

# SELECTED MEDICAL AND LEGAL PROBLEMS OF A SURGEON'S ASSISTANT AS A NEW SPECIALITY IN THE POLISH HEALTHCARE SYSTEM

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**Abstract.** On 26 November 2021, a new speciality concerning surgical physician assistance (Polish: *chirurgiczna asysta lekarza*) was introduced in a regulation of the Polish Minister of Health. The term ‘surgeon’s assistant’ refers to an independent healthcare professional authorised to perform certain medical and surgical procedures under the supervision of a specialist surgeon. Undoubtedly, the successful introduction of this new speciality depends primarily on the appropriate training process. Then, it will be necessary to change the internal procedures existing at medical facilities, to ensure that the work of surgeon’s assistants is organised properly and enables their effective cooperation with other qualified practitioners. The introduction of a new speciality is a great challenge for hospitals, surgeons and society in general. It requires taking many additional legal and organisational measures by hospitals as well as at the national level.

**Keywords:** Polish healthcare system; physician assistant; surgeon’s assistant; supervision of a specialist surgeon

## INTRODUCTION

On 26 November 2021, the Regulation of the Minister of Health of 10 November 2021<sup>1</sup> amending the Regulation on Specialities in Fields Related to Healthcare, came into force.<sup>2</sup> Pursuant to this amendment, a new speciality concerning surgical physician’s assistance was introduced. This newly introduced area of speciality applicable to health professionals provoked heated discussion and strong opposition from parts of the medical

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<sup>1</sup> Journal of Laws of 2021, item 2131 (the “Amended Regulation”).

<sup>2</sup> Regulation of the Minister of Health on Specialities in Fields Related to Healthcare of 13 June 2017, Journal of Laws of 2022, item 342 as amended (the “Speciality Regulation”).

community.<sup>3</sup> It was pointed out that the introduction of this speciality is not the right direction for changes serving as a solution to the growing problem of a shortage of surgeons.<sup>4</sup> However, according to hospital representatives, the above change was necessary due to the growing problem of too few specialist doctors, and that the Polish Ministry of Health should have gone further and created the profession of physician assistant.<sup>5</sup> In addition, during the discussion, the issue of the surgeon's supervision over an assistant who is not a doctor was raised. According to the medical community, patients should be operated on by surgeons, with any assistance being provided by resident physicians. The Ministry of Health referred to experience from other countries as justification for the new speciality. In addition, the Ministry of Health argued that the introduction of a new speciality is intended to enrich the healthcare system with specialist medical staff, which will help relieve the burden on surgeons.<sup>6</sup>

As part of this study, the authors attempt to analyse some medical and legal problems related to the introduction of surgical assistance to a physician.

## 1. MEDICAL ASPECTS OF SURGICAL ASSISTANCE TO A MEDICAL EXPERT

The Supreme Medical Council reports that [as of 1 June 2022] there are 9,535 general surgeons in Poland, of which 8,910 practiced. About 50% of surgeons are actively operating. The most worrying thing is that the average age of a surgeon is 60, and 25% of them are over retirement age.<sup>7</sup> According to the data provided by Eurostat, in 2018, in Poland there were 54.2 surgeons per 100,000 inhabitants; for comparison, in Germany that number is 119.<sup>8</sup> The average time needed to educate a fully independent surgeon is about 10-12 years (after six years of speciality training in general surgery,

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<sup>3</sup> See <https://nil.org.pl/aktualnosci/5777-nowa-specjalizacja-chirurgiczna-asysta-lekarza> [accessed: 01.10.2022].

<sup>4</sup> See <https://pulsmedycyny.pl/chirurgiczna-asysta-lekarza-recepta-na-brak-chirurgow-lekarze-sa-innego-zdania-1123732> [accessed: 01.10.2022].

<sup>5</sup> See <https://www.prawo.pl/zdrowie/asystent-lekarza-dlaczego-potrzebujaja-ich-chirurgzy-kiedy-i-gdzie,509731.html> [accessed: 01.10.2022].

<sup>6</sup> See <https://www.prawo.pl/zdrowie/specjalizacja-chirurgiczna-asysta-lekarza,515317.html> [accessed: 01.10.2022].

