/93, OSNCP 1993, No. 9, item 153. Also in its other rulings, the Supreme Court held that the application of Article 5 Civil Code was justified in a situation when a final time limit was not observed, provided that failure to observe the time limit was caused by reasons beyond the control of the party and without the party's fault, and, moreover, if confirmation of the expiry of the final time limit would result in an irreparable loss for the party, e.g. a definite loss of the possibility to pursue a specific entitlement (see, e.g. the ruling of the Supreme Court – Civil Chamber of 11 December 2002, I CKN 1385/00, Legalis). See also a dissenting opinion of the Supreme Court judge Krzysztof Pietrzykowski to the aforementioned resolution of the seven judges of the Supreme Court of 20 June 2013, III CZP 2/13, OSNC 2014, No. 2, item 10. One should agree with the aforementioned dissenting opinion which refers, in particular, to axiological arguments and the previously established line of jurisprudence.

[37] B. Ziemianin, *supra* n. 27, p. 286; Z. Radwański, *Prawo cywilne*, 2007, *supra* n. 7, p. 359; A. Wolter, J. Ignatowicz, K. Stefaniuk, *supra* n. 33, pp. 339–340.

[38] Likewise, I. Kunicki (ed.), *supra* n. 6, Article 67c, section no. 13.

[39] However, it may be considered that such cases may be justified with regard to the patient's heirs who, at the same time, are not immediate family members within the meaning of Article 446 § 3 and § 4 Civil Code. In that case, the expiry of the time limit under Article 67c paras 2 and 4 APR results in an irreversible loss of the possibility to obtain compensation for the damage suffered, also through civil proceedings. However, such cases need to be decided on *a casu ad casum* basis.

the provisions of Article 121(4) Civil Code and Article 123 § 1(2) Civil Code also apply to the course of time limits set out in Article 67c para. 2 APR.

The legal nature of the time limit stipulated in Article 67c para. 2 APR determines the type of a decision to be taken by the committee if, in the course of the examination of the case, the committee establishes that the time limit for submitting an application has expired. It is important to note that sometimes the preliminary examination of medical documentation, or even the content of the statements made in the application for determining a medical incident, enables the committee to establish that the time limit (especially counted *a tempore facti*) has been exceeded (which, however, should not *a priori* constitute grounds for rejecting or returning the application, as provided for in the rules of procedure that have been analysed). However, in many a case, this fact may only be verified in the course of the preparatory inquiry. As a consequence, if the time limit set out in Article 67c para. 2 APR is exceeded and, at the same time, there are no reasons to moderate its duration by applying Article 121(4) or Article 123 § 1(2) Civil Code by analogy, or if there are no reasons for not taking its expiry into account in view of the rules of social coexistence (Article 5 Civil Code), the committee should, pursuant to Article 67j para. 1 APR, issue a decision on the absence of a medical incident.[40] Incidentally, it is also worth noting that – contrary to the rules of procedure adopted by some committees[41] – none of the APR provisions provide for any sanction for breaching Article 67c para. 2 APR that might be imposed during the preliminary examination of an application for determining a medical incident. Article 67d para. 5 APR only stipulates that an incomplete or unduly paid application is returned to the applicant without being examined. As regards the examination of the completeness of the application, this provision refers to Article 67d paras 1 and 2 APR which contain an exhaustive list of requirements to be met by an application for determining a medical incident, and it does not stipulate that Article 67c para. 2 APR should be examined.[42] This is an additional argument supporting the idea that compliance with the time limits set out in Article 67c para. 2 APR should be examined in the course of the preparatory inquiry and that non-compliance with such time limits does not entail the breach of formal requirements for the application to determine a medical incident.

4. ASSESSMENT OF THE REGULATIONS AND COMMENTS *DE LEGE FERENDA*

The assessment of the regulations adopted in Article 67c paras 2 and 4 APR is not only strictly related to the consequences of the classification as final time limits, but must also be made from the perspective of the duration of those time limits and the moment when they begin to run.

---

[40] Likewise, Z. Cnota, G. Gura, T. Grabowski, E. Kurowska, *supra* n. 8, Article 67c, section no. 2; I. Kunicki (ed.), *supra* n. 6, Article 67c, section no. 19.

[41] See, e.g. § 25 para. 1 and para. 2(3) of the Rules of Procedure of the Mazowieckie Committee.

