Keywords: *medical malpractice, compensation culture, defensive medicine, healthcare, doctor-patient relationship*

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The situation of doctors facing medical malpractice allegations and its potential consequences for the healthcare system and individual patients[1]

Abstract

The topic of liability for medical malpractice and patients' claims is more and more popular in Poland. Doctors feel insecure in the face of increasing allegations from patients, and it seems not uncommon such allegations to be unjustified from the factual (medical) perspective. However, even in such cases doctors still have to participate in long and disruptive proceedings explaining that they did not commit an error. Contrary to a possible belief that diligent doctors have nothing to fear, they actually may face wrongful allegations too. This results in a lack of trust toward the patients and deteriorates the doctor-patient relationship, which is of importance also from the perspective of patients and of the healthcare system. This article presents the situation of Polish medical practitioners regarding medical malpractice allegations and consider its potential consequences for the healthcare system and for individual patients.

I. Introduction

For considerable time both legal practitioners and doctors in Poland have observed growing numbers of medical malpractice allegations. Such 'allegations' should broadly be understood as any type of expression of patient's dissatisfaction with medical service through complaints, civil actions or criminal offence notifications related to medical malpractice. In this sense Poland seems to follow the tendencies of other, especially western European countries and the United States, where such occurrence started several years earlier. With the development of the healthcare system,

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team-based care has become more common. Nowadays, it is rather rare that a single doctor is responsible for the entire treatment. Instead, a whole team of medical practitioners participates in taking care of a patient. Therefore it is no longer perceived that only a doctor can commit an error, but any other member of medical staff too[2]. Nevertheless, the topic of medical malpractice still affects mostly doctors. They feel insecure in the face of increasing numbers of patients' complaints, especially ones which are unjustified from the factual (medical) perspective. Even in such cases doctors may have to participate in long and disruptive proceedings explaining that they did not commit an error. These might be several grounds for such situations, but what seems even more important are the potential consequences for the healthcare system in Poland and for an individual patient.

II. 1. Medical malpractice liability and complaints in Poland

Medical malpractice liability systems slightly differ through countries. In the *common law* system, the category of medical malpractice belongs to the civil liability based on the tort of negligence, which occurs when there is a breach of duty of care[3] and it is rather infrequent for a medical incident to result in a criminal prosecution. In this sense, the Polish system of medical malpractice liability is closer to the German one, in which a doctor can also be prosecuted based on the criminal code regulations[4]. Therefore patients may formulate medical malpractice allegations against doctors both in civil and criminal proceedings as well as they have other means to file complaints. Regardless which way the patient choses to follow, they act exercising their rights, even though there might not be medical basis to determine the occurrence of an error. The doctor, on the other hand, has to confront the allegations.

Regarding civil liability for damage, it may arise either from contracts or torts[5], the tort regime is the main domain in medical malpractice cases[6] Patients can sue entities in several configurations depending on, generally speaking, whether doctor provides services in a healthcare entity or private practice[7]. While working for an entity, providing services may be based on a contract of employment or a civil law contract.

2 T. Sroka, *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*, Warszawa 2013, p. 457, with the literature cited therein.

3 M. S. Pandit, S. Pandit, *Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense – A legal perspective*, „Indian Journal of Urology" nr 3 (2009), pp. 372–378, DOI: 10.4103/0970-1591.56206.

4 M. S. Stauch *Medical malpractice and compensation in Germany* „Chicago-Kent Law Review" nr 3 (2011), p. 1141.

5 W. Robaczyński, *Odpowiedzialność deliktowa a odpowiedzialność kontraktowa za szkody medyczne* (w:) *System Prawa Medycznego. Odpowiedzialność prawna w związku z czynnościami medycznymi,* red. T. Dukiet-Nagórska, A. Liszewska, Warszawa 2021, pp. 193-207.

6 W. Robaczyński, *Odpowiedzialność…*, pp. 204, 272.

7 In details: W. Robaczyński, *Odpowiedzialność…*, pp. 271–284.

Depending on the type of contract, different provisions regulate the doctor's liability. When the patient's injury is caused by a doctor employed under an employment contract, the employer (its insurer) is the one to bear the civil liability for the doctor's malpractice[8]. In turn, the employed doctor may be liable to the employer[9]. The doctor may be directly liable to the patient when they provide medical services in the entity as an independent contractor under a civil law contract[10] or in private practice. Civil liability insurance is mandatory for healthcare entities and doctors practising in individual or group private practice[11]. Having insurance makes both, the insured one and the insurer, liable *in solidum*, which means that the patient may sue the healthcare entity, its insurer or both, likewise they can sue the doctor, their insurer, or both[12]. If the contested act of a doctor displays the elements of a criminal offence from the Polish Criminal Code[13], the victim may file a notice of possible criminal offence as well as seek compensation in separate civil proceedings. According to interviews with some of patients' attorneys[14], it is not an uncommon practice to notify the public prosecutor's office that an offence may have been committed during the treatment. Such conduct at times is practiced in order to save the client the costs and to leave the verification of facts and evidence to the public prosecutor. If the prosecutor's office finds grounds for the criminal liability, these findings may facilitate the subsequent civil proceedings, especially since the findings leading to a final conviction in criminal proceedings are binding on the court in civil proceedings[15].

