

Extrajudicial ways of compensating for medical damage in Poland

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ABSTRACT

On January 1, 2012, an amendment to the act on Patient Rights and the Ombudsman for Patient Rights was passed. The amendment introduced the concept of a medical event, defining legal bases for voivodeship commissions to adjudicate on medical events and setting regulations for establishing compensation and atonement in such cases. The commissions do not adjudicate on hospital staff's fault in a medical event. The provisions of the act on Patient Rights and the Ombudsman for Patient Rights determined a fee for

an application concerning adjudication for a medical event; however, the provisions do not allow for exemptions from this fee. The provisions are imprecise and obscure. Despite the commissions' obligation to issue a statement on a medical event or its absence within 4 months from the moment of application, the provisions hamper the chances of obtaining financial compensation for damage suffered as a result of medical events.

Key words: Patient; law; medical event.

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INTRODUCTION

On January 1, 2012, an amendment to the act on Patient Rights and the Ombudsman for Patient Rights (hereinafter defined as the act on patient rights [1]) was passed. The main objective of the amendment was to allow patients to claims compensation for medical errors without going to court. The justification for the amendment also indicated that another objective was to reduce the time for consideration of the cases of patients, related to medical errors. It was emphasized that: consideration of the case, concerning compensation for medical error, in court takes approximately 4 years, whereas, the bill introduces a solution, which will allow to obtain compensation within 3 months [2]. It should be indicated that already at the stage of works of the Sejm the bill was criticized by representatives of the legal and medical environment and the association representing patient rights [3].

Despite criticism against assumptions of the amendment to the act on patient rights of April 28, 2011, an amendment to the provisions of the act on patient rights and the Ombudsman for Patient Rights was enacted, as well as to the act on obligatory insurances, the Insurance Guarantee Fund and the Polish Communication Insurance Office, which became effective on January 1, 2012, except for the provisions related to applying for the voivodeship commissions for adjudicating on medical events, which became effective within 14 days from the moment of promulgation of the above mentioned act, i.e. on June 17, 2011. A new chapter, 13A, was added to the provisions of the act on patient rights [4], introducing, e.g. the concept of a medical event, provisions related to determining compensation concerning medical events and legal bases for the functioning of the voivodeship commission for adjudicating on medical events (hereinafter called commission); moreover, procedures of the commission's investigation were defined.

It shall be mentioned that the provisions of the act on patient rights should be applied exclusively to medical events that happened after January 1, 2012. The events that happened before January 1, 2012 are beyond the commission's judgment.

The objective of this article is to present and assess an extrajudicial way of compensation for medical damages in Poland.

At the beginning of the discussion in this article, it should be indicated that the extrajudicial way of compensation for medical damage in Poland is an alternative for patients, and it is based on the Swedish No Fault Patient Insurance (NFPI), i.e. the system of liability without fault.

It means that the entitled subject has the right to choose from two options, i.e.:- submitting

an application to the commission, - taking a case to court.

However, it shall be emphasized that the choice of the extrajudicial mode is not ultimate as the applicant may still go to court, withdrawing the application for establishing the occurrence of a medical event to the day of adjudication, resulting from the application for the case reconsideration (...) or not accepting the compensation offer (...) [5].

Another important issue related to the subject matter is the fact that the commission does not decide on the level of damage and fault, but only on the fact of the event occurrence and causation between the event and damage in order to establish whether it is a medical event or not [6]. Thus a medical event is an objective category depending on the current state of medical knowledge [6].

Art. 67a of the act on patient rights defines a medical event as a procedure that is inconsistent with the current medical knowledge concerning: diagnosis, if it caused improper treatment or delayed proper treatment contributing to development of a disease; treatment, including surgical procedure; using a medicinal or medical product that caused: infecting a patient with a biological pathogenic agent, body damage, health disorder or the patient's death [4]. It should be indicated that the provisions of Chapter 13a, related to principles and mode of determining compensation in case of the occurrence of medical events, should only be used in relation to the medical events that resulted from the provision of healthcare services in a hospital, within the meaning of the act on medical activity. It means that the commissions do not have competences for adjudicating on healthcare services, other than hospital services. Moreover, an extrajudicial claim for compensation does not apply, if a patient suffers damage in a hospital, which is related to his rights [6]. The concept of a medical event is related to an action that may be performed by any person taking part in the process of healthcare service provision during the patient's stay in a hospital [7].

It shall be indicated that the provisions of the act on patient rights also define a possibility of staying the proceedings before the commission. It may take place, if the case on financial compensation is validly judged in relation to the same event, or if the civil proceedings are in progress; then, the proceedings before the commission are not commenced, and the commenced ones are discontinued [4]. Moreover, the proceedings should be stayed, if other proceedings for professional liability of a person performing the medical profession or the criminal proceedings for an offence are in progress. Termination of the proceedings for professional

liability causes commencement of the proceedings before the commission, *ex officio*.

