

Types of physician's liability for medical errors on a contract of employment and a civil law contract

Rodzaje odpowiedzialności lekarza za błędy medyczne w ramach umowy
o pracę oraz umowy cywilnoprawnej



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Abstract

As errors in medicine occur, it is important to obey all the requirements necessary to avoid the liability for medical damages. Physician's liability depends on a type of legal relationship within which he acts.

Key words: medical error, doctor's liability, civil contract

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Introduction

Despite doctors' best efforts, errors in medicine occur [1]. Doctor's liability for medical errors might be of different types: civil, criminal, ethical. Regarding the first type of liability, it is perceived as significant due to its financial consequences [2]. The range of doctor's liability differs significantly depending on a title of medical services. Namely, a contract of employment guarantees financial secure, while civil contract stipulates joint and several liability of a doctor and a medical entity. In turn criminal, likewise ethical, liability of a doctor is a type of personal responsibility, which can be borne only by a natural person.

Civil — financial liability

Polish Labour Code regulation of the article 120 concerns employee's protection against a third-party damage claims. The only entity obliged to compensate the damage is an employer. An employer has a recourse claim against an employee, whose actions or omissions have caused a damage. However, the above mentioned claim is limited to the amount of three remunerations, unless a physician

has caused a damage by a deliberate action. Thus it would be wrong to imagine that an employer's liability is limited in any other way by this rule of law [3].

In case a doctor enters into a civil contract with a medical entity as an individual medical practice, he bears joint and several liability for damages caused while performing medical activity. Contract of employment guarantees financial secure, as claims for medical damages are high, including not only compensation, but often also a disablement pension.

Requirements of civil liability

In case a medical service is given within the scope of health insurance guaranteed by the state, a doctor shall be liable for a tort, namely an act or omission that gives rise to injury or harm to another for which courts impose liability [4]. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers [5]. The liability for private medical services is also strengthened by a contractual bound, as a patient may also require certain level of due diligence while performing contractual obligations by a doctor.

Contractual liability imposes sanctions for non-observance of contractual obligations, while tort law attaches sanctions to breaches of rules of conduct, which are imposed by statutes [6]. As a result, while performing private medical services, a doctor may be liable for both: tort and contractual obligation [7]. To establish a right to compensation against a doctor, an injured patient must establish the existence of a duty of care between doctor and patient, breach by the doctor of that duty and a direct causal relation between that breach of duty and the complained of injury [8]. Only some percentage of hospital inpatient admissions result in an adverse event, from among which cause claims for medical negligence cause a court action. However, both the number of claims and the awarded compensations increase as failures to uphold a suitable standard of care appear more often [9].

The requirements of tort liability are as follows: a fault, a damage and a causal link between both [10]. The fault occurs when a party responsible for damage can be charged with an objective and subjective impropriety of behaviour. The objective element is omission of a legal order – violation of specific orders or prohibitions. Subjective element is expressed in a wrong psychological attitude of a perpetrator of a damage and manifests itself in the lack of knowledge, carelessness in the proceedings or negligence consisting in failure to comply with due diligence [11].

Diagnostic error

A diagnostic error is either diagnosis of a non-existing disease (a positive error) or not recognising the existing disease, which leads to a deterioration of patient's health [12]. An error committed on this stage of treatment usually results from faulty premises, on which the physician resisted and affects the entire treatment process, often causing irreversible effects [13]. A doctor may shirk responsibility if his wrong diagnosis has been justified by the symptoms [14].

However, if it resulted from such acts or omissions as e.g. a failure to perform all the necessary tests, lack of proper analysis, misinterpretation of the X-ray, the liability is inevitable. Some authors define diagnostic error as a diagnosis, that was unintentionally delayed, wrong or missed [15]. The others consider it to be a failure to establish an accurate and timely explanation of the patient's health problem or communicate that explanation to the patient [16].

Therapeutic error

Therapeutic failure may be a consequence of a previously made diagnostic error, but it may also consist in e.g. performing a surgery despite the existence of medical reasons. Therapeutic error is as a choice of a wrong method of

treatment, improperly performed surgery, widening of an operating field without a necessity.