Apart from filing a civil lawsuit or notifying the public prosecutor's office, a patient has other means to disclose the potential negligence of a doctor. These are, for instance, a complaint to the Ombudsman for Patients when one of patients' rights specified in the Act on Patients' Rights (APR)[16] or in other provisions of law was breached by a doctor. Sometimes this action is undertaken in order to confirm a breach of the right before filing civil claims in court. It is observed that especially during the pandemic there was a significant increase in the number of complaints filed by

8 M. Nesterowicz, *Prawo medyczne*, Toruń 2019, p. 88; K. Bączyk-Rozwadowska, *Podstawy prawne odpowiedzialności zakładu leczniczego, w tym za lekarza kontraktowego* (w:) *System Prawa Medycznego. Odpowiedzialność prywatnoprawna*, red. E. Bagińska, Warszawa 2021, p. 137.

9 Ustawa z dnia 26.06.1974 r. Kodeks pracy (t.j. Dz.U. z 2023 r. poz. 1465), article 120.

10 Although judiciary allows exceptions in this regard, see Supreme Court Judgement from January 26, 2011, IV CSK 308/10, LEX no 784320.

11 Such an obligation is provided by Rozporządzenie Ministra Finansów z dnia 29.04.2019 r. w sprawie obowiązkowego ubezpieczenia odpowiedzialności cywilnej podmiotu wykonującego działalność leczniczą (Dz.U. poz. 866 z późn. zm.).

12 M. Serwach, *Ubezpieczenia odpowiedzialności cywilnej* (w:) *System Prawa Medycznego. Odpowiedzialność prawna w związku z czynnościami medycznymi,* red. T. Dukiet-Nagórska, A. Liszewska, Warszawa 2021, p. 296.

13 Ustawa z dnia 6.06.1997 r. Kodeks karny (t.j. Dz.U. z 2024 r. poz. 17 z późn. zm.).

14 Consulted during the research.

15 Ustawa z dnia 17.11.1964 r. Kodeks postępowania cywilnego (t.j. Dz.U. z 2023 r. poz. 1550 z późn. zm.), art. 11.

16 Ustawa z dnia 6.11.2008 r. o prawach pacjenta i Rzecznik Praw Pacjenta (t.j. Dz.U. z 2023 r. poz. 1545 z późn. zm.).

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patients[17]. A complaint may also be submitted to the Regional Professional Liability Ombudsman, who is part of the regional medical council[18]. The amendment of 16 June 2023 to the APR introduced also a modified way of compensation for patients by establishing the Medical Incident Compensation Fund[19]. Obtaining a compensation benefit does not require proof of the medical entity's fault. The basic condition for a positive decision is an occurrence of a medical incident which could have been avoided with a high degree of probability if the service had been provided to the patient in accordance with current medical knowledge or if another available diagnostic or treatment method had been used[20].

III. 2. Compensation culture?

Compensation culture is a term applied to various types of damages claims, but most clearly in relation to personal injury claims through the tort system[21]. There is no single definition of the compensation culture and, depending on interpretation, the presence of such may be more or less visible in any given society[22]. On one hand it may refer for example to a greater likelihood of claims than in the past, on the other, to 'a worrying sub-culture of frivolous and fraudulent claiming'[23]. This last one gives it rather pejorative connotation[24], albeit some state that there is no evidence for its existence, and it is rather a repeated myth[25]. It needs to be noted that different trends may be observed in relation to personal injury resulting from different events, however, only the tendencies in clinical negligence claims are of relevance to the topic of this article. The term itself, as stated by J. Hand, was mentioned for the first time in a British newspaper[26], however it might be associated mostly with the United States and their high-profile compensation cases[27] - one of the most famous being the 'hot coffee case' *Liebeck* v. *McDonald's Restaurants*[28].

17 *Postępowania wyjaśniające prowadzone przez Rzecznika Praw Pacjenta w sprawach indywidualnych w latach 2019–2021*, https://www.gov.pl/web/rpp/raporty-za-rok-2022.

18 Ustawa z dnia 2.12.2009 r. o izbach lekarskich (t.j. Dz.U. z 2021 r. poz. 1342), art. 31 sec. 1 subsec. 1.

19 APR, chapter 13b.

20 Fundusz Kompensacyjny Zdarzeń Medycznych, https://tinyurl.com/h5e65f7x.

21 A. Morris, *Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury*, „The Modern Law Review" nr 3 (2007), p. 350, https://doi.org/10.1111/j.1468-2230.2007.00642.x.

