



## REVIEW PAPER

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# Provincial Commission for Adjudication of Medical Events as an alternative choice of indemnization of medical damage – functional and system analysis

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## Abstract

**Introduction.** Since January 1, 2012 a patient who suffered so-called medical damage has the right to choose between two alternative routes to compensate for medical damages, i.e. legal or extrajudicial.

**Aim.** To present the consequences of the out-of-court compensation for medical damages for patients on the basis of existing legal acts and the literature.

**Materials and methods.** The analysis of legal acts and literature regarding extrajudicial compensation.

**Conclusions.** The provisions regulating the out-of-court medical compensation for patients are inconsistent and unclear. As a result of the application of the regulations in force by Provincial Commission for Adjudication of Medical Events, there are difficulties for the injured patients to receive compensation or redress. The analysis of legal acts and literature shows that only court proceedings are the most effective way to assert their rights for patients who have suffered so-called medical damage.

**Keywords.** law, patient, responsibility, medical event

## Introduction

Change of the provisions of the Act on Patient Rights and the Patient Rights Ombudsman (hereinafter called the Law on Patients' Rights) was enforced on 1 January 2012.<sup>1</sup> One of the most important goals of amending the provisions of the Act on Patients' Rights was to enable patients to claim compensation for medical errors without using the only legal path. In the justification, the project promoter also pointed out that the purpose

of amending the regulations is to shorten the time of consideration of patients' cases due to medical errors. The justification stresses the fact that consideration of a case for damages for medical malpractice in court lasts on average over 4 years, while the current law introduces a solution that is to allow compensation to a patient in a 3-month period.<sup>2</sup> It should be noted that already at the stage of works over the draft of amendments to the Law on Patients' Rights was criticized by the represen-

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tatives of legal and medical circles and by associations representing patients' rights.<sup>3</sup>

On April 28, 2011, the provisions of the Act on Patient Rights, the Ombudsman for Patients' Rights and the Act on Compulsory Insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau, enforced on January 1, 2012, were amended. The exceptions were the provisions regarding the submission of candidates to provincial commissions for adjudicating on medical events, which came into force within 14 days from the date of the announcement of the above Act, i.e. on June 17, 2011. A new chapter 13A was introduced, in which, i.e. the concept of a medical event and provisions determining damages and compensation in the event of medical events, as well as the legal basis for the functioning of provincial commissions for adjudicating on medical events (hereinafter referred to as a commission) were added. Procedures related to the conduct of proceedings at the Commission for Adjudication of Medical Events have been defined.<sup>4</sup>

The provisions of the Act on Patient Rights should be applied only to medical events that have occurred after 1 January 2012 events that took place before 1 January 2012 remain outside the commission's assessment.<sup>4,5</sup>

## Aim

The aim of the paper is a critical analysis of legal regulations and the functioning of extrajudicial roads in the compensation of medical damages.

The work deals with the structure and functioning of out-of-court redress at the Commission for Adjudication of Medical Events and presenting the consequences of extrajudicial roads.

## Material and methods

The above topic was based on a critical analysis of current legislation from the scope of operation of the commission for adjudication on medical events, as well as analysis of literature in Polish and foreign scientific journals dealing with the subject of medical errors and out-of-court liability without fault. In order to set the time frame for the collected legal acts, the documents were limited to the date of publication between 2011 and 2018 due to the fact of establishing a Provincial Commission for the Adjudication of Medical Events. The thematic review of literature, cross-sectional and original research was also included. The article also takes into account the professional experience of the author, who in the years 2012-2017 was a member of the Commission for Adjudication of Medical Events. The LEX Legal Information System, Legalis 2013 Legal Information System, Google Scholar, PubMed and articles searched for on the websites of publishers of scientific journals were used as the source of the literature.

