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The role of a court expert opinion in medical proceedings in the light of judicial decision of the Polish courts

ABSTRACT

Evidencing in medical trials for damages is difficult, and it requires not only knowledge in the field of law, but also in the field of medicine. The main impediment to fluent proceeding in medical matters which requires to be strongly emphasised is a vast difficulty for courts in taking evidence by an expert within reasonable time. Such evidence is generally necessary in every case because there is a necessity to learn medical facts from the perspective of specialist knowledge (Article 278 § 1 of CPC). The problematic nature of damages for so called medical errors has gained more and more significance, both because of the growing number of claims and the damages paid in relation thereto and the rising costs of insurance against those events incurred by healthcare centers. In such legal circumstances, it is worth indicating the extent to which the evidence by an expert doctor is taken in medical proceedings and the significance thereof for a proper course of the proceedings. Nevertheless, frequently opinions by experts are rather far from being objective. Often, as a result of falsely interpreted solidarity of representatives of the profession, experts disregard the lack of knowledge and diligence of a doctor and the organisational omissions in health care centers. Their opinions are very often unclear, ambiguous, posing different hypotheses and the possibilities of damage which do not assist the court in properly assessing the events in matters for compensation. Because of that, a higher standard of conduct for expert doctors should be considered, the manner in which they are appointed and an improvement of the effectiveness of their work.

Keywords: Civil Procedure Code, court expert opinions, medical processes

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Znaczenie opinii biegłego w procesach medycznych w świetle orzecznictwa polskich sądów

STRESZCZENIE

Zasadniczą przeszkodą w sprawnym prowadzeniu spraw medycznych, wymagającą szczególnego podkreślenia, są olbrzymie trudności sądów w przeprowadzaniu dowodu z opinii biegłych w rozsądnym terminie. Dowód ten jest w zasadzie niezbędny w każdej sprawie, z uwagi na konieczność poznania faktów medycznych z perspektywy wiedzy specjalistycznej (art. 278 § 1 k.p.c.). Jednocześnie jest to główna przyczyna długotrwałości tego postępowania. Sądy korzystają z pomocy biegłych lub instytutów naukowo-badawczych (różnego rodzaju akademii medycznych) głównie w bardziej skomplikowanych sprawach, wymagających kompleksowej, interdyscyplinarnej analizy.

Problematyka odszkodowań za tzw. błędy medyczne nabiera coraz większego znaczenia zarówno z uwagi na rosnącą liczbę roszczeń i wypłacanych z tego tytułu odszkodowań, jak i rosnących kosztów ubezpieczeń od tych zdarzeń, jakie ponoszą placówki medyczne. Warto zatem w tym stanie prawnym wskazać, w jakim zakresie przeprowadzany jest w procesach medycznych dowód z opinii biegłego lekarza i jakie ma znaczenie dla prawidłowego toku postępowania. Często opinie biegłych są nie tylko dalekie od obiektywizmu ze względu na fałszywie pojmowaną solidarność zawodową, ale także niejasne oraz niejednoznaczne.

Stąd należy zastanowić się nad zwiększeniem standardów pracy biegłych lekarzy i sposobu ich powoływania oraz poprawieniem sprawności ich pracy i koniecznością „specjalnego" szkolenia biegłych oraz rzetelnym przygotowaniem do wykonywania tej funkcji jako pomocnika sądowego.

Słowa kluczowe: biegły, procesy medyczne, znaczenie opinii biegłego

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It seems that civil courts deliver more and more judgments concerning compensation and medical damages. The number of processes for compensation, and long-term judicial proceedings do not always end up positive ruling for the plaintiff (i.e. a doctor). The increase in medical processes is a phenomenon not only in Poland. This is due to the fact that more and more patients are aware of their rights and their attempts to investigation. In these processes, it is essential to conduct evidence, where the initiative evidence, or presentation evidence, belongs to the party (plaintiff and defendant). But there are no standards of expert opinion that allow to use this opinion by judge in proceeding. The problematic nature of damages for so named medical errors has gained more and more significance, both because of a growing number of claims and damages paid in relation thereto and rising costs of insurance against those events incurred by healthcare centers. In such legal circumstances, it is worth indicating the extent to which the evidence by an expert doctor opinion is taken in medical proceedings and the significance thereof for a proper course of the proceedings. Expert medical opinion in the judicial process can have a big impact on the outcome of the case – in many cases is the basis of this decision.

In recent years, the growth of its importance is becoming more noticeable. This is due to from the fact that the current development of medical science is carried out at a rapid pace with new technologies and the doctor will meet almost everywhere. The main aim of this elaboration is to show how important is the role of an expert opinion in proceedings concerning medical malpractice and what should change in that matter.

Evidencing in medical trials for damages is difficult, and it requires not only knowledge in the field of law, but also in the field medicine. The peculiarity of medical professions causes that very often evidentiary means usually used by the plaintiff are not available in proceedings against a healthcare provider. Such phenomena make the Polish courts adopt a more liberal attitude towards the issues of the burden of proof than in other typical situations. A similar trend can be noticed also in proceedings before regional commissions for evaluation of medical events specified in the Act dated 6 November 2008 on Patient's Rights and the Commissioner for Patient's Rights.[1] Because of that, in the currently binding law since 1 January 2012 after an amendment of the Act on Patient's Rights and the Commissioner

[1] Unified text: Dz. U. (Official Journal no. 159 dated 2012).

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for Patient's Rights[2], a new out-of-court procedure of compensating for medical damage suffered in hospitals was introduced in the Polish law. Above all, court matters for damages related to the so named medical error still last very long. Nevertheless, the diagnosis of such state of affairs proves the complexity of the issue at hand. Knowledge of the issue facilitates comprehension of the problem and constitutes necessary assistance in setting prospective directions for reasonable reforms.

Firstly, it must be indicated that these are very difficult trials which require examination of a series of facts such as: fault of medical staff, an adequate causal link, which is very complex because of the plurality of possible factors affecting the plaintiff's current health condition. Because of that, in fact, voices in the case law and the legal literature have begun to accept evidence based on some probability (*prima facie*), which constitutes an exception from the evidentiary certainty stemming from Article 233 of CPC ("Civil Procedure Code"). A possible contributory negligence on the part of the person who suffered the damage can be an issue that matters[3]. Each of those facts poses a difficulty as such. Additionally, there is a need for selecting these errors which have really been committed from those which, when submitted in the course of the proceedings, represent only a demand resulting from one's attitude or even delusion.

The main impediment to fluent proceeding in medical matters which requires to be strongly emphasized is a vast difficulty of courts in taking evidence by expert within a reasonable time. Such evidence is generally necessary in every case because there is a necessity to learn medical facts from the perspective of specialist knowledge (Article 278 § 1 of CPC). Taking such evidence is the key and preliminary cause of protracted proceedings. It occurs that the total time of such evidentiary proceedings amounts to a year, or even longer. In these circumstances courts turn to court experts or research institutes (various medical academies) for assistance mainly in more complex matters or those requiring a comprehensive interdisciplinary analysis.

These alternatives do not ensure a fast opinion giving process. Research institutes set very remote deadlines for drafting opinions. That is because opinions they provide, in fact, are their auxiliary activity and a natural

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[2] Dz. U. (Official Journal no, item 660 dated 2011).

[3] See also the speech of A. Michałowski, Vice president of the regional Bar of Advocates, in: M. Domagalski, *Can disputes concering errors of doctors can be solved faster?*, Rzeczpospolita (national journal "Rzeczpospolita") dated 17 February 2009.

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consequence of their scarce number and high number of works commissioned by courts.

In turn, it is difficult to find experts of particular specializations because there is an insufficient number of specialists in certain branches of medicine, whereas competences of many of them raise reservations.[4] The lack of interest in becoming listed expert doctors who are professionally the most active and have comprehensive and up-to-date knowledge of medicine is particularly noticeable. It is highly likely that this is because of substantially small attractiveness of the function of an expert, which, without doubt, ensues from an archaic and strongly defective regulation of the experts' position. Exercising the function of an expert does not entail, as such, recognition of the highest professional qualifications. Selection of candidates for experts has been entrusted to presidents of regional courts[5], who in fact do not have specialist knowledge of particular branches, medicine in this case. It appears necessary to implement the system of professional certification by selected specialists who act under supervision of the president of the court, which is renewable at a specific period of time. Such guarantee of professionalism and ethics would allow for the use of the title „the court expert" also in matters other than opinions provided to courts, thereby adding to prestige reflected accordingly in good professional opportunities[6].

