

POLISH SYSTEM OF OUT-OF-COURT COMPENSATION FOR MEDICAL INJURIES

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Abstract. One of the most serious problems in proceedings intended to repair personal injury caused while treating a patient is an attempt to reconcile two divergent interests – the interest of the injured party and the interest of the party responsible for repairing said damage. This leads to lengthy lawsuits, escalation of court costs and sometimes to the aggrieved parties' giving up their pursuit of recompense for the injury caused to them. This is why research and legislative attempts are being taken up throughout the world to aid the aggrieved patient in obtaining compensation. These legislative works and the related comparative research have contributed to the introduction in countries such as New Zealand, Sweden or France of alternative systems of remedying medical injuries. In Poland a system based on 16 commissions for the evaluation of medical incidents has been in operation since 1 January 2012. The Polish system was intended to mirror foreign models which exercised the principle of facilitating the patient in obtaining quick, inexpensive and certain recompense for the injury suffered during medical treatment. The Polish system, despite the legislator's declarations, has not sufficiently drawn on foreign models. It is unique and completely novel in the world scale, which does not, however, translate into its effectiveness. The aim of this paper is to present to a foreign reader the premises of liability and the proceedings before voivodship commissions for evaluating medical events. This paper intends to demonstrate the main mistakes made by the Polish legislator so that other countries can avoid wrong models during their own legislative works. Moreover, the conclusions present proposals of legislative amendments which would improve the operation and effectiveness of the commissions.

Keywords: repairing damage, compensation, recompense, medical incident, patient

INTRODUCTION

On 1 January 2012 provisions regarding the procedure and rules for determining compensation and recompense in case of medical incidents entered into the Polish legal system.¹ The new provisions are a response to the growing number of so-called medical lawsuits and the need to enable patients or, in the event of their decease, their heirs to pursue claims for damages arising from the broadly understood treatment process.

In Poland – as in other countries – the right model of the system in which the injured party could quickly and at the lowest possible cost obtain compensation for personal injury has been discussed for years. Since the late 1960s, views have begun to appear in the Polish legal writings according to which the traditional

¹ Act of 28 April 2011 amending the act on patients' rights and Patient's Ombudsman and the Act on compulsory insurance, the Insurance Guarantee Fund and the Polish Motor Insurers' Bureau, Journal of Laws item 660 as amended.

model of civil liability for medical injuries based on fault does not fulfil its role and in practice often does not lead to providing the aggrieved party with even partial indemnification [Karkowska and Chojnacki 2014, 31; Bączyk–Rozwadowska 2013, 209]. The search for other solutions also on the basis of branches of the law that are not associated in the domestic legal order with the regulation of traditionally understood principles of liability for damage provides evidence of the existence of the crisis known in Western literature as *malpractice crisis* [Furrow, Greaney, Johnson, et al 1997, 283]. Attempts to amend legislation in countries such as New Zealand [Skegg 2004, 298–334], Sweden [Wendel 2004, 367–91] or Belgium [Kozioł 2004, 89–120] aimed at enabling a quick and full compensation for the damage suffered by patients during the treatment process in isolation from the requirement to prove the fault of a particular health professional [Bączyk–Rozwadowska 2013, 213].

As a result of the legislative work, a new agency for legal protection was incorporated into the Polish legal system – voivodeship commissions for the evaluation of medical incidents² that operate in each of the 16 Polish voivodeships. The provisions regulating the proceedings before the commission for the evaluation of medical incidents were introduced into the Act of 6 November 2008.³ With the establishment of these commissions, the Polish legislator created a system of out-of-court compensation for damages resulting from “medical incidents.” The aim of this system was to introduce into domestic legislation a method independent of and subsidiary to the judicial course of compensation for damage that was suffered during a treatment process. The legislator’s guiding principle was to eliminate those difficulties in obtaining compensation for medical injuries in civil proceedings which actually led to limitation of access to the court and thus also of the right to compensation. Therefore, changes in Polish law were aimed at simplifying and accelerating pursuit of claims and reducing the costs of proceedings [Karkowska and Chojnacki 2014, 35–36].⁴ Fundamental data in this regard is provided by the explanatory memorandum to the draft amendment to PRA.⁵ The data presented there shows that if in 2001–2009 there had been no new claims in Poland regarding compensation or recompense in medical injury cases, examination of a case concerning damage suffered as a result of medical treatment would, on average, last about four years (assuming that the case is examined in two-instance proceedings, without remanding the case for re-examination and that no cassation appeal is filed). The main purpose of the reform in this scope was, therefore, to lighten the common courts’ burden and to transfer at least part of the compensation cases outside the common court system.