22 A. Morris, *Spiralling…*, p. 363.

23 A. Morris, *Spiralling…*, p. 363.

24 R. Lewis, *Compensation Culture Reviewed: Incentives to Claim and Damages Levels*, „Journal of Personal Injury" (2014), p. 209–225.

25 The Compensation Myth, https://tinyurl.com/ypt2846c.

26 J. Hand, *The Compensation Culture: Cliché or Cause for Concern?,* „Journal of Law and Society" nr 3 (2010), pp. 569–591, https://www.jstor.org/stable/40958933.

27 E. Jackson, *Medical Law…*, p. 169.

28 1994 Extra LEXIS 23 (Bernalillo County, N.M. Dist. Ct. 1994).

In the UK, the number of medical malpractice cases doubled in ten years (2007-2017) and the costs associated with dealing with them quadrupled[29]. The significant increase in the number of cases related to medical malpractice, despite the costs and other difficulties in pursuing claims, raises fears of development of the US-like compensation culture[30]. At the same time, only less than 4% of patients experiencing treatment-related injury choose to pursue claims[31]. This may indicate that the fear of compensation culture in the medical sector is only an unfounded misperception of reality. On the other hand, the increase in the number of claims indeed may have some correlation with the society's propensity to sue. However, it might be insufficient to draw firm conclusions as the tendency may arise from a parallel increase in medical malpractice incidents, patients' awareness regarding their rights or access to justice, etc. The rise in the number of medical malpractice claims was also discussed in German legal scholarship. From the late 1970s to the late 1990s, the number of cases in that country increased almost 3.5 times[32]. The increase in the number of medical cases has reached a certain point and has remained more or less stable since then[33]. According to the German Federal Statistical Office, there were 10,853 judgments in local and regional courts in civil cases involving medical liability in 2018[34]. The general increase in the number of claims submitted by patients may potentially confirm the existence of the compensation culture in that society. Still, it would be necessary to find out what the reasons for the increase are. The increased number of both civil and criminal cases is being linked to the 'juridicalisation' of medicine, which worries doctors as it affects their activities[35]. As for the reasons for the increase itself, like in Poland and other countries, it is rather a set of interdependent elements, including social changes and the reshaping of the patient-doctor relationship as well as changes in legislation[36]. What is relevant is that in many cases no medical malpractice is found[37].

In a similar manner as in other countries, it is difficult to state with certainty that the compensation culture exists and is widespread in Poland. Unfortunately, there are no comprehensive data on the exact number of medical malpractice cases being considered by courts. As for criminal proceedings, these cases fall under different

29 House of Commons Committee of Public Accounts, *Managing the costs of clinical negligence in hospital trusts*, Fifth Report of Session 2017–19, p. 8, https://bit.ly/3HF8LKs.

30 E. Jackson, *Medical Law…*, p. 169.

31 National Audit Office 2017, *Managing the costs of clinical negligence in trusts*, p. 10, https://bit.ly/3QsCY38.

32 K. Krocker, *Die Haftung für ärztliche Behandlungsfehler bei Vorsorge, Diagnose oder Therapie in Deutschland, England und Frankreich*, Berlin 2019), p. 48.

33 K. Krocker, *Die Haftung…*, s. 48.

34 Cited after: K. Ulsenheimer, K. Gaede, *Arztstrafrecht in der praxis* C. F. Müller 2021, p. 2.

35 K. Ulsenheimer, K. Gaede, *Arztstrafrecht…*, p. 4.

36 K. Ulsenheimer, K. Gaede, *Arztstrafrecht…*, s. 11.

37 M. S. Stauch, *Medical malpractice…*, pp. 1141–1142; J. Preuß et. al., *Begutachtung behaupteter letaler Behandlungsfehler im Fach Rechtsmedizin*, „Rechtsmedizin" nr 6 (2016), pp. 367–382, DOI: 10.1007/s00194-006-0415-x.

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types of offences, and they do not constitute a separate category in the court register. It is also problematic to estimate exactly the number of civil law cases in individual years[38]. However, consulted during this research lawyers dealing with medical malpractice cases on a daily basis, both on the side of doctors and patients, unequivocally indicate that the number of such cases is increasing. This impression is also shared by doctors. There are some figures published by the National Public Prosecutor's Office. In each subsequent year between 2015-2021, the numbers of initiated investigations were, respectively: 1,772; 2,187; 2,367; 2217; 2,161; 1,797; 1,751, and in each of those years 121, 117, 141, 153, 197, 187, 200 indictments, respectively, were brought to courts. Between 2018 and 2021, there were in total 5,739; 5,905; 5;464 and 5;206 open medical malpractice cases in the prosecutors' offices[39]. It needs to be noted that during the pandemic, the functioning of courts and public institutions was restricted, which might have influenced the numbers from that period. According to the Deputy State Prosecutor of Poland, as referred to in a press release[40], the number of notices of possible criminal offences is increasing, while the number of prepared indictments remains relatively stable. This might indicate that the propensity to formulate unfounded accusations by individuals increases.