## Genesis of the creation and definition of a medical event

The out-of-court medical method of compensation in Poland is an alternative for patients and is modelled on the Swedish No Fault Patient Insurance (NFPI), i.e. a guilt-free liability system.<sup>6</sup>

Guilt-free adjudication is also a global trend. In many countries, both in the world and in the European Union, there is a need to introduce a new compensation system in connection with damage to patients during treatment. The dynamic development of medical knowledge means that the traditional civil liability model, based on the principle of guilt, does not lead to full compensation of patients' claims.<sup>7</sup> In some cases, it is difficult to prove medical negligence or even organizational failures in the case of a healthcare provider.

On the other hand, there is an increase in awareness among injured patients and an increase in the number of court cases in the European Union. The waiting time for determining a case or waiting for the first hearing is extended. Problems with evidence are the reason why patients (even after a long period of legal proceedings) may not get adequate compensation.<sup>8</sup>

It is worth emphasizing that there is a serious problem related to reporting the occurrence of medical damage and related barriers reported by healthcare professionals. Research conducted by Jalal P. et al. in 2015 among healthcare workers (doctors, nurses) showed that 50% of the respondents made a medical error in relation to the patient but did not report this fact.<sup>9,10,11,12</sup> Several international reports indicated the occurrence of medical errors and their impact on the health care system. In the United States, medical errors are classified as the eighth main cause of death. In 2008, 6.3 million injuries were reported, and about 1.5 million were associated with a medical error. The estimated average total error cost was about \$13,000. In Australia (2003), approximately 1% of all hospital patients suffered from an adverse health event due to a treatment error. Medical error is an unintentional injury due to treatment or practice that is initially aimed at improving the health of patients. Since the early 90s of the last century, awareness has increased that patients are at risk of injury that can be avoided in the immediate consequences of healthcare. Damage that can be avoided evade the trust of the patient and family to the service provider and institution.<sup>13-15</sup> Revealing the error is an effective technique for restoring lost trust. Medical errors are a serious problem in healthcare, most doctors do not formally report errors, and do not even learn from them. The disclosure of medical errors in healthcare facilities is considered a key element of ongoing activities to improve patient safety and quality of care.<sup>16</sup>

In Poland, the patient or the entitled person has the right to choose between two possibilities of pursuing

claims, i.e.: court and out-of-court, that is, submitting an application to the commission.

An important issue is the fact that the commission does not rule on the extent of damage and guilt, but only the fact of an event and causal relationship between this event and damage, to be able to determine whether it is a medical event or not. A medical event is therefore an objective category, depending on the current state of medical knowledge. Disposition of art. 67a of the Act on Patient's Rights, specifies that a medical event is inconsistent with current medical knowledge regarding: diagnosis if it caused inappropriate treatment or delayed proper treatment, contributing to the development of the disease. It also includes treatment, including the performance of an operation, the use of a medicinal product or a medical device that produces effects in the form of: infection of the patient with a biological pathogen, injury or disorder of health or death of the patient.<sup>17</sup>

It is worth emphasizing that the regulations of Chapter 13a of the Act on Patient Rights regarding principles and the mode of determining compensation and redress in the case of medical events should be applied only to medical events resulting from the provision of health services in a hospital within the meaning of the Act on Medical Activity. Therefore, it should be clearly stated that commissions have no competence to adjudicate for other types of health services than hospital services. Additionally, it should be noted that a medical event refers to an act that may be committed by any medical professional, i.e. a person participating in the process of providing health care during the patient's stay in the medical entity conducting the hospital.<sup>18</sup>

### Structure of the Commission for Adjudication of Medical Events

The provisions of the Act on Patient Rights regulate the status, composition and tasks of the commission. The commissions operate at the relevant provincial offices. The commission consists of 16 members with knowledge of patients' rights and fully public rights. Half of them have at least higher education and a master's degree or other equivalent in the field of medical sciences who have been in the medical profession for at least 5 years or hold a doctorate in medical sciences. The other half must have at least higher education and a master's degree in the field of legal sciences, and should be employed in positions related to the application or creation of law for at least 5 years or have a PhD degree in legal sciences.<sup>18,19</sup>