² Hereinafter: the voivodeship commission/the commission.

³ Act of 6 November 2008 on patients’ rights and Patient’s Ombudsman, Journal of Laws of 2019, item 1127 [hereinafter: PRA].

⁴ Judgment of the Constitutional Tribunal of 11 March 2014, ref. no. K 6/13, Journal of Laws item 372.

⁵ Explanatory memorandum to the draft act of 6 November 2008 on amending the act on patients’ rights and Patient’s Ombudsman, <http://ww2.senat.pl/k7/dok/sejm/074/3488.pdf> [accessed: 14.03.2020].

The aim of the article is to present to a foreign reader the Polish out-of-court compensation system for damages incurred during treatment. Due to global tendencies to facilitate compensation (not only for damage caused during treatment), it is justified to include the Polish system in the scholarly discussion. It is the comparative works that give the impulse – due to the convergence of the methods adopted throughout the world – for further development of the no-fault systems. They make it possible to draw on good practices and to avoid duplication of mistakes.

1. THE PREREQUISITES FOR LIABILITY IN PROCEEDINGS BEFORE VOIVODESHIP COMMISSIONS FOR THE EVALUATION OF MEDICAL INCIDENTS

The Polish legislator has formulated the legal definition of the concept of “medical incident” (Article 67a PRA). As stipulated in PRA, a medical incident involves infecting a patient with a biological disease agent, a bodily injury or a disorder of the patient’s health or his death that have occurred in a hospital as a result of the following procedures that are contrary to the current medical knowledge: 1) diagnosis, if it caused malpractice or delayed appropriate treatment, contributing to the development of the disease; 2) treatment, including performance of a surgical procedure; 3) use of a medical product or medical device.

Investigation whether a specific damage arose as a result of a “medical incident” may be carried out in proceedings before a voivodeship commission (Article 67c section 1 PRA). Therefore, in practice a medical incident means an undesirable consequence of circumstances that involve medical risk. This concept departs from the determination of a specific perpetrator of the injury and, consequently, the assessment of the subjectively understood fault. The concept of a medical incident is, therefore, confined to establishing whether a treatment process is objectively contrary to the principles of medical knowledge. Therefore, determining that in certain conditions there are prerequisites for a medical incident will not affect – as a general rule – the criminal or disciplinary liability of the direct perpetrator of the injury, because this perpetrator does not have to be determined in the course of the proceedings. This is why the responsibility of the organizational unit (the health care entity) that operates the hospital is depersonalized.

The legislator’s restriction of the possibility of pursuing claims concerning medical incidents only to injuries that took place in hospitals operated by health care entities was justified by the legislator by saying that hospitals carry out the most complex medical procedures, consequently an injury is most likely to occur in such an entity.⁶ Even before the entry into force of the amendment to PRA Polish legal scholars and commentators [Karkowska and Chojnacki 2014, 35] raised, pertinently, in author’s belief, doubts about the compliance of the said restric-

⁶ Ibid.

tion with the principle of equality before the law.⁷ According to the cited view, the discussed regulation does not provide injured persons with equal treatment within the healthcare system. A person injured in a hospital may take advantage of a faster and, above all, definitely cheaper way of pursuing compensation for the injury, while a patient injured outside the hospital is excluded from proceedings before a voivodeship commission [Urbaniak 2014, 153–65; Sarnes 2014, 79–97].

2. WHO MAY REQUEST THAT A MEDICAL INCIDENT BE DECLARED?

Naturally, the directly injured patient is entitled to request that a medical incident be declared. In addition, the Polish legislator also granted this right to the heirs of the deceased patient (Article 67b(1–2) PRA). While there is no doubt about the patient’s right, the legislator’s decision that heirs may also appear in the proceedings before voivodeship commissions is controversial [Nesterowicz and Wałachowska 2011, 21–35; Bączyk–Rozwadowska 2013, 345–46; Kowalewski, Śliwka, and Wałachowska 2010, 22–39; Serwach 2011, 20–29; Ziemiak 2011, 165–217].