[42] Likewise, I. Kunicki (ed.), *supra* n. 6, Article 67d, section no. 2; or D. Karkowska, J. Chojnacki, *supra* n. 10, pp. 487–488.

The time limit for submitting an application for determining a medical incident is far too short. The period of one year following the date when the patient learns about an infection, bodily injury or impairment of health, or following the patient's death, as well as the period of three years following the occurrence of the damage do not correspond to the views expressed in scholarship in support of the idea of extending the time limits for pursuing personal injury claims, especially in the case of 'medical damage'.[43] The postulates put forward in the legal doctrine in this respect are closely related to the incubating and dynamic nature of this kind of damage, which often develops without symptoms that would enable such damage to be detected sufficiently early.[44] Notably, already during the legislative work on the Act of 28 April 2011 amending the Act on patients' rights and Patient Ombudsman and the Act on mandatory insurance, Insurance Guarantee Fund and the Polish Motor Insurers' Bureau,[45] a proposal was formulated in the parliamentary Health Committee that the provision of Article 67c para. 2 APR should be worded in a way similar to former Article 442 § 1 Civil Code.[46] However, the legislator did not decide to extend the time limits as proposed, even despite the fact that the adoption of the proposed regulation would nevertheless be a step back vis-à-vis the protection granted to the injured parties under Article 442^1 § 3 Civil Code, justifying it with a terse statement that their duration is sufficient to ensure protection of patients' rights.[47]

Moreover, pursuant to Article 67c para. 2 APR, the one-year period for submitting an application to determine a medical incident runs from the moment when the injured party learns only about the damage (and not also about the entity which is obliged to redress it, as is the case with Article 442^1 § 3 Civil Code), whereas the short three-year period runs from the moment when damage occurs and absolutely limits the possibility to pursue the claim for determining a medical incident in proceedings before the committee. The solution that has been adopted is definitely less favourable in comparison with the one provided for in the Civil Code. Given the conjunction of the grounds occurring in Article 442^1 § 3 Civil Code, the limitation period begins to run against the injured party once the injured party has collected all the information necessary to pursue the claim. On the other hand, in the case of

---

[43] M. Śliwka, *Wybrane czynniki determinujące działalność wojewódzkich komisji orzekających o zdarzeniach medycznych*, Prawo i Medycyna 3–4, 2012, pp. 17–18.

[44] In that regard, see the views expressed in case law regarding the occurrence of the so-called 'new damage' or 'new health condition', e.g. the ruling of the Supreme Court – Civil Chamber of 2 December 1998, I CKN 910/97, OSNC 1999, No. 6.

[45] Dz.U. 2011, item 660, as amended.

[46] Drafted with effects for Article 67c para. 2: The application shall be submitted within three years following the date on which the applicant learns about the infection, bodily injury or impairment of health or the date of death of the patient referred to in Article 67a para. 1; however, this period may not be longer than 10 years from the date on which the event resulting in the infection, bodily injury or impairment of health or the patient's death occurs (see Additional report of the Health Committee on the government Bill amending the Act on patients' rights and Patient Ombudsman and some other acts (paper No. 3488) of 18 March 2011, paper No. 3922-A).

[47] See the justifications of the Bill amending the Act of 6 November 2008 on patients' rights and Patient Ombudsman, published on the website of the Senate of the Republic of Poland, paper No. 3488, http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf (accessed 2.2.2012).

a patient or the patient's heirs involved in the proceedings before the committee, the period for them to submit an application for determining a medical incident starts to run as early as from the moment when they learn about damage within the meaning of Article 67a para. 1 APR. It is emphasised in the case law that the moment when the injured party learns about the entity obliged to redress the damage[48] is of particular importance for the limitation period specified in Article 442^1 § 3 Civil Code. This moment may potentially occur after obtaining the information about the damage itself,[49] and yet this has no effect on the situation of the patient or his/her heir wishing to initiate proceedings before the committee.

