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Medical-Malpractice Disputes – Analysis of the Use of Evidence from Medical Disciplinary Proceedings in Litigation for Damages

Spory o błąd medyczny – analiza wykorzystania dowodów z procesów dyscyplinarnych lekarzy w procesach odszkodowawczych

ABSTRACT

The article presents the principles of practicing the medical profession, which are based not only on compliance with the law, but also have their basis in professional deontology. It should be assumed that one of the most important principles that a physician should never forget at every stage of his or her professional activity is the principle of due diligence. This issue of medical due diligence is assessed by both medical and civil courts. The study indicates the legal and actual possibilities of using evidence from proceedings before a medical court in a civil trial for a medical error. The following evidence was analyzed: medical records, expert opinion, and judgments issued by other courts.

Keywords: due diligence; professional deontology; malpractice; physicians

INTRODUCTION

The purpose of this article is to show the occurrence of mutual penetration of civil law and regulations regarding the professional liability of medical doctors on the example of court cases regarding medical errors. A central concept related to the assessment of a doctor's behavior is "due diligence". This term is the domain

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of civil law, but by reference to Article 4 of the Act of 5 December 1996 on doctors and dentists professions[1] it also refers to the professional liability of doctors. There may be a real or legal connection between the civil and professional proceedings of physicians. This relationship is most evident at the stage of evidence proceedings. The present article shows the three most significant pieces of evidence in civil law court cases regarding medical malpractice that are as follows: medical records, expert opinion as well as rulings of other courts. In the case of an expert opinion, the analysis was based on the examination of court files from 2015–2018 in medical courts in Lodz and Warsaw. Only those cases related to the lack of due diligence in the patient's diagnostic and treatment process were selected from the judgments of medical courts. From these cases, there were separated those in which a parallel civil trial was pending and the opinion of experts was used.

MALPRACTICE LITIGATION: SPECIFIC FEATURES

The number of malpractice suits has been increasing in Poland in recent years. In their judgments, civil courts more and more frequently award high damages.[2] When it comes to court cases regarding medical errors, high damages and compensations of maximum million zlotys are often ruled. That has not been changed for 10 years. However, liability for the harm suffered may only be established when the practitioner has in fact committed a medical error. The academic view is that medical error is any case when a doctor has acted inconsistently with the rules that follow from the current state of medical knowledge, failed to exercise due diligence or exceeded his or her competence, thus acting *contra legem artis* (which means improper action or omission in violation of the rules of medical knowledge).[3] When it comes to court decisions, the classical definition of medical error is provided in the judgment of the Polish Supreme Court,[4] identifying it as the practitioner's action (or omission) in the area of diagnosis or treatment that is inconsistent with medical science to the extent available to the doctor. However, error alone does not *per se* entail civil liability. The rule is that the obligation to compensate the harm may form only when that error is culpable and the statutory

[1] Consolidated text, Journal of Laws 2022, item 1731, as amended, hereinafter: the ADDP.

[2] K. Nowosielska, *Za błąd lekarza najwyżej milion rekompensaty dla pacjenta*, 2.1.2020, https://www.prawo.pl/zdrowie/najwyzsze-milionowe-rekompensaty-dla-ofiar-bledow-lekarskich,496767.html (access: 21.4.2020).

[3] Z. Marek, *Błąd medyczny – odpowiedzialność etyczno-deontologiczna i prawna lekarza*, Kraków 2007, p. 76.

[4] Judgment of the Supreme Court of 1 April 1955, IV CR 39/54, OSN 1957, no. 1, item 7.

grounds of liability for damages as provided in the Act of 23 April 1964 – Civil Code[5] are met, at the same time.

Medical-malpractice litigation is highly complicated in terms of evidence. In pursuit of proving their point, the parties to the case frequently present the court with multiple proofs (such as medical records, expert opinions, rulings of other courts) that lead to awarding or dismissing the claim. This results from how, in line with Article 6 of the CC, the burden of proving the facts (the circumstances on which the liability for damages depends) rests on whomever is attempting to derive legal consequences from such facts. The Code of Civil Procedure,[6] on the other hand, in Article 232 requires the parties to offer evidence to establish the facts from which they infer legal consequences and also to invoke all facts and proofs without delay, so that the case can proceed swiftly and efficiently (Article 6 § 2 of the CCP). Thus, it is already at the beginning of the civil trial that the need for an expert witness may arise in order to help the complainant to demonstrate the grounds of liability for damages.[7]

To obtain the evidence, the patients often initiate criminal proceedings first but currently also professional-responsibility (disciplinary) proceedings before medical disciplinary boards (referred to as "medical courts" in Polish law). One could brave the assertion that at the present stage the proceedings before medical disciplinary boards are the "foreground" before the proceedings that of paramount importance to the patient – the litigation for damages. It is in the medical disciplinary proceedings that the patient obtains information about the medical records that are of importance to the litigation and has access to the expert opinion drafted for the purposes of those proceedings, as well as the board's own ruling after the end of the proceedings. All this evidence can be used in civil litigation.

THE TERM OF MEDICAL ERROR – DOCTRINE STATEMENT

Medical professional may face the responsibility for the misconduct only in case of committing a medical error. In general understanding, error stands for misconception of reality.[8] When it comes to medicine that means occurrences of

[5] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2022, item 1360, as amended), hereinafter: the CC.

[6] Act of 17 November 1964 – Code of Civil Proceedings (consolidated text, Journal of Laws 2021, item 1805, as amended), hereinafter: the CCP.