Voivodeship commissions for adjudicating on medical events

The provisions of the act on patient rights regulate the status, membership and tasks of the commission. In the beginning it shall be emphasized that the commission's status raises theoretical doubts [9]. Art. 67e par. 2 determines that executing tasks of the voivodeship commission is not executing tasks of the public authority. The provision results in a lack of possibility of appealing against these decisions to the administrative courts, in the absence of regulations that would allow to appeal against the decisions in the common courts [10].

It shall be indicated that the Constitutional Tribunal in its judgment of March 11, 2014 stated that art. 67j par. 7 of the act on patient rights is inconsistent with art 45, par. 1, art 77 par. 2 and art 78 of the Constitution as it does not provide for a possibility of a physician's appeal against the decision of the voivodeship commission [11]. The commission works at the competent voivodeship offices. It consists of 16 members having knowledge of patient rights and enjoying all public rights. Among the members:

- 8 persons have at least higher education and a master's or equal degree in medical sciences and have been performing the medical profession for at least 5 years or have a doctoral degree in medical sciences;

- 8 persons have at least higher education and a master's degree in legal sciences and have been working in positions related to applying or creating law for at least 5 years, or have a doctoral degree in legal sciences.

It is obligatory for all commission members to have knowledge of patient rights. However, it shall be indicated that the provisions of the act do not set down any requirements for testing that knowledge. Candidates for commission members do not have any obligation to prove their knowledge, e.g. by a positive result of an interview or by finishing an appropriate course or postgraduate studies [7]. Practice has shown that the commission members had a course on patient rights, however, it took place after their nomination and not in order to get it [7].

The legislator indicates that the commission members cannot be persons, who were finally sentenced for an intentional offence or an intentional fiscal offence, punished by virtue of disciplinary or professional liability and were imposed a legally binding prohibition against holding the position, performing the profession or conducting the business activity; or prohibition against conducting an activity connected with nurturing, treatment, education or care of juveniles.

The voivode assigns 14 member of the commission, and two of them are assigned by the Minister of Health and the Ombudsman for Patient Rights. The voivode assigns 4 members from among candidates proposed by the council of physicians, dentists, nurses, obstetricians and laboratory diagnosticians, 4 – from among candidates proposed by the professional council of the Bar and the council of legal advisors, and 6 – by social organizations working for patient rights. Moreover, it shall be mentioned that in art. 67g of the act on patient rights the legislator defines an obligation of the commission members to maintain confidentiality of the information related to a patient collected in the course of the proceedings before the commission also after termination of their membership [4]. The term of commission office is 6 years. In the situation of revocation or death of a commission member, the tenure of a member appointed to his place expires on the same day as the whole commission's office term. The legislator determines the cases, in which earlier revocation of a commission member is acceptable. These are:

- resignation from the position,
- illness that permanently prevents him from performing his duties,
- circumstances excluding a possibility of performing the function,
- failure to make a declaration on no conflict of interest
- shirking duties of the voivodeship commission member or their improper performance.

The provisions of the act on patient rights are imprecise about a possibility of dismissing the commission member for shirking duties of the voivodeship commission member or their improper performance. However, there is no indication as to who is supposed to assess the work of the commission member, which is crucial in the question of a decision on his revocation [6]. In art. 67e, par. 10 the legislator also defines an obligation to inform the employer of the newly appointed commission member about the fact of the appointment and about dates of sessions [4]. It shall be indicated that the literal meaning of the above provision does not say which subject should inform the employer about the sessions. In relation to that, art. 67e, par. 10 of the act requires clarification.

The provisions also indicate that the ascendant and descendant spouses in a straight line of the adjudicating panel members cannot sit in the adjudicating panel, as well as the owners, employees or coworkers of the insurance company or medical entity managing a hospital and members of their organs, members of the organs and persons employed in the entity constituting the medical entity and shareholders with more than 10% of the capital stock in trade companies, which are insurance companies or medical entities managing

a hospital. This absolute limitation shall be deemed right or even too broad subjectively (all the descendant and ascendant), but at the same time it is one of the possibilities of guaranteeing the members' impartiality and objectivity of proceedings [12].

It is also related to descendant and ascendant spouses of the adjudicating panel members. The provisions also define exclusion of the commission member from the proceedings, if the member:

- is an applying entity or he is in a legal relationship with the entity and the result of the proceedings affects his rights and duties,
- is in a relationship with the applying entity, which raises doubts about his impartiality,
- is a spouse, relative or kinsman in a straight line, a side relative to the fourth degree or a side relative to the second degree of the applying entity,
- is related to the applicant by virtue of adoption, care or guardianship,
- or is a proxy or legal representative of the applicant [4].

It shall be added that before being appointed to the adjudicating panel, the commission members have to make a declaration on no conflict of interest the copy of which is presented in the decree of the Minister of Health of December 8, 2011, on the model of declaration on no conflict of interest for members of the voivodeship commission for adjudicating on medical events [8].

The provisions clearly show that the commission's work is supervised by the Chairman, whose task is to appoint a four-person group of commission members according to the order of applications for establishing the occurrence of a medical event, where 2 of them have to represent medical professions, and the other 2 – legal professions. In practice, the result of the above rule may be that there is no physician in the group. I believe that in the cases where the subject of the motion at the commission session is e.g. an assessment or diagnosis that could have caused improper treatment or that delayed proper treatment of a patient, participation of a physician is obligatory. Another problem is related to establishing an even number of members, participating in the session. "The legislator stipulated that in the case of equal number of votes the vote of the chairman is decisive, as the commission adopts resolutions by majority of votes [7].