As the law now stands, the statute of limitation for claims under wrongful acts is regulated by Article 442^1 Civil Code,[50] which was introduced into the Civil Code in parallel with repealing of Article 442 Civil Code,[51] as the latter had been criticised in the doctrine.[52] The amendments to these provisions of the Civil Code were inspired by the ruling of the Constitutional Tribunal of 1 September 2006.[53] In that ruling, the Constitutional Tribunal stated that by depriving the injured party of the possibility to claim compensation for personal injury that becomes apparent after the lapse of ten years following the occurrence of the event that caused the damage, Article 442 § 1 second sentence of the Civil Code is inconsistent with Article 2 and Article 77 para. 1 of the Constitution of the Republic of Poland of 2 April 1997.[54] In other words, the legal situation in that regard was changed on the basis of the idea that a claim cannot become subject to the statute of limitations before it has reached maturity,[55] while such effects sometimes resulted from how this issue was regulated in Article 442 § 1 and § 2 Civil Code.[56] Therefore, the method adopted by the legislator to regulate the time limit set out in Article 67c para. 2 APR means that a patient may lose his/her right to pursue a claim for determining a medical incident even before the personal injury caused to that patient becomes apparent.

---

[48] See, e.g. the ruling of the Supreme Court – Civil Chamber of 10 April 2002, IV CKN 949/00, Legalis.

[49] It is difficult to imagine the reverse situation, where the injured party knows about the person obliged to redress property damage but does not know about the damage itself (see also the ruling of the Supreme Court – Civil Chamber of 27 October 2010, V CSK 107/10, Legalis).

[50] More on the work of the Civil Law Codification Commission, see M. Balwicka-Szczyrba, *Przedawnienie roszczeń o naprawienie szkody wyrządzonej czynem niedozwolonym*, Monitor Prawniczy 24, 2007, pp. 6–7.

[51] Amendments to the Civil Code were introduced by the Act of 16 February 2007 amending the Civil Code (Dz.U. 2007, No. 80, item 538) and entered into force on 10 August 2007.

[52] See broadly in Z. Radwański, *Przedawnienie roszczeń z czynów niedozwolonych w świetle znowelizowanego art. 442 k.c.*, Monitor Prawniczy 11, 2007, p. 58 et seq. See also in more detail on the evolution of the principles of the statute of limitations in claims under torts, and the views in the legal doctrine and judicature in this respect in M. Balwicka-Szczyrba, *supra* n. 51, pp. 1–2.

[53] Ruling of the Constitutional Tribunal of 1 September 2006, SK 14/05 (Dz.U. 2006, No. 164, item 1166).

[54] Dz.U. No. 78, item 483, as amended.

[55] A. Śmieja, [in:] A. Olejniczak (ed.), *System prawa prywatnego*, Vol. 6: *Prawo zobowiązań – część ogólna*, 2nd edn, Warszawa 2014, p. 697.

[56] See the ample justification of the resolution of the full Civil Chamber of the Supreme Court of 17 February 2006, III CZP 84/05, OSNC 2006, No. 7–8, item 114. See also W. Czachórski, [in:] Z. Radwański (ed.), *System prawa cywilnego*, Vol. III: *Prawo zobowiązań – część ogólna*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1981, p. 698 and the literature cited therein.

The issue of the time limit set for submitting an application for determining a medical incident also covers the issue of the time limit for the heirs of a deceased patient to pursue a clam for determining a medical incident. Pursuant to Article 67c para. 4 APR, in the case of the patient's death referred to in Article 67a para. 1 APR, the time limit stipulated in Article 67c para. 2 APR does not begin to run until the succession proceedings are completed.

Although the rule set out in Article 67c para. 4 APR should be endorsed as it excludes the possibility for the time limit under Article 67c para. 2 APR to start running until the succession proceedings are finally concluded, it should be noted that this provision appears to be incorrectly worded in the light of the rules of correct legislation. Firstly, it should be included as the second sentence of Article 67c para. 2 APR, thus leading to greater consistency of this regulation. Secondly, it should be noted that Article 67c para. 4 APR refers to a 'time limit' in the singular, whereas Article 67c para. 2 APR contains a regulation concerning two time limits for pursuing the determination claim (defined *a tempore scientiae* and *a tempore facti*). Since it is not possible to establish which of the two time limits regulated in Article 67c para. 2 APR the legal norm under Article 67c para. 4 APR refers to, it is necessary to propose an interpretation of this provision that would be closest to its purpose. It should be assumed that by introducing para. 4 to Article 67c APR, the legislator wanted to enable heirs to pursue a succession case without the risk of them losing the right to apply for determining a medical incident. Accordingly, the phrase 'the time limit [...] does not run' should be understood broadly as 'the time limit for submitting an application for determining a medical incident in proceedings before the committee'. This conclusion also stems from the wording of Article 67c para. 2 APR. The time limit *a tempore facti* has the nature of an absolute (cut-off) time limit,[57] which means that, according to the view held by some scholars, the suspension of the course of only the time limit a *tempore scientiae*[58] will not affect the three-year time limit provided for in Article 67c para. 2 APR. The only acceptable interpretation, therefore, is that Article 67c para. 4 APR refers to both time limits set out in Article 67c para. 2 APR.

