

**PROTECTION OF THE PATIENT AGAINST PRACTICES
VIOLATING COLLECTIVE INTERESTS OF CONSUMERS
AND COLLECTIVE INTERESTS OF PATIENTS**

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ABSTRACT

This article is an attempt to analyse the term “patient”, determine his basic rights, as well as draw attention to practices violating collective interests of patients. It also invokes relations of the patient as a consumer, as well as practices violating collective consumer interests. It indicates the patients’ rights and the bodies appointed to protect these rights.

Key words: patient, consumers, health

When observing today’s society, we can easily notice that more and more people know their rights and more and more often use the knowledge of binding legal regulations, demonstrating a demanding attitude. This phenomenon is more and more detectable and common in many domains of life, also in the daily life. It also applies to patients in relations with the broadly understood healthcare. This article is an attempt to analyse the term “patient”, determine his basic rights, as well as draw attention to practices violating collective interests of patients. It also invokes relations of the patient as a consumer, as well as practices violating col-

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lective consumer interests. It indicates the patients' rights and the bodies appointed to protect these rights.

The origin of actions aimed at the protection of consumer interests does not reach too far, as it dates back to the end of the 19th century, moreover, it is directly connected with the rapid development of the market economy. Consumers, as a group weaker than entities stronger by definition - professionals, have been subjected to practices used and imposed by them. Movements designed to protect consumers have been developing mainly in the United States and in the countries of Western Europe. On the other hand, actions taken for the benefit of consumers have depended both on the specific nature and conditions of a given state. For instance, the USA saw the development of an independent social movement, and its equivalent in France and in the UK was the cooperative movement. On the other hand, Scandinavian countries developed the institution of *ombudsman* – a parliamentary commissioner, whose tasks include consumer protection¹.

The legal definition of a “patient” has been indicated in the Act of 6 November 2008 on Patients' Rights and the Commissioner for Patient's Rights². According to Article 3 (1) point 4 of the indicated Act, it is a person requesting the provision of health services or using health benefits provided by the entity providing health services or a healthcare professional. The presented definition of a patient refers to the approach presented by WHO in MDPP and allows for distinguishing several elements indicated by D. Karkowska. “The notion refers solely to a natural person, which means that a patient is “every person” (“every human”) – regardless of his current health condition, whether he is sick or healthy – who uses healthcare services, including actions related to disease prevention, or in relation to whom any action is taken aimed at preserving, rescuing, restoring or improving health, as well as other healthcare activities resulting from the treatment process or separate regulations regulating the principles of its performance. The Act on Patients' Rights assumes an active role of the patient. The patient is whoever “requests the possibility to use” or “already

¹ J. Bazylińska, *Ochrona zbiorowych interesów konsumentów w prawie Unii Europejskiej i wybranych prądach prawnych państw członkowskich*, Toruń 2012, pp. 21 – 22.

² Polish Journal of Laws 2017, No 78, item 1318 j.t.

uses” health services, regardless of the title, i.e. regardless of having rights to health care services financed from public funds³. In order to discuss “patients’ rights”, it should be indicated that they are perceived as a category of human rights⁴, with addition that human rights are always considered in the context of functioning of a particular institution, which is a part of the generally understood healthcare system⁵.

On the other hand, the term “consumer” has many definitions on the grounds of the binding Polish law. One of the first legal acts indicating a legal definition of the notion of a consumer is the Regulation of the Council of Ministers of 30 May 1995 on detailed conditions of conclusion and execution of sales contracts for movable goods involving consumers⁶. According to § 3, a consumer is anyone who purchases a product for purposes not related to business activity.

In some Acts, the legislator indicates an individual definition, while in others – refers e.g. to the Civil Code⁷. It should thus be emphasised that this notion does not have a uniform definition and depends on the specific legal regulation.

The Act on Consumer Rights of 30 May 2014⁸ also does not directly introduce a legal definition of a consumer, but refers to the Code’s definition, contained in Article 22¹ of the Civil Code. The Court of Appeal in Warsaw indicates that the definition of a consumer, inferred from Article 22¹ of the Civil Code, contains four elements. “Firstly, a consumer may only be a natural person, secondly, he must take a legal action, thirdly, this action remains in a specific relationship with the social role of this person, fourthly, the addressee of the declaration of will is the entrepreneur”⁹.

³ D. Karkowska, *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz*, LEX, 2016.

⁴ M. Paszkowska, *Prawa pacjenta jako swoista kategoria praw człowieka, praca doktorska* in: *Nauka Polska* (portal internetowy), <http://nauka-polska.pl/dhtml/raporty/praceBadawcze?rtype=opis&lang=pl&obje ctId=22389> [date of access: 08.07.2014]; see also: R. Tabaszewski, *Prawo do zdrowia w systemach praw człowieka*, Lublin 2016.