The source of – justifiable – doubts of representatives of legal science involves first of all the granting of the entitlement to compensation for non-financial personal injury to the patient’s heirs, while the Polish Civil Code⁸ includes the closest family members in the catalogue of “indirectly injured” persons. This concept is interpreted in the established line of Polish judicial decisions through the lens of the actual emotional relationship between the deceased and the person seeking compensation or recompense in relation to his decease and is not restricted to formal family legal ties,⁹ as is the case in inheritance. Seeking recompense by persons who are heirs of the deceased, and who did not keep in contact with the deceased for a long time or were in conflict with him (these circumstances are not subject to examination in the proceedings before the commission) could meet strong social opposition. For the purposes of proceedings before the commission it is sufficient to have the formal status of an heir, i.e. to hold a valid court declaration of succession, a notarial certificate of succession registered by a notary or a European Certificate of Succession.

The second significant weak point of the adopted solution is the risk – rather only theoretical, but still valid – that the municipality of the last place of residence of the deceased or the State Treasury participate in the proceedings as a party (Article 935 CC). If the deceased leaves no spouse, relatives by consanguinity or chi-

⁷ Article 32(1) of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended.

⁸ See Article 446(3–4) of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [hereinafter: CC].

⁹ Judgment of the Supreme Court – Civil Chamber of 13 April 2005, ref. no. IV CK 648/04, OSNC 2006 no. 3, item 54.

Children of the deceased's spouse called to succession by law, the estate falls to the municipality of the deceased's last place of residence as the statutory heir or if the deceased's last place of residence in the Republic of Poland cannot be established or the deceased's last place of residence is abroad, the estate falls to the State Treasury. It is difficult to imagine a logical justification for granting the State Treasury the right to seek recompense for the death of the patient.

3. WHEN SHOULD THE PETITION BE SUBMITTED?

A patient or his heir may submit a petition for a declaration of a medical incident within 1 year of the day on which he became aware of the occurrence of damage justifying the claim for medical incidents (*a tempore scientiae*), while this period is limited to 3 years from the date of the damage (*a tempore facti*) (Article 67c(2) PRA). In the case of heirs, the final date for submitting the request does not run until the inheritance proceedings close (Article 67c(4) PRA). The deadline for initiating proceedings before a voivodeship commission is time-barred under substantive law, which means that its expiry should be taken into account by the commission *ex officio* and should constitute the basis for the commission's issuing a decision on the absence of a medical incident [Białkowski 2020, 142–59].

4. WHAT IS THE ORGANISATION OF VOIVODESHIP COMMISSIONS?

Voivodeship commissions for the evaluation of medical incidents are classified in the Polish legal writings as quasi-judicial bodies [Karkowska 2012, 496; Mucha 2012, 38–52; Sadowska 2014, 84–93; Zduński 2013, 129–44]. These are such bodies of legal protection (distinguished next to courts and out-of-court bodies, e.g. police) [Bodio, Borkowski, and Demendecki 2013, 23–24], which lack one of the features of judicial bodies – most often they do not have the statutory guarantee of independence [ibid.].

Sixteen voivodeship commissions (one in each Polish voivodeship) were appointed to adjudicate on medical incidents. The voivodeship commission is composed of sixteen members, of which eight must have a university master's degree or equivalent in the field of medical sciences, and the remaining eight members must have a university master's degree in the field of legal sciences. Each member of the commission must have relevant professional experience (minimum five years) or hold a doctoral degree in legal sciences or in the field of medical sciences. An additional requirement formulated for commission members is knowledge of patients' rights and full public rights (Article 67e PRA). Fourteen out of the sixteen members of the commission are appointed by the voivode from among candidates proposed by professional associations of doctors, dentists, nurses, midwives, laboratory diagnosticians and advocates, by the association of attorneys-at-law and by social organisations operating in the voivodeship for the

benefit of patients' rights. The minister competent for health matters and the Patient's Ombudsman each appoint one member of the commission.

A member of the commission may not be sentenced by a final judgment for an intentional offence or intentional tax offence, be punished for disciplinary or professional liability with legal validity and may not be subject to a final decision on a penalty consisting in a prohibition from operating an activity involving upbringing, treatment and education of minors and providing care for them. The term of office of a member of the commission is six years, and in the event of his dismissal (Article 67e(9) PRA) or death a new member is co-opted for the remaining term of office. The work of the voivodeship commission is managed by the chairperson elected by its members by a majority of votes with a quorum of 3/4 of the commission's composition. The Commission independently adopts the regulations on the basis of which it proceeds.