<sup>7</sup> The Supreme Medical Council, *Summary of doctors and dentists by field and degree of specialization*, 2019, [https://nil.org.pl/uploaded\\_files/1574855455\\_zapazdziennik-2019-zestawienie-nr-04-1.pdf](https://nil.org.pl/uploaded_files/1574855455_zapazdziennik-2019-zestawienie-nr-04-1.pdf) [accessed: 01.10.2022].

<sup>8</sup> European Commission. Eurostat, 2018, [https://ec.europa.eu/eurostat/statistics-explained/images/e/e3/Physicians%2C\\_by\\_speciality%2C\\_2018\\_Health20.png#xd\\_cof=NDg4ZmVmMTMtZjdhNi00YTczLWJjNTktMzkwMDkwYTEzMDDE0~](https://ec.europa.eu/eurostat/statistics-explained/images/e/e3/Physicians%2C_by_speciality%2C_2018_Health20.png#xd_cof=NDg4ZmVmMTMtZjdhNi00YTczLWJjNTktMzkwMDkwYTEzMDDE0~) [accessed: 01.10.2022].

a surgeon becomes independent after about four to six years of practice). The Ministry of Health has already noticed these disturbing data and has recognised general surgery as a priority speciality. In the spring session of 2022, out of 2,000 resident places, 97 places were allocated for general surgery, and only 35 doctors chose this speciality (there were no applicants for almost two-thirds of the vacancies). In 2015, the Supreme Medical Council reported that, the number of surgeons in Poland would decrease by 15% by 2025 and decrease by 30% by 2035.<sup>9</sup>

An aging society, an increasing number of highly specialised operations, a constantly decreasing number of surgeons and increasing work costs mean that the Polish healthcare system is facing an organisational problem, the consequences of which will undoubtedly affect patients. It has been known for several years that there is a growing shortage of medical staff in Poland, especially surgeons, making it necessary to take effective action for the benefit of future patients. In order to maintain the standard, efficiency and cost-effectiveness of treatments, the Ministry of Health has introduced a new medical speciality – a surgeon's assistant. This has existed as a medical profession in the United States of America since 1965 (it is modelled on the existing Physician Assistant (PA) role) and was introduced in response to a shortage of doctors [Perry, Detmer, and Redmond 1981, 132-37].

In the USA, the term 'PA' is defined as an independent healthcare professional authorised to perform certain medical and surgical procedures under the supervision of a specialist physician. The responsibilities of a surgeon's assistant include a physical and subjective examination of a patient, conducting diagnostics and therapy, as well as active participation in surgical operations. It should be emphasised that surgeon's assistants must work under the supervision and responsibility of a surgeon, and that their duties and rights are strictly regulated by national law [Hooker and Cawley 2021, 498-504].

The success of the profession of surgeon's assistant in the USA meant that Western European countries began to introduce the US model, seeing it as an opportunity to improve their own healthcare systems, as well as to fill the gap, i.e. a lack of surgeons. This process started in 2001 in the Netherlands [van den Brink, Driesschen, and Elfering 2021], in 2003 in Canada, in 2005 in Germany, in 2006 in Scotland, in Argentina, Brazil and Chile in 2007 and in 2010 in the UK [Hains, Strand, and Turner 2017]. The introduction of the surgeon's assistant position in these countries has relieved surgeons from some of the burden of their duties, and the achieved financial results (effective cost reduction [van den Brink, Hooker, van Vught, et al. 2021]) have

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<sup>9</sup> Supreme Medical Council, *Demography 2015*, [https://nil.org.pl/uploaded\\_images/1575630138\\_zalacznik-1-do-demografia-2015-v-0704.pdf](https://nil.org.pl/uploaded_images/1575630138_zalacznik-1-do-demografia-2015-v-0704.pdf) [accessed: 01.10.2022].

resulted in estimates that demand for this type of speciality will increase by 30% in the coming years [Hooker and Cawley 2021, 498-504].