If this interpretation is adopted, it creates a risk that the institution provided for in Article 67c paras 2 and 4 APR will be distorted. In fact, the submission of a claim of succession to an estate or the registration of an act certifying succession are not limited in time and may take place many years after a patient's death. Thus, if the aforementioned interpretation is considered correct, one should acknowledge the possibility that heirs may effectively seek the determination of a medical incident long after the injury has been inflicted to the patient. It is difficult to understand the *ratio legis* behind this solution, which imposes very restrictive time limits on the right of the directly injured person to initiate proceedings before the committee, while extending (without any statutory limit, in fact) the time limit for submitting an application for determining a medical incident for persons injured indirectly.

---

57 I. Kunicki (ed.), *supra* n. 6, Article 67c, section no. 19.

58 H. Frąckowiak, *supra* n. 7, p. 253.

This problem is also important from another perspective. The APR provisions are the only ones that grant the possibility of compensation to an heir as a person who is indirectly injured because of the damage suffered by a patient during medical treatment. The provisions of the Civil Code do not provide for such a possibility (see Article 446 § 3 and § 4 Civil Code). This means that the expiry of the time limit set for pursuing the claim for determining a medical incident by the heirs in proceedings before the committee leads to a situation where some heirs (especially in the case of intestate succession) will lose the possibility of compensation for the damage suffered, i.e. those who cannot be regarded as the immediate family members of the deceased patient within the meaning of Article 446 § 3 and § 4 Civil Code.[59] In order to give effect to the legislator's intention to grant the patient's heirs the right to compensation of damage in proceedings before the committee, the time limit set in Article 67c para. 2 APR in conjunction with Article 67c para. 4 APR must be genuinely achievable for this group of indirectly injured persons. This intention should also be taken as a point of reference when interpreting the regulation in question.

To complete the foregoing discussion, it should also be stressed that, contrary to the views taken by some legal scholars who believe that Article 67c para. 4 APR only applies to the confirmation of inheritance by court,[60] this provision also applies to the acquisition of inheritance through the registration of a certificate of inheritance. Thus, the completion of succession proceedings within the meaning of Article 67c para. 4 APR should be understood, on the one hand, as the moment when the decision confirming the acquisition of inheritance becomes final (Article 521 § 1 in conjunction with Article 677 § 1 CCP) and, on the other hand, as the date when the certificate of inheritance is registered (see Article 95p of the Act of 14 February 1991: Law on notaries[61]).[62]

The present analysis of the time frame during which it is permissible to submit an application for determining a medical incident leads to a conclusion that the regulation adopted in Article 67c paras 2 and 4 APR is clearly a step backwards

---

[59] In the case law, the meaning of the term of the 'immediate family member' used in Article 446 § 3 and § 4 Civil Code is based not so much on blood relationship or affinity (the basis for determining the group of persons entitled to intestate inheritance) as on the actual emotional bond between the indirectly injured person and the deceased person. Therefore, it is assumed in scholarship that immediate family members within the meaning of Article 446 § 3 and § 4 Civil Code include, for example, people living in an informal relationship (cohabiting) (see K. Bączyk-Rozwadowska, *Roszczenia odszkodowawcze rodzin poszkodowanych pacjentów po nowelizacji kodeksu cywilnego (art. 446 § 4)*, Prawo i Medycyna 2, 2010, pp. 32–34). Thus, although the common-law spouse has the right to pursue claims under Article 446 § 3 and § 4 Civil Code in connection with the death of his/her partner, this spouse is not entitled to obtain the status of an heir in intestate inheritance, unless he/she has been appointed to the inheritance in the will and, as a consequence, the right of the spouse to effectively submit an application for determining a medical incident is excluded.