1

MEDICAL ERROR IN MEDICAL PROCEEDINGS IN POLAND

The number of matters the subject-matter of which is liability of doctors for medical errors is growing all over the world. In Poland, the number of complaints examined in the professional liability procedure, the number of matters in medical courts and the number of penalties imposed rise from

[4] That is indicated correctly by J. Budzowska in: B. Liskowska, *Patients will still wait long for compensation for a medical error*, Dziennik Gazeta Prawna (national daily "Dziennik Gazeta Prawna" dated 18 May 2011

[5] See. § 1 of the Minister of Justice regulation dated 24 January 2005 on court experts, Dz. U. (The Official Journal) no. 15, item 133.

[6] Read more on the subject P. Szewczyk, *Dyletanctwo w majestacie prawa*, Kwartalnik Krajowej Rady Sądownictwa ("The Quarterly of the National Council of Justice"), 2010, no. 3, pp. 59–65; Biegli sądowi – zapomniana reforma, ("The court experts – forgotten reform"), The European law in practice, no. 10, pp. 23–26.

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10 to 30% per annum (on average by 14%), and the frequency of complaints against doctors' conduct is higher than the European average. The data of the Bureau of Patients' Rights of the Ministry of Health reveal that failure to comply with rights of patients most frequently consists in impeding their access to medical services, difficulty in obtaining medical documentation, doctors failure to provide patients with information about their health condition in a clear and comprehensible manner.[7]

Firstly, we should define the term medical error. There are three main types of doctor's liability related to his treatment activity[8]: – professional liability – that means the liability for committing the so named professional misconduct; the effect of inappropriate conduct is a disciplinary penalty (a warning, reprimand, temporal or permanent deprivation of the right to practice the profession) – civil liability – that it the liability for inflicting material damage or a nonmaterial wrong (violation of such personal right as life, health, honour, freedom, commemoration of a deceased); the outcome thereof is the necessity to pay damages (in the case of damage suffered) or compensation (in the case of a wrong); common courts resolve disputes in civil lawsuits – criminal liability – means the liability for committing a crime (defined in the law); the effect thereof imposition of the penalty of restriction of liberty, imprisonment or a fine[9]. The error in the medical art (medical error, doctors' error, failure to treat) is a conduct contrary to the commonly approved principles of medical knowledge. A doctor is obliged to practice the profession in compliance with the guidelines of the current medical knowledge, with the methods available to him as well as the preventative and diagnostic means and means of treatment of illnesses in compliance with professional ethical standards and due diligence (Art. 4 of the Act dated 5 December 1996 on the profession of a medical doctor and a dentist)[10]. The condition of acting *lege artis* refers to all activities of a doctor that are undertaken with respect to a patient, irrespective of the stage or manner of

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7 Krajewski R. *Odpowiedzialność zawodowa lekarzy. Medycyna po Dyplomie* ["The professional liability of a doctor". The medicine after the diploma"] 2004, no. 1(94), pp. 16–25; *Trudna droga dochodzenia praw pacjenta*. [„A difficult route to pursue the patents' rights"] http://prawo.money.pl/aktualnosci/wiadomosci/artykul/trudna droga dochodzenia praw pacjenta,36,0,233508.html

8 T. Kaczmarek, J.T. Marcinkowski, *Odszkodowania za niepowodzenia lecznicze*, ["The compensation for medical failures"] Orzecznictwo Lekarskie [„The medical reported cases"] 2011, no. 8(2), p. 80.

9 *Trudna droga dochodzenia praw pacjenta*. ["A difficult route to pursue the patents' rights"] http://prawo.money.pl/aktualnosci/wiadomosci/artykul/trudna droga dochodzenia praw pacjenta,36,0,233508.html.

10 Unified text.: Dz. U. [„Journal of Laws"] dated 2011 no. 277, item 1634, as amended.

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treatment. Setting *lege artis* principles which relate to an individual case is a task for representatives of medical sciences[11]. Therefore, medical damage occurs most frequently when a doctor fails to apply due diligence when performing medical activities (diagnosis, treatment) required professionally and formally specified. It is formalized and specified by law that a doctor should perform surgeries in compliance with the current knowledge and medical science, but failure to comply with that principle may be interpreted lack of due diligence in medical practice[12].

Art. 8 of the Medical Ethics Code stipulates that a doctor should perform diagnosis, treatment and prevention with due diligence by committing essential time thereto. According to the settled case-law such diligence should even be higher than average in view of the subject of medical treatments – i.e. a human being – and the effects which are often irreversible[13], whereas, Art. 21 of the Medical Ethics Code stipulates that in the event of a serious mistake made by a doctor or occurrence of unexpected complications in the course of treatment he should inform the patient and undertake actions to remedy detrimental effects.

Therefore, errors can be diagnostic, therapeutic, technical or organizational[14]. A diagnostic error consists either in a diagnosis of a non-existent illness, or failure to find a real illness, and usually results from wrong prerequisites which led a doctor. An erroneous diagnosis may be unconfirmed by symptoms, it may be a consequence of the lack of auxiliary medical tests or imprecise interview. It may, however, be caused inculpably – the mere erroneous diagnosis does not prejudge the guilt. Therapeutic error consists in a choice of improper method of treatment, prescription of a wrong medicine. The notion of "an error in the medical art", therefore, relates not only to a therapeutic error (error in treatment, which includes an error during an operation), but also to a diagnostic error (error in diagnosis). In case it is necessary to perform specialist tests prior to a surgery a diagnostic error

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[11] P. Daniluk, *Czynność lecznicza jako kontratyp*, ["The act of treatment as a countertype"] PiM 2008, no. 2, p. 29.

[12] See more: R. Patryn, *Określenie zasady postępowania lekarza z należytą starannością z płaszczyzny orzecznictwa sądowego*, [„Defining principles of doctor's conduct with due diligence in view of courts' reported cases"] PiM 2012, no. 2, p. 84 and subsequent.

[13] The judgment of the Appeal Court in Kraków dated 9 March 2001, I Aca 124/2001, Przegląd Sądowy ["The court review"] 2002, no. 10, p. 130.

[14] See more: M. Wolińska, *Odpowiedzialność karna lekarza za błąd w sztuce lekarskiej*, [„The criminal liability of a doctor for an error in the medicial art."] Prok. i Pr. 2013, no. 5, p. 24 and subsequent.

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may refer to the stage of such tests, which in consequence may lead to an erroneous diagnosis of the illness and to an erroneous decision about a surgery or about the scope of such a surgery[15].

The conduct contrary to the commonly recognized principles of medical knowledge the so named medical error constitutes an objective category which is independent from any specific person or fact[16]. The same applies to failure to exercise due diligence. Determination of those conditions is necessary, but does not already suffice to prove doctor's liability. In case of civil liability existence of an adequate causal link between the doctor's conduct and the effect which results therefrom must be determined, whereas, in criminal law – the ability to objectively attribute the effect to a specific person. Moreover, subjective requirements for liability must be met, i.e., the grounds to determine that a doctor was guilty when committing the act. This entails the necessity to determine that a particular doctor, in view of his age, qualifications, professional experience or specific conditions under which he acted, could have acted in compliance with the norm, i.e. according to the current state of medical knowledge or the principles of prudence which apply in handling a certain good. Under the criminal law a doctor may be held liable for an offence against life or health of a patient in relation to medical treatment (to be understood broadly, i.e, which included diagnosis, therapy and prevention of illnesses) only if an error in the medical art has been culpable. Determination of a medical error rests upon an answer to a question whether doctor's conduct in a specific situation, in view of all the facts existing at the moment of a treatment, in particular the data which at that time was available to him or could have been available to him, was in compliance with the requirements of current knowledge and medical science and a commonly accepted practice of doctors"[17].

Committing of a medical error by a doctor or conduct contrary to the principles of due diligence may entail different forms of legal liability, whereby the condition for applying some of them is the occurrence of an adverse effect. An act of treatment conducted contrary to the *lege artis* principles or without due diligence, but which does not trigger negative effects (even such

[15] The Supreme Court ["SC"] judgment dated 24 October 2013, IV CSK 64/13, LEX no. 1413156.

