

VI. MODELS OF PROFESSIONAL LIABILITY OF HEALTH CARE WORKERS IN POLAND – DE LEGE LATA AND DE LEGE FERENDA PROPOSITIONS

1. Introduction

Professional liability is connected with the violation of the rules of particular profession. It is different from criminal, civil and employee responsibility. In contrast to civil liability, there is no requirement for harming a patient, or – as in case of criminal liability – committing a crime²⁷². Professional liability is also not dependent on a legal form of a profession itself, e.g. the employment relationship, as it is in case of employee responsibility. The basis for professional liability is violation of the rules of the particular profession and acting in conflict with professional ethics. Hence, the essence of the discussed liability is to ensure the quality of services and take care of the image of the profession as a whole, not only its repressive-educational functioning. The difference between professional liability and civil, criminal and employee responsibility also refers to other two questions – occupational court consisting exclusively of representatives of the particular profession with a possibility of ruling a penalty of ban on practicing the profession. The above mentioned right is especially important as it is reserved for occupational courts only. No common court is entitled to adjudicate on a penalty of ban on practicing a profession.

Professional liability is related to membership of a professional group that is important from the point of view of the society²⁷³. Professions, whose proper practice is particularly meaningful for the entire society, shall be connected not only with social respect, or even prestige, but also with special consequences, which are borne by the society by virtue of the improper practice of the profession. There is no doubt that the above mentioned professions include health care professions.

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²⁷² The doctrine expresses the view that disciplinary liability is similar to criminal-judicial liability, however, the scope of professional liability is wider than in criminal liability. Professional liability is also borne when there is no criminal liability yet. The above is explained by membership of the particular professional group, which is related to complying with common obligations and special obligations connected with the particular profession or membership of particular organization. Zielińska, E. 'Odpowiedzialność...', *op. cit.*, pp. 93-94.

²⁷³ Fiutak, A. 'Odpowiedzialność zawodowa' [In] *Leksykon prawa medycznego. 100 podstawowych pojęć*, ed. Górski, A., C.H. BECK, Warszawa 2012, p. 127.

The aim of these deliberations is an analysis of regulations relating to professional liability of health-care workers in Poland. However, it shall be emphasized that the presented deduction is not going to be focused on a detailed analysis of professional liability of every one profession that applies to health care, as the existing reference books mention it very often. The presented deliberations will concentrate on distinctness of regulations of the chosen professional liability aspects for particular professions, and development of assumptions in order to regulate these professions, which with their present legal status are not professionally responsible. The analysis will include the following fields of professional liability: essence, parties, stages of proceedings, trial's openness, courts, penalties and registers of the punished.

For the purpose of this paper, the analyzed professions will be divided into three groups: physicians, dentists, nurses and obstetricians (group A), physiotherapists and laboratory diagnosticians (group B) and professions applicable in the health care system, which do not belong to any of these categories: paramedics, occupational health and safety specialists, physiotherapists, dieticians and human nutrition specialists, audio-phonologists and speech therapists, optometrists, epidemiologists, coordinators of clinical studies, cosmetologists, pharmacists, psychotherapists, addiction psychotherapists, addiction therapists, toxicologists, psycho-oncologists, psycho-traumatologists, radio-pharmacists, medical engineers and electro-radiologists (group C). This division is related to the type – or its lack – of a legal act regulating the analyzed matter – in case of physicians, dentists, nurses and obstetricians it will be the act²⁷⁴, laboratory diagnosticians and pharmacists – the decree²⁷⁵. The professions included in the third group (for the purpose of this paper – group C), despite legislative attempts, do not bear any professional liability²⁷⁶. Moreover, the above mentioned division is

²⁷⁴ Professional liability of physicians and dentists has been regulated in chapter 5 of the act on medical chambers (LJ 2009 No. 219, item 170 with amendments), whereas, liability of nurses and obstetricians – chapter 6 of the act on association of nurses and obstetricians (LJ 2011, No. 174, item 1038 with amendments).

²⁷⁵ The acts include only basic rules of professional liability; detailed norms are included in executive regulations: the decree of the Minister of Health from 24.09.2004 on detailed rules and procedures of disciplinary proceedings for laboratory diagnosticians (LJ 2004 No. 225, item 2295) issued on the basis of statutory entitlement under art. 70 of the act from 27.07.2001 on laboratory diagnostics (official codification: LJ 2014, item 1384) and the decree of the Minister of health from 31.03.2003 on proceedings in cases of professional liability of pharmacists, issued on the basis of statutory entitlement under art 62, par. 2 of the act from 19.04.1991 on proceedings in cases of professional liability of pharmacists.

²⁷⁶ The example of action undertaken in order to regulate medical professions are two bills: parliamentary (the bill on the chosen medical professions – 4th cadence of Polish Parliament, paper no. 846) and governmental (the bill on the chosen medical professions and rules of acquiring a specialist title in other fields, applicable in health care). The first bill determined terms and conditions of performing 23 professions called medical professions (dental assistant, dietician, physiotherapist, dental hygienist, school hygienist, addiction therapy instructor, speech therapist, masseur, medical caregiver, child caregiver, optometrist, optician, audiologist, paramedic, medical analyst, dentist, electro-cardiologist, pharmacist, orthopaedist, occupational therapist). The bill also assumed that persons practicing the above mentioned medical professions are subject to professional liability for actions conflicting with the rules of

in accordance with the position expressed in the doctrine, as the regulations referring to professional liability may be divided into two categories – acts of the old and the new generation. The first group includes standards for laboratory diagnosticians and pharmacists (which does not have any legal solutions, yet), whereas, the second group includes physicians, dentists, nurses and obstetricians²⁷⁷. In conclusion, the analysis of the effective standards, especially, distinctness illustrating changes of the legislator's position, will allow to develop a model (scheme) of regulation of professional liability, being a proposition of regulation of professional liability for the professions applicable in the health care system, which do not have these regulations.