⁵ B. Kmiecik, *Wychowanie do praw pacjenta* in: *Forum Prawnicze* 2014, p. 29.

⁶ *Polish Journal of Laws* 1995, No 64, item 328.

⁷ *Polish Journal of Laws* 2016 item 380 j.t.

⁸ *Polish Journal of Laws* 2014, item 827 j.t.

⁹ Judgement of Appellate Court Warsaw, 28.04.2015 r., VI ACa 775/14, LEX no 1712704.

It should be stressed that the notions of a consumer and a customer are not identical. According to the Civil Code, a consumer is solely a natural person. On the other hand, a customer may be a business entity, and thus both a person and a company or an institution, probably interested in buying a particular product. A consumer is a person who uses already purchased services or goods¹⁰. In addition, a customer is inseparably connected with the market, while a consumer may - but does not need to - be a participant in the market to obtain consumer goods and services¹¹.

The Court for Protection of Competition and Consumers clearly indicated what kind of conduct should be considered as a practice violating collective interests of consumers. "It is necessary to determine that an entrepreneur's action is unlawful and violates the collective interest of the consumer. An unlawful practice of the entrepreneur is an action as well as omission, namely refusal to take actions despite the existence of a legal obligation to act. Furthermore, unlawful actions are not only actions that are inconsistent with the law, but also with good practice and principles of social coexistence that, as standards of conduct binding in business transactions, should be observed just like legal regulations. Furthermore, illegal practices of entrepreneurs must be aimed at collective interests of consumers, namely apply to the present, future and prospective consumers, when they breach the rights of an unlimited and undefined number of consumers. At this point, it should be indicated that only a cumulative occurrence of all those premises may cause it to be acknowledged that a prohibited practice has occurred - lack of one of these elements makes it impossible to apply provisions of the Act on Protection of Competition and Consumers¹²".

The collective interest of consumers is the interest which is neither a personal law nor another individual interest but is the interest of a certain community (group), but it does not constitute a sum of individual

¹⁰ E. Kieźel, *Konsument i jego zachowania na rynku europejskim*, Warszawa 2010, p. 29.

¹¹ S. Smyczek, I. Sowa, *Konsument na rynku. Zachowania, modele, aplikacje*, Warszawa 2005, p. 27.

¹² Judgement of Court for Competition and Consumer Protection, 22.07.2009 r., XVII Ama 26/09, Dz. Urz. UOKiK, 2009/4/32.

interests of people belonging to this community. It is a distinct, independent legal category, protected by the legal order. It is the generalised individual interest. The collective interest not only absorbs individual interests, but also exceeds them¹³.

Whereas according to Article 59 of the Act on Patients' Rights and the Commissioner for Patients' Rights understands a practice breaching the collective rights of patients as:

- 1) illegal organised acts or omissions of entities offering health services,
 - 2) organisation, contrary to regulations on solving collective disputes, of a protest campaign or strike by the strike organiser, ascertained by a final and binding court decision
- intended to deprive patients of rights or limit these rights, in particular undertaken in order to achieve financial benefits.

It should be noted that the unlawful nature is a component of the perpetrator's action, presented as a conflict with the valid principles of the legal order. Sources of these principles result either from commonly binding standards – as rules of conduct determined by orders and bans resulting from standards of the positive law, particularly the civil, penal, administrative, labour, financial law, etc., or from orders and bans resulting from the principles of social coexistence. However, it is important for this unlawful nature to be confirmed by a legally binding sentence. With regard to the other practice, it is reasonable to indicate two premises. The first one is a legally binding sentence confirming that the strike has been organised, contrary to regulations on resolving collective disputes, and the second one is the purpose. Organisation of an “*illegal*” strike should aim at depriving patients of rights or limiting these rights. The qualified form in this case is achieving a financial benefit. The action itself should be, in the first place, subject to court proceedings¹⁴.

It should be emphasised that the sum of individual rights is not a collective patients' right or a collective interest of consumers. It is forbidden

¹³ I. Wesółowska, Przesłanki uznania praktyki za naruszającą zbiorowe interesy konsumentów in: Internetowy Kwartalnik Antymonopolowy i Regulacyjny, no 4(3), 2014.

¹⁴ Z. Cnota, Gura G., Grabowski T., E. Kurowska, Zasady i tryb ustalania świadczeń/roszczeń (odszkodowania i zadośćuczynienia) w przypadku zdarzeń medycznych. Komentarz, Warszawa 2016, p. 2.

to use practices both violating the collective rights of patients, as well as violating the collective interests of consumers.