In my opinion, in line with the phrase 'blame, claim and gain', it can be concluded that compensation culture may refer to a common belief ingrained in society that any loss can and should be compensated materially. In fact, such a statement does not seem to be contradictory to the original understanding of the compensation culture, as only this kind of perception may justify the idea of presenting frivolous or unjustified lawsuits. From my observations such an approach has started to penetrate into the Polish society, at least regarding medical malpractice. People are observed to be more oriented towards seeking compensation for their loss which used to be accepted as a natural risk. What needs to be highlighted, is the fact that indeed many patients suffer from injuries, some of them being very serious or lethal, caused by medical negligence and by all means they deserve redress. Nonetheless, according to data from a 2018 survey, just over half (51%) of broadly understood medical civil cases are won by the defendant[41]. Considering the correlation between civil and criminal proceedings in case of medical malpractice[42], propensity to formulate notices of possible criminal offence, which later turns out not to be supported by evidence, in my opinion, can be an argument for the existence of a compensation culture in Poland.

38 It is estimated that there were around 2200 civil cases in courts in 2021, J. Ojczyk, *Budzowska: No-fault to walka o godność pacjenta, a nie kary więzienia*, https://bit.ly/3YWgGtS.

39 *No-fault w pewnych przypadkach byłoby demoralizujące. Rocznie do sądów trafia mniej niż 200 spraw*, https://bit.ly/3yNKcar.

40 P. Kmiecik, *Ponad 5 tys. zgłoszeń o błędach medycznych w 2022. Ile trafiło do sądu?*, https://tiny.pl/d7s5x.

41 R. Tymiński, M. Serocka, *Kto i ile płaci za błędy medyczne? Analiza linii orzeczniczej wydziałów cywilnych sądów powszechnych w sprawach o błąd medyczny*, „Ginekologia i Perinatologia Praktyczna" nr 2018/1, p. 35.

42 Mentioned in point 1 of this article.

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IV. Doctors' approach to medical malpractice claims

The topic of medical liability and patients' claims is increasingly discussed among doctors who seek the assistance of lawyers. They are concerned about the growing numbers of allegations which may significantly affect their reputation. While discussing the doctors' concerns regarding medical malpractice with some lawyers, I noticed they seem not to understand that the risk of liability itself and the final outcome of the proceedings is not the sole concern of doctors. The fact that only a small part of the criminal cases in Poland end up in court[43] does not mean that doctors have nothing to worry about. On the contrary, it means that majority of cases have no basis to be considered in court, yet doctors are bothered by preliminary proceedings. From my consultations with doctors, it seems their concern is the possibility to be implicated in proceedings (including preliminary proceedings), even though they perform their duties diligently. Similarly, in civil cases, the fact that doctors or healthcare entities they work for is covered by mandatory insurance does not deprive them of their worries in case of being accused of malpractice. Notably, their concerns include having to account for negligence they did not commit and the sense of injustice. They may have to participate in long and disruptive proceedings with the perspective of being convicted, even though they were saving someone's health and life. Such situations cause frustration and additional stress. They influence the ability to carry out work on a regular basis as well as negatively affect doctors' personal life.

The research project that this article is a part of included an overview survey on doctors' attitude towards patient claims arising from alleged medical malpractice. The survey was conducted among 101 volunteers found through Regional Chambers of Doctors, medical entities or directly. The structure of the questionnaire enabled to classify the respondents by length of service, type of specialisation (surgical, non-surgical, other) and practice in a private or public entity. The vast majority (87 respondents) of the surveyed group were practitioners in public entities, however 3 of them pointed out they worked also in private sector. Regarding years of experience, the most numerous group was the one of doctors with up to five years of experience – 43 doctors. The second largest group was doctors with more than 20 years of experience and included 33 doctors. The questionnaire consisted of six questions in total. Three of them were relevant for the topic of this article[44]. The first one was whether doctors were concerned about profession-related medical malpractice claims. 89% of respondents answered 'Yes', while almost 7% answered 'Difficult

43 See previous passage.

44 Partially the survey was discussed in A. Wszołek, *Factors potentially enhancing medically unjustified malpractice claims in Poland*, „Przegląd Prawa Medycznego" nr 2024/2, p. 200–201, erratum: on page 200 the number of volunteers should be 101 instead of 102 and the percentage of 92,16 should be 87.

