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Voivodship Commission for Evaluation of Medical Events in Poland is this institution still needed?

by dr Monika Urbaniak*

Index: 1. Introduction; 2. The commission procedure; 3. The composition of the commission; 4. Conclusion.

Abstract.

In Poland on January 1st 2012 entered into force regulations establishing voivodship commissions for evaluation of medical events. This institution was intended to be an alternative for years-lasting court proceedings as well as to facilitate the process of granting compensation and damages. The procedure to claim damages before the commission is optional and is applicable only to events occurred after January 1st 2012. The legislator providing for a new alternative to court proceedings solution did not impede patients to claim damages in the same court proceedings as before. However, anybody who receives damages in the case heard by the voivodship commission loses his right to file with a common court. Unfortunately, it is not free of defects on both system and constitutional grounds.

1. Introduction

On January 1st 2012 entered into force regulations establishing voivodship commissions for evaluation of medical events. This new institution was intended to be an alternative for years-lasting court proceedings as well as to facilitate the process of granting compensation and damages. The amended Act of November 6th 2008 *on Patients' Rights and the Ombudsman for Patients' Rights*[1]introduced the possibility to claim compensation and indemnity for damages suffered as a

* Chair and Department of Facility Management Organizations in Health Care, Poznan University of Medical Sciences, Poznan, Poland.

[1] Ustawa z dnia 6 listopada 2008 r. *o prawach pacjenta i Rzeczniku Praw Pacjenta* t.j. Dz. U. z 2012 r. poz. 159.

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result of a medical event. Under Article 67a of the Act, a medical event is construed as an infection, bodily injury, health disorder or the patient's death being a result of a diagnosis, treatment, application of a medicinal product or a medical device not compliant with current medical knowledge.

The new institution was intended to be an alternative for court proceedings lasting for years and to facilitate the process of granting compensations and damages in a quick and simple way. The Polish model of compensating for medical damages refers in its solutions to institutions which are in force in a similar shape in Scandinavian countries and in France. The essence of those solutions is to guarantee a more effective protection of the patient's rights. It needs to be specified, however, that French commissions for example are presided by a judge and the purpose of their work is only to give an opinion. On the other hand, the commissions in Scandinavian countries are limited in the maximum amount of the damages they can award and also they conduct the proceedings without the obligation to prove somebody guilty.

It is also worth emphasizing that the necessity to undertake measures to increase the safety of patients and to prevent adverse events in health care constitutes the object of interest of the World Health Organization, the European Union and the Council of Europe. The act particularly important is the Recommendation Rec(2006)7 of the Committee of Ministers to Member States on management of patient safety and prevention of adverse events in health care[2] which was prepared by the Expert Committee composed of the most acknowledged specialists coming from fourteen countries and from the World Health Organization. The object of the recommendation is the proposal to elaborate a strategy for patient safety in each country of the Council of Europe as well as to elaborate a system of reporting and registering adverse events in health care. An adverse event within the meaning of the recommendation is each unwanted or unexpected event which could cause or caused damage to one or more patients receiving health care. These issues also interested the European Commission which intends to implement an integrated approach with regard to patient safety in all member states. The legal solutions implemented in Poland regarding commissions for evaluation of medical events should be viewed as an element of the national strategy for patient safety.

[2] Recommendation Rec(2006)7 of the Committee of Ministers to Member States on management of patient safety and prevention of adverse events in health care. Council of Europe, Committee of Ministers, 2006. (https://wcd.coe.int).

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2. The commission procedure

The procedure to claim damages before the commission is optional and is applicable only to events occurred after January 1st 2012. The intention of the project of the statute was to introduce a new institution able to relieve the courts overburdened with proceedings for damages for medical mistakes. It needs to be pointed out that the statute limited the possibility to claim damages only to hospitals, while it is not competent for clinics or open treatment facilities. The commission is a *quasi*-judicial body but a party cannot file an appeal against its ruling with acommon court. The commission, performing public court's functions, operates in the judiciary sector[3]. The structure of the commission, division into adjudicating panels and their submission to the provisions of the Code of Civil Procedure are all factors which make commissions similar to common courts[4].In the current legal status it is doubtful if the commission for evaluation of medical events may be construed as aso-called Alternative Dispute Resolution – ADR which is an alternative for common judicial bodies way to resolve disputes. It seems that due to the lack of consent of the parties in the form ofan arbitration clause or to the lack of reference to the provisions of the Code of Civil Procedure with regard to mediation or arbitration court this solution cannot be construed as one of ADRs[5].