Teamwork is especially important in growth-oriented fields such as medicine, and surgery in particular. In Article 6(1) of the Act on Patients' Rights and the Patients' Rights Ombudsman of 6 November 2008,<sup>10</sup> it is stated: "The patient has the right to health services corresponding to the requirements of current medical knowledge," and the doctor providing the medical service is required to exercise due diligence.<sup>11</sup> Article 8 of the Code of Medical Ethics states: "The physician should perform diagnostic, therapeutic and preventive activities with exactitude and appropriate allocation of time." Hence, if the doctor does not have time or skills, they should not perform a given procedure. "If any aspect of caring for the patient is beyond the capacity of a physician, the physician must consult with or refer the patient to another appropriately qualified physician or health professional who has the necessary capacity. This does not apply to emergencies and serious conditions, where a delay may threaten the patient's health or life."<sup>12</sup> Taking into account the regulations cited above, it should be stated that the introduction of the surgeon's assistant speciality in the Polish situation will require many organisational and legal changes to prevent the sharing and overlapping of powers and responsibilities.

Despite many doubts, there is certainly a "safe place" for a surgeon's assistant in large surgical centres where complex, highly specialised operations are performed involving a multi-person team, where three or four individuals stand at the operating table (the surgeon and two or three assistants). The position of surgeon's assistant should be first introduced in large surgical centres where there is the possibility of direct supervision, as well as the conditions and experience necessary to carry out training in this field. In addition, centralisation and the narrow speciality of surgical teams in a highly specialised centre is associated with better treatment outcomes. Analyses show that performing surgery in a specialist centre is associated with a better prognosis and fewer complications [Wroński 2007, 305-11].

In surgical treatments, good results depend on cautious patient qualification for the procedure, proper preoperative preparation and, subsequently, superior technical performance and proper guidance of the patient in the post-operative period. A mistake may occur at any of these stages, so compliance with the appropriate professional standards to avoid complications, is mandatory. Situations where only the surgeon and a surgeon's assistant are present at the operating theatre should be avoided. In an emergency

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<sup>10</sup> Journal of Laws of 2020, item 849 as amended (the "Act on Patients' Rights").

<sup>11</sup> Article 8 of the Act on Patients' Rights.

<sup>12</sup> Article 10(2) of the Code of Medical Ethics.

situation, e.g. when the surgeon faints, there would be no other person capable of continuing the operation on their own.

## 2. SPECIALISED PHYSICIAN'S SUPERVISION OVER SURGEON'S ASSISTANTS

According to the explanatory memorandum to the draft Amended Regulation, the introduced speciality in the field of surgical physician assistance would enable a nurse or paramedic who has obtained qualifications after completing a speciality training programme to relieve a doctor (in particular a general surgeon) in pre-operative procedures, as well as at the operating table and after surgical procedures. A surgeon's assistant, after completing speciality training and obtaining the title of a specialist, would therefore be qualified to participate in the diagnostic, therapeutic and surgical processes as an active assistant in surgical procedures.<sup>13</sup> When assisting, a surgeon's assistant with speciality qualifications would be able to participate in preparing the patient for surgery, perform basic diagnostic procedures according to the indications for emergency surgical treatment and procedures required for minor surgical interventions on an outpatient basis, as well as manage patients after surgery by giving them appropriate basic care.<sup>14</sup> A detailed scope of responsibilities of a surgeon's assistant will be defined in the internal procedures of a healthcare institution, as neither the Speciality Regulation nor the Speciality Programme define in detail their professional competencies. Due to the nature of this speciality, it should be assumed that, as a rule, a surgeon's assistant performs procedures independently. "*Independence, in fact, implies full responsibility for actions or omissions.*"<sup>15</sup>

Supervision over the performance of assisted surgical procedures is to be performed by a specialist physician.<sup>16</sup> Neither the wording of the Speciality Regulation nor the laws constituting the basis of the healthcare system explicitly include the duty of supervision or control of the physician over individuals assisting at the operating table or performing pre- or post-operative procedures. However, the duty of supervision arises from the function performed by the specialist physician during the surgery, i.e. the primary surgeon or the leader of the operating room team. The surgeon or leader of the operating room team can be compared to the captain of a ship who takes responsibility for the entire operation [Malicki and Malicka-Ochtera

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<sup>13</sup> Speciality training programme for the surgeon's assistant profession, Warsaw 2022, 3, approved by the Minister of Health on 7 February 2022, the "Speciality Programme").

<sup>14</sup> Ibid.