In order to qualify a practice as violating the collective rights of patients, it is necessary to demonstrate that the violation applies to rights of an undefined larger number or group of patients. Additionally, the violation of collective patients' rights requires repeatability of behaviour, indicating consistency of action, with regard to a given group of patients. To assess whether illegally organised acts or omissions constitute a practice violating the collective rights of patients, it is significant for the behaviour to be displayed by an entity providing health services¹⁵. Furthermore, a violation of collective patients' rights can be seen when the effects of actions may threaten or appear in the sphere of every potential patient in similar circumstances. Therefore, to ascertain violation of collective patients' rights, it is important to determine whether a specific action of the healthcare entity has no strictly specified addressee but is addressed at an indefinite group of entities. This means that it is not the quantity of actual, confirmed violations but, above all, their nature and consequently the possibility (even only potential) of causing negative effects for a specific community that determines violation of the collective interest¹⁶. From this perspective, the argument of the ruling of the Supreme Administrative Court (N) of 29 November 2016 seems important, in accordance with which a violation of individual patients' rights constitutes a sufficient signal that the possibility of occurrence of practices violating collective patients' rights has likely been fulfilled¹⁷. This is an impulse for the Commissioner for Patients' Rights to act and verify circumstances in the scope concerning violation of individual patients' rights, in order to determine whether the observed practice applies to a broader group of patients.

In order to provide specific examples of such practices, it is worth referring to cases from real life, which constituted the basis for creation of the rich case law. And so, the Supreme Administrative Court in the sentence of 30 January 2018 - the problematic issue was the circumstance, in which the commissioner ascertained that the X-ray examination result

¹⁵ Judgement of WSA Warsaw, 23.01.2017, VII SA/Wa 1040/16.

¹⁶ Judgement of NSA (N), 05.09.2017 r., II OSK 1015/17.

¹⁷ Judgement of NSA (N), 29.11.2016 r., II OSK 1908/16.

belongs to the hospital, rather than to the patient, since it is an internal document of the institution. The problem in this case laid in the manner of storage of medical documentation. However, it was not explained how the hospital stores folders (or files) with the medical history of patients, and it is irrelevant whether it is an internal or external documentation. The hospital thus violated the rules of procedure, and such practices violate the collective interest of patients¹⁸.

The exclusion of granting an oral authorisation by the patient or his or her representative or cessation of operations on specific days without securing access to the medical documentation also significantly breaches and limits the collective rights of patients¹⁹.

On the other hand, as noticed by the Commissioner for Patients' Rights, misleading of potential patients as to the medical specialisations is not subject to provisions of the Act on Patients' Rights and the Commissioner for Patients' Rights, but may constitute a matter of discussion on the basis of provisions of the Act on the professions of physicians and dentists (Journal of Laws 2015, item 464, as amended)²⁰.

As it has been rightly indicated by L. Wengler, the issue of recognising the patient as a consumer is significant, since it may imply disputes in competence between the President of the Office of Competition and Consumer Protection and the Commissioner for Patients' Rights in the case of each of these bodies acknowledging a practice used by the provider to be violating, respectively, the collective interests of the group whose protection has been entrusted by the legislator. It is probable that a violation of collective patients' rights will be simultaneously considered as a violation of collective consumer rights²¹. The disputes between bodies competent to protect different rights, created in such a case, will constitute positive disputes, since more than one body will be able to consider itself competent in the given case.

¹⁸ Judgement of NSA, 30.01.2018 r., II OSK 2825/17.

¹⁹ Judgement of NSA (N), 9.02.2016 r., II OSK 2843/15.

²⁰ Judgement of WSA Warsaw, 30.05.2016 r., VII SA/Wa 385/16, Legalis No 1513860.

²¹ L. Wengler, *Praktyki naruszające zbiorowe prawa pacjentów wprowadzenie do problematyki*, Gdańskie Studia Prawnicze, Tom XXVIII, 2012, pp. 366-367.

An important role in the process of differentiating patients' rights has been played by international organisations. The leading one among them has been the World Health Organisation, which issued the Declaration on the Promotion of Patients' Rights in Europe along with the Model of Declaration on Patients' Rights, constituting the basis for creating the Polish legislation with regard to protection of health and, above all, constructing patients' rights in the key act in this respect - the Act on Patients' Rights and the Commissioner for Patients' Rights. This Act makes a dichotomous division of patients' rights into individual rights and collective rights, however, without explaining mutual relations between these rights²².

It should be noted that, until June 2009, no legal act in Poland contained a definition of patients' rights, and only several Acts listed their types and regulated the identity of their subjects. However, it was rightfully assumed that patients' rights are a set of rights granted to a person for using health services²³.