The legislator also determined that the adjudicating panel is entitled to:

- remuneration in the amount not exceeding 430 PLN for participation in the session;
- reimbursement of travel costs in the amount and under the conditions determined in the provisions based on art. 77⁵ §2 of the labor code, i.e. on the basis of the decree of the

Minister of Labor and Social Politics on the amount due to a worker employed in a national or self-governmental entity of the budget sphere by virtue of a business trip of January 29, 2013 [13].

- a day free of work on the day of the session, without the right to remuneration.

Determination of remuneration for participation in the session comes within the competence of the proper voivode. It shall be indicated that the above record results in the fact that the remuneration for the commission members may vary. In relation to that, determination of the unified remuneration for participation in the sessions is justifiable.

Proceedings before the voivodeship commission for adjudicating on medical events

The basis for the commencement of the proceedings before the commission consists in submitting an application by a patient or his legal representative in cases of infection, body damage or health disorder. Whereas in the case of the patient's death, it shall be submitted by his/her inheritors. Thereby, the legislator limited the list of persons entitled to applying for establishment of the occurrence of a medical event. It shall be indicated that this regulation is inconsistent with art. 446, §3 and 4 of CC, as it says that if a victim dies as a result of body damage or health disorder, the court may grant the closest family members of the deceased proper compensation if their life situation considerably deteriorated; moreover, the court may grant the closest family members of the deceased the amount by virtue of satisfaction for harm suffered. Thus, the circle of persons entitled to compensation or satisfaction for harm suffered is limited to the closest ones. "The concept of a close person is not defined in the act and includes persons related by kinship and those staying in close relationship, such as children adopted by a foster family, persons being in a quasi-marital relationship (concubine), a child staying in a care facility, who stayed in contact with the deceased, etc. [14]. It shall be emphasized that the provisions of CC do not give the definition of a close person. However, the concept is included in art. 3 item 2 of the act on patient rights, indicating that the close persons are: a spouse, relative or kinsman to the second degree in a straight line, legal representative, person remaining in a relationship with the patient or indicated by him/her [4].

Thus, the opinion of M. Nesterowicz and M. Wałachowska, who indicate that: The regulation in the act on patient rights – in comparison with CC – limiting the circle of persons entitled to compensation benefits in case of the patient's death, is justified. Also, the act does not determine to which inheritors it applies, i.e. in a straight line, or also in some further lines (however, it can be

assumed that these are inheritors included in the will and those, who inherit on the basis of the act) [15].

It shall be indicated that “in each case, the legislator idealistically assumed full capacity of inheritors”. Experience has taught us that the situations, in which there is any financial issue, are usually extremely conflict-provoking [16]. The legislator also determined that the application for establishing the occurrence of a medical event shall be submitted to the commission competent for the hospital. It shall be indicated that this regulation results in the situation in which the proceedings for establishing the occurrence for a medical event may be conducted outside the applicant’s place of residence, which may increase the costs of the proceedings by the cost of establishing the occurrence of a medical event. I think that in such situation it would be justified to change the provisions of the act on patient rights, which would allow to submit an application to the commission competent for the place of the occurrence of the medical event or for the place of the applicant’s place of residence.

The provisions do not directly indicate that the application for establishing the occurrence of a medical event may be also submitted by the applicant’s proxy. A possibility of submitting the application by the proxy results indirectly from art. 67g par. 2 of the act on patient rights, determining the circumstances of a commission member’s exclusion. The literature is not unanimous in the question of submitting the application by the proxy. However, in practice a possibility of the proxy’s acting is allowed for. The power of attorney is granted one inheritor by the other inheritors in order to submit an application and let him represent them in the proceedings before the commission. Failure to enclose it with the application is a formal deficiency and it is the basis for returning the application to the applicant without consideration. Whereas, revocation of power of attorney by the inheritors results in discontinuation of the proceedings related to establishing the occurrence of a medical event. It shall be indicated that the provisions of the act on patient rights do not refer to compliance with the provisions of CC concerning the power of attorney, which may raise doubts about its scope and duration. It shall be assumed that all these questions should be regulated in the contents of the power of attorney (or possibly in the contents of an agreement between the authority and the proxy, if such an agreement is concluded), and their assessment should be based, most of all, on the provisions of CC related to the power of attorney [17]. Moreover, the provisions of the act on patient rights do not regulate a claim for granting replacement cost by a proxy of an insurance company or a medical entity managing a hospital.

