

Augustynowicz Anna, Strzelec Paweł, Wrześniewska Wal Iwona, Bobiński Krzysztof, Kowalska Mariola, Partyka Olga, Czerw Aleksandra. The scope of obligatory civil liability insurance of entities conducting medical activities and liability for damages resulting from violations of patients' rights in the Polish law. *Journal of Education, Health and Sport*. 2018;8(4):357-366. eISSN 2391-8306. DOI <http://dx.doi.org/10.5281/zenodo.1232075> <http://ojs.ukw.edu.pl/index.php/johs/article/view/5443> <https://pbn.nauka.gov.pl/sedno-webapp/works/864096>

The journal has had 7 points in Ministry of Science and Higher Education parametric evaluation. Part b item 1223 (26/01/2017).
1223 Journal of Education, Health and Sport eissn 2391-8306 7

© The Authors 2018;

This article is published with open access at Licensee Open Journal Systems of Kazimierz Wielki University in Bydgoszcz, Poland

Open Access. This article is distributed under the terms of the Creative Commons Attribution Noncommercial License which permits any noncommercial use, distribution, and reproduction in any medium, provided the original author (s) and source are credited. This is an open access article licensed under the terms of the Creative Commons Attribution Non commercial license (Http://creativecommons.org/licenses/by-nc/4.0/) which permits unrestricted, non commercial use, distribution and reproduction in any medium, provided the work is properly cited.

This is an open access article licensed under the terms of the Creative Commons Attribution Non commercial License (http://creativecommons.org/licenses/by-nc/4.0/) which permits unrestricted, non commercial use, distribution and reproduction in any medium, provided the work is properly cited.

The authors declare that there is no conflict of interests regarding the publication of this paper.

Received: 05.03.2018. Revised: 10.03.2018. Accepted: 27.04.2018.

The scope of obligatory civil liability insurance of entities conducting medical activities and liability for damages resulting from violations of patients' rights in the Polish law

**Anna Augustynowicz¹, Paweł Strzelec², Iwona Wrześniewska Wal³,
Krzysztof Bobiński¹, Mariola Kowalska¹, Olga Partyka⁴, Aleksandra Czerw^{1,4}**

¹Department of Public Health, Medical University of Warsaw, 02-097 Warsaw, Poland

²District Chamber of Legal Advisers, 20-607 Lublin, Poland

³School of Public Health of the Centre for Postgraduate Medical Education, 01-813 Warsaw, Poland

⁴Department of Economic and System Analysis, National Institute of Public Health–NIH, Poland

Correspondence to: e-mail: aleksandra.czerw@wum.edu.pl

Abstract: In the elaboration, the objective scope of obligatory civil liability insurance of entities conducting medical activities in the context of protection from damages resulting from violations of patients' rights was presented. Based on art. 25 sec. 1 of the Act on Medical Activity, insurance

protection covers damages that are the result of the provision of medical services or an illegal omission to provide them. It concerns consequences of erroneous actions related to the provision of medical services as well as damages occurring as a result of an unjustified refusal to provide a medical service or premature cessation of the provision of services if there was an objective prerequisite to continue them driven by medical grounds. The objective scope of insurance protection resulting from obligatory civil liability insurance of an entity conducting medical activities does not apply – as a rule – to damages resulting from violations of patients’ rights. It cannot be considered that a damage related to violation of a patient’s right constitutes a consequence of the provision of medical services or an illegal omission of the provisions of medical services. Such damage is a consequence of a violation of the patient’s right. Financial consequences of patients’ claims resulting from violations of patients’ rights will be borne by entities conducting medical activities. If a patient requests a financial redress, its payment will not be made from the obligatory civil liability insurance policy. The violation of patient’s right to medical services constitutes the only exception.

Key words: patients’ rights, medical staff, medical services, civil liability insurance, financial redress

Introduction

“The concept of patients’ rights aims at underlining the particular nature of the social and legal situation of a man being a patient from the perspective of entities providing medical interventions as well as in the eyes of the entire society”. A feature deciding about the practical significance of patients’ rights is undoubtedly the possibility to efficiently execute them in front of competent and independent legal protection bodies [1].