Patients' rights have been systematised in the concerned Act on Patients' Rights and the Commissioner for Patients' Rights (*u.o.p.p.*)²⁴, but they can be also found in other Acts, such as on the professions of physicians and dentists²⁵, on the professions of nurses and midwives²⁶, on mental health protection²⁷.

Compliance with patients' rights, specified in the Act on Patients' Rights and the Commissioner for Patients' Rights, according to Art 2 of the Act, is a duty of public authorities competent with regard to protection of health, the National Health Fund, entities offering health services, healthcare professionals, as well as other people participating in the provision of health services. It should be highlighted that patients' rights are applicable both to the public sector and to the private sector of the medical services market. Entities liable under patients' rights are, above all,

²² Tamże, p. 371.

²³ M. Paszkowska, Powszechnie prawa polskiego pacjenta, „Zeszyty Naukowe Ochrony Zdrowia. Zdrowie Publiczne i Zarządzanie” 2007, no 1–2, p. 23.

²⁴ Polish Journal of Laws 2017 item 1318 j.t.

²⁵ Polish Journal of Laws 2017 item 125 j.t.

²⁶ Polish Journal of Laws 2018 item 123 j.t.

²⁷ Polish Journal of Laws 2017 item 882 j.t.

healthcare professionals, in particular: doctors, nurses, midwives, laboratory diagnosticians²⁸.

“The regulation, binding previously and currently, protects reasonable expectations of the patient that the medical and diagnostic methods used towards him/her will comply with his/her needs and, as based on verified and up-to-date methods, will be services of appropriate quality. Assumption of intentional violation of patients’ rights would be justified in the event created as a consequence of negligence of health professionals, non-performance of diagnostic tests for the patient, even if it fits within the category of medical error. Protection guaranteed in the law also covers breach of the right to the proper standard of medical care, which may cause negative mental experiences for the patient, discomfort, loss of trust towards the healthcare professionals, even if it did not result in medical damage. Granting of compensation for breach of patients’ rights does not require fulfilment of the premise of damage; it may be granted for the mere fact of violation and does not depend on simultaneous occurrence of such damage. On the other hand, if the violation of patients’ rights results in bodily damage, disorder or deterioration of health condition - the patient may claim damages on the basis of Article 445 of the Civil Code”²⁹.

To protect patients’ rights, the Commissioner for Patients’ Rights has been established, being the central government administration authority. Both the requirements necessary to perform this function, as well as the Commissioner’s competences have been strictly specified in Articles 41-58 of u.o.p.p. The Commissioner carries out his duties with the help of the Office of the Commissioner for Patients’ Rights. It is also worth mentioning that there also exist appointed Commissioners of Psychiatric Patients’ Rights, referred to in provisions of the Act of 19 August 1994 on Protection of Mental Health. On the other hand, the central state administration body competent in cases of competition and consumer protection is the President of the Office of Competition and Consumer Protection, acting

²⁸ M. Paszkowska, Rzecznik Praw Pacjenta w systemie ochrony prawnej in: *Przegląd Prawa Publicznego*, no 7-8, 2010, p. 182

²⁹ Judgement of Appellate Court, Białystok, 30.06. 2016 r., I ACa 155/16, LEX nr 2112360.

on the basis of the Act of 16 February 2007 on Protection of Competition and Consumers.

It should be kept in mind that the patient, as a consumer, has certain instruments in the Polish legal order, thanks to which he may claim his rights against health service providers in spite of the exclusion applied in the Act on Consumer Rights³⁰.

To sum up, it should be stated that the rights of patients are a separate group of rights, which are also subject to protection that is different from the standard consumer rights. Separate provisions included in the Act on Patients' Rights and the Commissioner for Patients' Rights are also important, as they indicate the catalogue of practices violating collective the collective patients' rights and the very definition of a patient, as well as appoint a body to protect these rights, namely the Commissioner for Patients' Rights. On the other hand, the notion of a consumer and practices violating the collective interests of consumers are specified in other legal acts, and the Office for Protection of Competition and Consumers has been appointed to protect their rights, with the President as its leader. However, it should be kept in mind that, in accordance with Article 59 (3) of u.o.p.p., protection of collective patients' rights provided for in the Act does not exclude protection resulting from other acts, particularly from regulations on counteracting unfair competition, regulations on protection of competition and consumers and regulations on counteraction of unfair trading practices.

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³⁰ See also: M. Ganczar, M. Szewczak, Pacjent jako konsument usług zdrowotnych – wybrane aspekty prawne in: *Internetowy Kwartalnik Antymonopolowy i Regulacyjny* 2017, no 3(6), p. 99.

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