I shall also start with an explanation of the use of such terms as 'health care workers' and 'professions applicable in the health care system' instead of 'medical professions', both in the title and the paper. In the present legal state there is no legal definition of a medical profession. It is true that in the act from 15.04.2011 on medical activity²⁷⁸ the legislator provided a definition of a *person practicing the medical profession*²⁷⁹, however, the definition was provided only for the purpose of that act and besides the cases of statutory reference it is not applicable to other acts. In consequence, there are no unambiguous rules classifying professions as the medical professions. The reference literature refers the above term both to professions directly used by the legislator (physician, dentist, nurse, obstetrician, pharmacist) and laboratory diagnosticians²⁸⁰. Lack of the legislator's consequence in using the term 'medical professions' is also visible in another document

professional ethics and violation of regulations on medical profession practice (art. 51 of the bill). The second bill included regulations on practicing 19 professions, called medical professions, (similarly to the parliamentary bill, except for the following professions: addiction therapy instructor, medical caregiver, orthoptist, paramedic). The bill also assumed that persons practicing medical profession are subject to professional liability for violation of rules of practicing medical profession, consisting in: 1. Malpractice of medical profession resulting from lack of knowledge necessary for practicing that profession or lack of due diligence; 2. Abusing professional entitlements; 3. Disrespect for intimacy and personal dignity of a patient; 4. Failing to inform a patient or his legal representative or informing him inappropriately about the patient's rights or undertaken professional actions. 5. Failing to maintain professional confidentiality (art. 45 of the bill). The works on the bill were not completed.

²⁷⁷ See Wrześniewska – Wal, I. *et. al.* miting Zielińska, E. [In] Wrześniewska – Wal, I., Augustynowicz, A., Tatar, T. 'Porównanie regulacji prawnych dotyczących odpowiedzialności dyscyplinarnej diagnosty laboratoryjnego w odniesieniu do przepisów prawnych odnoszących się do wybranych zawodów medycznych' (Comparison of legal regulations concerning disciplinary responsibility of a laboratory diagnostician with reference to legal acts relating to chosen medical professions), *Journal of Laboratory Diagnostics*, No. 51(2)/ 2014, pp. 169 – 172.

²⁷⁸ LJ. 2013 item 217

²⁷⁹ According to art. 2, par. 1 item 2, a person practicing medical profession is a person entitled to provision of health care services under separate regulations and a person able to prove acquisition of professional qualifications for health care services provision within the specified range or in the particular medical field. See more on the definition of a person practicing the medical profession in: Potulski, J. 'Osoba wykonująca zawód medyczny' [In] *Leksykon prawa medycznego. 100 podstawowych pojęć*, ed. Górski, A., C.H. BECK, Warszawa 2012, pp. 136-141; Dercz, M., Rek, T. 'Ustawa o działalności leczniczej. Komentarz', WoltersKluwer, Warszawa 2012, pp. 27-27, 100-109

²⁸⁰ Karkowska, D. 'Zawody medyczne', Wolters Kluwer, Warszawa 2012, pp. 107-108

that is often referred to by the doctrine – Classification of professions and specializations for the purposes of the labour market²⁸¹. The above mentioned act does not include any list of medical professions, but only a group of health specialists (No. 22) in which he included: physicians, nurses, obstetricians, emergency medical service specialists, veterinarians, dentists, laboratory diagnosticians, pharmacists²⁸² and other health care service specialists, including: occupational health and safety specialists²⁸³, health protection specialists, physiotherapists²⁸⁴, dieticians and food specialists²⁸⁵, audio-phonologists and speech therapists²⁸⁶, optometrists and health protection specialists, who are not classified anywhere else²⁸⁷ (epidemiologist, coordinator of clinical studies, cosmetologist, a person qualified in pharmacy, psychotherapist, addiction psychotherapist, addiction therapist, toxicologist, psycho-oncologist, radio-pharmacist, medical engineer, electro-cardiologist, other health care services specialists, who are not classified anywhere else). In conclusion, according to the applicable regulations and the standpoint expressed in the doctrine, the term ‘medical professions’ refers only to a physician, dentist, nurse, obstetrician, pharmacist and laboratory diagnostician. The term ‘health care system professions’ is much wider than the term ‘medical professions’²⁸⁸. It includes both medical

²⁸¹ Due to the fact that on 01.01.2015 there has been introduced a new Classification, which is an appendix to the decree of the Minister of Labour and Social Politics from 07.08.2014, replacing the previous classification from 2010, these solutions will concentrate on the new regulations, and the applicable regulations will be referred to only for the purposes of showing changes in the legislator’s standpoint on the subject matter.

²⁸² There has been a change in the classification. Previously, pharmacists were a subgroup of other health care services specialists (No. 2281), since 01.01.2015 they are treated as a large group within the group of health care services specialists (228).

²⁸³ A health promoter has been replaced with a health promotion and education specialist. The new classification also includes environmental health specialist and other specialists in the occupational health and safety and environmental protection, who were not included in the classification from 2010.

²⁸⁴ The new classification includes a new subgroup – physiotherapists (no. 229202).

²⁸⁵ The legislator expanded the catalogue by other dieticians and food specialists (no. 229390).

²⁸⁶ Three subgroups were added: neuro-speech therapists (no. 229403) surdo-audiology therapists (no. 229404), and other audio-phonologists and speech therapists (nr 229490).

²⁸⁷ The classification includes four new professions: psycho-oncologists (no. 229909), psycho-traumatologists (no. 229910), medical engineer (no. 229912), electro-cardiologist (no. 229913).