[16] M. Nesterowicz, *Prawo medyczne...,* [„The medicial law"], Warszawa 2007, p. 187.

[17] The Supreme Court ["SC"] jusgement dated 10 December 2002, V KK 33/02, LEX no. 75498.

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as a threat of putting the patient's life or health at risk), is not an offence[18]. That can, however, be deemed a professional misconduct subject to the jurisdiction of medical courts under the Act on Medical Chambers or result in civil liability for violation of patient's rights (Art. 4 of the Patient's Rights Act [hereinafter: PRA] based on Art. 448 of the Civil Codew hich allows for an award to an injured patient of an appropriate amount as compensation for the injury suffered). Such liability occurs independently from the civil liability for the material damage to a patient caused by the doctor's error.

It is worth mentioning that under Art. 55 of PRA in civil matters the Commissioner for Patients' Rights is entitled to demand to institute proceedings and participate in pending proceedings within the powers of a public prosecutor. Criminal liability occurs only when as a result of a doctor's error a patient dies – (Art. 155 of Penal Code [hereinafter: PC]), his body is injured (Art. 156 and 157 of PC) or when only a possible danger of those effects occurs (Art. 160 of PC). If a patient is infected in the hospital by a biological pathogen, or his body is injured, his health deregulated or he dies because of a diagnosis which is inconsistent with the current medical knowledge or because of the application of a product or a medicinal device, and it is impossible to determine an individual perpetrator, Art. 67a-67 of PRA provide for the possibility to obtain from an insurer damages on the basis of a statement of the regional commission for evaluation of medical events that as a consequence of provision of health services an adverse medical event has occurred.

The data from the years 1998–2002 presented by R. Krajewski, President of the Supreme Medical Court reveal that in that period a motion for punishment by medical courts was most frequently filed against general surgeons, obstetricians and gynaecologists. The number of complaints against doctors amounted from 1658 in 1998 to 2751 in 2002, and the number of motions for punishment grew from 186 to 318 (by 70%), and it deserves attention

[18] See more in: M. Boratyńska, P. Konieczniak, *Prawa pacjenta*, [„The patients' rights"] Warszawa 2001; K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu*, [„The civil liability for damage caused during treatment"] Toruń 2007; M. Filar, S. Krześ, E. Marszałkowska-Krześ, P. Zaborowski, *Odpowiedzialność lekarzy i zakładów opieki zdrowotnej*, [„The liability of doctors and healthcare centres"] Warszawa 2004; M. Boratyńska, *Wolny wybór. Gwarancje i granice prawa pacjenta do samodecydowania*, [" The free choice. The warranties and boundaries of patients' rights to decide on own"] Warszawa 2012; A. Fiutak, *Prawo w medycynie*, [„The medicinal law"] Warszawa 2011; R. Kubiak, *Prawo medyczne*, [„The medicial law"] Warszawa 2014; M. Nesterowicz, *Prawo medyczne. Komentarze i glosy do orzeczeń sądowych*, ["The medicinal law. Commentary an glosses to court decisions"], Warszawa 2012 and other.

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that in as much as 24,0% of cases the reason for filing a complaint was violation by a doctor of the doctors' ethical principles; the approximate percentage of complaints (22,3%) concerned a diagnostic error and in almost 40% of complaints the ground was a therapeutic error[19]. According to other data, a medicinal error occurs in one in ten hospitalisations – that would amount to 830 thousand medical errors per year. According to A. Sandauer, out of 500 selected from several thousands of matters dealing with complaints filed with the Patients' Society *Primum Non Nocere* which have been examined, approximately 80% thereof have been non-finally deemed to be well-grounded , which, after all,t does not forecast a positive court judgement – the examined data reveal that 1/3 of the complaints dealt with a mother and a child during delivery, 1/4 – in-hospital infections, the majority of the remainder of matters dealt with errors during surgery (which includes items left inside a patient's body during surgery) and wrong diagnoses.

2

EXPERT IN MEDICAL PROCEEDINGS

Only a person having specialized knowledge can become an expert in civil proceedings.[20] In medical proceedings, a doctor who has specialized knowledge in a specific area of medicine which concerns the proceedings should, therefore, be an expert. Moreover, an expert must enjoy full civil

[19] See: among others, J. Kroner, *Trzeba wiedzieć, czego żądać po błędzie lekarza*. ["It is necessary to know what to demand after the doctor's error"], http://www.rp.pl/artykul/93292,176368_Trzeba-wiedziec – -czego-zadac-po-bledzie-lekarza.html; Trudna droga dochodzenia praw pacjenta. ["A difficult route to pursue rights of a patient"] http://prawo.money.pl/aktualnosci/wiadomosci/artykul/trudna;droga;dochodzenia;praw;pacjenta,36,0,233508.html; M. Rzemek M. *Trudno wygrać ze szpitalem.* ["It is difficult to win with hospital"] http://www. rp.pl/artykul/93292,402330_Trudno-wygrac-ze-szpitalem.html; K. Nowosielska, *Opiekę poprawią raporty o błędach.* ["The health care will improve after the report on errors"] http:// www.rp.pl/artykul/75733,649191-Opieke-poprawia- raporty-o-bledach-.html; I. Lewandowska, *Kiedy szpital odpowiada za błędy.* ["When the hospital is liable for errors"] http://www.rp.pl/artykul/93292,179186_Kiedy-szpital- odpowiada-za-bledy.html

[20] See more on the expert J.J. Litauer, *Dowód z opinii biegłego według kodeksu postępowania cywilnego*, „Polski Proces Cywilny" ["The evidence from an expert opinion under the civil procedurę code, The Polish civil proceedings"] 1937, no. 1–2, pp. 3–17; A. Góra-Błaszczykowska, *Opinia biegłych w postępowaniu cywilnym*, ["The exter opinion in civil proceedings"] „Edukacja Prawnicza" 2005, no. 1, pp. 3–8; S. Dalka, *Opinia biegłego oraz opinia instytutu naukowego lub naukowo-badawczego w procesie cywilnym,* ["The expert opinion and from the scientific or reseach institute in civil proceedings „Nowe Prawo" 1987, no 10,

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and citizen's rights, be over 25 years of age, have theoretical and practical specialized knowledge in a particular branch of science, technical science, art, craft, and also other ability for which he is to be appointed an expert, give warranty of due performance of obligations of the expert and finally, consent to be appointed an expert.

An expert is appointed by court by virtue of an ex *officio* decision or upon a motion of the parties. The court defines the scope of tasks assigned to an expert in the decision on the appointment thereof. Among experts there are: permanent court experts, persons appointed experts *ad hoc* for separate matters, research and specialist institutions[21]. The procedure of appointing permanent court experts is defined in the regulation of the Minister of Justice dated 24 January 2005 on court experts[22]. The permanent court expert is appointed by the president of a regional court for the period of 5 years, after he consents to perform this function. The court expert is only an auxiliary body of the justice authorities in cases which require specialized knowledge[23], is the institution of procedural court law and can use the title

p. 71–83; T. Widła, *Ocena dowodu z opinii biegłego*, [„The assessment of evidence from expert opinion"] Katowice 1992; M. Rybarczyk, *Biegły w postępowaniu cywilnym*. *Opinia. Odpowiedzialność. Wynagrodzenie*, ["The expert in civil proceedings. Opinion. Liability. Remuneration"] Warszawa 2001; J. Sehn, *Dowód z biegłych w postępowaniu sądowym*, [„The evidence from experts in court proceedings"] „Nowe Prawo" 1956, no. 3, pp. 22–34; W. Ossowski, *Uwagi o korzystaniu z biegłych w sprawach cywilnych,* [„The remarks on the use of experts in civil law matters"] „Nowe Prawo" 1960, no. 10, pp. 1346–1351; S. Rejman, *Dowód z opinii biegłego w postępowaniu cywilnym*, [„The evidence from expert opinion in civil proceedings"] Warszawa 1967; R. Łyczywek, *Problemy etyki wykonywania czynności biegłego sądowego,* [„The problem of ethics in performing acts of a court expert"] „Nowe Prawo" 1969, no. 3, pp. 416–428; K. Knoppek, *Rozgraniczenie dowodu z zeznań świadków i dowodu z opinii biegłego w postępowaniu cywilnym*, [„Setting the boundry line between the evidence from witness testimony and from the expert opinion in civil proceedings"] „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1984, no. 4, pp. 121–127; T. Widła, *Odpowiedzialność biegłych – nowe problemy*, [„The liability of experts"] „Palestra" 2005, no. 7–8, pp. 123–132; J. Turek, *Biegły sądowy i jego czynności*, [„The court expert and his activity"] „Monitor Prawniczy" 2007, no. 24, pp. 1358–1364; *Dowody w postępowaniu cywilnym,* [„Evidence in civil proceedings"] edit. Ł. Błaszczak, K. Markiewicz, E. Rudkowska-Ząbczyk, Warszawa 2010, pp. 482–498.

