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## Medical Negligence (ECPRD Request No. 4842)<sup>1</sup>

Zaniedbania medyczne (wniosek ECPRD nr 4842)

In Poland, patients' rights are protected by the instruments included in the Act on Patient Rights and the Patient Ombudsman. This law provides for a procedure for dealing with medical negligence claims, which are referred to as medical event. Other types of proceedings related to a claim arising from a medical error include civil proceedings, proceedings relating to the professional liability of a person performing a medical profession and criminal proceedings in a criminal case. As a rule, it can be concluded that the initiation of one of the proceedings excludes the possibility of using another form of applying for a claim.

**Keywords:** medicine, compensation

W Polsce prawa pacjenta chronią instrumenty zawarte w ustawie o prawach pacjenta i Rzeczniku Praw Pacjenta. Ustawa ta przewiduje procedurę rozpatrywania roszczeń z tytułu zaniedbań medycznych, które określa się mianem zdarzenia medycznego. Inne rodzaje postępowań związanych z roszczeniem z tytułu błędu lekarskiego to postępowania cywilne, postępowania dotyczące odpowiedzialności zawodowej osoby wykonującej zawód medyczny oraz postępowanie karne w sprawie karnej. Co do zasady można stwierdzić, że wszczęcie jednego z postępowań wyklucza możliwość skorzystania z innej formy dochodzenia roszczenia.

**Słowa kluczowe:** lek, odszkodowanie

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In response to ECPRD Request No. 4842 regarding „Medical Negligence” the Bureau of Research provides the following information:

### How are medical negligence claims addressed in your jurisdiction?

In Poland, a medical event is understood as infection of a patient with a biological pathogen, damage to the body or health of the patient, as well as his death resulting from the following factors, if inconsistent with current medical knowledge:

- 1) diagnosis, if it caused inappropriate treatment or delayed proper treatment, contributing to the development of the disease,

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- 2) treatment, including surgery,
- 3) use of a medicinal product or medical device.

A patient who believes that a medical error may have occurred in his case or that he was treated incorrectly has several legal options:

- the procedure provided for in the Act of 6<sup>th</sup> November 2008 on Patient Rights and the Patient Rights Ombudsman<sup>2</sup>,
- civil proceedings,
- criminal proceedings,
- proceedings related to professional liability.

Patients' rights are protected by the instruments included in the Act on Patient Rights and the Patient Ombudsman. The application for determination of a medical event is submitted to the district committee adjudicating on medical events competent for the seat of the hospital. The patient has one year to submit an application for establishing a medical event. This date is counted from the day on which he learned about the occurrence of the medical event. In this application, the occurrence of the medical event, as well as the damage that resulted from it, should be made more plausible. The assessment of whether a medical event actually took place rests with the district committee for adjudicating on medical events. The performance of the committee's tasks does not constitute the exercise of public authority. The purpose of the proceedings before the district committee is to determine whether the event which resulted in property or non-property damage constituted a medical event. After the deliberation, the district committee issues a written decision on a medical event or the lack of it, along with a justification. A valid decision on the determination of a medical event authorizes to take steps to satisfy the applicant's claims for compensation or pecuniary compensation from the hospital or the insurer. It should be noted that the compensation will only apply to damages related to hospital care provided on the territory of the Republic of Poland.

### **What are the processes and procedures for calculating and paying compensation arising from a medical negligence claim?**

The decision of the district committee for adjudication on medical events is the basis for initiating enforcement procedures before the district committee. Enforcement procedures are taken against the medical entity running the hospital or against the insurer if the given medical entity has an insurance policy against liability for medical events and such protection covers the event referred to in the committee's decision. The district committee does not adjudicate on the amount of damage and the amount of compensation but takes statutory actions aimed at completing the enforcement procedures in relation to the decision on the determination of a medical event.

<sup>2</sup> Consolidated text in Dziennik Ustaw [Journal of Laws] of 2020, item 849 as amended.

The process of calculating and paying compensation resulting from a medical event claim is set out in Article 67k of the Act on Patient Rights and the Patient Rights Ombudsman. This provision specifies the actions of the insurer after the district committee issues a judgment.