[60] Z. Cnota, G. Gura, T. Grabowski, E. Kurowska, *supra* n. 8, Article 67c, section no. 4; I. Kunicki (ed.), *supra* n. 6, Article 67c, sections no. 16–18.

[61] Dz.U. No. 22, item 91, as amended.

[62] For the effects of registration of the certificate of inheritance, see also P. Borkowski, *Prawo o notariacie. Komentarz do zmian wprowadzonych ustawą z dnia 24 sierpnia 2007 r. o zmianie ustawy – Prawo o notariacie oraz niektórych innych ustaw*, LEX, Article 95p, section no. 1–3.

in the statutory protection to injured parties, for instance, in comparison with the amendments that have been introduced with regard to the statute of limitations for a claim for compensation for personal injury caused *ex delicto*. The fact that Article 442 Civil Code was repealed and Article 442^1 § 3 Civil Code entered into force had a positive effect on the legal situation of injured parties. Despite the expiry of the time limit under Article 67c para. 2 APR, a patient and some of his/her heirs can still go to court to pursue a damages claim, but in order to enhance the efficiency of the committees and, as a consequence of achieving the legislator's intention to disburden common courts, at least partially,[63] it is necessary to postulate, *de lege ferenda*, the unification of the time limits set in Article 67c paras 2 and 4 APR as well as the prerequisites for the commencement of those time limits with Article 442^1 § 3 Civil Code. The Civil Code regulation of the statute of limitations for claims for compensation of personal injury caused by a wrongful act is an optimal solution, and it would be desirable to equalise the rules governing the time limit for the patient or the indirectly injured person to submit an application for determining a medical incident with the statute of limitations applicable to claims for compensation for damage caused by a wrongful act. Meanwhile, it should be stressed that it is far more important not just to extend the time limits for submitting an application for determining a medical incident, but also to properly determine the moment of their commencement *a tempore scientiae*, while simultaneously lifting the restriction arising from the time limit running *a tempore facti*.

BIBLIOGRAPHY

Balwicka-Szczyrba M., *Przedawnienie roszczeń o naprawienie szkody wyrządzonej czynem niedozwolonym*, Monitor Prawniczy 24, 2007.

Bączyk-Rozwadowska K., *Roszczenia odszkodowawcze rodzin poszkodowanych pacjentów po nowelizacji kodeksu cywilnego (art. 446 § 4)*, Prawo i Medycyna 2, 2010.

Bączyk-Rozwadowska K., *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu*, 2nd edn, Toruń 2013.

Borkowski P., *Prawo o notariacie. Komentarz do zmian wprowadzonych ustawą z dnia 24 sierpnia 2007 r. o zmianie ustawy – Prawo o notariacie oraz niektórych innych ustaw*, LEX 2017.

Broniewicz W., *Postępowanie cywilne w zarysie*, 10th edn, Warszawa 2008.

Cnota Z., Gura G., Grabowski T., Kurowska E., *Zasady i tryb ustalania świadczeń/roszczeń (odszkodowania i zadośćuczynienia) w przypadku zdarzeń medycznych. Komentarz*, Warszawa 2016.

Frąckowiak H., *Postępowanie przed Wojewódzką Komisją do spraw orzekania o zdarzeniach medycznych*, 1st edn, Warszawa 2016.

Góra-Błaszczykowska A. (ed.), *Kodeks postępowania cywilnego*, Vol. 1: *Komentarz. Art. 1–729*, Legalis.

Grzybowski S. (ed.), *System prawa cywilnego*, Vol. I: *Część ogólna*, Warszawa–Wrocław 1974.

Gwiazdomorski J., *Terminy zawite do dochodzenia roszczeń*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 3, 1968.

[63] See the justifications of the Bill amending the Act of 6 November 2008 on patients' rights and Patient Ombudsman, published on the website of the Senate of the Republic of Poland, paper No. 3488, http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf (accessed 2.2.2012).