<sup>15</sup> See <https://www.prawo.pl/zdrowie/blad-w-sztuce-medycznej-a-odpowiedzalnosc-odszkodowawcza,237156.html> [accessed: 01.10.2022].

<sup>16</sup> The Speciality Programme, 3.

2017, 63; Siemaszko 2020, 59]. Internal procedures in healthcare institutions setting out the rules governing operations performed by a team of individuals should specify who is responsible, and the extent of their supervision or control over the actions of other team members. Therefore, it is necessary to carry out a legal analysis of the possible liability of the specialist physician for a medical error made by their assistant.

In doctrine and jurisprudence, there are a number of definitions of “medical error” that are similar in meaning [Zieliński 2016, 181-94; Nawrocki 2018, 206-209; Wolińska 2013, 19-35]. The purpose of this publication is not to analyse this concept, but to establish the scope of the assistant’s possible liability – alone or together with the supervising specialist physician – in the event of such an error. It should be emphasised that it is possible to distinguish between civil, criminal and professional liability for medical malpractice caused by an error. Based on well-established case law, medical malpractice is an act or omission of a doctor during the diagnosis or treatment of a patient that deviates from accepted standards of practice in medicine to the extent available to the doctor. A doctor’s negligence with regard to the duty to give care to the patient and to organise the safety of hygiene and care of the patient does not constitute medical malpractice.<sup>17</sup> Thus, the determination of medical malpractice depends on the answer to the question of whether, in the specific situation, and taking into account all of the circumstances existing at the time of the procedure, and in particular the information available to the doctor at the time, the doctor’s conduct complied with the requirements of current medical knowledge and medicine, as well as generally accepted medical practice.<sup>18</sup>

A medical error by medical staff assisting the team leader, consisting of a breach of procedures and duties in the procedures performed, should be approached in an appropriate manner [Marczewska and Kopański 2012, 15]. Obviously, the role of the specialist physician still remains predominant in the process of treating the patient, but the correctness of the treatment depends on the cooperation of the physician with the medical staff, i.e. other physicians, anaesthesiologists [Wąsik and Sygit 2017, 33], nurses, paramedics, laboratory diagnosticians and surgeon’s assistants. Consequently, any decisions made by the attending physician are a result of cooperation/collaboration of all those involved in the surgery or the diagnostic and therapeutic process. In the case of irregularities at the stage of diagnosing or treating a patient, it is therefore not possible to speak only of “medical malpractice” or “medical error” – as this would imply the attribution of guilt

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<sup>17</sup> Judgment of the Supreme Court of 1 April 1955, ref. no. IV CR 39/54, OSNCK 1957, No. 1, item 7.

<sup>18</sup> Judgment of the Supreme Court of 8 September 1973, ref. no. I KR 116/72, OSNKW 1974 No. 2 item 26.

and legal responsibility for the consequences of a medical error committed or a breach of the standards of ethics exclusively to the attending physician [Puch, Nowak-Jaroszyk, and Swora-Cwynar 2020, 616]. Increasingly, the doctrine and jurisprudence is rightly moving in the direction of individualising the responsibility of each member of the medical team for their act or omission and the fault on their part [Siemaszko 2020, 60].

Surgeries are carried out by a surgeon – a licensed physician with a surgical speciality. In very few cases, a surgeon is assisted only by a nurse, and more often one or more other licensed physicians are involved in a surgical operation, i.e. physicians as assistants at surgery. There is no doubt that performing surgery carries an enormous risk. However, in addition to the standard situations, it may happen that the patient suffers much more serious and unpredictable injury as a result of the surgery, e.g. by a retained foreign body left in the operation site.

The correct performance of the operation is not possible without the participation of other individuals, in addition to the specialist doctor, whose involvement is related to the division of responsibilities among the individuals with different specialities. The division of responsibilities is based on specific medical procedures developed in accordance with current medical knowledge. Unfortunately, common law does not define the concept of an “operating team” [Siemaszko 2020, 56] nor the role or scope of supervision of the doctor who is the leader of the team. Thus, it should be assumed that the legislator leaves these issues to be regulated in the internal procedures of healthcare institutions. Such internal procedures should enhance the safety of both the patient and those people participating in the operating team. Furthermore, if a medical error occurs, they should facilitate the identification of the person or people to blame for such an adverse medical event. This provides the medical team leader (surgeon) with certain guarantees that they will not be held professionally, criminally or civilly liable for every occurrence of a medical error. Naturally, this does not exclude their liability in the event of a failure to exercise due diligence in supervising the work of the entire team. In such a situation, there should be not a medical malpractice case, but negligence in the performance of a specific function by the specialist doctor as team leader.<sup>19</sup>