„1. Within the scope regulated by this Act, the insurer is bound by the decision of the district committee

2. The insurer, through the district committee, within 30 days from:

1) receipt of the notification referred to in Article 67j paragraph. 9,

2) delivery of the district committee's decision on a medical event issued as a result of submitting an application for reconsideration of the case – presents the applicant with a proposal for compensation and redress. The proposal may not be higher than the maximum amount of compensation and redress specified in paragraph 7.

3. If the insurer fails to submit, within the time limit referred to in paragraph 2, proposed compensation and redress, the insurer is obliged to pay them in the amount specified in the application, not higher than that specified in paragraph 7.

4. In the case, referred to in section 3, the district committee shall issue a certificate stating the submission of the application for the establishment of a medical event, the amount of compensation or redress, and the fact of failure to submit the proposal referred to in paragraph 3. The certificate constitutes an enforcement title. The provisions of Part II, Title I, Part Three of the Code of Civil Procedure shall apply.

5. The entity submitting the application, within 7 days from the date of receipt of the proposal referred to in paragraph 2 submits, through the district committee, to the insurer a declaration of its acceptance or rejection.

6. Along with the declaration of acceptance of the proposal referred to in paragraph 2, the applicant submits a declaration of waiver of all claims for compensation and pecuniary compensation for the harm suffered that may result from events recognized by the district committee as a medical event in terms of damage, which were revealed by the date of submission of the application. The declaration made by the heir representing the other heirs referred to in Article 67d paragraph. 2, paragraph 3, is effective against the others.

7. The maximum amount of benefit (compensation and redress) for one medical event for one patient in the case of:

1) infection, bodily injury, or health disorder of the patient – amounts to PLN 100,000;

2) death of the patient – PLN 300,000.

In the case referred to in section 6, the compensation and redress proposal presented by the insurer constitutes an enforcement title. The provisions of Part II, Title I, Part Three of the Code of Civil Procedure shall apply.

9. Presentation by the insurer of the proposal referred to in paragraph 2, or the payment of compensation or redress by them, do not constitute recognition of the claim for the purposes of its pursuit in civil proceedings.

10. The provisions of paragraphs 1–9 and the provisions issued on the basis of paragraph 11, to the extent to which they relate to the insurer, shall apply to the medical entity running the hospital, in the case of:

1) exhaustion of the sum insured with regard to all medical events in a hospital, the effects of which are covered by the insurance contract referred to in Article 67i paragraph. 2, point 2, or failure to conclude this agreement.

(...)”

The Act on Patients’ Rights and the Patient’s Rights Ombudsman does not specify the minimum amount of compensation and pecuniary compensation for the applicant. It only indicates that the amount cannot exceed the maximum amount of the benefit, which in the case of infection with a biological pathogen, health disorder, and bodily injury is PLN 100,000 and in the event of the patient’s death – PLN 300,000. These amounts are guaranteed sums defining the upper limit of the insurer’s liability. If the amounts indicated are exhausted, the insurer will no longer be obliged to pay the benefit to the patient, legal representative or his heirs. In accordance with Article 67k paragraph 10 of the Act, the financial consequences of exhausting the sum insured or not concluding an insurance contract are transferred to the medical entity running the hospital, so the hospital will be obliged to pay the benefit.

Detailed rules for determining the amount of compensation and redress are set out in the Regulation of the Minister of Health of 27<sup>th</sup> June 2013 on the detailed scope and conditions for determining the amount of benefit in the event of a medical event<sup>3</sup>. The provisions of the ordinance define the elements taken into account by the medical entity running the hospital or by the insurer submitting the offer. These elements have been established separately for medical events resulting in the patient’s death, and separately for events resulting from the infection of the patient with a biological pathogen, bodily injury or health disorder. The amount of the benefit for the patient’s death is set in the ordinance in the maximum amount of PLN 100,000 of redress and PLN 200,000 of compensation. In the case of events resulting from infection of a patient with a biological pathogen, bodily injury or health disorder, the elements taken into account when determining the proposed amount of benefit by the medical entity running the hospital or the insurer are: degree of health deterioration (level of bodily harm) resulting from a medical event (weighting 60%, with a maximum amount of PLN 60,000) deterioration of the quality of life, which includes the need to provide care of third parties (in the weight of 10%, with a maximum amount of PLN 10,000), loss of earning capacity or the inability to undertake work or continue

<sup>3</sup> Dziennik Ustaw of 2020 [Journal of Laws], item 750.

education (5% weight, with a maximum amount of PLN 5,000) and the last element – treatment nuisance or other harm related to a medical event (25% weight, with a maximum payment amount of PLN 25,000).