[21] T. Ereciński, *Komentarz do art. 278 k.p.c*. ["The commentary to art. 278 of CPC"] [in:] *Kodeks postępowania cywilnego. Komentarz. Postępowanie rozpoznawcze. T*. I, ["The civil procedure code. Commentary. Examination proceedings Vol. 1"] edit. T. Ereciński, Warszawa 2012, p. 1179 and subsequent.

[22] Dz. U. [Journal of Laws] No. 15, item. 133.

[23] There are three concepts of the status of the court expert: an expert as a witness – which stems from the Roman proceedings, the witness and the expert at the same time in one person which continues to appear in the Anglo-Saxon proceedings (an expert witness), where the parties on own appoint witness and motion to the testimony from him; an expert as a judge of facts – where the value of a judgment is ascribed his opinion in an incidental specialized issue, which functioned in Germany by the 50-ties of the 20th century and finally an expert as an assistant – a personal source which possesses specialized knowledge who only assists the judge in determining the disputes facts which require specialist knowledge

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of a court expert to draft opinions for specific entities only. Use of the title of a court expert in other actions is unlawful and discredits such a person to the extent which enables to deem such a person unable to guarantee due performance of obligations of the expert[24]. The court has discretion to summon a person enlisted as the court expert or a person from outside the list on condition that they have appropriate professional specialist qualifications in a specific area. According to the position established in jurisprudence, there is no difference between the approach to and assessment of an opinion provided by the court expert and that by any other expert appointed by authorities in the proceedings[25].

The aim of appointing an expert doctor is to establish the substantive truth in respect of committing a medical error. The expert is somewhat a counsel to the court who has specialist knowledge which the court lacks in specific proceedings. The task of the expert is to render available to the court and familiarize the court with the characteristics of a particular branch, or to explain ambiguities or discrepancies in the matter. An expert is obliged to conscientiously and diligently assist the court in a decision making process. It, however, must be remembered that a final decision always rests upon the court, which relates to the court's independence, also when deciding whether an opinion should be finally admitted or rejected.[26] In matters dealing with doctors' liability, the role of an expert doctor will, therefore, consist in familiarizing the court with the rules and principles governing strictly medical phenomena. It rests upon the expert to indicate a possible cause and effect link between a doctor's certain conduct or lack thereof and the effect which it has occurred. The facts which may be subject to the expert opinion can be very different. It is sometimes evident at first glance that the guilt of a perpetrator is almost evident. In other matters, the number of which is substantially higher, the facts are complex and very difficult to be resolved unambiguously.

– read more: A. Czapigo, *Rola biegłego a rola specjalisty w procesie karnym – aspekty praktyczne na tle rozważań modelowych*, ["The role of an expert and that of a specialist in criminal proceedings"] PiP 200, notebook: 9, pp. 104–106; H. Popławski, Z. Wentland, *Opinia biegłego jako dowód*, ["The expert opinion as evidence"]WPP 1960, no. 4, p. 450 and subsequent.

[24] The judgment of the Appeal Court in Warszawa dated 20 August 1998, II SA 992/98.

[25] The Supreme Court ["SC"] judgment dated 5 February 1974, III KR 371/73.

[26] Widła T., *Ocena dowodu z opinii biegłego*, ["The assessment of evidence of expert opinion"], Katowice 1992, p. 117.

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The expert opinion is subject to evaluation, as any other evidence, under Art. 233 § 1 of the Code of Civil Procedure [hereinafter: CPC][27]. The court is not bound by the expert opinion and assesses it on the basis of a comprehensive analysis of evidence, but not in the aspect of reliability of that opinion, as it is in case of court assessment of reliability of evidence by witness, but in the aspect of positively or negatively acknowledged values of the reasoning, and why the expert's view has convinced the court or not[28]. As it was rightly noticed by the Supreme Court in its judicial decisions, an expert opinion differs in various criteria of such assessment. The criteria are: compliance with the principles of logic and common knowledge, the knowledge of an expert, theoretical basis of an opinion, the manner of motivating, and the level of firmness of the conclusions expressed therein.[29]. The subject-matter of an expert opinion in not to present facts, but to assess them according to expert knowledge (specialized knowledge)[30]. Therefore, the opinion is not subject to verification, as is evidence which proves facts on the basis of the truth and falseness criterion; nor are assessments of facts being the subject-matter of the expert opinion by witness or participant in the proceedings reliable in assessing such evidence by expert[31]. The court must, however, share the expert views on the merits, and it must not provide own statements instead of these[32].

Therefore, when assessing, for example, an opinion by an expert doctor the court should always examine whether it was drafted by a doctor of that

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[27] The Supreme Court ["SC"] decision dated 7 November 2000, I CKN 1170/98, OSNC 2001, no. 4, item 64.

[28] W. Ossowski. *Uwagi o korzystaniu z biegłych w sprawach cywilnych*, ["Remarks on use of experts in civil matters"] NP. 1960, no. 10, p. 1350.

[29] See more: T. Widła, op.cit. p. 18; J. Turek, *Biegły sądowy i jego czynności*, [„The court expert and his activities"] MoP 2007, no. 24, p. 1359; W. Ossowski, *Uwagi o korzystaniu z biegłych w sprawach cywilnych,* ["Remarks on use of experts in civil matters"] NP 1960, no. 10, p. 1350.

[30] The term specialized knowledge must be understood as the knowledge that extends beyond common, generally accessible knowledge in specific societies, the knowledge in the area of science, art, technics, crafts. The specialized knowledge does not include the knowledge which are available for an adult having specific life experience, level of education and general knowledge – see: the Supreme Court ["SC"] judgment dated 15 April 1976, II KR 48/76, OSNKW 1976, no 10–11, item 133. More information about specialized knowledge, see. e.g. S. Kalinowski, *Opinia biegłego w postępowaniu karnym,* [„The expert opinion in criminal proceedings"] Warszawa 1972, pp. 17–26; S. Dalka, *Opinia...,* [„The opinion..."] p. 73; T. Wiśniewski, *The gloss to the Supreme Court resolution dated 30 October 1985, (III CZP 59/85)*, „Nowe Prawo" ["The new law"] 1987, no. 10, pp. 129–132; T. Widła, *Ocena...,* ["The assessment ..."] pp. 12–18.

[31] The Supreme Court ["SC"] decision dated 7 November 2000, I CKN 1170/98,OSNC 2001, no. 4, item 64.

[32] The Supreme Court ["SC"] decision dated 19 December 1990, I PR 148/90, OSP 1991, no. 11–12, item. 300.

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specialization that relate to illnesses or damage caused as a result of a medical error which are suffered by a complainant; the opinion was professionally drafted and based on current knowledge, and it has no gaps or doubts. The court, during assessment, should examine whether the opinion was based on an analysis of the medical documentation collected in the case and whether the conclusions presented therein are supported by relevant arguments. The next stage is to examine whether experts duly explained the issues presented by the court, indicated the grounds for their theses and indicated the basis thereof. It is crucial to determine whether the opinion was professionally drafted and based on the current knowledge, and at the same time whether it has no gaps or doubts.

In principle, an opinion is a specialist opinion expressed in a specific matter to enable resolution of a legal problem, on the basis of which the court issues a ruling. An opinion by expert is preceded by evidentiary proceedings. In such a decision, a body which commissioned an opinion must indicate the form and timeframes for an opinion to be drafted.[33] If necessary, an expert can be requested to provide oral explanation of the content of the opinion or to answer questions posed by the parties in the proceedings. It is crucial that when drafting an opinion the rules of logical reasoning must be preserved. An opinion duly drafted must be coherent and must indicate consistent reasoning, which enables proper justification thereof[34].