5. THE PROCEEDINGS BEFORE THE COMMISSION – AN OUTLINE

Proceedings before the commission are initiated by a petition [Białkowski 2020, 142–59]. The entities entitled to submit a petition are the patient or the patient's heir (Article 67b(1) PRA). The petition is subject to a flat fee of PLN 200, which, compared to the filing fee (5% of the value in dispute) should be considered a very favourable solution for the petitioner.

After passing the initial (formal) verification, the petition for a declaration of a medical incident is forwarded to the head of the health care entity operating the hospital to which the petition refers and to the insurer with which the entity has executed a contract of insurance for patients in the event of medical incidents (this insurance in the current regulatory environment is not mandatory). These entities may, within 30 days of being served the petition, come forward with their position, otherwise the petition, as for the circumstances indicated in it and the amount of compensation and recompense (Article 67d(6) PRA), shall be deemed fully acknowledged.

If the aforementioned entities present their position, the stage of examination of cases begins. The presentation of the parties' positions and the taking of evidence is done during a public sitting in which both the petitioner and the representative of the head of the health care entity and the agent of the insurer may participate (Article 67i(2) PRA). The organisation of sittings and explanation of the case, including the taking of evidence, were regulated by the legislator by a broad reference to the provisions of the civil procedure [Jarocha 2013, 29–52].¹⁰ The proceedings before the commission should be completed within four months from the date of submission of the petition (Article 67j(2) PRA).

Pursuing the objective of the proceedings, which is to determine whether the incident that results in material or non-material damage was a medical incident

¹⁰ The Polish civil procedure is regulated in the Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2019, item 1460 as amended [hereinafter: CCP].

(Article 67i(1) PRA), the commission adjudicating in a four-member panel (Article 67f(1) PRA) issues a written decision. The Commission may issue two types of substantive decisions: on a declaration of a medical incident or lack thereof (Article 67j(1) PRA). The decision is made by a 3/4 majority in the presence of all members of the commission (Article 67j(3) PRA). The decision is delivered to the parties, who may within 14 days from the date of service submit a request for the case to be reconsidered (Article 67j(7) PRA).

The Commission informs the parties about the ineffective expiry of the time limit for submitting a request for the case to be reconsidered (Article 67j(9) PRA). The thirty-day period for the submission by the insurer or health care entity that operates the hospital of the offer of the amount of compensation and recompense (Article 67k(2) PRA)¹¹ begins as from the date of serving the information on the expiration of the time limit for submitting a request to have the case reconsidered.

The insurer is bound by the commission's decision (Article 67k(1) PRA), which, however, does not rule on the amount of compensation due to the patient or his heir. The state of being bound by the decision lasts until the performance is made for the benefit of the petitioner or until he rejects the payment offer (Article 67k(5) PRA) [Ziemiak 2011, 165–217]. The payment offer proposed by the insurer must be within the limits set out in the Act, i.e. up to PLN 100,000 for the patient and up to PLN 300,000 for the heirs of the deceased patient – damage caps (Article 67k(7) PRA). It is also known in other legal systems, e.g. in Sweden [Farrell, Devaney, and Dar 2010, 34]. The regulation of the Minister of Health¹² provides details on how to determine the amount of compensation for damages suffered as a result of a medical incident.

The provisions of this regulation are, *de facto*, a dead letter as the legislator did not foresee mechanisms for the commission's authority to inspect whether the parties in the proceedings comply with its content. Furthermore, neither PRA nor the quota regulation sets minimum compensation thresholds that would be granted in the event of a certain type of injury.

If the insurer makes an offer to pay compensation or recompense to the petitioner, the patient or his heir is entitled to accept or reject it within 7 days of its receipt. Making a statement of acceptance of the proposal has far-reaching consequences. Along with the acceptance of the proposal, the patient or his heir is also required to submit a declaration on the waiver of any further claims for compensation and recompense for injury suffered that may result from events consi-

¹¹ It should be emphasized that in the second stage of the proceedings which starts with the service of the notice referred to in Article 67j(9) PRA or with the date of service of the decision of the voivodship commission issued as a result of submitting a request for reconsideration of the case, the hospital operator may act independently instead of the insurer (see Article 67k(10) PRA). Therefore, comments on the insurer's operation at this stage of the proceedings should be appropriately related to the activity of the hospital operator.