Therapeutic errors can occur in the administration phase, in the prescription phase, in the transcription phase and in the preparation phase [17]. The judiciary as an example of therapeutic error has indicated a mistake to prescribe pyralginum for asthma in the form of an injection for oral use at home, without predicting the possibility of an anaphylactic shock, which led to the death of the patient who was deprived of immediate professional help [7].

Error of performance

The improper performance of correct medical decisions is to be considered as a performance error. Sometimes it is also called a technical error [18]. Executive error means incorrect implementation of diagnostic or therapeutic recommendations and is much more complex than decision error. The category of executive error should be understood as the execution of medical service that resulted in patient's damage [19].

The essence of a joint and several liability of a doctor

Joint and several liability of a doctor results in certain rights of a patient, who is planning to start a litigation concerning his interests. He is entitled to demand his full or partial compensation, from all or several entities obliged to compensate a damage or from each of them separately. The entities jointly liable are: a physician, a medical entity in which he performs his medical activity and insurers of both. Compliance with an obligation to compensate a damage by any of liable debtors releases the others.

The essence of joint and several liability consists in the fact, that each of the joint and several debtors is liable for the fulfilment of the entire obligation. However, final scope of each entity's liability depends on its participation in a damage. If a patient has suffered from technical error of a doctor, who performed his medical activity on a civil contract, such a doctor shall bear the liability himself [20]. If a damage has been caused by a defectiveness of a medical equipment that should be provided by a hospital, a doctor shall not be liable for such a damage [21].

Conclusions

Patient's damage, being a consequence of therapeutic procedures, which are considered to be activities aimed at protecting human life and health, is devoid of the features of illegality on condition, that the procedure is performed in a manner consistent with generally recognised principles of knowledge and medical art [22]. An error in medical practice is an act (omission)

incompatible with medical science in the field available to the physician [23].

An error in medical art depends on whether certain doctor's behaviour in a specific situation, as well as all the circumstances existing at the time of performing a medical procedure, have been coherent with the requirements of current knowledge, medical science and commonly accepted medical practice. Each physician is required to perform his profession in accordance with current medical knowledge, available methods and means of prevention, diagnosis and treatment, in accordance with principles of professional ethics and due diligence [24, 25].

Despite increasing attention to issues of patient safety, medical damages continue to occur, causing direct and consequential injuries to patients, families, and health care providers. A doctor performing medical activity on a civil contract is subjected to joint and several liability for damages caused to patients, while contract of employment guarantees employer's liability for damages caused by his employee.

Conflict of interest(s)

The author declare no conflict of interest.

Streszczenie

Ponieważ błędy w medycynie występują, to ważne jest, aby przestrzegać wszystkich wymagań niezbędnych do uniknięcia odpowiedzialności za szkody medyczne. Odpowiedzialność lekarza zależy od rodzaju stosunku prawnego, w ramach którego on działa.