The voivode appoints 14 members of the commission, while two members of the commission are appointed by the Minister of Health and the Patient's Rights Ombudsman. The voivode appoints 4 members from the candidates nominated by professional self-governments of doctors, dentists, nurses and midwives and laborato-

ry diagnostics, 4 - from the candidates nominated by the bar's professional self-government and self-government of legal advisors and six by social organizations acting for patients' rights. It should also be mentioned that in art. 67 g par. 5 of the Act on Patient's Rights, the legislator specified the obligation of the commission members to warranty confidentiality of information about the patient obtained during the proceedings before the commission, also after the membership in the commission has ceased. The commission's term of office is 6 years. In the event of dismissal or death of a member of the commission, the term of office of the member appointed in his place also expires on the expiry of the term of office of the entire commission.<sup>20-22</sup>

Knowledge in the field of patient rights is an obligatory requirement for all commission members. It should be pointed out that in the provisions of the Act on Patient's Rights, however, there is no requirement to check the knowledge of candidates for commission members from the above-mentioned scope. The candidates for commission members have no obligation to document the above knowledge. No form of verification was foreseen, e.g. in the form of an appropriate course or post-graduate study or even a positive result of the interview. Previous practice has shown that commission members receive training in patient rights only after receiving the nomination and not before obtaining it.<sup>23</sup>

The legislator also pointed out that the members of the commission cannot be persons convicted for intentional crime or intentional fiscal offences, legally punished by disciplinary or professional punishment, against whom a ban on a specific position, performance of a specific profession or conducting a specific economic activity or banned to conduct activities related with care, treatment, education of minors or taking care of them.<sup>24</sup>

The issue of dismissing a member of the Commission is not clearly defined by law. The regulations do not cover the dismissal of a member of the Commission in the event of avoiding the duties of a member of the provincial commission or their improper performance. There is also no appropriate body or institution to supervise and give opinions that would evaluate the work of a Commission member.

The provisions of the Act on Patient's Rights define the situation of exclusion of a member of the commission from participation in the proceedings. The first exclusion concerns the situation when a member of the commission is the applicant or remains in such a legal relationship that the result of the proceedings affects their rights and obligations. The next situation includes the circumstances in which a member of the commission remains with the person submitting the application in a relation that raises doubts as to their impartiality.

Obviously, the exclusion is also indisputable in a situation where the application is submitted by a spouse, relatives or in-laws in a straight line, but also side relatives up to the fourth degree and side affinity to the second grade of the applicant. The exclusion also applies to the relationship of adoption, care or guardianship with the applicant. The legislator does not allow the possibility of participating in commission meeting if the commission member is also a statutory representative or a representative of the applicant.<sup>25,26</sup>

A prerequisite for becoming a commission member to work in the adjudicating commission is to make a declaration on the lack of conflict of interests, which was specified in the Ordinance of the Minister of Health of December 8, 2011 on the model statement on the absence of a conflict of interest filed by a member of Provincial Commission for Adjudication of Medical Events.<sup>27</sup>

The provisions of the Act on Patients' Rights clearly show that the commission is headed by the Chairman, whose tasks include appointing a four-member commission according to the order of receipt of the request for establishing a medical incident from the alphabetical list of members, 2 of them must represent medical professions and 2 of them must represent a legal profession. In practice, the above principle of designating the composition of the commission results in the fact that it may not include a physician. In cases where the subject of the application at the commission meeting is e.g. the assessment of whether a diagnosis that could cause inappropriate treatment or delay the proper treatment of the patient, the doctor's participation in the commission should be obligatory. Another problem is the identification of an even number of members taking part in the meeting. The provisions of the Act state that in the case of an equal number of votes, the chairman's vote is decisive as the commission adopts resolutions by a majority of votes.