The legal system applicable in Poland ensures protections to patients if their rights are violated as well as when damage is made during the provision of medical services. In such situations, patients can pursue their claims both within criminal as well as civil proceedings. Protection of patients based on the Criminal law due to sanctions resulting from it is most onerous for the originator. Depending on the type of medical staff’s behaviours we deal with and the consequences of such

behaviours, the originator may be subject to liability under certain provisions of the Criminal Code [1]. In the case of patients' rights, the Criminal Code provides for liability for violation of a patient's right to secrecy of information related to it (art. 266 of the Criminal Code), the right to give consent to medical services (art. 192 of the Criminal Code) as well as the right to medical services (art. 155-157 of the Criminal Code and art. 160 § 2 of the Criminal Code).

Regarding the civil law protection of patients' rights, the Act on Patients' Rights and the Ombudsman for Patients' Rights [2] provides that "in the case of culpable violation of patients' rights, the court may grant an appropriate amount to the victim as a financial compensation for the damage suffered based on art. 448 of the Civil Code" (liability due to violation of personal rights). The above-mentioned act also determines the circle of entities obliged to observe patients' right, simultaneously making them addressees of potential claims as a result of a violation of these rights [3]. Pursuant to art. 2 of the act, observance of patients' rights constitutes an obligation of public authorities that are competent in the field of health care, the National Health Fund, entities providing medical services and medical staff.

The applicable provisions of law impose an obligation to enter into a civil liability insurance agreement on entities conducting medical activities. Based on art. 25 sec. 1 of the Act on Medical Activity [4] and § 2 sec. 1 of the Regulation of the Minister of Finance on obligatory civil liability insurance for entities conducting medical activities [5], the insurance agreement covers damages that are the result of the provision of medical services or an illegal omission of the provision of medical services. These regulations determine the scope of insurance protection within obligatory civil liability insurance for entities conducting medical services.

A matter requiring settlement is whether damage that occurred as a result of a violation of patients' rights is subject to insurance protection resulting from the formula of obligatory civil liability insurance for entities conducting medical services within the Republic of Poland. Establishing whether damage, which occurred as a result of a violation of patients' rights, is a damage, which simultaneously is a consequence of the provision of medical services, or whether an illegal omission of the provision of medical services is essential.

Review method

Within this review, the applicable legal acts as well as monographs along with a hard copy and electronic publications in journals in Polish within the field of the civil law as well as the medical law were analysed. Also, the decisions of Polish courts were analysed. The considered publications originate from 2010-2013.

Review results

The wording of art. 25 sec. 1 of the Act on Medical Activity assumes that insurance protection may apply to entities conducting medical activities. Additionally, the objective scope of obligatory civil liability insurance applies to the consequences of erroneous actions related to the provision of medical services as well as damages occurring as a result of an unjustified refusal to provide a medical service or premature cessation of the provision of such services if there was an objective prerequisite to continue them driven by medical grounds [6]. In essence, it also constitutes violation of patients' rights to medical services.

In art. 25 sec. 1 of the Act on Medical Activity, the legislator provides only for medical services. They do not refer to civil liability for damages that are the result of the provision of services other than medical, e.g. related to improper accommodation or board, etc." [6]. It can be clearly concluded from this that the legislator leaves certain areas of civil liability, which are not consequences of the provision (or omission of the provision) of medical services, beyond the objective scope of insurance protection.

The term "medical service" constitutes an element of a broader category, i.e. "health care service". In accordance with the Act on health care services financed from public funds [7], health care services include medical services, health care benefits in kind and benefits associated (art. 5 item 34 of the Act). The term "medical service" is defined by the legislator in art. 2 sec. 1 item 10 of the Act on Medical Activity, assuming that it involves "activities aimed at preserving, saving, restoring or improving health as well as other medical activities resulting from the treatment process or separate provisions regulating the principles of their provision".

In this measure, the relation between the terms "medical services" and "patients' rights" should be determined. Based on the quoted art. 2 sec. 1 item 10 of the Act on medical Activity, the term "medical service" is limited to the sphere of activities of a strictly medical nature aimed at patients' health. Patients' rights – although commonly used in the language of the law and in the legal

language – do not have their uniform (not to mention statutory) definition. It is fairly noticeable in the Polish legal doctrine that one can speak about patients' rights in the patient-public authority relation and the relation between patients and a particular entity entitled to provide medical services [6] [8]. Another aspect related to the patient-service provider relation has greater significance.