Słowa kluczowe: błąd medyczny, odpowiedzialność lekarza, umowa cywilnoprawna

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References

- Mallory Su, Weller J, Bloch M, et al. The individual, the system, and medical error. *BJA CEPD Reviews*. 2003; 3(6): 179–182, doi: [10.1093/bjacepd/mkg179](https://doi.org/10.1093/bjacepd/mkg179).
- Nesterowicz M. *Medical Law*. TNOiK, Toruń 2002: 147.
- Gray TC, Shelley FC. A medico-legal view. *Br J Anaesth*. 1978; 50(7): 721–728, indexed in Pubmed: [678357](https://pubmed.ncbi.nlm.nih.gov/678357/).
- Judgement of the Appellate Court in Białystok, III APA 4/17, 27.11.2017 r., Legal Information System LEX number 2423331.
- Legal Information Institute, Cornell Law School. <https://www.law.cornell.edu/> (14.04.2018).
- Judgement of the Appellate Court in Łódź, III APA 4/17, 09.09.2015, Legal Information System LEX number 1808681.
- Supreme Court Judgement, 24.12.1954 r., I C 1673/53; *Law and Medicine* 2008/3/140143. : 140143.
- Body DI. Civil and criminal actions against anaesthetists. *Br J Anaesth*. 1994; 73(1): 83–92, indexed in Pubmed: [8038061](https://pubmed.ncbi.nlm.nih.gov/8038061/).
- Bryden D, Storey I. Duty of care and medical negligence. *Continuing Education in Anaesthesia Critical Care & Pain*. 2011; 11(4): 124–127, doi: [10.1093/bjaceaccp/mkr016](https://doi.org/10.1093/bjaceaccp/mkr016).
- Judgement of the Supreme Court, 24.10.2013, IV CSK 64/13, Legal Information System LEX number 1413156.
- Judgement of the Appellate Court in Gdansk, V ACa 990/14, Legal Information System LEX number 1770650.
- McLennan S, Rich LE, Truog RD. Apologies in medicine: legal protection is not enough. *CMAJ*. 2015; 187(5): E156–E159, doi: [10.1503/cmaj.131860](https://doi.org/10.1503/cmaj.131860), indexed in Pubmed: [25070986](https://pubmed.ncbi.nlm.nih.gov/25070986/).
- Finch JD. Legal obligations and responsibilities of the medical practitioner. *Br J Anaesth*. 1987; 59: 870–876, doi: [10.1093/bja/59.7.870](https://doi.org/10.1093/bja/59.7.870).
- Judgement of the Appellate Court in Białystok, 09.03.2016, I ACa 817/15, Legal Information System LEX number 2016283.
- Graber ML, Franklin N, Gordon R. Diagnostic error in internal medicine. *Arch Intern Med*. 2005; 165(13): 1493–1499, doi: [10.1001/archinte.165.13.1493](https://doi.org/10.1001/archinte.165.13.1493), indexed in Pubmed: [16009864](https://pubmed.ncbi.nlm.nih.gov/16009864/).
- Balogh EP, Miller BT, Ball JR. Committee on Diagnostic Error in Health Care; Board on Health Care Services; Institute of Medicine; The National Academies of Sciences, Engineering, and Medicine. *Improving diagnosis in health care*. National Academies Press, Washington 2015.
- Krähenbühl-Melcher A, Schlienger R, Lampert M, et al. Drug-related problems in hospitals: a review of the recent literature. *Drug Saf*. 2007; 30(5): 379–407, indexed in Pubmed: [17472418](https://pubmed.ncbi.nlm.nih.gov/17472418/).
- Hébert PC, Levin AV, Robertson G. Bioethics for clinicians: 23. Disclosure of medical error. *CMAJ*. 2001; 164(4): 509–513, indexed in Pubmed: [11233873](https://pubmed.ncbi.nlm.nih.gov/11233873/).
- District Court Judgement i Wrocław, 13.02.2015, I C 478/12, Legal Information System LEX number 1841633.
- Pacella F, Collini S, Angelucci F, et al. Infections in hospital departments. What is hospital responsibility? *Clin Ter*. 2017; 168(4): e266–e270, indexed in Pubmed: [28703843](https://pubmed.ncbi.nlm.nih.gov/28703843/).
- Committee no Medical Liability and Risk Management; Council on Quality Improvement and Patient Safety. Principles of patient safety in pediatrics. *Pediatrics*. 2001; 107(6): 1473–1475, doi: [10.1542/peds.107.6.1473](https://doi.org/10.1542/peds.107.6.1473).
- Schenkel S. Promoting patient safety and preventing medical error in emergency departments. *Acad Emerg Med*. 2000; 7(11): 1204–1222, indexed in Pubmed: [11073469](https://pubmed.ncbi.nlm.nih.gov/11073469/).
- Nelson LJ, Morrissey MA, Kilgore ML. Damages caps in medical malpractice cases. *Milbank Q*. 2007; 85(2): 259–286, doi: [10.1111/j.1468-0009.2007.00486.x](https://doi.org/10.1111/j.1468-0009.2007.00486.x), indexed in Pubmed: [17517115](https://pubmed.ncbi.nlm.nih.gov/17517115/).
- Schenkel S. Promoting patient safety and preventing medical error in emergency departments. *Acad Emerg Med*. 2000; 7(11): 1204–1222, indexed in Pubmed: [11073469](https://pubmed.ncbi.nlm.nih.gov/11073469/).
- Nelson LJ, Morrissey MA, Kilgore ML. Damages caps in medical malpractice cases. *Milbank Q*. 2007; 85(2): 259–286, doi: [10.1111/j.1468-0009.2007.00486.x](https://doi.org/10.1111/j.1468-0009.2007.00486.x), indexed in Pubmed: [17517115](https://pubmed.ncbi.nlm.nih.gov/17517115/).