In view of the level of complexity of medical proceedings, it is particularly important for the expert to use language which is as little specialist

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[33] See more: J. Turek, *Dopuszczenie dowodu z opinii biegłego* [w:] Rola biegłego we współczesnym procesie, [„Admittance of evidence from expert opinion [in:] „The role of an expert in modern proceedings"] Warszawa 2002, p. 18, and also *Uchybienia procesowe sądów rejonowych w toku prowadzenia dowodu z opinii biegłych,* [„The procedural defects of district courts in the course of hearing evidence from the expert opinions"] Zeszyty Naukowe IBPS no. 23/1985, p. 39 and subsequent; Before the court issues a decision on evidence, it should first thoroughly exmine whether a fact for the determination of which scpecific evidence was admitted, whether it is crucial to resolve the matter, whether a specific fact requires to be proven, whether specific evidence has not been called only to delay the proceedings, and whether specific evidence in not to be dismissed under the law of procedure or material law – J. Klich-Rump, *Podstawa faktyczna rozstrzygnięcia sądowego w procesie cywilnym*, [The factual basis of court ruling in civil proceedings" Warszawa 1977, p. 103 and M. Malczyk-Herdzina, *Dopuszczalność dowodu z urzędu w procesie cywilnym,* [The *ex officio* admissibility of evidence in civil proceedings"] PS 2000, no. 6, p. 59 and subsequent.

[34] More, among others: J. Szarycz, *Ocena ekspertyzy psychiatrycznej i psychologicznej przez sąd,*[„The assessment by the court of psychiatric and psyhological opinion"] NP. 1978, no. 4; the SC judgment dated 7 December 1994, II URN 43/94, OSNAPiUS 1995, no. 8, item 102; the SC judgment 19 May 1998, II UKN 55/98, OSNAPiUS 1999, no. 10, item. 351; the SC judgment dated 29 July 1999, II UKN 60/99, OSNAPiUS 2000, no. 22, item 832.

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as possible so that the opinion can be comprehensible to the court and other parties in the proceedings. An opinion which comprises a list of omissions committed by a doctor or lower level staff , if no conclusions will be drawn from those omissions, will not be deemed a duly drafted opinion. It is particularly important for a person drafting an opinion to have all necessary competences or abilities, and whether an expert meets the requirements as regards a procedural ability to implement his knowledge is not determined by the expert – doctor's specialization but the scope of his competences on the merit[35].

The role of an expert, defined by the boundaries of his specialized knowledge, causes that that the court cannot and should not expect an opinion on how to resolve the matter[36]. To assess the matter, the court most frequently relies on the expert doctor opinion of particular specializations. The issue of appropriate presentation of an evidentiary thesis becomes particularly important. It happens that courts turn to experts with a direct question whether a given event is a workplace accident. Such practice appears to be erroneous because, in consequence, the burden of a judgment is transferred to experts[37]. An expert who has submitted a written opinion should in every case be summoned to a hearing[38]. When drafting an opinion, as it has already been mentioned above, an expert must exercise due diligence to be able to follow a possible cause and effect link correctly. It must also be emphasized that the expert should take into account the facts when drafting the opinion, and also consider legal circumstances dated back to the moment when an act has been committed, and not the moment of drafting the opinion .

An opinion by expert doctor in court proceedings can significantly affect the ruling – in many cases it constitutes the grounds for such ruling. In recent years the growing importance of such opinions has become more noticeable. That stems, among others, from the fact that at present medical sciences develop at fast pace, and an expert encounters new technologies

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35 The Supreme Court ["SC"] judgment dated 28 May 1997, IV KKN 80/97, Prok.i Pr.-wkł. 1997, no. 11, p. 7.

36 B. Gudowska, *Dowód z opinii lekarza biegłego, cz. 1* ["The evidence from expert opinion. Part 1"], Przegląd Ubezpieczeń Społecznych i Gospodarczych 2001, no. 6, p. 8 and subsequent.

37 B. Gudowska, *Dowód z opinii lekarza biegłego, cz. 2,* ["The evidence from expert opinion"] Przegląd Ubezpieczeń Społecznych i Gospodarczych 2001, no. 7, p. 10 and subsequent.

38 S. Rejman, *Dowód z opinii biegłego w postępowaniu cywilnym,* ["The evidence from expert opinion in civil proceedings"] Warszawa 1967, s. 9 and subsequent; the Supreme Court ["SC"] decision dated 15 February 1958, I CR 392/57, NP. 1959, no. 1, p. 98; the Supreme Court ["SC"] decision dated 13 March1969, II CR 65/69, OSPiKA 1970, no. 1, item 9.

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at almost every step. For the courts it is a major facility to base rulings often on unambiguous and firm conclusions which result from opinions of court experts.

3

THE FORM OF EXPLAINING SPECIALIZED KNOWLEDGE IN THE FIELD OF MEDICINE

The Supreme Court's judgment dated 3 March 1981 confirms the significance of an expert opinion[39], according to which a judicial body cannot resign from an expert opinion if ascertainment of a fact requires specialist knowledge. It also cannot reject all specialist opinions and adopt in the proceedings an own different position, this would be ascertainment of facts without required evidence. It is for the court to decide whether such specialist knowledge is necessary for a ruling in the matter. The Civil Procedure Code does not stipulate an obligation to summon other experts every time there is a discrepancy between opinions of experts on file or opinions of experts heard at a hearing, the above law grants to the court the right to evaluate expert opinions in view of the specialized knowledge on equal terms with other evidence; such right is the right to evaluate freely and not arbitrarily, the court, therefore, when evaluating, is and must be bound by certain limitations which result from the evidence taken, principles of logic, science and experience. The facts that a judge has knowledge in a specific area do not relieve the court from the obligation to take evidence by expert because a judge cannot replace an expert (thus, he would also deprive the parties of a possibility of asking questions and criticizing a particular view). The knowledge of the court is not evidence in a case, but only enables and facilitates the court to evaluate the evidence by expert.

Specialized knowledge of the court adjudicating in the matter cannot thus constitute grounds for an expert opinion to be deemed erroneous and resolution of a dispute cannot be based thereon even if the court in the justification of a decision cited extensive reference literature[40]. In turn, an

[39] IV KR 271/80, OSNPG 1981, no. 8, item 101.

[40] The S.C. resolution dated 30 October 1985, III CZP 59/85, OSNCP No. 9/1986, item 140 together with the gloss of A. Wiśniewski, NP 1987, no. 10, p. 127 and of W. Siedlecki, OSP 1986, no. 7–8, p. 139.

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expert, after being commissioned to draft an opinion must consider whether an issue which an authority to the proceedings addresses to him, does in fact require specialized knowledge; whether this is the area which is within the scope of his knowledge or abilities; whether it falls within the scope of his specialization. There is, after all, no *numerus clausus* of the abilities which qualify an expert to be appointed also in medical matters[41]. The judicial body may not resign from an expert opinion if ascertainment of a fact requires specialized knowledge. The judicial body may not reject all specialist opinions and assume an own different standing in the matter; this would mean that the facts are ascertained without required evidence[42]. Often an expert opinion may be conclusive for the matter. Therefore, a question arises whether a person (e.g. a doctor) – as a party to the proceedings – may somehow affect an expert opinion or have a possibility to control it? What requirements should such opinion meet to be in compliance with legal provisions?