Almost two years of the existence of voivodship commissions for evaluation of medical events enable to make a preliminary evaluation of their activity. Above all it needs to be pointed out that in 2012 few applications were filed with voivodship commissions for evaluation of medical events. It was caused above all by the fact that a considerable number of applications filed with commissions in 2012 were dismissed because they regarded events which had occurred prior to January 1st 2012. Now most patients' applications regard services in obstetrics, surgery and orthopedics.

The statute excluded the openness of the proceedings with respect to the proceedings before a commission for evaluation of medical events.Consequently, this provision results in a different

[3] E. Bagińska, *Działalność wojewódzkich komisji do spraw orzekania o zdarzeniach medycznych a wykonywanie władzy publicznej*, [w:] E. Kowalewski (red.) *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, Toruń 2011, s. 151.
[4] M. P. Ziemiak, *Postępowanie przed wojewódzkimi komisjami do spraw orzekania o zdarzeniach medycznych. Wybrane aspekty* [w:] E. Kowalewski (red.) *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, Toruń 2011, s. 167.
[5] Ibidem, s. 151.

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understanding of premises of responsibility by various commissions. As a result, there are discrepancies in particular commissions with respect to the number of cases which were terminated withthe confirmation of a medical event. The highest numberof cases, namely 17, in which the confirmation of a medical event was adjudicated took place in Wielkopolska. Furthermore, it needs to be criticized that there is a limited communication between adjudicating panels in different parts of the country which results in a slow development of a uniform approach in judicial decisions. All that leads to a situation where addressees of legal regulations characterized with the same relevant feature to the same degree are not treated equallybut differently dependently on which voivodship commission the given case is examined by. This situation leads to the violation of the principle of equal protection of laws[6].

To obtain damages or compensation it is necessary that a voivodship commission for evaluation of medical events confirms the occurrence of a medical event. The main amendment introduced by the statute was defining therein of the notion of a "medical event" intended as an infection of the patient with a biological pathogenic factor, bodily injury or health disorder as well as death being a result of a diagnosis, applied treatment or a surgery performed not in compliance with current medical knowledge.

The statute introduced a maximum time limit to file an application before the commission. The application may be filed within one year from the date on which the patient or his or her statutory representative got to know about the occurrence of an infection, bodily injury or health disorder. In the case of death the right is granted to decedent's successors and the time limit to file the application has been extended; it cannot, however, exceed the period of three years from the date of the occurrence of the event resulting in an infection, bodily injury, health disorder or death of the patient. The application is examined by the commission competent with respect to the seat of the hospital where the event took place. It needs to be emphasized that the time limit to file an application may turn out to be too short in the situation where some medical damages may emerge after the lapse of many years. This means that the application may not be filed with the commission but damages may still be sought in judicial proceedings[7].

The intention of the legislator was to establish voivodship commissions in order to create an alternative for court proceedings. First of all, the commission was given a time limit of four months

[6] Zob.: E. Chemerinsky, *Constitutional Law. Principles and Policies*, 3rd ed., Aspen 2006, s. 668 i nast.
[7] M. Śliwka, *Wybrane czynniki determinujące działalności wojewódzkich komisji orzekających o zdarzeniach medycznych*, Prawo i Medycyna, 2012 nr 3-4, s. 18.

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to examine the application. In reality, it is more an advisable time limit because just the adduction by the commission of the evidence based on expert's opinion extendsthe proceedings over the statutory time limit. An expert before the commission can be a specialist medical practitioner entered in the register of physicians in a given field of medicine or a voivodship consultant in a given field of medicine, pharmacy or in any other field applicable in health care.

The proceedings before a voivodship commission may be instituted on the application of the patient, his statutory representative or patient's successors in the case of his death. Under Article 26 section 3 item 10of the Act on Patients' Rights, the entity providing health services shall provide the medical documents to the successors within the scope of the proceedings which are in progress before the voivodship commission for evaluation of medical events. This provision was intended to make possible for successors to have access to documents yet before the proceedings in order to assess substantial legitimacy of the intended application. In practice there might arise a situation where a successor who has not yet submitted the application with the commission will not get access to documents because the proceedings is not yet in progress because the application has not yet been submitted[8]. The civil code limits the number of people entitled to claim damages exclusively to close relatives.It needs to be emphasized that the Act on Patients' Rights considerably extends the number of people entitled to file the application with the commission to all successors. For example, the application may be filed by a *gmina[NUTS level 5 – translator's note]*in the case of a personnot having any successors. It needs to be pointed out that this understanding of who is entitled to file the application is a solution incompliant with civil law principles of compensation for medical damages[9].