The catalogue of patients' rights does not have a uniform nature. It includes rights, which remain in a strict relation with the medical services provided, as well as rights of which the relation with such services is less visible. To provide an example, we can indicate that the execution of a given patients' right can constitute a condition of legality of a medical service (e.g. respecting the right to information and the right to give consent is a *sine qua non* condition of legality of medical services). On the other hand, the execution of rights, which does not constitute a condition of legality of a medical service, but is aimed at the improvement of the comfort of its provision (the right to pastoral care, the right to respect private life), is equally important. Observance of patients' rights accompanies the provision of medical services. However, it cannot be stated that damage related to violation of patients' rights is a consequence of the provision of medical services or an illegal omission of the provision of medical services. Such damage is a consequence of a violation of patients' rights. Consequently, damages that are the result of a violation of patients' rights remain beyond insurance protection specified in art. 25 sec. 1 of the Act on Medical Activity. An exception concerns a violation of patients' right to medical services. In practice, a violation of this right occurs when medical services are not provided, even though the patient's condition justifies their provision as well as when services are provided contrary to the current medical knowledge. Such damages can be considered to be the result of the provision of medical services or an omission of their provision. Therefore, a violation of the patients' right to medical services is covered by insurance protection within obligatory civil liability insurance.

Additionally, it must be noted that irregularities related to the provision of medical services as well as violation of patients' rights can be independent of one another. In practice, we may deal with a situation in which medical services were provided correctly, and still patients' rights were violated. And vice versa – medical services were provided incorrectly or their provision was omitted, while patients' rights were not violated.

Pursuing claims for financial compensation for the suffered damage by patients in practice constitutes a relatively frequent situation [9] [10]. In most cases, they are claims related to violation of personal rights such as health and life, i.e. a personal injury or causing a health disorder, usually

resulting from a medical error of a diagnostic or therapeutic nature, or omission of the provision of a medical service by medical staff [11]. Claims for financial compensation for the suffered damage in relation to violation of patients' rights, which were not related to a medical service provided in a faulty manner or its omission, are less frequent. Most frequently, compensation claims resulting from violation of patients' right are related to claims for damages and (or) compensation being a consequence of a medical service provided in a faulty manner or its omission.

According to the Supreme Court, a personal injury constitutes violation of tissue continuity in the form of a wound (external or inside the body) the essence of which are certain anatomical changes which may also cause violation of the functionality of an organ of the body (e.g. organ of hearing) [12]. While a health disorder constitutes a violation of the principles of the functioning of the body in the form of certain disturbances in the functioning of the body, being an effect of a personal injury or with a spontaneous nature (e.g. as a result of HCV infection). Both forms of damages may manifest themselves in physical suffering as well as mental suffering (e.g. depression, trauma, etc. also of a transient nature) [13]. The forms of damages referred to above are undoubtedly "consequences of the provision of medical services or illegal omission of the provision of medical services" and as such they remain within the scope of the obligatory civil liability insurance for entities conducting medical activities.

However, an entire catalogue of damages that may be suffered by patients, which result from numerous activities accompanying the provision of medical services, but certainly are not consequences of their provision (or omission), can be indicated. To present an example, we can refer to a decision of the Supreme Court dated 20 September 2013 in which the court decided that damage occurred as a result of violation of the right to freedom of conscience in relation to granting the sacrament of anointing of the sick during hospitalization. It happened against the patient's will, as he is an atheist, and without his knowledge as the patient was in a pharmacological coma. The patient argued that when he found out about being anointed, he was shocked, he suffered from a nervous breakdown, his physical and mental condition deteriorated, and he was at risk of another heart attack [14]. The damage referred to by the patient was a consequence of violation of his personal rights as a result of actions undertaken by people who were not medical staff (in this case a hospital chaplain), which were not medical services, as well as their consequences. The occurrence of damage as a result of activities accompanying the provisions of medical services can be caused also by behaviours resulting in violation of the patients' right to respect for the dignity

of the patient. It concerns e.g. inappropriate comments regarding the patient's appearance, offending the patient, allowing third persons to enter the examination room during the examination (it occurs often that a nurse enters the room to bring the patient's medical records), lack of screens in collective rooms in which doctors examine patients, surprise of the patient by participation of other people in the examination, imposing beliefs on patients or commenting their opinions, tactless commenting on the patient's lifestyle [15].