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to say'. Another question concerned whether doctors believed that some patients' medical malpractice claims were made unfairly or for frivolous, reckless reasons. To this question, the respondents could choose numbers from 1 to 5, where 1 meant "definitely not" and 5 meant "definitely yes". A significant proportion of respondents – 87% – answered in the affirmative (55% chose answer "5" and 32% chose answer "4"). As for the third question, 'Do you think that wrongfully/recklessly accusing a doctor of medical malpractice by bringing a case to court or the public prosecutor's office may violate the doctor's reputation?', 97% of the doctors answered 'Yes', while the remaining 3% answers were 'Difficult to say'. The number of respondents might not be enough to extrapolate the results on the entire population of doctors in Poland and to formulate firm conclusions, but it definitely sheds light on their point of view. Especially such a high percentage of positive answers to the questions presented above may signal that doctors are generally concerned about this type of claims, and that this phenomenon represents a significant problem for them. Having a sense of being left alone with the issue, doctors seek protection from allegations on their own.

V. 4. Defensive medicine and other potential consequences

One of the potential consequences of patients' propensity to sue in the medical sector is defensive medicine. It describes the behaviour of medical personnel, which is primarily intended to protect them from potential claims for alleged medical malpractice. It may manifest itself through ordering tests and examinations, referrals or avoidance of high-risk patients or procedures, mainly (but not only) to reduce the risk of liability for medical error[45]. However such practice may seem to imply a conscientious performance of one's work, actually it is not concentrated on avoiding medical errors, but rather on protecting medical staff from patients' claims and liability. Therefore, these might be healthcare services which are not necessarily beneficial – minimally beneficial, at most – to patients, but which are undertaken in order to avoid lawsuits[46]. Moreover ordering such unnecessary services generate extra costs for the healthcare system. Especially doctors who already suffered accusations and went through a long trial may confront a dilemma of choosing between patients' well-being and their own safety. Some of doctors who have been particularly badly affected by wrongful accusations may decide to change their specialisation to a less risky one[47], which should not happen. The existence of defensive medicine and the issue of doctors practising it has already been discussed in other countries, like

45 U.S. Office of Technology Assessment, *Defensive Medicine and Medical Malpractice,* Washington, DC 1994, p. 1.

46 F. A. Sloan, J. H. Shadle, *Is there empirical evidence for "Defensive Medicine"? A reassessment*, „Journal of Health Economics" nr 2009/28, p. 481.

47 I. Dudzik, *Nie traktujcie nas jak przestępców*, „Medical Tribune" 2022/5, https://bit.ly/3KhbHjB.

the UK and the US[48]. For example, in one of the studies, 93% of the surveyed doctors responded that they practised defensive medicine[49]. However, there are also some studies denying the existence of this phenomenon[50]. The topic of defensive medicine is also present in the German legal scholarship[51].

Providing services as prescribed, lack of willingness to take risks, uncertainty and lack of self-reliance, hedging with forms and a reluctance to take responsibility are outward signs of an attitude in which the doctor sets aside their medical conscience and the welfare of the patient for the sake of their own safety and sets himself or herself rather to act according to the guidelines of his or her advocate.[52]

Defensive medicine is not yet a commonly discussed topic in Poland, however, there are more and more articles on this subject, also in the context of no-fault liability[53]. Awareness of the existence of defensive medicine in Poland at the moment is based on experience and familiarity with the insights of the medical milieu, rather than on examinations or measurements of a confirmed phenomenon. When talking to doctors, one can hear statements about the necessity to stick to the prescribed standards only and to avoid complicated cases[54] in order not to expose oneself to the risk of being sued. Sometimes carrying many tests is motivated by an aim to avoid public prosecutor's accusations[55]. Defensive medicine may be practiced both as over-examination and under-examination of patients, which may manifest itself in ordering excessive tests at the request of the patient or the patient's family[56]. However, excessive tests may be also linked to financial benefits. For example, doctors who cooperate with diagnostic laboratories and receive a share in the profit may prescribe extra tests in order to benefit from it. In my opinion, fixed standards and algorithms of conduct in particular medical cases may be also perceived as a kind of a trigger for defensive medicine to be practiced. As long as the doctor sticks to the formal procedures, which are the basis for evaluating the doctor's conduct, they will not be accused of malpractice. Hence doctors may get into the habit of acting automatically in accordance with standards and give up relying on their experience and instinct. Providing standard level of care as prescribed in the rules of conduct would not always be beneficial to the

48 F. A. Sloan, J. H. Shadle, *Is there…*, p. 481.

49 D. M. Studdert et al., *Defensive medicine among high-risk specialist physicians in a volatile malpractice environment*, „Journal of the American Medical Association" nr 2005/21, p. 2609–2617.

50 Examples of such studies present F. A. Sloan, J. H. Shadle, *Is there…*, p. 482.

51 K. Ulsenheimer, K. Gaede, *Arztstrafrecht…*, p. 2.

52 K. Ulsenheimer, K. Gaede, *Arztstrafrecht…*, p. 2, and the literature cited therein (own translation from German).

53 T. Pasierski, I. Kołakowska, *Medycyna defensywna – kto przed kim się broni i kto na tym traci*, https://tiny.pl/d7snt; M. Libura, *Medycyna defensywna, czyli byle nas nie oskarżyli. Kto traci? Pacjent*, https://tiny.pl/d7slj; D. Bieńkowska, *Kryzys tradycyjnych reżimów odpowiedzialności prawnej lekarza w polskim systemie prawnym*, „Medyczna Wokanda" 2020/14, pp. 40–41, DOI : 10.32055/mw.2020.14.3.