At this point, it should be noted that Polish legislation, despite the introduction of supervision into the terminological grid of the law, has not defined this concept in a sufficiently clear manner. The term “supervision” also appears in many laws constituting the basis of the healthcare system, but without a clear definition. Supervision is a broader concept than control.

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<sup>19</sup> Judgment of the Supreme Court of 17 February 1967 ref. no. I CR 435/66, OSNC 1967, No. 10, item 177.

Supervision always involves control activities, whereas the exercise of control is not always, or rather rarely, combined with the right to use supervisory measures. In practice, control is limited to comparing the actual state of affairs with the required state, i.e. the state defined by the legal framework, technical and economic standards or requirements arising from medical knowledge. In practice, many terms are used in this respect, i.e. words that are close to each other or used interchangeably, i.e. control, supervision. These are concepts that are close to each other, but there are important differences between them [Borodo 1997, 215-16]. Supervision in administrative law means “the examination of the activities of a given administrative entity (control) combined with the possibility of assisting, influencing and also modifying those activities, carried out by an organisational or functional superior body in order to ensure the lawfulness of those activities and, in specific cases, compliance with certain specific values (also defined in law)” [Boć 2002, 236]. The Constitutional Tribunal understands supervision as “specific procedures giving the relevant state bodies, endowed with the relevant powers, the right to ascertain the facts as well as to correct the activities of the supervised body.”<sup>20</sup> Thus, the supervision of a specialist doctor over an assistant would prevent the assistant from performing medical procedures independently.

Extensive case law and doctrinal views have been expressed regarding the supervision over a resident doctor. The rules of residency and the legal status of a resident doctor are set out in the Act on the Professions of Physician and Dentist of 5 December 1996<sup>21</sup> and the Regulation of the Minister of Health on the Specialities of Physicians and Dentists of 31 August 2020 issued on its basis.<sup>22</sup> A physician undergoes medical speciality training within the framework of a residency or in other forms indicated in the Act on the Professions of Physician and Dentist. Pursuant to Article 16h(1) of that act, a resident doctor undergoes speciality training on the basis of an employment contract concluded with an entity providing speciality training for a period specified in the speciality programme. It should be pointed out that the Act on the Professions of Physician and Dentist does not restrict a resident from practising medicine. Thus, residents can – like other doctors – provide healthcare services in the forms permitted by law. However, a resident doctor undergoing speciality training “remains under the supervision of the head of speciality training.” The supervision of the head of the speciality training over the resident physician’s performance of diagnostic,

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<sup>20</sup> See the grounds for the resolution of the Constitutional Tribunal of 5 October 1994, ref. no. W 1/94, OSS 1994, No. 4-5, item 157.

<sup>21</sup> Journal of Laws of 2021, item 790 as amended (the “Act on the Professions of Physician and Dentist”).

<sup>22</sup> Journal of Laws of 2020, item 1566 (the “Speciality Regulation”).



therapeutic and rehabilitation procedures is obligatory until the physician has acquired the ability to perform the supervised procedures independently. Within the scope of supervision, the head of the speciality training should, among other things: draw up a detailed plan of the speciality training; consult and assess the diagnostic tests proposed and performed by the doctor and offer an interpretation, diagnosis of the disease, forms of treatment, prognosis and recommendations for the patient; supervise the doctor's performance of diagnostic, treatment and rehabilitation procedures included in the speciality programme; and participate in the doctor's surgical procedure or the applied method of treatment or diagnosis posing an increased risk for the patient, until the doctor acquires the ability to perform or apply them independently.<sup>23</sup> It is up to the head of the speciality training to assess the resident's ability to perform the procedures assigned to them independently. However, during the period when the resident doctor does not yet have the capacity to perform independently, the head of the speciality training or the doctor in charge of the training is liable for the procedures performed under their supervision, unless the resident doctor has clearly contributed to the injury to the patient by not exercising due diligence in performing the entrusted task.<sup>24</sup> Consequently, a resident doctor may be found to be in breach of Article 160(3) in conjunction with Article 160(2) of the Criminal Code of 6 June 1997<sup>25</sup> regardless of the responsibility of the supervising doctor.