Art. 67d, par. 1 in relation to 67k, par.7 of the act on patient rights defines obligatory elements, which shall be included in the application. The legislator specified that these are: the patient’s data (name and surname, birth date, PESEL or series and number of a document confirming the identity, if possessed), name and surname of a legal representative (if there is a representative in the proceedings), names and surnames of all inheritors and the indication which of them represents the others (only if the proceedings are related to the patient’s death), shipping address, data of the medical entity managing a hospital (company name, address of the head-office and the hospital, if they are different), justification of the application, including substantiation of the event which resulted in infection, body damage, health disorder or patient’s death or financial and non-financial harm, indication of the subject of the application – infection, body damage, health disorder or patient’s death, and a suggestion of the amount of compensation, not exceeding 100,000 PLN in case of infection, body damage or health disorder and 300,000 PLN – in case of the patient’s death [7]. It shall be added that evidences substantiating circumstances indicated in the application should be enclosed, e.g. medical documentation, confirmation of payment in the amount of 200 PLN, and – in case of the patient’s death – the certificate on inheritance. The fee for the application is paid to the account of the competent voivodeship office. The fee is included in the costs of the proceedings before the commission.

The provisions of the act on patient rights do not provide for the patient’s exemption from the payment. “In case of the discussed regulation, the legal course may be more favorable, as the poorest persons may expect a court-appointed lawyer, exemption from court costs and [16].

Art. 67 says that the proceedings before the commissions are subject to the provisions of CC. In relation to that, presenting the concept of substantiation on the basis of the provisions of CC is justified. Basically, substantiation (*semiplena probatio*) assumes a possibility of existence of certain circumstances that are significant in terms of the process and it does not require compliance of statements (provisions) with the actual state of affairs [19]. In other words, to some extent, substantiation “frees” the proceedings from evidentiary formalism [17]. In the eyes of the provisions of the act on patient rights the legislator is obliged to substantiate occurrence of a medical event by e.g. submission of medical documentation.

The provisions also determine time limitation related to submitting an application for establishing the occurrence of a medical event. Art. 67c says that it cannot take place later than within a

year from the day in which the entity entitled to put it forward learned about the infection, body damage, health disorder or the patient's death; however, not later than within 3 years from the date of the event. Art. 67c, par. 4 of the act also says that in the case of submitting the application by the patient's inheritors the period ends with termination of the inheritance proceedings. It shall be indicated that art. 442¹ CC does not determine the time limit for seeking redress for the close person's death depending on the inheritance proceedings. Whereas art. 67d par. 2 determines an obligation to enclose a certificate of inheritance to the application. "However, one shall remember that the proceedings related to the establishment of inheritance may be considerably extended by the inheritance court" [17]. The act also provides for a possibility of avoiding expiration, which takes place at the moment of submitting the application to the voivodeship commission for adjudicating on medical events, however, it is related exclusively to the events mentioned in the application [7].

The proceedings before the commission are formalized. It shall be emphasized that incomplete or improperly paid application is returned to the applicant without consideration. The provisions also do not say anything about informing the applicant about the basis and justification of returning the application by the commission. There is also no regulation of formal consideration of applications, i.e. in terms of its completeness and payment. Practice shows that applications are formally considered during the sessions summoned for this purpose, or by the Chairman of the commission. In relation to that we should adopt a solution consisting in considering the application by the Chairman of the commission without calling the session.

Moreover, the provisions do not determine a possibility of passing an application to another commission. It shall be indicated that it would be justified in the case of charges relating to reasonable doubts concerning impartiality of commission members or in case of failure to gather the required number of members of the adjudicating panel.

The commission immediately forwards the complete and paid application to the manager of the medical entity managing a hospital, whose activity is related to the application, and to its insurance company. The provisions determine a 30-day period - from the date of receiving the application with its justification - for the manager and insurer to present their position. Failure to present the position or presenting it later is equivalent to the acceptance of the application in terms of the circumstances and the proposed amount of compensation.

A problem appears, when the medical entity's manager and his insurer present their

position. It is necessary to get familiarized with medical documentation in order to present the position on the application - or position on the proposed amount of compensation in case of stating the occurrence of a medical event by the commission. However, the provisions do not regulate the question of making medical documentation accessible to the parties of the proceedings by the commission. In practice, sending an application the commission informs the parties about a possibility of having access to medical documentation in the commission's office.

Analyzing the act on patient rights it shall be indicated that the legislator did not precisely regulate the question of keeping documentation concerning the proceedings before the commission by a voivode. Art. 67n of the act literary says that declarations of no conflict of interest, protocols and opinions with their justifications are kept by the voivode for 10 years. It shall be indicated that this provision does not take into consideration medical documentation, which is collected in relation to particular proceedings.

Powers of the voivodeship commission for adjudicating on medical events

Art. 67i, par. 1 of the act on patient rights says that the aim of the proceedings before the commission is to establish if the event that has resulted in financial or non-financial harm was a medical event. Whereas, the commission is not entitled to determine the level of harm suffered by a patient, or in case of his death – by his inheritors, or to assess the application for compensation presented by the insurance company [15].