The court expert qualifies as a personal evidentiary source, and his opinion is considered to be an evidentiary means which aims to explain and assist the court in resolving a civil or criminal matter. The Supreme Court in the decision dated 7 November 2000[43] found that the subject-matter of an expert opinion is not to present facts, but assessment of facts based on professional knowledge (specialized knowledge). Therefore, the opinion

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[41] Read more about the "modern evidence" in J. Turek in the gloss to the Supreme Administrative Court judgment dated 13 February 2003, II SA 1620/01, MoP no. 8/2003, p. 849 and subsequent. The confirmation of the above is to approve of the possibility of hearing evidence from the expert dowser (the SC resolution dated 30October 1985, III CZP 59/85, PiP No. 5/1986, p. 139 together with the glosses: J. Gurguiel, OSPiKA No. 7–8/1986, item 139, W. Siedlecki, NP No 10/1987, p. 127 and T. Wiśniewski, Pal. No 1/1987, p. 110), more extensive use of evidence from the nature (see: W. Stojanowska (edit.), *Dowód z badań DNA a inne dowody w procesach o ustalenie ojcostwa*, [„The evidence from DNA tests and other evidence the maters of establishment of paternity"] Warszawa 2000) and problems related to use in court proceedings of the evidence from the study of the print (J. Warylewski, *Dopuszczalność stosowania poligrafu w świetle nowej procedury karnej*, ["The admissibility of using the print in the light of new criminal procedure"] Pal. No 5–6/2000, p. 75–80 and the literaturę cited therein) or evidence from the opinion of the examination of scent – T. Hanausek, *Meandry osmologii, ["*The meanders of the science of scent"] Pal. No. 1–2/1998, p. 45; A. Karocki, J. Widacki, *Próby identyfikacji zapachów, „Problemy Kryminalistyki"* ["The attempts to identify scents, "The concerns of criminalistics:], vol. 95, p. 64, an also the judgment of the Appeal Court in Lublin dated 29 September 1998, II Aka 142/97 together with the gloss of J. Dzierżanowska, Pal. No. 7–8/1999, p. 194 and the Supreme Court judgment dated 5 November 1999 , V KKN 440/90 together with the gloss of K. Woźniewski, PiP no 9/2000, pp. 84–91.

[42] I. Piotrowska, *Pozycja i rola biegłego sądowego w świetle oczekiwań organu procesowego.* [„The position and role of a court expert in the light of expectations of the procedural bodies"] Arch. Med. Sąd. ["The Achieve of Court Medicine"] Krym. 2007, no. LVII: pp. 196–199; the Supreme Court judgment dated 3 March 1981, IV KR 271/80.

[43] I CKN 1170/98, OSNC 2001, no. 4, item 64.

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is not subject to verification, as opposed to evidence which proves facts on the basis of the truth and falseness criterion. The role of court experts is not to communicate to the court own observations regarding the facts of the matter (because this task is assigned to witnesses or parties). An expert doctor discusses the presented circumstances on the basis of specialized knowledge and professional experience, he formulates his own evaluation in the proceedings on the basis of the collected facts and evidence. It is not allowed to refer by an expert to own observations about the facts the ascertainment of which rests upon the court. The expert should base on evidence provided by the court. If it does not suffice to formulate a binding opinion or does not at all give a possibility to draft it, the expert is not allowed to take steps to supplement the evidence on his own (e.g. hear witnesses, documentary evidence). The court can revert to an expert appointed in the matter to determine whether and to what extent the evidence should be supplemented[44]. The conclusions of an expert, based on the available evidence, in principle, could be unambiguous and firm, drafted with expertise, based on the current knowledge, devoid of gaps and doubts. Nevertheless, if due to the lack of all facts or the current knowledge, it is impossible for an expert to deliver a categorical opinion, then the expert is considered to have fulfilled the obligation by indicating the extent of probability of the conclusions which have been drawn.

The court is not bound by the expert opinion and should assess it and other evidence on equal terms. Non-critical acknowledgement thereof would lead to a possibility to resolve the matter by the expert , and not by the court. The court assesses an opinion on the basis of a free assessment of evidence which characterizes in that the positive or negative admittance of the value of reasoning included in the opinion as well as justification why the expert's view did or did not meet the courts expectations should be taken into account. The control of an expert opinion occurs from the perspective of the principles of logical reasoning and the sources of cognition[45]. A degree of trust in the knowledge of an expert plays a significant role. The opinion by expert may not be assessed exclusively on the basis of the conclusion thereof. The court should verify correctness of its individual elements which decide about validity of conclusions thereof. Among the mentioned elements are:

[44] The Supreme Court ["SC"] judgment dated 22 May 1978, I CR 177/78, OSP 1979, no. 5, item 83.

[45] The Supreme Court ["SC"] decision dated 15 June 1970 r., I CR 224/70, the SC Bulletin of 1970, no. 11, item 203.

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indication of the legal grounds for drafting an opinion, indication of the scope thereof which is defined by a decision on admission of evidence, the facts and description of the method and manner of conducting research, conclusions of an expert. An experts, in his opinion, should discuss every fact (piece of evidence) and based on his specialist knowledge indicate these pieces which are helpful to determine the health status, and those which are not and why. He should also discuss every document concerning the treatment.

It is worth noticing that an opinion by an expert doctor in medical processes, because of its specific significance should include specific elements. The manner in which an opinion is provided is free, it has however been generally accepted that a doctor's opinion contain data from interviews, description of the subject, an answer to the thesis on the basis thereof, and justification[46]. It consists of the parts as follows: the headline identifying the matter (file reference number, a plaintiff complainant), a defendant (a doctor or institution against the decision of which an appeal is filed) and the cause of the matter (a pension, damages, compensation, compensatory pension), the query of the Court, case study, (which discusses the material on case file), examination – the documents filed by a person examined, medical history (statements of the person being interviewed, additional queries and answers thereto), description of physical examination, description of the tests conducted, e.g, spiromerty, audiometry, electrocardiography, laboratory tests), diagnosis, the analysis of provisions and specialist literature – if such a separate analysis is justified and the case study – discussion, which corresponds to an extended medical history report and the conclusions with a short justification[47]. The scope of the opinion depends on the question posed by the court, it can be limited (e.g. in a matter for damages in connection with body injury caused by a medical errors) or extensive (e.g. the link between an illness as a complication of an earlier surgery and the scope of information provided by a doctor prior to that). A doctor expert opinion is to provide the court with a tool which will assist to deliver a decision or convince him that only the assessment which is included therein is appropriate[48].

Such evidence does not precede the significance of other evidence and automatically does not possess a full convincing value. The court may reject

[46] The Supreme Court ["SC"] judgment dated 29 July 1999, II UKN 60/99, OSNIAPiUS 2000, 22, item 831.

[47] See more: R. Szozda, M. Procek, *Lekarz jako biegły sądowy*, ["The doctor as a court expert"] Nowiny Lekarskie [„Medical News"] 2007, no. 76, p. 263.

[48] The Supreme Court ["SC"] decision dated 7 November 2000, I CKN 1170/98, OSN IC 2001, 4, item 64.

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to give faith to the content of such an opinion and give faith to other evidence. To justify such a position the court indicates that the lack of criticism in acknowledging such an opinion would lead to a possibility that the matter is resolved by the expert and not by the court. It must be emphasized, however, that not always an expert opinion of specific content constitutes evidence proving liability of an individual for a medical error. There are instruments which serve to argue with the content of an opinion delivered by a specific expert, and even to enable proving a thesis opposite to that of the expert. The parties have certain limited controlling powers. They do not have to passively observe the matter. If they believe that the content of an expert opinion does not meet the requirements defined by the law or is contrary to those requirements, they may motion to hear the expert at a hearing, to supplement the opinion, that the same or other experts redraft the opinion or disqualify the expert, or admit other evidence in favour or against the opinion.

It must also be emphasized that an expert doctor has to be aware of the consequences of improper performance of his obligations. His conduct shall not be unpunished. He is personally liable for own actions, irrespective of whether he has been obliged to undertake a particular action by the court or by another authority[49]. The correctness of expert activities in court proceedings has significance also because of the subsidiary liability of the Treasury. An expert will, therefore, be liable for diligence, correctness of the merits of the opinion, providing it within a prescribed deadline. Turning back to the initial considerations, an expert should start preparing an opinion after he has found that the evidence which has been provided to him is sufficient and after the court has clearly defined the scope and direction of development of the opinion. . The opinion which lacks such basis can be claimed to be incomplete, unclear or not firm.

Violation of law by an enlisted expert may result in his disciplinary or criminal liability. There are examples which prove that because of non-appearance of an expert at a hearing or failure to be prepared to participate therein – failure to study the documentation – the matter has extended to

[49] See more: T. Ereciński, *Komentarz do art. 287 k.p.c. [in:] Kodeks postępowania cywilnego. Komentarz...*, ["The commentary to art. 278 of CPC [in:] „Kodeks Postępowania Cywilnego. Commentary ..."] p. 1198.

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last for several years, which exposed the Treasury to damage because a complaint was filed due to the lengthiness of the proceedings[50].