54 I. Dudzik, *Nie traktujcie nas…*, https://bit.ly/3KhbHjB.

55 T. Pasierski, I. Kołakowska, *Medycyna defensywna…*, https://tiny.pl/d7snt.

56 T. Pasierski, I. Kołakowska, *Medycyna defensywna…*, https://tiny.pl/d7snt.

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patient, on the contrary, the doctor's experience and fair assessment of the situation may save a person's life. On the other hand, a formally required action may give no real benefit to the patient. An expert in one of the cases has commented that an allergy test is only a safeguard against criminal liability, not against the death of the patient[57].

Capturing and investigating the actual scale of defensive medicine is not easy, because information on medical procedures and ways of conduct may be acquired from and evaluated only by medical practitioners. Such investigation would require doctors to participate in the study and to honestly admit whether they practice defensive medicine and what kind of measures they undertake to avoid potential claims. Another proposal to objectively assess the scale of defensive medicine could be focusing on a certain disease or group of patients and comparing the numbers of procedures performed in different locations, for example, CNS examinations in emergency wards[58]. Nevertheless, I see such an approach void as the main indication of a doctor's action to be considered defensive medicine is their motivation, therefore participation of doctors in the investigation would be more adequate. In order to find out what kind of particular measures might be undertaken by medical practitioners with the aim of avoiding prosecutions, I consulted some gynaecologists, as it is one of the specialisations with the highest risks of being sued[59]. One of the examples I was given was continuous cardiography recording during the first stage of labour undertaken in case oxytocin or an epidural was administered to the patient[60]. Another example was a newborn's arterial blood gas analysis[61]. Even though those actions are not completely meaningless for the patients, they are perceived as useful formal evidence in case of potential malpractice accusations[62]. Regarding actions related to medical files, the consulted doctors mentioned some colleagues avoiding to stamp and sign the records so that they are not directly linked with it. In Poland, the medical file is part of crucial evidence during medical malpractice proceedings, therefore being careful about the wording used in the record is important. Consulted doctors also shared that those who have already been involved in court proceedings in their career, like heads of hospital departments, are more aware of some ambiguous expressions, which may be used against doctors. They are also aware of the comments which are vital to be included in the record therefore they instruct younger colleagues. One more given example

57 A. Zoll, *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu*, Warszawa 1988, p. 61.

58 T. Pasierski, I. Kołakowska, *Medycyna defensywna…*, https://tiny.pl/d7snt.

59 R. Tymiński, M. Serocka, *Kto i ile płaci…*, p. 36.

60 *Projekt Rekomendacji Polskiego Towarzystwa Ginekologów i Położników dotyczących śródporodowego monitorowania stanu płodu*, https://tinyurl.com/43ht76xz.

61 *Projekt Rekomendacji…*, https://tinyurl.com/43ht76xz.

62 *Recommendations of the Polish Gynecological Society concerning application of cardiotocography in obstetrics*, „Ginekologia Polska" nr 2014/9, p. 714.

of doctors avoiding risk was an exaggeration of the prospectus so that the patient does not consent to a complicated procedure.

Apart from the current situation having influence on patients, the risk of malpractice allegations and prosecution creates also negative competition between medical practitioners themselves. Fear of being held liable makes representatives of different specialisations blame each other. An example of that, again shared by the consulted doctors, is related to the above mentioned newborn's arterial blood gas analysis procedure which may serve to protect gynaecologists against accusations made by neonatologists in case of deterioration of the newborn's condition. This may signalize that in cases resulting in prosecution doctors may focus on seeking a scapegoat rather than tracing the true error and the responsible for the negative outcome. Examination of medical incidents is however helpful in avoiding them in the future. Another worrying aspect is the shortage of doctors on the market, currently at the level of 15%[63]. The General Chamber of Doctors assures that this gap can be filled by the group of current students and that in 2048 there may be even too many doctors on the market[64]. Those prognosis are based on the number of medicine students, nevertheless it is not sure if the conditions of work, also regarding risk of liability, will be satisfying for younger candidates in order to pursue medical career. As signalled by the General Chamber of Doctors the issues with access to medical services stems from system inefficiencies "where doctors spend more than half their time on bureaucracy and documentation instead of helping patients"[65]. Fulfilling such formal duties is however necessary to avoid unnecessary allegations and claims and so will be continued if no changes are made.