The act on patient rights determine that the commission informs the applicant, the manager of a medical entity managing a hospital and his insurer about the date of the session at least 7 days in advance. The provisions say that in such situation art. 131 CC shall be applied. It means that the information may be delivered by postal operators, persons employed in the court, bailiff or court delivery service. However, practice shows that the commissions make deliveries by Poczta Polska. The provisions also determine the competences of the commission in relation to the proceedings. These are:

- summoning persons to provide explanations: the applicant, the manager of the medical entity managing a hospital, whose activity is related to the application, or persons, who performed the medical profession in the medical entity, and other persons employed in it or related to it during the period when, according to the application, a medical event took place or who were indicated in the application as persons, who may have any information that is useful for the proceedings and for an insurance company;

- asking for documentation kept by the medical entity;
- inspecting hospital rooms and equipment;
- consulting physicians from the list of the Medical Committee members, who are related to the particular fields of medicine, working with the Ombudsman for Patient Rights or the voivodeship consultant in the field of medicine, pharmacy or other fields, applicable in health care.

As far as the powers of the commission are concerned, it shall be indicated that the legislator did not impose any sanctions for non-occurrence of witnesses, summoned to provide explanations at the session. Moreover, the provisions of the act on patient rights do not specify a deadline for giving an opinion by an expert. The commission is entitled to request for medical documentation; however, the provisions do not specify whether it is acceptable to request for the documentation from any medical entity managing a hospital, or only from the medical entity being the party of the proceedings. Whereas, according to art. 67d, par. 2 of, saying that it is an applicant, who is supposed to enclose evidences substantiating the circumstances indicated in the application, and art. 6 CC, the power of the commission to get the access to the medical documentation shall be assumed as subsidiary [20].

Reassuring, it is impossible for the commission to adjudicate on the occurrence or non-occurrence of a medical event not later than 4 months after the submission of the application. I think that the period should be treated as instructive.

The commissions also have powers resulting from compliance with the provisions of CC. These are:

- a possibility of issuing a document - at a specific time and place - belonging to third parties and being the evidence for the fact that is significant for the case settlement, unless the document includes secret information (art. 248 § 1 CC);
- a possibility of requesting for a duplicate or officially authenticated extract from the document that can be found in documentation of the public authority organ or another state organ (art. 250 CC);
- a possibility of imposing a fine on the parties of the proceedings in the situations determined in art. 252 and 253 CC, and on expert physicians in the situation determined in art. 287 CC.

The provisions also say that the decision of the commission shall be taken by a majority of $\frac{3}{4}$ of votes, in the presence of all members of the adjudicating panel. An obligation of the chairman of the adjudicating panel is to announce the decision - including the main elements of the settlement - during the session at which the decision

was taken. Justification of the decision is prepared within 7 days. The provisions do not determine a person responsible for preparation of the document stating the occurrence or non-occurrence of a medical event; they also do not specify which elements should be included in the commissions' decisions. There is also a significant problem consisting in determination of a kind of this document. In such case, one should refer to art. 244 CC, which states that official documents prepared in the determined form by the appointed organs of the public authority and other state organs - within the scope of their work, are the evidence for what they officially certified. The official document may also be prepared by the professional, self-governmental, communal and other social organizations within the scope of the public administration matters, commissioned by the act. The official document shall include a symbol (name) of an organ, signature of a person performing the organ's function and contents expressing the organ's will or knowledge of the matters in its competence. The document is only the evidence of what it officially certifies (presumption of reliability) [21]. The literary meaning of art. 244 CC is that the legislator does not define the commissions as organizations entitled to issuing official documents. Thus, the decision of the commission cannot be an official document. If we assume that the legislator appointed the commissions to perform particular public tasks, i.e. to establish whether a medical event occurred or not, then the documents issued by the voivodeship commissions may be given the value of official documents [17].

In relation to that, it is possible to accept both notions. The entity submitting the application can withdraw it to the day in which the decision is issued as a result of submitting the application for the case reconsideration. In such case, the commission discontinues the proceedings concerning establishment of the occurrence of a medical event. The basis for discontinuation of the proceedings is also the applicant's death or the revocation of the power of attorney to represent the other inheritors. The decision with its justification is delivered to the applicant, manager of the medical entity managing a hospital, and insurer. The parties of the proceedings are entitled to submit a reasoned request for the case reconsideration within 14 days from the moment of delivery of the decision and its justification. It shall be indicated that in art. 67j, par. 7 of the act on patient rights the legislator does not determine limitations of charges. Hence, it shall be assumed that the limitations related to the type and scopes of charges are exclusively related to the complaint [17]. The provisions also determine a 30-day period for the reconsideration of the case. The commission participating in the case reconsideration has to

consist of different members. None of the members participating in issuing the charged decision can adjudicate on that case. An obligation of the commission adjudicating on medical events, is also to inform the entities, entitled to submitting the justified application related to the case reconsideration, about its ineffective expiration. Thus, it shall be assumed that submitting the application after the deadline means that the application does not have any legal consequences [17].