²⁸⁸ An interesting analysis of the medical professions was conducted by W. Preiss, who – following the criterion of the field of work and names – assumed that the professions acting within the scope of widely understood health care service include: physicians and dentists; veterinarians; clinical diagnosticians, microbiologists; pharmacists, nurses, obstetricians, paramedics, medical assistants; clinical psychologists; speech therapists, nursing staff: hygienists, dieticians, physiotherapists, masseurs, orthoptist; veterinarian staff: veterinary technicians, veterinarian sanitary controllers; pharmaceutical staff: pharmacy technicians; technical occupations: biomechanics, dental technicians, orthopaedic technicians, opticians, orthopaedic mechanics, audio-prosthetists, and auxiliary occupations: orderlies, hospital medics, veterinarian medics, dental assistants, pharmaceutical assistants, balneological surgeons etc. See: Preiss, W. ‘Zawody w sferze ochrony zdrowia’ [In] Prawo medyczne, ed. Kulbicki, L., Urban&Partner, Wrocław 2003, p. 116.

professions and the professions that are applicable in the health care system, but are not presently regarded as medical professions²⁸⁹ - despite postulates.

2. Comparison of professional liability of physicians, dentists and nurses (group A), and laboratory diagnosticians and pharmacists (group B)

This part of the publication will concentrate on a comparative analysis of legal regulations of professional liability of physicians, dentists, nurses and obstetricians (group A), as well as pharmacists and laboratory diagnosticians (group. B). The consideration will include the following fields: nature of liability, parties of proceedings, stages, penalties and register of the penalized.

At the beginning, we shall notice the differences in the legal bases of the discussed groups. The professional liability of group A is regulated by the act, whereas, group B – the decree. The solution produced by the legislator causes considerable reservations. The Constitution of the Republic of Poland states in art. 92 that *Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act*²⁹⁰. Moreover, the Constitutional Tribunal emphasized that the statutory entitlement cannot be of a blank nature, giving the executive authorities the freedom to shape its essential meaning. The entitlement shall determine the instructions regarding the act's contents, so that the legislator's intention referring to solutions provided for in the executive act were clear²⁹¹.

It is worth analyzing the statutory entitlements, authorizing the Minister of Health to issuing decrees on professional liability of the professions from group B. In art. 70 of the act on laboratory diagnostics the legislator authorized the Minister of Health

²⁸⁹ What is worth attention is the fact that the list of medical professions include only the professions, which are subject to professional liability. Thus, in the opinion of the author, we may draw the wrong conclusion that the list of medical professions means the list of public trust professions.

²⁹⁰ The Constitution of the Republic of Poland does not include the definition or the subject of the act. Whereas, in the Legal Sciences it is assumed that the act in its material meaning is the legal act including abstractive and general norms (the issuing procedure is not important), and in a formal meaning – the act issued in a special mode, but not necessarily including abstractive and general norms. Among the features of the act the doctrine lists: the highest legal power after the Constitution; being enacted by the parliament; special procedure of enacting and general nature. Banaszak, B. 'Konstytucja Rzeczypospolitej Polskiej. Komentarz', 2nd edition, Warszawa 2012; access: System of Legal Information: Legalis.

²⁹¹ Ruling of the Constitutional Tribunal from 28.10.2014, sign. K 8/14. The doctrine emphasizes the lack of consequence of the Constitutional Tribunal in the interpretation of the act's exclusivity. On the one hand, the Tribunal has no possibility of issuing non-statutory acts, regulating the matter exclusive for the acts, and on the other hand, it allows such a possibility, and at the same time gradates the scope of necessary statutory regulations, based on the essence of regulated matter (dominating view). See more: Skwara, B. 'Rozporządzenie jako akt wykonawczy do ustawy w polskim prawie konstytucyjnym', Wolters Kluwer, Warszawa 2010, p. 81.

(in agreement with the Minister of Justice, after consulting the National Council for Laboratory Diagnosticians) to issuing the decree including: *detailed terms and procedures of disciplinary proceedings in relation to laboratory diagnosticians, with special emphasis on composition, procedure of issuing and features of disciplinary courts, mode of investigation, disciplinary proceedings at first instance and on appeal, as well as rules for implementation of decisions and bearing proceedings costs*. The above entitlement is equivalent to the competence norm resulting from art. 62, par. 2 of the act on the Chambers of Pharmacists: *In agreement with the Minister of Justice and after consulting the General Council of Pharmacists the Minister of Health defined the decree on the proceedings in cases of professional liability of pharmacists, taking into consideration features and composition of pharmaceutical courts and mode of investigation, proceedings at 1st and 2nd instance, proceedings costs and way of implementation of pharmaceutical courts decisions*.

One shall agree with the standpoint expressed in the doctrine that not only do not the statutory delegations include any instructions on a way of regulation, but they also leave legislative freedom. The above results in regulation by the act that is less important than the act on the matter from the sphere of civil rights and freedoms²⁹².

It is also worth paying attention to the standpoint of the Constitutional Tribunal that the construction of entitlement allowing to issue a decree in order not to implement the act but to allow independent regulation of comprehensive issue, on which there are no direct norms of instructions in the act, is constitutionally unacceptable²⁹³. Confrontation of the above mentioned standpoint with the solution accepted by the legislator cannot be clearly assessed, for one shall not accuse statutory regulation of not including any aspects of professional liability, as e.g. a list of penalties, proceedings after issuing a decision, register of the punished are statutorily regulated. However, extensiveness, or one shall even say comprehensiveness, of the regulated matter in the decree unable us to give it the primacy of the executive regulation.