¹² Regulation of the Minister of Health of 27 June 2013 on the detailed scope and conditions of specifying the performance amount in the case of a medical incident, Journal of Laws item 750 [hereinafter: quota regulation].

dered by the voivodeship commission to be a medical incident in the scope of injuries that had been revealed before the date of submission of the petition (Article 67k(5) PRA). If the proposal is accepted by the patient or his heir, the proposal becomes an enforcement title without the court's declaring it enforceable (Article 67k(8) PRA).

In the event that the insurer fails to submit a compensation and recompense proposal within the time limit, the insurer is obliged to pay performances in the amount specified by the patient or his heir in the petition though not exceeding the statutory limits (Article 67k(3) PRA). In such a case, the commission issues a certificate in which it states that the petition has been submitted, the amount of compensation or recompense, and the fact that the insurer has not submitted the proposal. The certificate issued by the commission constitutes an enforcement title (Article 776 CCP) without the court's declaring it enforceable and is the basis for the initiation of enforcement proceedings by a court enforcement officer [Frąckowiak 2014, 233–42].

The provisions of PRA do not provide for inspection by a higher instance or judicial review or judicial review of administration. The parties are only allowed to request that the case be reconsidered (Article 67j(7–8) PRA) and to file a complaint only on formal objections against a decision on the existence or non-existence of a medical incident (Article 67m PRA) to be declared unlawful, which can only be based on a violation of the rules of proceedings before the commission. Both appeal measures are examined by voivodeship commissions.

The proceedings before the commission are divided into two stages [Bączyk–Rozwadowska 2013, 354; Mogilski 2011, 111–43]. The first stage commences with the submission of the petition for a declaration of a medical incident by the petitioner and ends with the issuance of a decision by the commission in which the commission determines whether the incident causing the damage was a medical incident (case examination stage). The proceedings transform into second stage proceedings only if the commission issues a decision on declaring a medical incident. The proceedings then begin with the submission of a proposal to pay compensation and recompense by the insurer or health care entity that operates the hospital and end with the acceptance of the proposal by the petitioner (quasi negotiations stage).

Therefore, in order to determine whether the commissions actually facilitate obtaining the recompense by the patient, it is essential to establish not only the percentage of cases that end with a decision declaring a medical incident, but also the share of proposals of health care entities or insurers that is accepted by patients.

6. COMPARISON OF THE AMOUNT OF COMPENSATION OBTAINED IN PROCEEDINGS BEFORE A VOIVODESHIP COMMISSION AND IN COURT PROCEEDINGS

The Polish legislator, enforcing the out-of-court system of compensation for medical injuries, decided that the compensation awarded to a patient in proceedings before a voivodeship commission may amount to up to PLN 100,000 whereas the patient's heirs may receive up to PLN 300,000 (Article 67k(7) PRA). In the proceedings – as has already been mentioned – the patient or his heirs may demand recompense (compensating a non-financial personal injury) and compensation (compensating a financial personal injury). This solution was *ab initio* criticised by Polish scholars in particular in relation to the stipulated amount of damage caps [Bączyk–Rozwadowska 2013, 364; Nesterowicz and Wałachowska 2011, 21–35; Frąckowiak 2014, 233–42]. It is rightly pointed out that a non-standard solution is to adopt limits on performances that the indirectly injured persons (heirs) can obtain at a higher level than the limits for a living patient [Nesterowicz and Wałachowska 2011, 21–35]. A serious defect of the regulation involves also absence of an option to obtain an annuity in proceedings before the commission, although the original draft law provided for the possibility of awarding it in the course of proceedings in the amount of up to PLN 3,000 per month.¹³ In order to compare the performances which can be obtained before a commission with the realities of judicial application of the law, several rulings of the Polish Supreme Court and common courts of law will be quoted:

1) in the judgment of 7 October 2010 the Court of Appeal in Wrocław awarded the claimant PLN 600,000 as recompense, compensation in the amount of PLN 220,000 and between PLN 4,500 and PLN 7,200 as annuity per month depending on the period¹⁴ (the case concerned an improperly performed removal of both thyroid lobes resulting in a sudden cardiac arrest, cerebral edema and, consequently, “cerebral coma” [Nesterowicz 2012, 415–23]);

2) in an older judgment of the Court of Appeal in Cracow, the claimant received PLN 200,000 as recompense, PLN 500 monthly as annuity and compensation in the amount of PLN 3,298 (the case concerned an incorrectly performed adenoidectomy, where the adenoid fell into the esophagus and then into the trachea during surgery, which combined with concealing this information from anaesthesiologists who were unable to intubate the patient, led to a cardiac arrest for about 10 minutes and 100% detriment to the patient's health);¹⁵

¹³ The legislator did not explain in the explanatory memorandum to the draft the reasons for resigning from the possibility of pursuing an annuity in the proceedings before a voivodeship commission.