An expert is the entity that plays a significant role in every court proceedings, which includes the proceedings for doctor's liability. Participation of an expert in proceedings concerned with liability of another doctor is essentially a facilitation for the court in view of highly specialist methods of treatment which are incomprehensible to a lay person. The quality of an opinion drafted by an expert, its simplicity and transparency assist the court in comprehending the mechanisms of a possible cause and effect link. Indication by an expert of such link is crucial for the court. It must, however, be taken into account that, irrespective of the quality of an opinion and the level of complexity thereof, the court is independent and it is its exclusive decision whether an opinion should be admitted or not. In must be pointed out that the role of an expert is somewhat auxiliary, and an expert is a specialist, a sort of connecting element between the medical knowledge and the court that applies law. The task of an expert is to draft an exhaustive opinion which, at the same time will be comprehensible for the court, which in consequence can and should determine the truth.

4

THE SIGNIFICANCE OF DOCTOR'S EXPERT OPINION IN MEDICAL PROCEEDINGS

As it has been previously analyzed, a doctor expert opinion in medical proceedings is of significant evidentiary value, and the court cannot resign from taking such evidence if the aim is to explain specialized information in the area of medicine.

Above all, it must be stated that in Polish civil proceedings only an opinion by an expert doctor appointed in compliance with the civil law procedure has relevance. Therefore, the party cannot, in the procedure of taking evidence by doctor expert present a doctor's expert opinion which has been

[50] In accordance with the Supreme Administrative Court in Warszawa dated 27 May 2009 II GSK 971/08, the diligence to perform obligations of an expert means also the obligation to draft opinions timely, and justify the reasons of delay and the judgment dated 23 April 2008, VI SA/Wa 140/08.

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ordered by the party[51]. An expert opinion, even by a permanent expert, which has been ordered by the party and submitted on the case files may not be evidence in trial[52]. All private opinions drafted at the request of a party in the proceedings and submitted on file do not constitute evidence by the expert opinion, but are presentation of a party's standing[53]. A private opinion does not constitute evidence by court expert within the meaning of Art. 278 of CPC, but constitutes a mere statement of the party, though supported with the specialized knowledge.

Medical knowledge of an expert doctor should correspond to the facts that are to be ascertained, i.e, body injury, damage to health, illness. To be able to determine health condition, the specialist knowledge is required; therefore, pursuant to Art. 278 § 1 of CPC, the court should appoint a court expert doctors whose specializations correspond to illnesses of the complainant and basing on the opinions issued by them, resolve the dispute. Concurrently, it must be stated that in order to completely resolve a dispute, the court, in the course of issuing further opinions, should consider discrepancies between them, as well as claims raised by the parties, and the proceedings as to evidence should evolve together with newly admitted motions as to evidence and with the facts which influence the subject-matter of the dispute[54].

Inability to work constitutes a category under law, therefore, the qualification of specific facts on the basis of expert opinions within the scope which requires medical knowledge rests with the court, and not with experts. The persons possessing professional knowledge are entitled to evaluate and determine the level of advancement of illnesses, their influence on the functional condition of the body, therefore, these facts are to be proven only by the evidence by expert (Art. 278 of CPC). An expert opinion aims to help the court to properly assess evidence collected in the matter when specialized

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[51] See more: W. Wyjątek, *Wybrane aspekty tzw. opinii pozaprocesowej w procesie karnym*, ["The selected issues of the so named out of court opinion in criminal proceedings"] Prawo i Medycyna ["Law and medicine"] 2011, no. 1, p. 118; T. Widła, *Ekspertyza pozasądowa, Problemy Praworządności ["The out of court expert opinion. The problems of law and order"] 1989,* no. 7, p. 16; K. Woźniewski, *Tzw. prywatne opinie biegłych*, ["The so named private expert opinions"] Gdańskie Studia Prawnicze. ["Gdańsk law studies"] Przegląd Orzecznictwa. ["Case law review"] 2005, no. 3, p. 92;

[52] The Supreme Court ["SC"] decision dated 29 September 1956, 3 Cr 121/56, OSN 1958, no. 1, item 16.

[53] See: the judgment of the Appeal Court in Warszawa dated 29 January 2014, I ACa 1302/13, LEX no. 1438294;

[54] The judgment of the Appeal Court in Poznań dated 18 September 2013, III AUa 280/13, LEX no. 1381467.

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knowledge is required to do this. Therefore, court-medical opinions drafted in the matter by expert doctors for assessment of illness of the insured have substantial evidentiary value[55].

In medical trials , the court rules relying on the expert opinion, but not on the basis thereof. In matters of failure to exercise due diligence by a doctor, and such obligation rests upon him, (Art. 355 § 1 of CC), the court in order to determine doctor's fault uses s the specialized knowledge of experts. The court is, however, not bound by expert opinions within the scope which is reserved for exclusive competence of the court, i.e. in order to assess whether the objective and subjective conditions of guilt are met[56].

Despite the fact that, in principle, Art. 278 of CPC provides for the court's right and imposes no obliged on the court , the use by the court of an expert opinion who possesses specialized knowledge is obligatory. The Appeal Court in Szczecin, in a judgment dated 27 February2014[57] stated that in the matter the subject of which is the right to a disability pension in effect of damage to the body, the assessment of inability to work within the scope requiring the specialized knowledge, which conditions the existence of such right, must be based on the evidence by experts who possess appropriate medical knowledge which is adequate to the types of illnesses the insured suffers from. In a matter the subject of which is the right to a disability pension or damages because of a medical error, assessment of an inability to work or of the damage to health to the extent which requires the specialized knowledge must be supported by evidence by expert who possess appropriate medical knowledge which is adequate to the types of illnesses the insured suffers from[58]. The specificity of such evidence is expressed in that the merits in this opinion remain under control of the court, which does not possess specialized knowledge, in fact, only to the extent of compliance with the principles of logical reasoning and common knowledge. The knowledge criterion of an expert, imposes the primary importance in such assessment[59]. According to the settled case-law, the control over an expert

[55] The judgment of the Appeal Court in Gdańsk dated 10 October 2013, III AUa 190/13, LEX no. 1391860.

[56] The Supreme Court ["SC"] judgment dated 10 February 2010, V CSK 287/09, LEX no. 786561.

[57] The judgment of the Appeal Court in Szczecin dated 27 February 2014, III AUa 716/13, LEX no. 1444861.

[58] The Supreme Court ["SC"] judgment dated 12 January 2010, I UK 204/09, LEX no. 577813.

[59] The Supreme Court ["SC"] judgment dated 27 September 2002, II CKN 1354/00, LEX no. 77046.

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opinion should consist in checking – from the perspective of the principles of logic and life experience – the reasoning in the justification of the opinion.

Because of the importance of the specialized knowledge possessed by an expert doctor, in case there are unclear issues, or contradictions within the opinion, it needs to be supplemented. Under Art. 286 of CPC, the court may, if necessary, demand an additional opinion from the same or another experts. Such a necessity can specifically arise when two experts appointed in the matter provide contradictory opinions. It does not, however, result from the above that the court in such case must to appoint a third expert. If, for example, an expert appointed later will, in a detailed and convincing manner, discuss the issues from the opinion submitted earlier by pointing out its flaws and defects, the court may stay with that opinion and base the ruling thereon[60]. The court is obligated to admit evidence by further experts or institutes if a necessity to do so arises, namely, when an already drafted opinion contains substantial gaps, is incomplete because it does not provide answers to evidentiary theses, is unclear or justified improperly or cannot be verified in any manner, which is, when the opinion submitted in the matter does not enable the judicial body to verify the reasoning contained therein about correctness of the conclusions. Above all, it must be indicated that it is the task of experts of different specializations to examine genesis of an illness of the examined person and how a specific incident affected creation or development of a specific illness.[61] Admitting evidence by a research institute is justified and necessary when a need for complex examinations arises, it is difficult to make a diagnosis, which requires specialist research or hospital observation and when contradictions in available opinions cannot be removed in any other manner.[62]. If the court has noticed ambiguities or gaps in drafted opinions which disable proper clarification of the contentious issue, which is crucial for resolving the case which requires specialized knowledge, then it should take advantage from the right provided in Art. 286 of CPC and turn to the same experts, or possibly – if necessary – to other court experts for an opinion. The lack of such an attempt does not enable to effectively refute a claim of violating Art. 278 § 1

[60] The Supreme Court ["SC"] judgment dated 24 August 1972, II CR 222/72, OSP 1973, no. 5, item 93.

[61] The Supreme Court ["SC"] judgment dated 9 November 1972, II CR 470/72, LEX 7180.