Reassuring, it shall be stated that the solution, accepted by the legislator, for regulating professional liability of laboratory diagnosticians and pharmacists in the non-statutory act is in conflict with a constitutional hierarchy of the legal acts, and it is unacceptable in the Polish law system. One shall only assume that the legislator's intention was to accelerate legislative works by concealing debatable questions, however, even a good intention cannot justify violation of the rules being the basis of the legal system. Despite the fierce criticism from the doctrine, the legislator has not undertaken any actions to change the above mentioned solution, yet.

Deliberations on the analysis of regulation of professional liability shall also include the nomenclature used by the legislator. Regulating the discussed matter, he used

²⁹² Huzarska, D., Piątkiewicz, J. A., Nowacki, P., Huzarska, J., Szpak, A. 'Różnice dotyczące odpowiedzialności zawodowej w ochronie zdrowia – regulacje prawne' (Differences in Professional liability in health care – legal regulations), *Zdrowie Publiczne*, No. 120(3)/2010, p. 288.

²⁹³ See decision of the Constitutional Tribunal from 02.09.1997, K 25/97 from 13.11.1999, K 12/99 from 20.05.2003, K 56/02.

different terms – liability of a physician, dentist, nurse, obstetrician and pharmacist was described as professional, whereas, laboratory diagnostician – disciplinary. However, the variety of terms has no influence on the contents of the regulation²⁹⁴. Moreover, the doctrine indicates that the terms professional and disciplinary liability may be used interchangeably²⁹⁵.

Analyzing the substantive scope of professional liability we shall draw a conclusion that it is broader than legal liability. Both representatives of professions from group A and B are subject to professional liability for violation of professional ethics rules and regulations of practicing the professions defined by the legislator as professional misconduct. At this point it is worth emphasizing that professional liability – unlike criminal, civil and occupational liability – includes actions that are in conflict with professional deontology. The previously mentioned regulation will have a special meaning for the relationship between representatives of the same profession, which – besides the question of professional confidentiality – is usually not regulated by any legal act. An example of the discussed actions is the free provision of health care benefits to other physicians, treated by the Code of Medical Ethics as a good custom (art. 67) or – in case of doubts – informing the controlled physician about the control by the controlling physician (art. 55)²⁹⁶. Whereas, the previously mentioned regulations are not included in the codes of professional ethics of the other professions under discussion²⁹⁷.

The parties in the proceedings on professional liability are: the sufferer (a natural or legal person, or organizational entity with no legal identity, whose legal rights have been directly violated or threatened by professional misconduct), the accused (a representative of one of the discussed professions against which the spokesman for professional liability pressed charges in the process of investigation or issued a motion for punishment) and the spokesman for professional liability conducting the investigation and being a prosecutor before the occupational court. Despite literal and constructive differences between the norms, the entitlements of the parties in all the analyzed professions are analogous. Both the sufferer and the accused may appoint not more than 2 proxies from

²⁹⁴ Huzarska, D. *et al.*, *op. cit.*, p. 287.

²⁹⁵ See: Fiutak, A. 'Odpowiedzialność zawodowa' [In] *Leksykon...*, *op. cit.*, p. 127.

²⁹⁶ The regulation causes my reservations, as the control of health care benefits provision shall ensure their high quality, therefore, warning about the control may significantly affect the process. Physicians shall always take care of provision of health care services, irrespective of circumstances of the control or its lack.

²⁹⁷ What is interesting – however, beyond these deliberations – the codes of professional ethics of the discussed professions refer to regulating the rules of behaviour of their representatives differently. The code of professional ethics of nurses and obstetricians in the RP limits the regulations, defining relationship between nurses and norms including relationships between representatives of the discussed profession, to the requirement for mutual respect, helping nurses with shorter professional experience and banning dishonest competition. The Code of Pharmaceutical Ethics concentrate exclusively on maintaining good customs and good pharmaceutical practice, whereas, the Code of Laboratory Diagnostics Ethics imposes the need for informing another diagnostician about observing faults in his behaviour.

among representatives of their professions, lawyers or legal advisors. It is interesting that the legislator did not provide for participation of legal representatives in judgment, however, he allowed all the parties to have a professional proxy. Based on the above we shall conclude that the legislator based the question of parties of the proceeding and their rights in the professional liability proceedings on one scheme.

The differences between representatives of both analyzed groups are most visible in the procedure of professional liability. One may acknowledge that the legislator based the proceedings stages on general assumptions, such as the requirement for investigation, proceedings before occupational court and opportunity to appeal against the decision of the occupational court, however, there is a significant difference in particular stages in both groups. The differences are insignificant within the analyzed groups, i.e. between laboratory diagnosticians and pharmacists, and physicians and nurses. The above confirms the previously presented view, expressed in the doctrine, that professional liability may be divided into the old generation and the new generation.

This part of deliberations will concentrate exclusively on the goals established by the legislator and the essence of particular stages of proceedings, exclusively in the context of differences between the two analyzed groups, as a detailed presentation of all aspects of professional liability is not the subject of this paper.

The legislator divided the proceedings on professional liability of physicians and nurses into four stages: verification activities, investigation, proceedings before court (respectively medical court or nurses and obstetricians court) and enforcement proceedings. The medical act *expressis verbis* defines aims only for the two first, however, an analysis of regulations allows us to state that particular stages of the professional liability proceedings of physicians and nurses have similar regulations²⁹⁸. The verification activities are concentrated on establishing, if the circumstances are the basis for investigation. The evidence of an expert opinion is not examined, nor are activities requiring execution of a protocol, except for hearing of the accusing party as a witness. The legislator cannot define the precise moment of completion of the verification activities, he can only determine that the spokesman for professional liability, after receiving the information about the possibility of committing professional misconduct, issues a decision to initiate or to refuse to initiate an investigation, aimed at examining, if the analyzed deed is a professional misconduct, which ends with a motion for punishment or discontinuance of the proceedings. It shall be assumed that the basis for initiating the investigation is a complaint or notification from the sufferer, however, if after reading the documentation from the event and/or hearing the sufferer as a witness, it appears that an offence took place, the spokesman initiates an investigation, whereas, if he suspects commitment of an offence – he applies for punishment.