The statute limits the time limit to file the application with the commission to one year from the date on which the applicant entity got to know about the infection, bodily injury or health disorder or the death of the patient. Furthermore, the statute specifies that the time limit to file the application may not be longer than three years from the date of the occurrence which caused the damage or the patient's death. The principle is that persons who suffered the damage earlier i.e. prior to January 1st 2012 may claim damages under the same provisions as before.

[8] M. Śliwka, *Udostępnianie dokumentacji medycznej w związku z postępowaniem przed wojewódzkimi komisjami do spraw orzekania o zdarzeniach medycznych,* Serwis Prawo i Zdrowie, Wydawnictwo WoltersKluwer, dostęp on line 14.10.2013.
[9] E. Kowalewski, M. Śliwka, M. Wałachowska, *Kompensacja szkód wynikłych z "błędów medycznych". Ocena projektowanych rozwiązań prawnych*, PiM 2010 nr 4, s. 27.

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The application may claim the amount of PLN 100,000.00 in the case of an infection, bodily injury or health disorder of the patient and the amount of PLN 300,000.00 in the case of the patient's death. It needs to be pointed out that the amount of PLN 100,000.00 for a proprietary or non-proprietary detriment constitutes a low amount compared to amounts obtained in court proceedings. Moreover, this amount is only one third of the compensation claimed by patient's successors in the case of his death. This leads to a question why the legislator differentiates the condition of the patient and persons aggrieved due to the death of a close relative. It seems not really reasonable that the patient's successors receive a higher compensation than the living aggrieved patient himself. It is worth considering then to extend the compensation limit with respect to amounts which a patient himself may claim in the application.

The provisions provide only for the maximum limit of the amounts to be claimed. It needs to be pointed out that setting a maximum limit of the claimed amount is incompliant with the principle of total compensation for damages[10]. In reality, there are no formal impediments to offer to the applicant compensation in the amount of several dozen zlotys. The insurer or - in the absence of insurance – the health service provider which makes a proposal of the settlement decides what amount will constitute the compensation. Only the dismissal of the proposal of the settlement by the applicant leads to the termination of the proceedings and the party may claim damages only before the court. It needs to be added hereby that the legislator imposed on entities managing hospitals a duty to stipulate an agreement of insurance against medical events originally fixing the time limit on January 1st 2012. Now the duty has been postponed to January 1st 2014. The statute does not specify how the agreements shall be financed so a significant majority of health services providers did not stipulate an agreement of insurance against medical events. It needs to be pointed out hereby that the lack of an order by the Minister of Health which would specify the amounts of compensation for medical events hinders the risk assessment to insurers which affects the level of insurance fees and the failure to stipulate contracts[11].

In particular, it needs to be emphasized that the legislator providing for a new alternative to court proceedings solution did not impede patients to claim damages in the same court proceedings as before. However, anybody who receives damages in the case heard by the voivodship

[10] E. Bagińska, K. Krupa - Lipińska, *Zdarzenie medyczne a problem przyczynowości*, [w:] E. Kowalewski (red.) *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, Toruń 2011, s. 237.
[11] M. Śliwka, *Brak umowy ubezpieczenia na rzecz pacjenta w kontekście postępowania przed wojewódzkimi komisjami do spraw orzekania o zdarzeniach medycznych*, Prawo i Zdrowie Serwis on line, dostęp 28.10.2013.

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commission loses his right to file with a common court. On the one hand, one may doubt if this solution is compliant with the Constitution and if it limits the right to a fair and public hearing of the case set forth in Article 45 of the Constitution. On the other hand, however, the applicant who decides to file with the commission has the right to take a decision whether to accept the damages and pecuniary compensation offered by the health services provider or to file with the court. In this sense, the solution adopted in the statute excludes the possibility to file with the court only within the scope of the damage which emerged in the period between the occurrence of a medical event and the date of filing the application. It needs to be mentioned that within the remaining scope the patient or his successors may file with the court. As transpires from the judicial decisions issued so far with regard to cases for damages for medical mistakes, judicial proceedings may lead to receive much higher compensations. Also for this reason, the limits in amounts to be possibly adjudicated by the commission being surprisingly low may turn out to be disadvantageous for the applicants.Sharing the arguments of the Supreme Medical Council it needs to be stated that provisions adopted in the statute infringe Article 45 section 1 of the Constitution insofar as the commission with its ruling decides about a medical event which equals to the statement that a medical mistake has been committed which affects the opinion about and a good reputation of the physician and of the health services provider where he is employed. By issuing the ruling with no right to appeal before a competent judicial body, it deprives physicians of the right to a fair and public hearing of their case which is guaranteed by the Constitution[12]. The right to appeal against the commission's ruling is not granted to the physician - this solution violates the right to defense set forth in Article 45 of the Constitution. M. Bidziński seems to be right that the solution in which the right to appeal is granted to the patient and his successors discriminates against physicians[13].