Ignatowicz J., *Bieg terminów zawitych w obrocie podlegającym orzecznictwu sądów powszechnych*, Zeszyty Naukowe Instytutu Badania Prawa Sądowego 5, 1976.
Ignatowicz J., *Glosa do orzeczenia SN z 10.3.1992*, OSP 1993.
Jarocha J., *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych*, Studia Prawa Publicznego 1, 2013.
Karkowska D., Chojnacki J., *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych*, Warszawa 2014.
Kunicki I. (ed.), *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych. Komentarz do art. 67a–67o ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta*, Warszawa 2016.
Nesterowicz M., Wałachowska M., *Odpowiedzialność za szkody wyrządzone przy leczeniu w związku z nowym pozasądowym systemem kompensacji szkód medycznych*, [in:] E. Kowalewski (ed.), *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, Toruń 2011.
Olejniczak A. (ed.), *System prawa prywatnego*, Vol. 6: *Prawo zobowiązań – część ogólna*, 2nd edn, Warszawa 2014.
Piasecki K. (ed.), *Kodeks postępowania cywilnego. Komentarz. Art. 1–366*, 6th edn, Warszawa 2014.
Pietrzkowski H., *Metodyka pracy sędziego w sprawach cywilnych*, 7th edn, Warszawa 2014.
Radwański Z. (ed.), *System prawa cywilnego*, Vol. III: *Prawo zobowiązań – część ogólna*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1981.
Radwański Z., *Prawo cywilne – część ogólna*, Warszawa 2007.
Radwański Z., *Przedawnienie roszczeń z czynów niedozwolonych w świetle znowelizowanego art. 442 k.c.*, Monitor Prawniczy 11, 2007.
Radwański Z. (ed.), *System prawa prywatnego*, Vol. 2: *Prawo cywilne – część ogólna*, 2nd edn, Warszawa 2008.
Stefaniuk K., *Prawo cywilne. Zarys części ogólnej*, Warszawa 1966.
Szpunar A., *Nadużycie prawa w dziedzinie przedawnienia*, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4, 1969.
Śliwka M., *Wybrane czynniki determinujące działalność wojewódzkich komisji orzekających o zdarzeniach medycznych*, Prawo i Medycyna 3–4, 2012.
Zieliński A., Flaga-Gieruszyńska K., *Kodeks postępowania cywilnego. Komentarz*, 8th edn, Warszawa 2015.
Ziemianin B., *Prawo cywilne. Część ogólna*, Poznań 1999.

Online sources
http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf
http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf

TIME LIMIT FOR SUBMITTING APPLICATION TO DETERMINE A MEDICAL INCIDENT: ANALYSIS AND COMMENTS *DE LEGE FERENDA*

Summary

The aim of this article is to critically assess the time limit for submitting an application for determining a medical incident. The starting point for the evaluation of Article 67c paras 2 and 4 of the Act on patients' rights and Patient Ombudsman is the inference that this time limit

should be qualified as final. This conclusion in particular impacts the effects of its expiry and the lack of possibility – contrary to the individual rules of procedure of voivodship committees deciding on medical incidents in which the time limit is defined under procedural law – for its restoration. The analysis of the solution adopted by the legislator is also conducted through the prism of its comparison with the statutory period of limitation in claims for compensation for damage caused by a wrongful act (Article 442^1 § 3 Civil Code). This comparison leads to the conclusion that the time limit for submitting an application for determining a medical incident significantly limits access to this alternative method of redressing damage caused by medical treatment.

Keywords: medical incident, application for determining a medical incident, substantive-law final time limit, compensation for damage

TERMIN DO ZŁOŻENIA WNIOSKU O USTALENIE ZDARZENIA MEDYCZNEGO – ANALIZA I UWAGI *DE LEGE FERENDA*

Streszczenie

Celem artykułu jest poddanie krytycznej analizie terminu do wniesienia wniosku o ustalenie zdarzenia medycznego. Punktem wyjścia dla oceny art. 67c ust. 2 i 4 ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta jest ustalenie, iż termin ten powinien być kwalifikowany jako termin zawity prawa materialnego, co rzutuje w szczególności na skutki jego upływu i brak możliwości – wbrew przyjętej w regulaminach poszczególnych komisji do spraw orzekania o zdarzeniach medycznych kwalifikacji tego terminu jako terminu prawa procesowego – jego przywrócenia. Analiza przyjętego przez ustawodawcę rozwiązania prowadzona jest również przez pryzmat jego porównania z ustawową regulacją przedawnienia roszczeń majątkowych o naprawienie szkody na osobie, wyrządzonej czynem niedozwolonym (art. 442^1 § 3 k.c.). Porównanie to prowadzi do wniosku, że termin do dochodzenia żądania ustalenia zdarzenia medycznego w znaczący sposób ogranicza dostęp do tej alternatywnej drogi służącej do indemnizacji uszczerbku powstałego w związku z leczeniem.