²⁹⁸ More on proceedings on the stages of professional liability of physicians and nurses: Rozwadowska, E. 'Położna w systemie prawnym. Prawo dla położnych', PZWL, Warszawa 2012, pp. 99-106; Sarnacka, E. 'Lekarz dentysta w systemie prawnym. Prawo dla lekarzy dentystów', PZWL, Warszawa 2014, p. 184.

The legislator regulated stages of proceedings on professional liability of laboratory diagnosticians and pharmacists differently. Most of all, there is no clear distinction of initial activities and enforcement proceedings. After receiving the credible information about an offence from the scope of professional liability, the spokesman for professional liability has a duty to initiate an investigation. The decree does not precise the term 'credible', however, one may assume that the basis for initiating the investigation shall be a justified suspicion. One may only assume that it is the spokesman that is an entity authorized for deciding, if the information is credible or not.

Confronting the above mentioned regulations one may state that there is no consequence in the legislator's regulation of the stages of proceedings for professional liability. Not only particular stages for each group are different, but also different is the basis for initiation of the proceedings – for group A it is 'a possibility of offence', and for group B – 'the credible information'. It results in the circumstances, where for one profession an investigation would be initiated and for the other, it would not, with the same factual state for both of them.

The legislator did not decide to determine duration of the proceedings, regulating only the time of investigation, differently for both groups. An investigation for physicians and nurses shall be completed within 6 months from the moment of its initiation by the spokesman for professional liability. In justified cases, the Supreme Spokesman may extend it for another period, however, no longer than another 6 months. Files of the proceedings lasting 12 months shall be transferred to the occupational court, which may extend the proceedings by another, unspecified period. An investigation for laboratory diagnosticians and pharmacists is regulated differently – relatively: 3 months, 3 months and 6 months.

No specified period for the proceedings before the occupational court shall be recognized as a significant breach by the legislator, as the lack of such regulation may cause significant delays in the proceedings, harming both reputation of physicians/nurses, and patients. Specifying the duration of the proceedings before the occupational court does not have to be categorical, however, the legislator's assumption that it shall be completed within 12 months – with a possibility of extending it by another 12 months in justified cases – could significantly affect the effectiveness of professional liability and its role in ensuring high quality of health care services. Lack of precision in determination of durability of the proceedings is well exemplified by experiences of voivodeship commissions for adjudication on medical events, which should give their decision within 4 months from the moment of receiving a motion²⁹⁹. However, a failure to meet the deadline neither imposes any duties on the commission, nor causes consequences, which means that it is a regulation that do not cause any consequences. Reassuming, the lack of norm determining duration of the proceedings and its imprecision significantly limits execution of the regulated procedure's goal.

²⁹⁹ Art. 67j par. 2 of the act on the patient's rights and the Spokesperson for the Patient's Rights (LJ 2012, item 159 with amendments).

Another question causing reservations is the lack of legal representatives in adjudication panels. A solution accepted in the commissions for adjudication on medical events seems to be much better at this point, as the medical aspect is assessed by medical representatives, and meeting procedural requirements is a duty of the legal environment. Moreover, adjudication panels in the occupational courts could avoid charges pressed against commissions, i.e. failure to ensure that a representative of the particular profession is a member of the panel³⁰⁰.

The aspect of penalties which may be imposed by the occupational courts is especially important in the discussed question, as the legislator decides to give the courts the power to impose a penalty of deprivation of the right to practice, which the common courts do not have. The importance of the above mentioned entitlement results from the rules of the regulated professions, applicable in the health care system. Representatives of each of the discussed professions may practice their profession only after acquiring the right to do it³⁰¹.

The legislator provided for a broader list of penalties for physicians and nurses. All analyzed occupational courts are entitled to adjudicate penalty, warning, reprimand, suspense or deprivation of the right to practice the profession. The penalty of suspension of the right to practice may be adjudicated in case of all professions for different periods – the medical court, the court of nurses and obstetricians and the disciplinary court of laboratory diagnosticians may adjudicate it for a period of a year to five years, whereas, the pharmacological court – 3 months to 3 years. Penalties reserved only for group A are: pecuniary penalty, ban on managerial functions in medical facilities (broader for physicians – in health care organizational facilities) for 1 to 5 years, limitation on the scope of practice for 6 months to 2 years. Moreover, only the court of nurses and obstetricians may adjudicate on a ban to practice in the association organs for 1 to 5 years.

Analyzing the list of penalties one shall remember that it is also a part of execution of the main task of professional liability, which – most of all – shall be a guarantee of high quality of services. The essence of the spokesman's for professional liability and the occupational courts function mostly consists in making sure of high quality of health care services. Analyzing the extended list of penalties for physicians and nurses one shall see indolence of the legislator in actualizing previous regulations. In my opinion,

³⁰⁰ Voivodeship commissions for adjudication on medical events adjudicate in groups of four consisting of two legal representatives and two medical representatives. Their members are chosen randomly, in alphabetical order, which may cause that the panel does not include a specialist from the discussed field of medicine, See more: Sarnacka, E., Jacek, A., Porada S. 'Odpowiedzialność szpitala z tytułu zdarzeń medycznych' [In] Etyczne problemy zarządzania w ochronie zdrowia, eds. Hartman, J., Zalewski, Z., Wolters Kluwer, Warszawa 2013, p. 176.