Under Article 67j section 8 of the Act *on Amendments to the Act on Patients' Rights* an application to review the case is heard by the voivodship commission within thirty days from the date of its receipt. The principle is that a member of the adjudicating panel who participated in the issuance of the challenged ruling cannot participate in the hearing of the application to review the

[12]Wniosek Naczelnej Rady Lekarskiej z 20 kwietnia 2013 roku do Trybunału Konstytucyjnego o zbadanie zgodności z Konstytucją *ustawy z dnia 6 listopada 2008 roku o prawach pacjenta i Rzeczniku Praw Pacjenta oraz przepisów ustawy o działalności leczniczej*,http://62.111.213.54/sprawa/sprawa_pobierz_plik62.asp?plik=F-479531638/K_6_13_wns_2012_04_20_ADO.pdf&syg=K%206/13, dostęp: 28.10.2013.

[13] M. Bidziński, *Opinia prawna w przedmiocie oceny zgodności z Konstytucją ustawy z dnia 6 listopada 2008 roku o prawach pacjenta i Rzeczniku Praw Pacjenta oraz ustawy o ubezpieczeniach obowiązkowych, ubezpieczeniowym funduszu gwarancyjnym i polskim biurze ubezpieczycieli komunikacyjnych oraz przepisów ustawy z 15 kwietnia 2011 r. o działalności leczniczej przygotowana na zlecenie Naczelnej Rady Lekarskiej,* http://www.nil.org.pl/__data/assets/pdf_file/0020/47603/Opinia-prawna_PPiRPP.pdf, dostęp: 14.10.2013.

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case. This means that the appeal against the ruling of the voivodship commission may be filed with the same commission which issued it with the recusation of persons adjudicating in the first panel. The lack of an instance of appeal common for all commissions may cause the lack of a proper instance control. It needs to be pointed out that the Constitutional Tribunal many times dealt with the constitutional principle of the right to a fair and public hearing of the case. In the judgment of March 31st 2009 the Tribunal stated that the constitutional principle of two instance judicial proceedings provides, among others, that the hearing of the case at the second instance – in principle –be remanded to a higher court and as a consequence that a means of appeal have a devolutive character and that the proceedings before the court of second instance be set forth the way to make possible for the court to examine in detail the heard case and issue a substantive decision[14]. In the judgment of June 27th 1995 the Tribunal stated that if a court hinders the persons concerned from appealing to a court of higher instance, the court's order limits their right to a fair and public hearing of the case which is contrary to the principle of a democratic state under the rule of law. This principle was confirmed in the judgment rendered already under the rule of the Constitution of 1997 in which the Constitutional Tribunal stated that an essential element of the right to a fair and public hearing of the case is the right to two instance judicial proceedings which is aimed to prevent mistakes and arbitrariness at the first instance[15].

In court proceedings the claimant must prove the fault of the physician or a different healthcare professional as well as a cause and effect relationship between the negligence leading to adverse results and the suffered damage. Moreover, in court proceedings there is the *inter partes* principle pursuant to which a party must prove legitimacy of the claims otherwise being subject to dismissal of the action. In the proceedings before the commission the applicant is bound to show the probability and not to prove a medical event. The commission - in order to examine in detail the circumstances of the case – may *ex officio* request the hospital to provide medical documents as well as to ask a specialist in a given field of medicine for an expert opinion.

In the proceedings before the commission the applicant may claim damages or compensation for damages resulting from so-called medical events occurred in hospital. The statute excludes the possibility to claim damages on account of medical events which took place in clinics, open treatment facilities or professional practices of physicians, dental surgeons, nurses or

[14] Wyrok TK z dnia 31 marca 2009 (sygn. akt SK 19/08, OTK ZU nr 3/A/2009, poz. 29.
[15] Wyrok TK z 10 lipca 2000 r., sygn. SK 12/99, OTK ZU nr 5/2000, poz. 143, s. 818-819.