The provisions also say that the insurer (or in case of his absence, the medical entity) is obliged to present the application for compensation to the applicant within 30 days from the moment of delivery of the notification about the ineffective expiration of the period for submitting the application for the case reconsideration; or delivery of the commission's decision issued on the basis of the application for the case reconsideration. Art. 67k, par. 7 of the act on patient rights says that the maximum amount of benefit (compensation) cannot exceed 100,000 PLN in case of infection, body damage or health disorder, or 300,000 PLN in case of the patient's death. It means that the legislator determined only the maximum amount of the benefit. The above provision causes that in practice there are situations, in which the insurer or medical entity proposes the benefit in the amount of 1 PLN for the entity submitting the application. It shall be added that the decree of the Minister of Health on the detailed scope and terms of determining the amount of the benefit in case of the occurrence of a medical event of June 27, 2013 determines the above in relation to one patient in case of particular types of medical events [18]. The control of the amount offered by the insurer or medical entity is beyond the commission's supervision. If the insurance company or medical entity presents the offer, the applicant shall declare its acceptance or refusal within 7 days. In the offer is accepted, the applicant declares the withdrawal of any claims for compensation for harm suffered, resulting from the medical events recognized by the commission, which happened before the day of submitting the application. However, the provisions do not regulate the consequences of accepting the offer by the applicant. Whereas, the offer itself must clearly define the elements of harm that are to be compensated and the amounts assigned to them. It is not enough to determine the global sum [15]. It shall be indicated that the provisions do not regulate failure to submit the statement concerning the insurance company's offer by the applicant. Obliging him to submit the statement may suggest that its lack means the consent; however, a requirement to declare the withdrawal of any further claims contradicts that [16]. A particular problem appears when applicants are legal

representatives of a juvenile, as on the field of the civil law they cannot withdraw the claims which are not their own [7]. In order to submit the above statement, the parents would have to obtain the permission of the guardianship court [22].

Whereas, failure to present the offer of compensation by the insurer or medical entity within 30 days results in an obligation to pay the amount determined in the application. In such situation, the commission issues a certificate, which includes the submission of the application for establishing the occurrence of a medical event, the amount of compensation and the fact of not presenting the offer by the insurer or medical entity. The status of the certificate, as well as the decision of the commission also raises many doubts [17]. The certificate is an executive right to which the provisions of section II, right I, part III apply. Whereas, art. 776 CC states that the executive rights are the basis for execution. The executive right is a right provided with an executive clause, unless the act states otherwise.

Art. 777 CC includes a list of types of executive rights. However, the certificate issued by the voivodeship commissions adjudicating on medical events was not indicated as an executive right in this provision. A person who gets the certificate will be able to submit an application for execution against the insurer or medical entity yet the same day [17].

The provisions of the act on patient rights also mention a complaint related to stating non-compliance of the commission's decision with the law. As far as the complaint is concerned, the legislator refers to applying art. 424[5] and art. 424[8] – 24[12] CC, respectively. The complaint can be lodged by the parties of the proceedings. It shall be lodged within 30 days from the date of the ineffective expiration of the application for the case reconsideration or after receiving the decision related to the case reconsideration. The basis for lodging the complaint consists in violation of the proceedings before the commission, exclusively. M.P. Ziemiaka is right about the fact that: The assessment of the adjudication standards' violation shall be individual for each case [17]. Art. 424 [5] CC determine the elements which shall be included in the complaint. Here, we shall pay special attention to the complaint element determined in art. 424 [5§] 1 CC – “substantiation of harm, caused by the decision related to the complaint”. Whereas, art. 424 [8] CC says that lack of substantiation causes rejection of the complaint.

The legislator does not specify, if the complaint related to stating non-compliance of the decision with the law is supposed to withdraw the imperfect decision (annulling or reformatory effect) or cause the execution of compensation claims [17]. The commission considers the complaint during a

closed session within 30 days from the moment of its reception in a group of 6 persons. It shall be indicated that consideration of the complaint in a 6-person group is debatable. It should be remembered that the commission members are persons with legal or medical education. In case of the complaint related to stating non-conformity of the commission's decision with the law, the proceedings are related to stating or not stating the violation of the provisions of the proceedings before the commission. In this connection, the participation of the commission members having medical education is doubtful. In such situation, it would be justified to reduce the size of the adjudicating panel to 4 members. The provisions of the act on patient rights also do not determine the consequences of accepting the complaint related to stating non-conformity of the decision with the law.

Proceedings costs

The legislator determines that the costs of the proceedings before the commission are borne by three entities. These are:

- applicant – in case of the absence of a medical event
- medical entity managing a hospital – in case of the absence of a medical event
- insurer – in case of not presenting the compensation offer.

Art. 67l, par. 5 determines that the costs of the proceedings include:

- application fee in the amount of 200 PLN;
- reimbursement of travel costs, lodging, lost earnings or incomes of the persons called by the commission;
- remuneration for preparing an opinion.

The decree of the Minister of Health of December 23, 2011 on the flat costs in the proceedings before the voivodeship commission for adjudicating on medical events [23] determine that the flat costs concerning the persons called by the commission are: 83.58 PLN for each complete 100 km, 34.50 PLN for each lodging, 153.57 PLN for each day – in case of lost earnings or incomes of the persons from the list of the Medical Committee members, working with the Ombudsman for Patient Rights or the voivodeship consultant;

the amount is increased by: 150 PLN if the author of the opinion has an academic title of professor, 100 PLN – Ph.D., 60 PLN – doctor.