³⁰¹ The right to practice a profession is issued on the basis of a diploma of graduating from a proper school. See: art 2b of the act on pharmaceutical chambers, art. 28 and 31 of the act on the professions of nurses and obstetricians, art 5 of the act on the professions of physicians and dentists, art. 9 par. 1 of the act on laboratory diagnostics.

it would be a mistake, if one assumed that the discrepancy results from the lack of relevance of introducing penalties limiting the practice of professions or performing managerial functions, all the more that the codes of professional ethics of the discussed professions include special regulations addressed to people having the previously mentioned functions.

It is worth paying special attention to the penalty of ban on performing a function of one's choice in the organs of professional associations, which may be adjudicated only by the court of nurses and obstetricians. The above certainly results from the fact that the act on the association of nurses and obstetricians was enacted as the last from among the analyzed acts.

In conclusion, one shall state that the legislator provided for significant discrepancies between the regulation of professional liability in both discussed groups, and sometimes even within professions from one group. What is the most visible is the fact of extending the meaning of professional liability and competence of the spokesman for professional liability among professions that were regulated later (physicians, nurses) and not introducing newer solutions in professions regulated earlier (laboratory diagnostician, pharmacist). Moreover, the legislator does not use the experience of voivodeship commissions for adjudicating on medical events. One may even state that besides the moment of a basic regulation, the field of professional liability stays beyond the interest of the legislator.

3. Proposition of regulating professional liabilities applicable in the health care system

It would be illusive to assume that the solution to a problem of lack of regulation of professional liability in many professions applicable in the health care system, could be one legal act. Previous experiences clearly show that putting a regulation covering many professions in one act causes delay and fruitless end of works, resulting in no regulation at all³⁰² instead of helping to regulate other professions. On the other hand, accepting many – often completely different – solutions for each profession would also not be a good idea. Developing many models, and novelizing them later seems to be illogical, as none of the professions could use experiences of others and the novelization of e.g. 20 acts would be time-consuming from the point of view of the legislator. Thus the above mentioned situation may result in no regulation for several professions.

A solution to the above may be the development of one model (scheme) of professional liability, which could be applied to all the discussed professions, however, it would not be one legal act, but an element (chapter) of the act regulating the practice of the particular profession. The suggested regulation is also an answer to a lack of detailed

³⁰² The above is confirmed by legislative experiences gained while working on the bills on chosen medical professions, described above.

regulations of practicing the medical professions. However, it is impossible not to see a fault of the suggested direction of legislative activities, which is time-consumption of the legislative process. Yet, accepting a uniform model of profession liability of personnel applicable in the health care system, and its subsequent regulation by the acts addressed to particular professions or their groups, is a comprehensive solution. In this paper I present a standpoint that even a time-consuming legislative process, which would however include the entire aspect of practicing particular profession, is a better solution than one legal act including only a part of required regulation, which is professional liability, addressed to all the discussed professions. However, looking at the previous legislative activities one may state that the legislator will not decide to regulate all professions applicable in the system of health care. All attempts end at the stage of project or social consultations. Thus, one shall conclude that the comprehensive regulation I suggested, would not be appreciated by the legislator and another solution shall be sought for. Therefore, it is worth considering creating a separate institution, concentrating on professional liability of medical representatives, similar to voivodeship commissions for adjudicating on medical events – appointing a commission for professional liability in professions applicable in the health care system, which would work with a voivode. The commission would consist of lawyers and representatives of all the discussed professions. The commission would be appointed similarly as commissions for adjudicating on medical events, however, the president's duty would be to appoint the members from among representatives of particular profession. Commissions working with a voivode would be more accessible for patients than institutions working within the framework of professional associations, as social trust in institutions working within one profession is weaker than in external institutions. What is more, a presence of legal representatives would help in increasing social trust in the discussed institution. A patient submitting a complaint would not have an impression that accusing a physician he was heard as a witness by e.g. a physician, and a decision on the subject matter would be also given by an adjudicating panel consisting of physicians only.

An advantage of the suggested solution is also the fact that all medical professions can be subject to professional liability *stricte*, not only those having professional associations³⁰³.

A question that requires a detailed analysis is defining an essence and scope of professional liability, assuming that the discussed professions do not have any legal regulations, regarding practicing the professions. The only rational solution would be basing the liability on failure to provide health care services with due diligence and violation of the patient's rights. At this point it is required to be careful so that the commissions were not an institution that copied tasks of the commissions for adjudicating on medical events or civil courts. Professional liability – contrary to civil liability – is not

³⁰³ Professional liability *stricte* is the liability of representatives of particular professions before occupational courts, whereas, *largo* – before common courts and tribunals.

and shall not be compensatory, thus, the presented commissions shall not adjudicate on compensation.

The key aspect related to a question of parties and stages of proceedings is a function of the spokesman for professional liability, whose task would be to conduct verification proceedings and investigations. In my opinion, an institution analyzing complaints and initially investigating the circumstances of their submission is a good solution of the legislator. The spokesman contributes not only to the efficiency of the process by deciding on submitting an application for punishment or its rejection in the absence of grounds for suspicion of committing a crime. Assuming that the discussed commission would be an equivalent of the institution of the spokesman for professional liability and the occupational court in the regulated medical professions, particular stages of the proceedings shall be similarly regulated. However, it would be a good solution to introduce the maximum duration of the proceedings before the occupational court which would be 6 months with a possibility of doubling it by the president of the commission by another 6 months in complicated cases.