Słowa kluczowe: zdarzenie medyczne, wniosek o ustalenie zdarzenia medycznego, termin zawity prawa materialnego, naprawienie szkody

EL PLAZO PARA PRESENTAR LA SOLICITUD DE DETERMINAR SUCESO MÉDICO – ANÁLISIS Y COMENTARIOS *DE LEGE FERENDA*

Resumen

El artículo critica el plazo para presentar la solicitud de determinar suceso médico. Para valorar el art. 67c ap. 2 y 4 de la ley de derechos de paciente y del Defensor de Derechos de Paciente hay que hacer constar que el plazo debe ser calificado como plazo perentorio de derecho sustantivo, lo que afecta en particular las consecuencias de su transcurso y falta de posibilidad de restaurarlo– a contrario de calificación de este plazo como plazo de derecho procesal adoptado en reglamentos de varias comisiones de sucesos médicos. El análisis de la solución prevista por el legislador se lleva a cabo también comparándola con la regulación legal de prescripción de pretensiones patrimoniales de reparación de daño personal ocasionado por

el hecho prohibido (art. 442[1] § 3 del código civil). Tal comparación lleva a la conclusión, que el plazo para presentar la solicitud de determinar suceso médico de una forma significativa limita el acceso a la vía alternativa que permita indemnizar el daño ocasionado en relación con el tratamiento.

Palabras claves: suceso médico, solicitud de determinar suceso médico, plazo perentorio de derecho sustantivo, reparación de daño

СРОК ПОДАЧИ ЗАЯВЛЕНИЯ О ЗАСВИДЕТЕЛЬСТВОВАНИИ МЕДИЦИНСКОГО ИНЦИДЕНТА: АНАЛИЗ И КОММЕНТАРИИ *DE LEGE FERENDA*

Аннотация

Статья посвящена критическому разбору срока подачи заявления о засвидетельствовании медицинского инцидента. При оценке ст. 67c § 2 и § 4 Закона «О правах пациента и об уполномоченном по правам пациента» отправным пунктом является констатация, что срок подачи заявления следует квалифицировать как преклюзивный срок действия материального права. Этот факт имеет значение, в частности, с точки зрения последствий истечения данного срока, а также обусловливает невозможность его восстановления, несмотря на принятую в регламентах отдельных комиссий по рассмотрению медицинских инцидентов квалификацию данного срока в качестве процессуального. Анализ соответствующих положений законодательства включает в себя сравнение с нормативным урегулированием срока давности по имущественным требованиям о возмещении ущерба здоровью, причиненного запрещенным действием (ст. 442[1] § 3 ГК). По результатам этого сравнения можно сделать вывод, что срок, в течение которого можно затребовать засвидетельствования медицинского инцидент, существенно ограничивает доступ граждан к этому альтернативному способу возмещения ущерба в связи с врачебной ошибкой.

Ключевые слова: медицинский инцидент; заявление о засвидетельствовании медицинского инцидента; преклюзивный срок действия материального права; возмещение ущерба

DIE FRIST FÜR DIE EINREICHUNG DES ANTRAGS AUF FESTSTELLUNG EINES MEDIZINISCHEN EREIGNISSES – ANALYSE UND ANMERKUNGEN *DE LEGE FERENDA*

Zusammenfassung

In dem Artikel wird die Frist für die Einreichung des Antrags auf Feststellung eines medizinischen Ereignisses kritisch analysiert. Ausgangspunkt für die Bewertung von Artikel 67c Absatz 2 und 4 des polnischen Gesetzes über Patientenrechte und den Patientenombudsmann ist die Feststellung, dass diese Frist als materielle Ausschlussfrist anzusehen ist, was insbesondere Auswirkungen auf ihren Ablauf und die mangelnde Möglichkeit – entgegen der in den Geschäftsordnungen der einzelnen Bewertungsausschüsse für die Feststellung von medizinischen Ereignissen angenommenen Einstufung dieser Frist als Frist des Verfahrensrechts – ihrer Wiedereinsetzung hat. Die Analyse der vom Gesetzgeber gewählten Lösung erfolgt auch durch Vergleich mit der gesetzlichen Regelung zur Verjährung von vermögensrechtlichen Ansprüchen auf Ersatz des aus einer unerlaubten Handlung entstandenen Schadens an einer

Person (Artikel 442[1] § 3 des polnischen Zivilgesetzbuches). Dieser Vergleich führt zu dem Schluss, dass die Frist für die Beantragung der Feststellung eines medizinischen Ereignisses den Zugang zu diesem alternativen Weg zum Ersatz eines durch die medizinische Behandlung verursachten Schadens erheblich einschränkt.