The competence of the competent voivode is to determine the remuneration for participation in the commission meeting. It should be noted that the above competence causes that the amount of remuneration for commission members may be different.<sup>28</sup>

### Application for establishing a medical event

Sine qua non condition of the entire procedure before the commission is the submission of an application by the patient or his legal representative in case of infection, injury or health disorder. However, in the case of a patient's death, this activity is performed by heirs. Thus, the legislator narrowed the catalogue of persons entitled to submit the application to establish a medical event. It should be pointed out that the above regulation in the Act on Patient Rights is inconsistent with art. 446 §3 and §4 of the Civil Code. It stems from the above

regulation in the Civil Code that if the victim's death resulted from a bodily injury or a bodily disorder, the court may award appropriate compensation to the closest family members of the deceased if his death results in a significant deterioration of their life situation, and the court may also grant to the closest members of the deceased's family an appropriate sum as compensation for the harm suffered. Regulation in the Law on Patient Rights - in comparison with the Civil Code - narrows the circle of persons entitled to compensation in the event of the patient's death. The Act also does not determine which heirs are concerned, so whether only in the first line or also further. It can be assumed, however, that they are both heirs of the will and hereditary on the basis of statute.<sup>29, 30</sup>

It should be pointed out that: "the legislator idealistically assumed, in each case, full capacity on the part of heirs. Experience shows that situations in which a financial issue arises are often extremely conflictogenic. "The legislator also determined that the application for establishing a medical incident is made to the commission responsible for the location of the hospital. It should be pointed out that the above-mentioned regulation results in the fact that proceedings for establishing a medical incident may be conducted outside the applicant's place of residence, which very often causes the costs of the proceedings to establish a medical incident to be increased. In this situation, it is justified - in the author's opinion - to clarify the provisions of the Act on Patients' Rights, which will also enable the submission of an application to the commission responsible for the place of the medical event or the place of residence of the applicant. The provisions of the Act on Patients' Rights show that the application for establishing a medical event can also be submitted by the applicant's attorney.<sup>31,32</sup> It should be added that the submitted application should be accompanied by evidence making the circumstances indicated in the application viable, e.g. medical documentation, payment confirmation, and in the event of the patient's death, the decision on the inheritance. In the light of the provisions of the Act on Patients' Rights, the applicant is required to make the medical event viable i.e. through submission of medical documentation.<sup>33,34</sup>

Another procedural element to which attention should be paid are the time limits for submitting the application. Previous practice indicates that the application is considered formally at meetings convened for this purpose or by the chairman of the commission. In the light of the above, it would be advisable to accept a solution to the examination of the application submitted by the chairman of the commission without convening a commission meeting for this purpose.<sup>35–37</sup>

The provisions of the Act on Patients' Rights also do not specify the possibility of submitting the application for consideration to another commission. It should

be pointed out that such a change would be justified in the case of allegation of reasonable doubts as to the impartiality of commission members or in the absence of an adjudication panel in a given commission in the required number of cases to be considered.<sup>22,38</sup>

The Commission shall forward the application completely and duly at the immediate request to the head of the hospital administering the hospital with which the application is related and to its insurer. The provisions of the Act on Patients' Rights define a 30-day period for the head of the therapeutic entity and its insurer to present his position from the date of receipt of the application along with the evidence to support it. Failure to present a position or presentation by a health care provider after the 30-day period from the date of receipt of the application is tantamount to acceptance of the application in the scope regarding the circumstances indicated therein and the proposed compensation amount and redress.<sup>16,18,39,40</sup>

However, the provisions of the Act on Patients' Rights do not regulate the issue of making the medical documentation available to the parties to proceedings. In practice, the commissions sending the application inform the parties about the possibility of access to medical records at the commission's headquarters. Lack of detailed regulations causes many difficulties for the parties to the proceedings.

### Competences of the Commission for Adjudication of Medical Events

The Article 67i paragraph 1 of the Act on Patients' Rights states that the purpose of the proceedings at the commission is to determine whether the event, which resulted in material or non-material damage, was a medical event. The Commission has no power to determine the extent of the damage suffered by the patient or, in the event of their death – by their heir, or to assess the compensation and redress proposed by the insurer.

The Act on Patients' Rights specifies that the commission notifies the applicant, head of the therapeutic entity running the hospital and its insurer about the date of the meeting at least 7 days before the meeting.