The regulated medical professions subject to professional liability before the occupational courts were provided by the legislator with a possibility of applying to courts of second instance. However, that possibility was not provided for in case of commissions for adjudicating on medical events, which causes considerable reservations of the doctrine, especially, in the aspect of constitutionality of the accepted solution. Regulating professional liability of medical personnel the legislator shall opt for a comprehensive and pro-constitutional solution, which means that consideration shall be given to the creation of the board of appeal. At this point it is possible to use a model accepted in relation to bioethical commissions, examining purposefulness and relevance of medical experiments. The commissions are created at medical universities and medical chambers, whereas, the Bioethical Commission of Appeal appointed at the Ministry of Health adjudicates on appeals of local commissions. The General Commission for Professional Liability would be appointed from among representatives of legal and medical environments by the Minister of Health, and it would be an organ of II instance.

The specialists, analyzed in this part of the treatise, practice their profession based on a diploma of graduation from a university or one of the forms of post-graduate studies, as their professions do not require a document giving 'the right to practice the profession'. The above is of crucial importance for defining the scope of penalties, especially, an equivalent of penalty of deprivation of the right to practice the profession. One shall think about the aspect of penalty of limiting or depriving of the right to practice the profession. Previously, the legislator did not decide to introduce a requirement to have the previously mentioned document, thus, implementation of such penalties would be groundless.

Authorizing a commission to impose a penalty that is more serious than warning, reprimand or pecuniary penalty is a sign of rationality. The lack of equivalent of the penalty of limiting or depriving of the right to practice the profession would contribute to weakening the role of the presented institution. In the subject matter it is problematic to regulate an influence of penalty on professional activity of the punished person. After being imposed with one of the described penalties, representatives of group A and B are required to immediately return the document stating their 'right to practice the profession'. The period of penalty is counted only from the moment of the return. As an employer is informed about the penalty, the punished employee must not continue his work at the same position, or start working in another medical facility, for he is required to provide a new employer with the document. The discussed professions are not required to have such a document, whereas, the possible requirement to return the document confirming graduation from the studies is not an equal penalty, as it confirms not only qualifications required for the profession, but also the fact of having higher education. A solution to that question could be the introduction by the legislator of an institution of register of the punished employers of the health care system, kept by a voivode, operating similarly to the register of punished persons, kept by professional associations of the above mentioned professions.

Regulation of professional liability of all professions applicable in the system of health care is not simple, as the analyzed group was not included by the legislator in the group of regulated professions. There are clear differences in practicing the professions by the groups catalogued here as group A and B.

4. Summary

One shall draw several conclusions from the above presented questions related to professional liability of medical professions. First of all, in Poland there is no single model of professional liability investigation. The dichotomous division into professions statutorily regulated, non-statutorily regulated and without professional liability *stricte* used by the legislator is not justified and causes serious reservations. The question that is especially controversial is the combination of professional liability not with the character of the work (health care), but with the fact of existing or not existing of the professional association. The lack of statutory regulation of the professional liability institution for laboratory diagnosticians and pharmacists shall be especially criticized. The question that is fiercely criticized by the doctrine and regarded even as an unconstitutional solution has still not become subject to the legislative procedure.

The previous lack of uniformity of the discussed proceedings shall be explained only by indolence of the legislator. Each of the described occupational courts is a separate entity, unable to learn from experiences of other institutions having the same goal – ensuring high quality health care services. Moreover, the legislator did not decide to

novelize norms regulating similar aspect for different professions of that field, when he was implementing newer solutions (e.g. a penalty of ban on working in institutions of professional associations).

However, analyzing the legal status of health care professions defined here as group C, one shall unambiguously state that the assumption that the legislator will regulate all professions separately with particular emphasis on questions of professional liability is a mistake, as the development of medicine causes development of new professions, such as e.g. electro-cardiologist. Nevertheless, it is worth thinking about creating an institution that would conduct the discussed proceedings for all professions, using experiences of institutions already existing in the legal system, such as voivodeship commissions for adjudication on medical events and bioethical commissions.

Thus, taking into consideration all observations presented in the paper, one shall determine that a condition for fulfilling the role of an institution for professional liability – ensuring high quality of services and professionalism – is a comprehensive regulation covering all professions applicable in the system of health care. Thus, the presented standpoints are only an introduction and foundation of the detailed legal regulation. It means that the legislator shall initiate the discussion on the subject of implementation of a systemic model of professional liability of all professions applicable in the health care system that would eventually lead to development of a uniform solution.

Organization of professional liability

Table 1. The basis of professional liability

Nurses/ Obstetricians	Physicians/ Dentists	Laboratory diagnosticians	Pharmacists
Members of self-government are subject to professional liability for violation of professional ethics rules or regulations referring to practice of the profession	Members of Chambers are subject to professional liability for violation of medical ethics rules and regulations referring to practice of the medical profession	for culpable, improper performance of laboratory diagnostics actions, and for actions conflicting with the rules of professional ethics or regulations referring to performance of actions of laboratory diagnostics	Members of pharmaceutical self-government are subject to professional liability before pharmaceutical courts for acting against the rules of professional ethics and deontology, and legal regulations referring to practice of the pharmacist profession
The act from 1 July 2011 on self-government of nurses and obstetricians	The act from 2 December 2009 on chambers of physicians and dentists	The act from 27 July 2001 on laboratory diagnostics	The act from 19 April 1991 on pharmaceutical chambers

Table 2. Courts of 1st instance

Nurses/ Obstetricians	Physicians/ Dentists	Laboratory diagnosticians	Pharmacists
District court of nurses and obstetricians	District Medical Court	Disciplinary court (art. 49)	District pharmaceutical court
<ul style="list-style-type: none"> - considers cases of professional liability, brought by district spokesman; - chooses deputies of the president of the district court, from among the members of that court; - submits a report on the state of ongoing cases to the district council; - submits annual and term reports to the district congress 	<ul style="list-style-type: none"> - considers cases of medical professional liability - considers protests against validity of elections of delegates for the district congress of physicians, and protests against validity of applications for dismissal - it submits an annual and term report on activity 	<ul style="list-style-type: none"> - considers disciplinary cases of laboratory diagnosticians, brought by disciplinary spokesperson - exercises disciplinary jurisdiction 	<ul style="list-style-type: none"> - adjudicates in all cases as 1st instance, reserving the rights of the Supreme Pharmaceutical Court - in cases of professional liability of members of the district pharmaceutical council and district audit committee, there adjudicates the district pharmaceutical court, appointed by the Supreme Pharmaceutical Court