¹⁴ Judgment of the Court of Appeal in Wrocław of 7 October 2010, ref. no. I ACa 896/10, “Przegląd Sądowy” 2 (2012), p. 123.

¹⁵ Judgment of the Court of Appeal in Cracow of 9 March 2001, ref. no. I ACa 124/01, Lex no. 357408.

3) the third example from the established line of Polish judicial decisions is the judgment of the Court of Appeal in Katowice of 21 November 2007,¹⁶ in which the court awarded the claimant PLN 15,577.27 as compensation, PLN 700,000 as recompense and a monthly annuity of PLN 1,900 (as a consequence of incorrect connection of a drip; the fluid, which was to be delivered into the bloodstream was pumped all night into epidural space, which resulted in the claimant's paralysis);

4) in the fourth case, the Supreme Court upheld the judgment awarding the claimant the amount of PLN 153,044 as recompense for a resection of the wrong kidney;¹⁷

5) the fifth case concerns the ruling on the claim of parents of a child who died as a result of the application of the Kristeller maneuver in labour. In this case, the court awarded the claimants jointly PLN 1,000,000 as recompense.¹⁸

Therefore, in the established line of Polish judicial decisions the amounts of total compensation and recompense that are awarded in court proceedings are several times higher than those which may be obtained by petitioners in proceedings before the commission. Furthermore, in the Polish legal system an important factor compensating for the suffered injury involves annuity, i.e. a periodic payment awarded to the aggrieved party in connection with diminishment of his future prospects or an increase of his needs due to the detrimental occurrence or due to being completely or partially incapable of working (Article 444(2) CC). This annuity may be claimed by other persons related to the deceased to whom the latter provided means of subsistence (Article 446(2) CC).

The conclusions that can be drawn based on the examples from the rulings quoted above are also reflected in the research carried out for the purposes of the discussed reform. According to data collected by the Ministry of Health, e.g. the amount of recompense awarded for jaundice infection in 2000 was on average PLN 168,000, while in 2006 it was already PLN 345,825.¹⁹ In the years 1996–1998 the average amount of compensation for HBV hepatitis infection ranged between PLN 5,000 and PLN 8,000.²⁰ However, in the judgment of 28 July 2016, the Court of Appeal in Lublin awarded the claimant the amount of PLN 100,000 as the mere recompense for getting infected with the same virus.²¹ Moreover, just a few years ago, the indemnification of personal injury awarded to a minor claimant

¹⁶ Judgment of the Court of Appeal in Katowice of 21 November 2007, ref. no. I ACa 617/07, Lex no. 795203.

¹⁷ Judgment of the Supreme Court – Civil Chamber of 10 March 2005, ref. no. IV CSK 80/05, OSNC 2006 no. 10, item 175.

¹⁸ Judgment of the Supreme Court – Civil Chamber of 24 March 2011, ref. no. I CSK 389/10, OSNC – Additional collection 2012 no. A, item 22.

¹⁹ Explanatory memorandum to the draft act of 6 November 2008.

²⁰ *Ibid.*

²¹ Judgment of the Court of Appeal in Lublin – I Civil Department of 28 July 2016, ref. no. I ACa 21/16, Legalis no. 1509100.

mant for an error in perinatal care did not exceed PLN 150,000.²² The analysis of the established line of judicial decisions carried out in the explanatory memorandum to the draft law indicates that currently in the case of an extremely severe condition of the child as a result of faulty conduct of labour, amounts of compensation not less than PLN 500,000²³ are awarded. An example of this is the judgment of the Court of Appeal in Lublin,²⁴ in which the court awarded a minor claimant the amount of PLN 600,000 as recompense, an annuity in the amount between PLN 4,069 and PLN 5,630 (depending on the period) and PLN 57,436.19 as compensation.