As in the case of a resident doctor, the qualification to practice surgical assistance requires the completion of a speciality in accordance with the Speciality Programme, followed by the successful completion of the National Speciality Examination in the field of healthcare.<sup>26</sup> During the course of speciality training in surgical assistance, the applicant for speciality training is supervised by the head of speciality training.<sup>27</sup> The scope of supervision includes, among other things, establishing detailed conditions for the conduct of speciality training in such a way that the applicant acquires the theoretical knowledge and practical skills specified in the speciality training programme.<sup>28</sup> It is also up to the head of the speciality training to assess the assistant's ability to perform the assigned procedures independently. Thus, after completing the speciality training and passing the examination, the assistant becomes independent in performing certain medical procedures.

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<sup>23</sup> See Article 16m(7) of the Act on the Professions of Physician and Dentist.

<sup>24</sup> See <https://www.prawo.pl/zdrowie/jak-samodzielny-jest-lekarz-rezydent-jaka-odpowiedzialnosc,262120.html> [accessed: 01.10.2022].

<sup>25</sup> Journal of Laws of 2022, item 1138.

<sup>26</sup> See Articles 4, 8, 10, 11, 12, 29, 33, 37 and 43 of the Act on the Award of the Title of Specialist in Fields Related to Healthcare of 24 February 2017, Journal of Laws of 2021, item 1297 (the "Specialities Act").

<sup>27</sup> *Ibid.*, Article 19(1).

<sup>28</sup> *Ibid.*, Article 19(6).

## CONCLUSIONS

Developments in medicine are making operations more and more complicated, and their performance requires the cooperation of multi-person operating teams consisting not only of doctors of various specialties, but also of highly specialised support staff. This may result in “limiting” the duties of a particular doctor and excluding supervision over other people in the team, e.g. a surgeon’s assistant.

Considering the analysis above, the legal status of a surgeon’s assistant should be assessed individually due to the scope of this speciality and considerable independence in performing procedures in the diagnostic and therapeutic process. Therefore, it cannot be included by analogy with other people who are support staff present at the operating table, e.g. nurses, instrument attendants, etc. The role of the person providing surgical assistance to the physician will be similar to that of the anaesthesiologist, who is also a staff member of the operating theatre. However, it should be emphasised that, when starting to perform professional procedures, the assistant should have the appropriate knowledge and skills. These, in turn, are acquired through a speciality training.

The success of the new speciality will depend primarily on the appropriate training process. It will be necessary to introduce appropriate changes to the internal procedures of medical facilities in order to ensure the proper organisation of the assistants’ work and their cooperation with specialist doctors. Creating the right work organisation will reduce the risk of medical errors resulting from organisational errors. Supervision from a specialist doctor over an assistant should focus on those of their procedures that go beyond their skills or competence as an independent member of the medical team [Rejman 1983, 55-71]. The development of medical science and the narrowing the duties of a specialist surgeon to solving a specific medical problem excludes the possibility of supervision over an assistant who is part of the team. Constructing the possibility of liability on the basis of supervision over team members who are also specialists in their field has been aptly criticised in the doctrine [Malicki and Malicka-Ochtera 2017, 9]. The doctrine rightly emphasises that as the team grows in size, the instrumentation is more extensive, the procedure is more complicated and team members, e.g. assistants, have to be specialists in their field. In that case, the role of the manager comes down to making fundamental, key decisions, like whether to operate and what method to use [Siemaszko 2020, 60].

The introduction of a new surgeon’s assistant speciality forces medical facilities to adopt appropriate work organisation and treatment procedures with the participation of assistants in such a way that ensures no harm is done to patients. This obligation results from the general rules of hospital

operation and is specified in a number of rules on conducting medical activity, such as hospital services, i.e. the fault in the organization.

To sum up, the introduction of a new speciality – surgeon's assistant – is a great challenge for hospitals, surgeons and society as a whole. It requires many additional legal and organisational solutions at the hospital level as well as at the central level.

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