[62] The Supreme Court ["SC"] judgment dated 5 May 2009, I UK 1/09, and also the judgment of the Appeal Court in Łódź dated 14 February 2013, I ACa 1074/12.

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and Art. 286 in connection with Art. 391 § 1 of CPC[63]. The mere dissatisfaction of the party with the expert opinion, if it does not raise any specific claims against it, does not provoke a necessity to appoint another expert or experts[64]. The opposite standing would mean that it is necessary to hear evidence from all available experts to make sure whether some of them were of the same opinion as the party[65]. Moreover, it must be stated that the court, under own examination of the facts, cannot take an opposite position about health condition of a person pursuing claims for damages to those expressed in expert opinions[66].

It is unacceptable in medical proceedings for an expert to be heard as witness, as it is the case in the Anglo-Saxon system[67]. A person who, because of specialized knowledge that he possesses has observations that are not available to other persons (e.g. a doctor who treats a patient), should, in principle, be heard as a witness, and therefore it is necessary to appoint another person to be an expert, who previously did not encounter facts which are crucial to resolve the matter[68]. In a judgment dated 17 November 2011[69] the Supreme Court explained that: "the relationship between evidence by witness and that by expert result from Art. 258 of CPC and Art. 278 § 1 of CPC. Under the first of the article as witness testimony serves to determine facts, under the other the role of an expert is to assess those facts on the basis of specialized knowledge. If a witness possesses such specialized knowledge, and concurrently has observations about crucial issues in the matter, his testimony will remain information about the facts which he has observed and assessed. Nevertheless, the validity of such assessment requires an expert opinion, presented in such a form as to guarantee the parties control

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63 The Supreme Court ["SC"] decision dated 29 August 2013, I CSK 20/13, LEX no. 1396359.

64 The Supreme Court ["SC"] judgment dated 15 February 1974, II CR 817/73, *unpublished* and the Supreme Court ["SC"] judgment dated18 February 1974, II CR 5/74, the SC bulletin, 1974, no. 4, item 64.

65 T. Ereciński, *The commentary to art. 278 of CPC [in:] „Kodeks Postępowania Cywilnego. Postepowanie rozpoznawcze. Część Pierwsza*, ["The civil Procedure Code. The examination proceedings. Part I"] edit. T. Ereciński, Warsaw 2012, p. 1185.

66 The Supreme Court ["SC"] judgment dated 13 October 1987, II URN 228/87, PiZS 1988, no. 7, p. 62.

67 See, among others, B. Sonny Bal, *The Expert Witness in Medical Malpractice Litigation*, Colmbia; Annas GJ. Scientific evidence in the courtroom. The death of the Frye rule. N Engl J Med. 1994; 330:1018–1021; Crosby E. *Medical malpractice and anesthesiology: literature review and role of the expert witness.* Can J Anaesth. 2007; 54:227–241.

68 The judgment of the Appeal Court in Lublin dated 28 May 2013, I ACa 124/13, LEX no. 1327585.

69 III CSK 30/11, LEX no 1129116.

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and influence on the manner the issues requiring specialized knowledge are presented in the matter. In a judgment dated 8 November 1976[70], the Supreme Court expressed an opinion, shared in the examined matter, that a person, whose observations, because of specialized knowledge he possesses, are not available to other persons (e.g. a doctor who treats a patient), should, in principle, be heard as a witness, and that the power of an expert is to be granted to another person who previously did not encounter the facts are crucial to resolve the matter".

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CONCLUSIONS

A patient who files a lawsuit for damages due to a medical error must evidence the grounds for his claim which also include the fault of a doctor. The presumption of guilt does not burden the doctor, he only undertakes to treat the patient with due diligence the lack of which the patient must prove to the doctor (that does not concern examples in which it is possible to admit the obligation of result). In court proceedings a doctor should, however, prove that he duly performed his duties and acted in accordance with the principles of medical knowledge – and a patient who has raised claims for damages present evidence to the contrary.

Concurrently, it is emphasized that the court can also admit evidence that has not been indicated by the parties, and possible defects in medical documentation cannot be used in the proceedings to the patient's disadvantage[71]. In a judgment from the year 1953 the Supreme Court emphasized that the patient, generally, does not possess sufficient knowledge to be able

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[70] I CR 374/76, OSNC 1977, no. 10, item 197.

[71] J. Kroner, *Trzeba wiedzieć, czego żądać po błędzie lekarza.* ["It is necessary to know what to demand after the doctor's error"], http://www.rp.pl/artykul/93292,176368_Trzeba-wiedziec- -czego-zadac-po-bledzie-lekarza.html; Trudna droga dochodzenia praw pacjenta. ["A difficult route to pursue rights of a patient"] http://prawo. money.pl/aktualnosci/wiadomosci/artykul/trudna;droga;dochodzenia;praw;pacjenta,36,0,233508.html; M. Rzemek, *Trudno wygrać ze szpitalem ["It is difficult to win with hospital"]* http://www. rp.pl/artykul/93292,402330_Trudno-wygrac-ze-szpitalem. Html; Błędy medyczne ["Medical errors"] http://hassist.pl/bledy-medyczne.html http://prawo.gazetaprawna.pl/artykuly/435585,szpitale_ placa_coraz_wiecej_za_bledy_lekarskie.html; Szpitale płacą coraz więcej za błędy lekarskie. ["Hospitals pay more and more for medical errors"] http://praca.gazetaprawna.pl/porady/433770,lekarz_odpowiada_za_szkody_powstale_w_wyniku_zlej_diagnozy.html

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to assess own illnesses and medical actions taken – therefore, crucial evidence in the matter will be an expert opinion based on "specialized knowledge" which should help the court to properly assess the doctor's conduct in the matter, being still a piece of evidence only. According to the law, when a doctor is entered in the list of court experts, there are specific requirements to be met. In every instance, an expert opinion aims to facilitate the court's proper assessment of the evidence collected in the case if the specialized knowledge is required to do so. The court cannot have any doubts as to reliability or biased attitude of the expert, and as regards an opinion drafted by him – as to the lack of the specialized knowledge at the highest professional level. The Supreme Court emphasizes that the court should not limit itself to a passive repetition of expert opinions, but should comprehensively examine the collected evidence and pass a judgment in compliance with the principle of free assessment of evidence. The experts are not appointed to present legal assessment and conclusions or to decide the matters, as that remains within the competence of the court – their role should be limited to the examination of facts in the matter and compliance of the rules of conduct with the rules of a doctor's medical knowledge, his duties, and to answering the questions of the court. Nevertheless, frequently opinions by experts are rather far from being objective. Often, as a result of falsely interpreted solidarity of representatives of the profession, experts disregard the lack of knowledge and diligence of a doctor and the organizational omissions in health care centers. Their opinions are very often unclear, ambiguous, they pose different hypotheses and the possibilities of damage which do not assist the court in properly assessing the events in matters for compensation. Because of that, higher standards of conduct for expert doctors should be considered, the manner in which they are appointed and improvement of effectiveness of their work. The need for a "specialist" training for experts as well as thorough preparation of them to perform the function of an assistant to court must be considered, because appropriate propensity as well as knowledge of law are necessary to be able to properly perform the function of an expert, comprehend the multiple „conflicts of interest", and tend not to remain in the middle.

Unsubstitutability of expert evidence physician creates a difficult situation in the command, which is caused by a distrustful relationship plaintiffs towards the health care. The opinions of experts in such proceedings very often are an expression of solidarity poorly understood professional. The professional solidarity causes prejudice during preparing the expert opinion.

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It leads to the development of commissioning several opinion by various experts, which causes adverse effects on the pending conduct and credibility of the experts. Or sometimes an expert refuses to issue an opinion.

So the main conclusion is to change the regulations by imposing clear responsibilities and respective penalties for not preparing an opinion.

Because of the fact, that the role of the expert in court proceedings is significant, one can compare it to the helper of judge. That's why the most important issue, conditioning obtaining proper opinion which will be the basis for findings of fact, is the proper cooperation of an expert with the court and reliability in performing outsourced duties. It is therefore necessary to emphasize the demand judicial cooperation with representatives of local medical professional self on the proper selection of an opinionated doctor in the case, so as not to expose the parties to the adverse effects of the wrong choice, which in turn can lead to excessive length of proceedings.

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