Given the above, and particularly in view of the amount of indemnification obtainable in the proceedings before the commission and the lack of a possibility to claim annuity, legal writings have proposed to increase the amounts that could be obtained in the course of proceedings before the commission to PLN 1,000,000, which would already include a capitalised annuity or up to PLN 500,000 as compensation and recompense along with the possibility of receiving an annuity by a directly injured patient, while leaving the amounts that can be obtained by indirectly injured persons at the current level [Nesterowicz and Wałachowska 2011, 21–35].

CONCLUSIONS

Despite the fact that the discussed amendments have already entered into force, the situation of patients injured during a medical treatment has not improved significantly in the provisions of Polish law. Research carried out by the Supreme Audit Office shows that only 32% of petitions end with a ruling that is a favourable to the patient, while only in 10% of all decisions on declaring a medical incident the payment for the patient is actually made.²⁵

Although credit must be given to the option of having the case for repairing a medical injury settled in an out-of-court establishment such as ADR where the costs are low (a PLN 200 fee as compared to the 5% charge when filing an application in a court) and although the time of proceedings is stipulated in the statute to be 4 months, the Polish legislator failed to avoid many errors which should not be repeated in works on analogical solutions in other countries.

The legislator's mistakes include mainly the fact that liability for repairing the damage is determined by "violation of the principles of medical knowledge." And even though this circumstance does not need to be "proven," as is the case in court proceedings, but only "substantiated," the greatest problem of medical suits

²² Explanatory memorandum to the draft act of 6 November 2008.

²³ *Ibid.*

²⁴ Judgment of the Court of Appeal in Lublin of 10 November 2009, ref. no. I ACa 523/09, Lex no. 1163111.

²⁵ Report of the Supreme Audit Office, <https://www.nik.gov.pl/kontrola/P/18/057/> [accessed: 14.04.2020].

is valid in proceedings before the voivodship commissions. Expert witness testimonies still need to be taken and such expert witnesses are responsible for determining whether the medical treatment was appropriate. This premise is contrary to the idea of a no-fault system.

Another major flaw involves giving the patient's heirs the right to file petitions for a medical incident to be declared (e.g. where there are no other heirs, the municipality of the last place of residence of the deceased will act as an heir in Poland). The Polish legislator relied here on a certain formal relation between the heir and the testator instead of granting this right, as modelled in the Polish civil code, to a person who actually suffered personal injury as a result of the death of the patient (e.g. closest family members).

One may also wonder why the occurrence of medical incidents was limited solely to hospitals run by health care entities. Any patient who suffered any injury during a treatment, regardless of the legal form in which the medical activity is carried out, should be allowed to seek recompense before a voivodship commission. The limitation introduced by the Polish legislator should be considered as entirely unfounded.

The time limit for submitting a petition for a medical incident to be declared is not praiseworthy either. The time limit for the patient to pursue his claims before a commission should be extended from one year from the date of learning about the injury to three years from the date of learning about the injury and about the person liable for repairing it. At the moment, the very short time limit (one year) runs from the moment of learning about the injury itself. When the treatment is carried out in a number of medical centres, the patient must determine in which of them he suffered the injury so as to pursue his claim effectively. Only after the patient collects all the information that allows him to file the petition effectively should the period start running.

The intent for proceedings before a commission to only declare a medical incident was also a no lesser mistake. The commissions do not have the authority to determine the amount of compensation. The amount of the proposed compensation depends on the unilateral decision of the entity liable for repairing the damage. The legislator limited the role of the commissions solely to deciding whether the facts meet the requirements of liability for a medical incident. When a commission does actually decide so, the entity that operates the medical activity or their insurer take over and may offer absurdly low compensation, e.g. PLN 1 for an injury involving the death of the patient, and bears no further related liability. The legislator did not stipulate an option of negotiations in the course of proceedings either, nor did he grant the commissions the authority to act as a mediator between the parties to the proceedings. This greatly prevents the medical entity and the aggrieved party from coming closer together to work out a compromise. Moreover, the medical entity's or the insurer's proposal is not subject to inspection either by the commission or by a common court of law and, what is more, is limited by the introduction of damage caps (PLN 100,000 for a patient;

PLN 300,000 for his heirs). These amounts deviate from the established line of judicial decisions and differ significantly from compensation that could be obtained in judicial proceedings. What cannot be overlooked either is the fact that the patient cannot pursue an annuity in proceedings before a commission. This means that if the type of the injury requires long-term and regular financing (physical therapy, medicines taken for life or specialist feeding), this injury will be allowed to be covered, in a limited scope, in a single compensation payment.

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