VI. Summary

According to the conducted survey, doctors in Poland are concerned about medical malpractice claims. They find some of the patient's claims unfair and frivolous. They also perceive wrongful accusations presented in court or to the public prosecutor's office as a threat to their reputation. and professional activities. Moreover, based on the consultations with doctors, they find it unfair the patient may file an allegation also with no actual medical basis as formally they exercise their rights. Paradoxically, the system, which is supposed to protect the interests of patients, may have an adverse effect, resulting in deterioration of the doctor-patient relationship and quality of services. Although it is difficult to capture and estimate precisely the phenomena of compensation culture or defensive medicine, these topics were discussed in foreign

63 *Polska na drodze do marnowania miliarda złotych rocznie na kształcenie nadmiarowych lekarzy*, https://tiny.pl/3cw7-y77.

64 *Polska na drodze…*, https://tiny.pl/3cw7-y77.

65 *Polska na drodze…*, https://tiny.pl/3cw7-y77.

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literature already years ago. As it seems, similar tendencies have started to penetrate the Polish society and medical sector. Under the constant pressure of the risk of liability and punishment, even a doctor committed to the *salus aegroti suprema lex* principle may begin to give precedence to their own interests in the decision-making and order excessive tests which generate costs for the healthcare system. Increasing number of medical malpractice cases also influences the time and costs of legal proceedings which are of no benefit to either party in the dispute. The current situation may also have a deterrent effect on young doctors avoiding high-risk specialisations, which may over time affect the healthcare system and patients' access to certain services.

The patient is primarily interested in the 'regularity' of the healthcare services, rather than in the pathology of the healthcare and who will be liable and what chance they have of obtaining compensation, which, after all, will not restore their health. They are the least interested in whether, in the event of death, compensation will be obtained by others. The issue of patients' rights and liability, on the other hand, is of paramount importance to those who make their living from it, i.e., lawyers, particularly defence lawyers, and insurance companies[66].

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66 J. Jończyk, *Prawa pacjenta i odpowiedzialność za szkodę z leczenia*, „Prawo i Medycyna" nr 1999/2, p. 28 (own translation from Polish).

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Abstrakt

Pojęcia kluczowe: *błąd medyczny, kultura kompensacyjna, medycyna defensywna, opieka zdrowotna, relacja lekarz-pacjent*

Sytuacja lekarzy oskarżonych o błąd w sztuce lekarskiej i potencjalne konsekwencje dla systemu opieki zdrowotnej i poszczególnych pacjentów

Tematyka odpowiedzialności za błędy medyczne i roszczeń pacjentów jest w Polsce coraz bardziej popularna. Lekarze czują niepewność wobec coraz częstszych zarzutów ze strony pacjentów, które nierzadko wydają się być nieuzasadnione z faktycznego (medycznego) punktu widzenia. Nawet jednak w takich wypadkach lekarze muszą uczestniczyć w długich i uciążliwych postępowaniach sądowych, wyjaśniając, że nie popełnili błędu. Wbrew możliwemu przekonaniu, że sumienni lekarze nie mają się czego obawiać, w rzeczywistości także wobec nich mogą zostać skierowane niesłuszne zarzuty. Te z kolei powodują brak zaufania do pacjentów i pogarszają relacje lekarz-pacjent, co ma znaczenie również z perspektywy pacjentów i systemu opieki zdrowotnej. Niniejszy artykuł przedstawia sytuację polskich lekarzy w kontekście zarzutów o błąd medyczny oraz jej potencjalne konsekwencje dla systemu opieki zdrowotnej i indywidualnych pacjentów.

Bibliography

1. **Bączyk-Rozwadowska Kinga,** *Podstawy prawne odpowiedzialności zakładu leczniczego, w tym za lekarza kontraktowego* (w:) *System Prawa Medycznego. Odpowiedzialność prywatnoprawna*, red. E. Bagińska, Warszawa 2021
2. **Bieńkowska Daria,** *Kryzys tradycyjnych reżimów odpowiedzialności prawnej lekarza w polskim systemie prawnym*, „Medyczna Wokanda" 2020/14, DOI: 10.32055/mw.2020.14.3
3. **Dudzik Iwona,** *Nie traktujcie nas jak przestępców*, „Medical Tribune" 2022/5, https://bit.ly/3KhbHjB
4. **Hand James,** *The Compensation Culture: Cliché or Cause for Concern?*, „Journal of Law and Society" nr 2010/3, https://www.jstor.org/stable/40958933
5. House of Commons Committee of Public Accounts, *Managing the costs of clinical negligence in hospital trusts*, Fifth Report of Session 2017–19, https://bit.ly/3HF8LKs
6. **Jackson Emily,** *Medical Law: Text, Cases, and Materials*, Oxford 2019