It shall be indicated that in a special situation the applicant may be exempted from the proceedings costs. In art. 67 the legislator refers to applying art. 102 CC. The provision determines - in the particularly justified circumstances - a possibility of charging the losing party with partial costs or not charging it at all by the court. Art. 102 CC is an exception from the rule concerning the

losing party's liability for the proceedings costs, determined in art. 98 CC.

In the decision of the High Court of February 11, 2010, there was presented the idea that: Establishing if there is “a particularly justified case” depends on the free assessment of the court. However, the assessment has to take into account all circumstances that may affect it [24]. Moreover, in the decision of February 22, 2011, the High Court stated that: difficult living, financial, health or personal situation, which makes it impossible for the party to cover the proceedings costs due to the opponent, is a circumstance justifying derogation from the rule expressed in art. 98 § 1 CC. Carrying out the assessment, the adjudicating court shall be guided by its own sense of justice; undermining the assessment of this court requires proving its faultiness [25].

Therefore, exempting the applicant from the proceedings costs shall be a free decision of the commission, which shall be taken after a detailed analysis of the applicant's situation.

CONCLUSIONS

The presented issues related to solving the cases in an extrajudicial way in Poland arouse many doubts due to imprecise and unclear regulations, which make it more difficult e.g. for a patient to obtain compensation, instead of making it easier by shortening the proceedings. Despite many provisions related to the status and competences of the commission, we cannot leave out the fact that the discussed “regulation (...) is regarded as crucial” [22]. I think that introducing a regulation, concerning solving the cases in an extrajudicial way in Poland, into the act on patient rights would be justified; however, the provisions require to be promptly changed with regard to:

1. determining the requirements for checking knowledge of candidates for the commission members in the field of patient rights, and specifying the provisions concerning a possibility of revoking the commission member due to shirking the duties of the voivodeship commission or performing them inappropriately;
2. specifying the provisions for determining the entity responsible for informing the employers of the commission members about the sessions;
3. determining equal remuneration of the Polish voivodeship commissions members for participation in sessions;
4. adopting the provisions of the act on patient rights to the provisions of the civil code in terms of extending the catalogue of persons entitled to submitting the application for establishing the occurrence of a medical event;
5. allowing to submit the application for establishing the occurrence of a medical event

to the commission competent for the place of the event or for the place of the applicant's residence;

6. referring to applying the provisions of the code of civil procedure in terms of the power of attorney;
7. determining the provisions concerning granting the replacement cost by the proxy of the insurer or medical entity managing a hospital;
8. determining the provisions concerning a possibility of exempting a patient from the fee for submitting the application;
9. determining the provisions related to the obligation of informing the applicant about the basis and justification of returning the application by the commission;
10. regulating activities concerning formal consideration of the application i.e. in terms of its completeness and payment;
11. determining the provisions concerning a possibility of advancing the application to another commission for its consideration;
12. regulation of making medical documentation available to the parties of the proceeding by the commission and storing medical documentation related to the proceedings before the commission by the voivode;
13. determining the provisions concerning a possibility of imposing sanctions in case of non-occurrence of witnesses summoned to provide explanations at the session, and the date of issuing the opinion by the expert;
14. specifying the provisions by indicating a person responsible for forming the judgment about the occurrence or non-occurrence of a medical event;
15. determining the elements that should be included in the decision of the commission on the occurrence or non-occurrence of a medical event;
16. regulating the consequences of accepting the compensation offer by the applicant and not issuing a declaration on the compensation offer presented by the insurer;
17. investigating complaints against non-conformity of the decision with law in a 4-person group of the commission member having at least legal education;
18. determining the consequences of consideration of the complaint against non-conformity of the decision with law.

The above propositions will significantly affect the practical application of the provisions of the act on patient rights.

Conflicts of interest

I hereby declare that I do not have any connection or financial relationship with any organization or person making a direct financial contribution to the article contents.