Schlüsselwörter: Medizinisches Ereignis, Antrag auf Feststellung eines medizinischen Ereignisses, materielle Ausschlussfrist, Schadensausgleich

LE DÉLAIS DE SOUMISSION D'UNE DEMANDE D'ÉTABLISSEMENT D'UN ÉVÉNEMENT MÉDICAL – ANALYSE ET COMMENTAIRES *DE LEGE FERENDA*

Résumé

Le but de l'article est d'analyser de manière critique le délai de soumission d'une demande d'établissement d'un événement médical. Le point de départ de l'évaluation de l'art. 67c alinéa 2 et 4 de la loi sur les droits des patients et du médiateur des patients, est la détermination que ce délai doit être qualifié de délai préfix du droit matériel, ce qui affecte notamment les effets de son expiration et le manque de possibilités de sa restauration – contrairement à ce qui est adopté dans les règlements des commissions individuelles de jugement des événements médicaux qualifiant ce délai comme le délai de droit procédural. L'analyse de la solution adoptée par le législateur se fait également dans l'optique de sa comparaison avec le règlement statutaire de prescription des prétentions patrimoniales en réparation du préjudice causé à une personne par un délit (art. 442[1] § 3 du Code civil). Cette comparaison conduit à la conclusion que le délai pour demander d'établissement d'un événement médical limite considérablement l'accès à cette voie alternative utilisée pour indemniser le préjudice résultant du traitement.

Mots-clés: evénement médical, demande d'établissement d'un événement médical, délai préfix du droit matériel, réparation du préjudice

TERMINE PER LA PRESENTAZIONE DELLA DOMANDA DI DETERMINAZIONE DI UN FATTO MEDICO: ANALISI E OSSERVAZIONI *DE LEGE FERENDA*

Sintesi

Obiettivo dell'articolo è l'analisi critica del termine per la presentazione delle domanda di determinazione di un fatto medico. Il punto di partenza per la valutazione dell'art. 67c commi 2 e 4 della legge sui diritti del paziente e sul Difensore dei diritti dei pazienti, è l'assunzione che tale termine debba essere qualificato come termine di decadenza di diritto sostanziale, con tutto ciò che ne deriva in particolare sulle conseguenze della sua scadenza e sull'assenza di possibilità di riapertura del termine, nonostante la qualificazione di tale termine come termine del diritto processuale, assunta nei regolamenti delle singole commissioni giudicanti sui fatti medici. L'analisi della soluzione assunta dal legislatore è condotta anche attraverso il prisma del suo confronto con la norma giuridica della prescrizione delle rivendicazioni patrimoniali di risarcimento del danno alla persona, inferto con un illecito civile doloso (art. 442[1] § 3 del

Codice civile). Tale confronto porta alla conclusione che il termine per far valere una richiesta di determinazione di un fatto medico limita in modo significativo l'accesso a tale via alternativa per l'indennizzo di un danno insorto in conseguenza a un trattamento.

Parole chiave: fatto medico, domanda di determinazione di un fatto medico, termine di decadenza di diritto sostanziale, risarcimento del danno

Cytuj jako:

Białkowski M., *Time limit for submitting application to determine a medical incident: analysis and comments de lege ferenda [Termin do złożenia wniosku o ustalenie zdarzenia medycznego – analiza i uwagi de lege ferenda]*, „Ius Novum" 2020 (14) nr 3, s. 142–159. DOI: 10.26399/iusnovum.v14.3.2020.30/m.bialkowski

Cite as:

Białkowski, M. (2020) 'Time limit for submitting application to determine a medical incident: analysis and comments *de lege ferenda*'. *Ius Novum* (Vol. 14) 3, 142–159. DOI: 10.26399/iusnovum.v14.3.2020.30/m.bialkowski