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obstetrics. The adopted solution presumes that damages that occur in hospitals are much more serious than those which occur in clinics above all due to the fact that much more serious medical procedures are carried out there. The issue of amendments to the provisions remains open but it needs to be suggested that before the introduction of possible amendments, current problems following from the application of the provisions should be settled.

An undoubted disadvantage of the new solution is that the work of courts is being doubled. Moreover, it needs to be pointed out that commissions in hearing cases exceed the statutory time limit of four months. The claim for the payment of pension may be made only in the statement of claim with the court. In the proceedings before the commission the pension may not be requested and the exclusion of such possibility is a significant drawback of this provision.

3. The composition of the commission

Voivodship commissions are composed of 16 members out of which 8 are persons with at least higher education and the title of *magister* or its equivalent in the field of medical sciences. There is no statutory obligation to appoint to the composition of the commission only a physicianas a person with education and practice in the field of medical sciences. It needs to be added that already at the stage of legislative works it was proposed that only physicians or dental surgeons be appointed as members of voivodship commissions but the statute was not adopted in this shape. Due to the lack of such provisions, there are situations where a commission adjudicates in the panel without a physician but only with a nurse, a laboratory diagnostician, a physiotherapist or even a psychologist.

Table no. 1

Composition of voivodship commissions for evaluation of medical events with the division into particular voivodships [*NUTS Level 2– translator's note*]

	Voivodship	**Physician**	**Nurse**	**Medicalanalyst**	**Pharmacist**	**Laboratorydiagnostician**	**Physiotherapist**	**Dental surgeon**	**Psychologist**
1	dolnośląskie	7	1	0	0	0	0	0	0

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2	Kujawsko - pomorskie	5	1	0	0	1	1	0	0
3	lubelskie	5	1	0	0	1	1	0	0
4	lubuskie	4	3	1	0	0	0	0	0
5	Łódzkie	2	3	0	0	1	0	1	1
6	Małopolskie	8	0	0	0	0	0	0	0
7	Mazowieckie	3	3	1	1	0	0	0	0
8	Opolskie	6	2	0	0	0	0	0	0
9	Podkarpackie	5	2	0	0	1	0	0	0
10	podlaskie	4	2	0	0	1	0	1	0
11	Pomorskie	4	3	0	0	1	0	0	0
12	śląskie	5	2	0	0	0	0	1	0
13	świętokrzyskie	1	5	0	0	1	1	0	0
14	Warmińsko - mazurskie	3	4	0	0	1	0	0	0
15	Wielkopolskie	5	3	0	0	0	0	0	0
16	zachodniopomorskie	4	3	0	0	1	0	0	0

Source: own elaboration

From the above table clearly results that there is a chance that there will be no specialist medical practitioner in a four person adjudicating panel. It needs to be pointed out that in the rules of procedureofparticular commissions which define their *modus operandi* and their organization it is specified that a half of the adjudicating panel should have education in the field of medical sciences but the regulations do not specify that it is necessary to appoint a physician or a dental surgeon to the adjudicating panel. For example, in Świętokrzyskie Voivodship in the case in which at the first instance in the composition of the commission there is the only physician, in the proceedings of appeal only a nurse, a physiotherapist or a laboratory diagnostician may be appointed to the adjudicating panel. It seems that the concept adopted in the statute to appoint persons with higher education in the field of medical sciences to the adjudicating panel should be limited only to the person of a physician or a dental surgeon.

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4. Conclusion

Summing it all, it needs to be stated that the legal regulation establishing the system of voivodship commissions for evaluation of medical events as an alternative to court proceedings in its current shape did not turn out to work properly. Unfortunately, it is not free of defects on both system and constitutional grounds. Also, the legislator has, contrarily to its intentions, failed to reduce the time of proceedings in particular cases. Particular criticism is due to inconsistency of commissions' rulings leading to the violation of the principle of equal protection of laws and to depriving physicians of the constitutional right to a fair and public hearing of their case following from depriving them of the possibility to challenge the ruling on the medical mistake. Also, it needs to be emphasized that commissions in their current shape may adjudicate in cases regarding complex medical procedures in the panels without a person performing the profession of a physician. In the light of the above arguments, the sense of commissions existence in their current shape needs to be questioned.