 DOI: 10.54383/0031-0344.2025.02.7

7. **Jończyk Jan,** *Prawa pacjenta i odpowiedzialność za szkodę z leczenia,* „Prawo i Medycyna" 1999/2
8. **Kmiecik Paweł,** *Ponad 5 tys. zgłoszeń o błędach medycznych w 2022. Ile trafiło do sądu?*, https://tiny.pl/d7s5x
9. **Krocker Karolin,** *Die Haftung für ärztliche Behandlungsfehler bei Vorsorge, Diagnose oder Therapie in Deutschland, England und Frankreich*, Berlin 2019
10. **Lewis Richard,** *Compensation Culture Reviewed: Incentives to Claim and Damages Levels*, „Journal of Personal Injury" 2014, http://dx.doi.org/10.2139/ssrn.2467110
11. **Libura Maria,** *Medycyna defensywna, czyli byle nas nie oskarżyli. Kto traci? Pacjent*, https://tiny.pl/d7slj
12. **Morris Anette,** *Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury*, „The Modern Law Review" 2007/3, https://doi.org/10.1111/j.1468-2230.2007.00642.x
13. National Audit Office. *Managing the costs of clinical negligence in trusts*, 2017, https://bit.ly/3QsCY38
14. **Nesterowicz Mirosław,** *Prawo medyczne*, Toruń 2019
15. *No-fault w pewnych przypadkach byłoby demoralizujące. Rocznie do sądów trafia mniej niż 200 spraw*, https://bit.ly/3yNKcar
16. **Ojczyk Jolanta,** *Budzowska: No-fault to walka o godność pacjenta, a nie kary więzienia*, https://bit.ly/3YWgGtS
17. **Pandit M. S., Pandit Shobha,** *Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense - A legal perspective*, „Indian Journal of Urology" 2009/3, pp. 372-378, DOI: 10.4103/0970-1591.56206
18. **Pasierski Tomasz, Kołakowska Iwona,** *Medycyna defensywna – kto przed kim się broni i kto na tym traci*, https://tiny.pl/d7snt
19. *Polska na drodze do marnowania miliarda złotych rocznie na kształcenie nadmiarowych lekarzy*, https://tiny.pl/3cw7-y77
20. *Postępowania wyjaśniające prowadzone przez Rzecznika Praw Pacjenta w sprawach indywidualnych w latach 2019–2021*, https://www.gov.pl/web/rpp/raporty-za-rok-2022
21. **Preuß Johanna, Dettmeyer Reinhard, Madea Burkhard,** *Begutachtung behaupteter letaler Behandlungsfehler im Fach Rechtsmedizin* „Rechtsmedizin" 2016/6, https://doi.org/10.1007/s00194-006-0415-x
22. *Projekt Rekomendacji Polskiego Towarzystwa Ginekologów i Położników dotyczących śródporodowego monitorowania stanu płodu*, https://tinyurl.com/43ht76xz.
23. *Recommendations of the Polish Gynecological Society concerning application of cardiotocography in obstetrics*, „Ginekologia Polska" 2014/9
24. **Robaczyński Wojciech,** *Odpowiedzialność deliktowa a odpowiedzialność kontraktowa za szkody medyczne* (w:) *System Prawa Medycznego. Odpowiedzialność prawna w związku z czynnościami medycznymi,* red. T. Dukiet-Nagórsksa, A. Liszewska, Warszawa 2021

25. **Robson Michelle, Maskill Jon, Brookbanks Warren,** *Doctors Are Aggrieved–Should They Be? Gross Negligence Manslaughter and the Culpable Doctor,* „The Journal of Criminal Law", 2020/4, DOI: 10.1177/0022018320946498
26. **Serwach Małgorzata,** *Ubezpieczenia odpowiedzialności cywilnej* (w:) *System Prawa Medycznego. Odpowiedzialność prawna w związku z czynnościami medycznymi,* red. T. Dukiet-Nagórska, A. Liszewska, Warszawa 2021
27. **Sloan Frank A., Shadle John H.,** *Is there empirical evidence for "Defensive Medicine"? A reassessment*, „Journal of Health Economics" 2009/28
28. **Sroka Tomasz,** *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*, Warszawa 2013
29. **Stauch Marc S.,** *Medical malpractice and compensation in Germany*, „Chicago-Kent Law Review" 2011/3
30. **Studdert David M. et. al.,** *Defensive medicine among high-risk specialist physicians in a volatile malpractice environment*, „Journal of the American Medical Association" 2005/21
31. **Tymiński Radosław, Serocka Marcelina,** *Kto i ile płaci za błędy medyczne? Analiza linii orzeczniczej wydziałów cywilnych sądów powszechnych w sprawach o błąd medyczny*, „Ginekologia i Perinatologia Praktyczna" 2019/1
32. **Ulsenheimer Klaus, Gaede Karsten,** *Arztstrafrecht in der praxis,* C. F. Müller 2021.
33. U.S. Office of Technology Assessment, *Defensive Medicine and Medical Malpractice,* Washington, DC 1994
34. **Wszołek Anna,** *Factors potentially enhancing medically unjustified malpractice claims in Poland*, „Przegląd Prawa Medycznego" 2024/2
35. **Zoll Andrzej,** *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu*, Warszawa 1988

 DOI: 10.54383/0031-0344.2025.02.7