In the cases referred to above, it cannot be assumed that the potential patient's damage was a consequence of the provision or omission of the provision of medical services. It resulted from behaviours, which constituted violation of patients' right. It is also worth noticing that although patients' rights usually accompany the provision of medical services, in some cases they may be completely disconnected from them. To present an example, we can refer to a situation when a given person has contact with the service provider (e.g. they register themselves to use a medical service, sometimes it is accompanied by presentation of medical documentation collected by the patient), and the service itself is not provided, e.g. due to the patient's resignation. If in such a situation, disclosure of confidential information concerning the patient (e.g. concerning the course of the previous treatment) takes place, it certainly can be assumed that the patients' right to secrecy of information related to them was violated). If the patient requests compensation, its payment will not be made from the obligatory civil liability insurance policy. In this case, the potential damage (non-property) is not a consequence of the provision of services, as no medical services were provided for the patient. It is not a consequence of illegal omission of the provision of medical services as failure to provide medical activities by the service provider resulted from a legal decision of the patient. Therefore, damages resulting from violation of patients' rights should not be identified with damages resulting from the provision of medical services or illegal omission of the provision of medical services.

Conclusions

1. Potential damages resulting from violation of patients' rights should not be identified with damages resulting from the provision of medical services or an illegal omission of the provision of medical services.
2. The objective scope of insurance protection resulting from obligatory civil liability insurance of an entity conducting medical activities within the Republic of Poland as a rule does not cover

damages resulting from violation of patients' rights specified in the Act on Patients' Rights and the Ombudsman for Patients' Rights.

3. The patients' right to medical services is the only right violation, which is covered by insurance protection within obligatory civil liability insurance. Such damages can be considered to be consequences of the provision of medical services or omission of the provision of medical services.

4. Financial consequences resulting from potential patients' claims related to violation of patients' rights will be borne by entities providing medical services.

References

1. Karkowska D., Prawa pacjenta. Wolters Kluwer Polska, Warszawa 2009.
2. Ustawa z 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta (Dz.U. z 2012 r., poz. 159 z późn. zm.) [Act dated 6 November 2008 on Patients' Rights and the Ombudsman for Patients' Rights (Journal of laws from 2012, item 159, as amended)].
3. Augustynowicz A., Budziszewska – Makulska A., Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz. CeDeWu, Warszawa 2011.
4. Ustawa z 15 kwietnia 2011 r. o działalności leczniczej (Dz. U. z 2013 r., poz. 217 z późn. zm.) [Act dated 15 April 2011 on Medical Activity (Journal of laws from 2013, item 217, as amended)].
5. Rozporządzenie Ministra Finansów z 22 grudnia 2011 r. w sprawie obowiązkowego ubezpieczenia odpowiedzialności cywilnej podmiotu wykonującego działalność leczniczą (Dz.U. Nr 293, poz. 1729) [Regulation of the Minister of Finance dated 22 December 2011 on obligatory civil liability insurance for entities conducting medical activities (Journal of laws No. 293, item 1729)].
6. Dercz M., Rek T., Ustawa o działalności leczniczej. Komentarz. ABC a Wolters Kluwer business, Warszawa 2012.
7. Ustawa z 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (Dz. U. z 2015 r., poz. 581 z późn. zm.). [Act dated 27 August 2004 on health care services financed from public funds (Journal of laws from 2015, item 581, as amended)].
8. Karkowska D., Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz. Lex a Wolters Kluwer business, Warszawa 2012.
9. Wałachowska M., Zadośćuczynienie pieniężne za doznaną krzywdę. Dom Organizatora, Toruń 2007.
10. Matys J., Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym. Wolters Kluwer Polska, Warszawa 2010
11. Witczak H., Witczak W., W sprawie zadośćuczynienia pieniężnego należnego pacjentowi. Teka Komisji Prawniczej – OL PAN, 2010; 3: 230-244.
12. Wyrok Sądu Najwyższego z 12 marca 1975 r., II CR 18/75, Lex nr 7669 [Decision of the Supreme Court dated 12 March 1975, II CR 18/75 LEX no. 7669].

13. Wałachowska M., Zadośćuczynienie pieniężne za uszkodzenie ciała lub wywołanie rozstroju zdrowia w prawie polskim. W: Koch A., Kwieciński T., Pokrzywiak J. [ed]. Zadośćuczynienie za uszkodzenie ciała lub uszczerbek na zdrowiu na tle innych systemów prawnych. Wiadomości Ubezpieczeniowe – special edition 2012: 11-24.
14. Wyrok Sądu Najwyższego z 20 września 2013 r., sygn. II CSK 1/13 [Decision of the Supreme Court dated 20 September 2013, file no. II CSK 1/13].
15. <http://prawalekarzy.pl/artykuly/najczestsze-przypadki-naruszenia-prawa-pacjenta-do-intymnosci-i-godnosci-80> [quoted on 15 June 2015].