The provisions of the Act on Patients' Rights define directly the competences of the commission in the scope of the proceedings. These are:

- a call for explanations by the applicant, the head of the hospital administering entity with which the application relates, and persons who performed the medical profession in the hospital operating entity and other persons employed or associated with it, during the period in which, according to the application a medical event took place or has been indicated in the application as persons who may have information relevant to the proceedings and the insurer;

- request for documentation maintained by the hospital operator,
- making visits to hospital premises and facilities;
- consultation with a doctor in a given field of medicine from the list of members of the Medical Commission operating at the Patient Rights Ombudsman or a provincial consultant in a given field of medicine, pharmacy or other field applicable in health care.

Regarding the aforementioned powers of the commission, it should be pointed out that the legislator did not specify any sanctions in the event that the summoned witnesses did not appear in order to provide explanations at the commission meeting. In addition, the provisions of the Act on Patients' Rights also do not specify the date of issuing an opinion by an appointed expert. Another issue is the Commission's power to request medical records. However, the provisions of the Act on Patients' Rights do not specify whether it is admissible from all medical entities running hospitals or only from the medical entity running the hospital which is a party to the proceedings.<sup>28</sup>

An important problem related to the issued ruling by the commission is also the specification of the type of this document. If we assume that the legislator appointed commissions as entities performing specific public tasks, i.e. determining whether a medical event occurred, then the documents issued by provincial commissions will be attributable to the value of official documents. Medical errors are one of the major threats for patient safety in all countries. Medication errors are common medical mistakes that can lead to serious consequences and even death of patients. Medical errors are one of the major threats for patient safety. Medication errors are common medical mistakes that can lead to serious consequences. No presentation by the insurer or healthcare entity within 30 days, proposals for compensation and redress result in the obligation to pay the amount specified in the application. In the above situation, the commission deciding on a medical event issues a certificate in which it states the submission of an application to establish a medical event, the amount of compensation or non-contentment and the fact that the above-mentioned proposal has not been presented by the insurer or hospital operator.<sup>18,41,42</sup>

The provisions of the Act on Patients' Rights also define a complaint as a remedy for a declaration of non-compliance with the decision of the commission.<sup>33</sup>

The Commission investigates a complaint in closed session within 30 days of its receipt in a 6-person panel. It is a debatable matter to consider a complaint with a 6-person panel. It is worth recalling that commission members are people with legal or medical education. In the case of a complaint filed against the law, the decision of the commission concerns only the statement or its ab-

sence of violation of the proceedings at the commission. In this situation, the adjudication panel will only deal with the procedural and not the medical issue. The question then arises whether it is necessary for persons with medical training to consider a legal and procedural issue. At the complaint stage, there is no need to expand the composition with another two people. The provisions of the Act on Patients' Rights also do not specify the effects of including a complaint for non-compliance with a law.<sup>43,44</sup>

## Conclusion

Presented issues regards out-of-court resolution of court disputes in Poland, it raises doubts due to imprecise and unclear legal regulations, which instead of facilitating and shortening the patient's claim for damages without using the court path obstruct, among others, the process of the patient receiving compensation. Despite many reservations about the status and competence of the commission, one cannot ignore the fact that the regulation in question is assessed as breakthrough. Based on the current practice, the thesis is that introducing the regulation on out-of-court resolution of court disputes in Poland to the Law on Patients' Rights was right, but the provisions require immediate amendment because these functions are far non-transparent and imprecise. Despite the obligation to issue a decision on a medical incident by the commission, or its absence within 4 months from the date of submitting the application, the applicable provisions make it difficult to obtain redress or monetary compensation for any harm that may result from events recognized by the provincial commission for medical events. Unfortunately, until now, the Legislature has not made significant steps in the matter of amending the regulations. The appointed Provincial Commissions for Adjudication of Medical Events for the new term of 2018-2024 operate on the basis of unchanged regulations.

Currently, court proceedings still remain the most effective alternative for a patient who asserts their claims for generally understood medical damage.

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