## **Civil liability**

In the case of medical malpractice, the method of claiming compensation is also a court trial in a civil action for compensation or redress. Civil liability is a financial liability; it serves to compensate for the damage suffered by the injured party to legally protected goods and to compensate for the harm suffered (mental and physical suffering). Injury is often the result of improper treatment (possibly medical malpractice). The doctor's liability depends on the nature of the legal relationship between him/her and the patient (whether the treatment was carried out in a medical facility, private clinic, or whether the doctor performed private medical practice). In this case, an action must be filed with a civil court, demanding compensation and redress. It should be emphasized that in the case of parallel civil proceedings pending in connection with the same medical event, it is impossible to initiate and conduct proceedings to establish a medical event.

### **In addition to compensation, are there further proceedings involving the health service or medical professionals that may arise from such claims, such as disciplinary action or further litigation?**

Other types of proceedings related to a claim arising from a medical error include proceedings relating to the professional liability of a person performing a medical profession and criminal proceedings in a criminal case.

It should be noted that in the event the district committee for adjudication on medical events determines that parallel proceedings concerning the professional liability of a person performing a medical profession or criminal proceedings are pending, the committee issues a decision to suspend the proceedings to establish a medical event. The conduct of proceedings in connection with professional liability is independent of the conducted civil or criminal proceedings.

## **Professional liability**

In the case of professional liability, its grounds are regulated in the Act of 2<sup>nd</sup> December 2009 on Medical Chambers<sup>4</sup>. Doctors are subject to professional liability for conduct that violates the principles of medical ethics and the provisions related to the practice of the medical profession. The Act defines such behaviour as

<sup>4</sup> Consolidated text in Dziennik Ustaw [Journal of Laws] of 2021, item 1342.

„professional misconduct”. As a court of original jurisdiction, the case is heard by the District Medical Court on the basis of an application for punishment filed by the professional liability ombudsman. The court competent to consider the case will be the medical court of the regional medical chamber of which the accused is a member at the time of the initiation of the proceedings. In this case, a complaint should be written to the District Medical Chamber, describing the entire facts (the course of treatment and attaching photocopies of medical documentation in possession, certified as true to the original), as well as the justification of the violation of medical ethics or the rules of practicing the profession. After the complaint is received, it is transferred to the professional liability ombudsman, who, after receiving the complaint (information) and getting acquainted with it, carries out checks. The verification activities are aimed at preliminary examination of the case, whether there are grounds for initiating proceedings. In the event there are grounds, an investigation is carried out. The explanatory proceedings may end either with discontinuation or with a motion for punishment. The aggrieved party is a party to the proceedings regarding the liability of a doctor and may appoint up to two attorneys. The representative may be: a doctor, an attorney-at-law, a legal advisor. Sanctions for professional misconduct may include admonition, reprimand, financial penalty, prohibition to perform managerial functions, limitation of the scope of activities in the performance of the medical profession, suspension of the profession, deprivation of the profession.

### **Criminal liability**

In the case of criminal liability, liability for one of the crimes against life and health, e.g. under Article 156 of the Act of 6<sup>th</sup> June 1997 – the Penal Code<sup>5</sup>, (unintentionally causing damage to health), Article. 157 § 1 of the Penal Code (average bodily harm). In this case, a notification of the commission of the crime should be submitted to the nearest police unit or the district prosecutor’s office. The notification may be in writing or verbally for the record. In this case, as before, the course of treatment should be described in detail, the consequences resulting from it, and photocopies of the medical documentation should be attached. If the submitted notifications justify the charge of commission of a crime, preparatory proceedings are initiated. The preparatory proceedings end either with an indictment or with the discontinuation of the proceedings. The aggrieved party may appoint an attorney-at-law, and may also act as an auxiliary prosecutor in a court trial. Criminal liability may result in a fine, restriction of imprisonment, imprisonment. The court may prohibit the practice of the profession for

<sup>5</sup> Consolidated text in Dziennik Ustaw [Journal of Laws] of 2020, item 1444 as amended.

a period of 1 to 10 years. The court may order on the injured party's behalf the payment of the interest or, at their request, the obligation to provide redress for the damage caused.

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