REFERENCES

1. The act from April 28, 2011 on amending the act on patient's rights and the Ombudsman for Patient's Rights and the act on obligatory insurances, Insurance Guarantee Fund and Polish Communication Insurance Office [Law Journal No. 113, item 660] (Polish)
2. The Sejm of the Republic of Poland: Justification for amendment of the act on patient's rights and the Spokesperson for Patient's Rights, available at <http://orka.sejm.gov.pl/> [cited: January 14, 2014] (Polish)
3. Krajewski R. Nowelizacja ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta a oczekiwania osób wykonujących zawody medyczne. Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa, editor: E. Kowalewski, Toruń: Dom Organizatora 2011, p. 87- 91. (Polish)
4. The act on patient's rights and the Ombudsman for Patient's Rights [u. t. Law Journal from 2012, item 159 with amendments]. (Polish)
5. Krupa – Lipińska K. Odpowiedzialność cywilna z tytułu zdarzeń medycznych w szpitalach. *Przeł Sąd.* 2013;11-12, 96.(Polish)
6. Karkowska D. Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta., Edition 2. Warsaw: Wolters Kluwer; 2012. p. 478 – 95. (Polish)
7. Sarnacka E, Jacek A, Porada S. Odpowiedzialność szpitala z tytułu zdarzeń medycznych. Etyczne problemy zarządzania w ochronie zdrowia [In]: Etyczne problemy zarządzania w ochronie zdrowia, Hartman J, Zalewski Z. (Eds), Warsaw: Wolters Kluwer Business; 2013. p.169-81 (Polish)
8. The decree of the Minister of Health from December 8, 2011 on the model of declaration on no conflict of interests, submitted by members of the voivodeship commission for adjudicating on medical events [Law Journal No. 274, item 1625] (Polish)
9. Zob. Bagińska E. Działalność wojewódzkich komisji do spraw orzekania o zdarzeniach medycznych a wykonywanie władzy publicznej. [In:] Problematyka cywilnoprawna i ubezpieczeniowa, Kowalewski E (Ed), Toruń: Wydawnictwo Dom Organizatora, 2011; p. 145-62 (Polish)
10. Frąckowiak H. Postępowanie przed wojewódzkimi komisjami ds. orzekania o zdarzeniach medycznych – nowa procedura (nie) dla profesjonalnych pełnomocników. *Radca Prawny Dodatek naukowy.*2014; p.14 D (Polish)
11. the judgment of the Constitutional Tribunal of March 11, 2014, K 6/13 [Internet], available at:

- <http://trybunal.gov.pl/rozprawy/wyroki/art/6751-postepowanie-przed-wojewo-dzkimi-komisjami-do-spraw-orzekania-o-zdarzeniach-medycznych-popelnionyc/s/k-613/>(Polish)
12. Paszkowska M. Rozstrzygnięcie roszczeń pacjenta w trybie ad ministracyjnym. *Przegląd Prawa Publicznego*.2013;7-8, p.58 (Polish)
 13. The decree of the Minister of Labor and Social Politics on liabilities due to a worker employed in a national or self-governmental entity of the budget zone by virtue of business travel from January 29, 2013 [Law Journal from 2013, item 167] (Polish)
 14. Pietrzykowski K Safjan M. (Eds). Comment to the Civil Code, Warsaw, Beck; 2013. System Informacji Prawnej Legalis. (Polish)
 15. Nesterowicz M, Wałachowska M. Odpowiedzialność za szkody wyrządzone przy leczeniu w związku z nowym pozasądowym systemem kompensacji szkód medycznych, Kompensacja szkód wynikłych ze zdarzeń medycznych [In:] *Problematyka cywilnoprawna i ubezpieczeniowa*, Kowalewski E (Ed), Toruń: Wydawnictwo Dom Organizatora, 2011; p. 28 – 30 (Polish)
 16. Przybycień A, Szewczyk P. Terra incognita, czyli o alternatywnym sposobie kompensacji szkód medycznych. *Edukacja Prawnicza Dodatek Specjalny*. 2012;1(130). X- IX (Polish)
 17. Ziemiak MP. Postępowanie przed wojewódzkimi komisjami do spraw orzekania o zdarzeniach medycznych. Kompensacja szkód wynikłych ze zdarzeń medycznych. *Problematyka cywilnoprawna i ubezpieczeniowa* [In:] *Problematyka cywilnoprawna i ubezpieczeniowa*, Kowalewski E (Ed), Toruń: Wydawnictwo Dom Organizatora, 2011; p.176-96 (Polish)
 18. the decree of the Minister of Health on the detailed scope and terms of determining the amount of the benefit in case of the occurrence of a medical event of June 27, 2013 [Law Journal, 2013, item 750] (Polish)
 19. Piasecki K. Kodeks postępowania cywilnego. Komentarz do artykułów 1–366. Vol. I, System Informacji Prawnej Legalis 2013 (komentarz do art. 243, teza 1) (Polish)
 20. Śliwka M. Prawo pacjenta do dokumentacji medycznej a postępowanie przed wojewódzkimi komisjami do spraw orzekania o zdarzeniach medycznych. Kompensacja szkód wynikłych ze zdarzeń medycznych [In:] *Problematyka cywilno-prawna i ubezpieczeniowa*, Kowalewski E (Ed), Toruń: Wydawnictwo Dom Organizatora, 2011, p. 260 (Polish)
 21. Uliasz M. (Ed) Komentarz do kodeksu postępowania cywilnego. 2008r., System Informacji Prawnej Legalis (Polish)
 22. Świdorska M. Zgoda uprawnionego a postępowanie przed wojewódzkimi komisjami odszkodowawczymi. [In:] *Problematyka cywilnoprawna i ubezpieczeniowa*, Kowalewski E (Ed), Toruń: Wydawnictwo Dom Organizatora, 2011, p. 227- 229 (Polish)
 23. The decree of the Minister of Health from December 23, 2011 on the flat amount of the costs of the proceedings before the voivodeship commission for adjudicating on medical events [Law Journal from 2011, No. 294, item 1740] (Polish)
 24. The decision of the High Court from February 11, 2010, I CZ 112/09, the System of Legal Information LEX No. 564753 (Polish)
 25. The decision of the High Court from February 22, 2011, I PZ 1/11, System Informacji Prawnej Legalis (Polish)