Table 3. Courts of 2nd instance

Nurses/ Obstetricians	Physicians/ Dentists	Laboratory diagnosticians	Pharmacists
Supreme Court of Nurses and Obstetricians	Supreme Medical Court	Higher Disciplinary Court	Supreme Pharmaceutical Court
<ol style="list-style-type: none"> 1. Considers cases of professional liability 2. Considers appeals against decisions of district courts 3. Considers complaints e.g.: <ol style="list-style-type: none"> a) about a decision of the Supreme Spokesperson on starting or refusal to start proceedings, referring to professional liability b) about a decision on suspending the right to practice the profession by the accused obstetrician 4. Chooses deputies of the President of the Supreme Court from among its members 5. Submits term reports on cases of professional liability to the Supreme Council 6. Adjudicates on resuming proceedings, referring to professional liability 7. Provides trainings for members of district courts. 	<ol style="list-style-type: none"> 1. Considers cases of medical professional liability 2) Considers complaints in cases determined by the act 3) Considers protests against validity of elections to and in organs of medical chambers, subject to art. 30, par. 2, item 2, and protests against validity of voting in case of request for an appeal; 4) submits an annual report on activity to the Supreme Medical Council 5) submits term reports on activity to the Polish Medical Congress 	<ul style="list-style-type: none"> - enacts internal regulations of the disciplinary court and Higher Disciplinary Court - considers appeals against decisions of the Disciplinary Court 	<ol style="list-style-type: none"> 1) Considers appeals against decisions of district pharmaceutical courts 2) adjudicates as 1st instance on cases of professional liability of members of: Supreme Pharmaceutical Council, Supreme Audit Committee, Supreme Pharmaceutical Court, Supreme Spokesperson for Professional Liability and his/her deputies, and members of district pharmaceutical courts, and district spokesman for professional liability and their deputies; 3) considers appeals against judgements pronounced on the bases, determined in point 2

Table 4. Professional liability spokesman

Nurses/ Obstetricians	Physicians/ Dentists	Laboratory diagnosti- cians	Pharmacists
District spokesman for professional liability		Disciplinary Spokesman	District spokesman for professional liability
<ul style="list-style-type: none">- conducts explanatory proceedings in cases of professional liability- has a function of an accuser before courts for nurses and obstetricians- submits annual and term reports to the district congress- organizes trainings on professional liability for members of self-government	<ul style="list-style-type: none">- conducts inspections and explanatory proceedings in cases of professional liability of physicians and dentists, being members of the chamber- performs a function of an accuser before medical courts- submits annual and term reports on activity to the district medical congress	Disciplinary Spokesperson prepares disciplinary proceedings and performs actions of an accuser before the Disciplinary Court and the Higher Disciplinary Court	District spokesperson for professional liability conducts proceedings in cases of professional liability
Supreme Spokesman for Professional Liability			Supreme Spokesman for Professional Liability
<ol style="list-style-type: none">1. Conducts proceedings in cases of professional liability2. Supervises the activity of district spokesman3. Has a function of an accuser before the court for nurses and obstetricians4. Considers complaints e.g.:<ol style="list-style-type: none">a) about decisions on refusal to start explanatory proceedings (the right to lodge – a sufferer)b) about decision on discontinuance of explanatory proceedings (the right to lodge – party to proceedings)5. Considers complaints against prolongation of district spokesman’ proceedings6. Submits report on activity to the Polish Congress7. Trains district spokesman and their deputies on professional liability8. Performs preventive actions within professional offences and actions conflicting with the rules of professional ethics.	<ol style="list-style-type: none">1. Conducts explanatory proceedings in cases of medical professional liability;2. Supervises the activity of district spokesman for professional liability3. Has a function of an accuser before medical courts;4. Considers complaints in cases determined by the act5. Resolves disputes over rightness between district spokesman for professional liability6. submits an annual report on activity to the Supreme Medical Council7. Submits term report on activity to the Polish Medical Congress		Supreme Spokesman for Professional Liability conducts proceedings in cases of professional liability of pharmacists and supervises the activity of district spokesman for professional liability

Table 5. Disciplinary punishments

Nurses/ Obstetricians	Physicians/ Dentists	Laboratory diagnos- ticians	Pharmacists
<ul style="list-style-type: none"> - admonition - reprimand <p>Fine given for the social purpose (1,000-10,000 PLN)</p> <ul style="list-style-type: none"> - ban on performing managerial functions - ban on performing functions received by election in organs of self-government - suspension of the right to practice the profession - limitation of the scope of actions in the practiced profession - deprivation of the right to practice the profession 	<ul style="list-style-type: none"> - admonition - reprimand - fine - ban on performing managerial functions in organizational units of healthcare for 1 to 5 years - limitation of the scope of actions in practicing the medical profession for 6 months to 2 years - suspension of the right to practice the profession for 1 to 5 years - deprivation of the right to practice the profession 	<ul style="list-style-type: none"> - admonition - reprimand - suspension of the right to practice the profession for the period of 12 months to 5 years 	<ul style="list-style-type: none"> - admonition - reprimand - suspension of the right to practice the pharmaceutical profession for 3 months to 3 years - deprivation of the right to practice the profession of pharmacist