[7] U. Drozdowska, *Dopuszczalność wykorzystania tzw. opinii prywatnych w cywilnych procesach medycznych – uwagi na tle prawa pacjenta do dokumentacji medycznej*, "Białostockie Studia Prawnicze" 2017, vol. 22(2), pp. 122–123.

[8] *Błąd*, [in:] *Słownik języka polskiego PWN*, https://sjp.pwn.pl/slowniki/błąd.html (access: 2.8.2022).

the medical professional's faulty judgment of patient's medical condition, medical records or when wrong conclusions are drawn from the existing data. There are many definitions of this concept in the doctrine of law.

Taking into consideration the subjective criterion, the following division into "medical error"[9] and "medical staff error"[10] is proposed. The term "medical error" is not homogenous though. One should remain cautious when employing the already well-established term in the literature introduced by J. Sawicki that is "medical malpractice".[11] The term "medical error" or "medical staff error" is associated with the still expanding competences and independence of medical personnel. A proper example might serve the occurrence of other medical professionals being entitled to fulfill duties previously assigned exclusively to doctors of medicine (e.g., nurses obtain the rights to make decisions as well as prescribe medications, physiotherapists conduct functional diagnosis independently, pharmacists take care of pharmacotherapy of a patient; in addition, all aforementioned medical specialists are fully entitled to COVID-19 vaccination qualification). The definition of medical occupation itself can be found in Article 2 § 1 (2) of the Act of 15 April 2011 on medical activity[12] which distinguishes two separate groups of medical professionals but does not provide any listing. The division mentioned does not refer to any clear criteria based on legal regulations (e.g., level of education). On that account, there have been certain efforts undertaken in order to define the circle of medical professionals who are entitled to be named so. Despite the rational criteria it failed to provide an explanation which occupations might be given such an attribute.[13] Without entering into the discussion in the doctrine, it is worth emphasizing that the doctor is still a leading person in the health care system, and the above-mentioned provision applies to doctors. In particular, empirical research was conducted on the judgments of medical courts.

Moving on to the division of errors and their subject being taken into account the following terms should be mentioned: "error resulting from failure to apply medical knowledge", "error of medical knowledge", and "medical malpractice".

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[9] J. Sawicki, *Błąd sztuki przy zabiegu leczniczym w prawie karnym*, Warszawa 1965, p. 125; G. Rejman, *Odpowiedzialność karna lekarza*, Warszawa 1991, p. 169 ff.

[10] In the medical community, not only in the case of a doctor, but also in other professional groups of medical workers the concept of medical error or medical professional error relates to errors committed by every person who, alone or in a team, participates in the process of diagnosis or treatment. See A. Gałęska-Śliwka, *Nieprawidłowa diagnoza – aspekty medyczno-prawne*, LEX/el.

[11] J. Sawicki, *op. cit.*, pp. 61–68.

[12] Consolidated text, Journal of Laws 2022, item 633, hereinafter: the AMA.

[13] D. Karkowska, *Zawody medyczne*, Warszawa 2012, pp. 71–108; K. Miaskowska-Daszkiewicz, *Medical Professions in Poland – Selected Legal Aspects*, "Polish Journal of Public Health" 2018, vol. 128(2), pp. 57–59.

As the subject literature demonstrates the aforementioned terms represent slightly different ranges of meaning yet are fully accepted.

According to P. Daniluk failure to comply with the adopted regulations of medical knowledge and medical conduct, both on the prevention, diagnosis, and rehabilitation stage as well as during the casual treatment and symptomatic treatment results in unlawfulness of doctor's behavior which is manifested as "medical malpractice".[14] Z. Marek claims that "medical malpractice" constitutes each case of medical professional's proceeding that is against the regulations of adopted knowledge, failed to apply due diligence, exceeded the competences, i.e. acted *contra lege artem* (which means improper action or abandonment violating regulations of medical knowledge).[15] On the other hand, A. Liszewska considers "medical malpractice" as an infringement committed by medical professional – fully aware of undertaking and performing a medical action – that undergoes specific regulations, which were based on scientific and practical grounds regarding legal goods being the life and health of a man, which on legal grounds comprise the basis for admitting the violation of the duty of caution.[16] Even the shortened review of the doctrine statement exhibits that the already mentioned authors treat the notion of medical error in a broad view, highlighting the lack of current medical knowledge and due diligence and additionally that such an infringement might relate to all stages of diagnostic and therapeutic process as well as prevention. Nevertheless, utilising the aforementioned notions of a medical error might be challenging in a court practice.

In criminal law, it is emphasized that there are two elements which denote the violation of caution: objective predictability of a possible exposure to violation of legal interest, or a behavior objectively violating the principle of conduct towards a given interest.[17] The duty of caution serves a key role in the field of consequential crimes, where the attribution of the effect is "conditioned, i.a., by breach of a rule of procedure, serving against the occurrence of the effect".[18] In fact, the doctor is responsible not for the medical error, but at best for its effect. In this connection, T. Sroka points out that "for the purposes of criminal liability for negative effects on the health or life of patients, it is completely unnecessary to use the concept of

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[14] P. Daniluk, *Błąd w sztuce lekarskiej – wybrane problemy*, "Prawo i Medycyna" 2004, no. 4, p. 45 ff.

[15] Z. Marek, *op. cit.*, p. 76.

[16] A. Liszewska, *Odpowiedzialność karna lekarza za błąd w sztuce lekarskiej*, Kraków 1998, p. 102.

[17] *Ibidem*.

[18] A. Dąbek, *Rozważania nad przydatnością pojęcia błędu medycznego dla ustalenia odpowiedzialności karnej lekarza za negatywne skutki dla życia i zdrowia pacjenta powstałe w procesie leczenia na gruncie polskiej literatury i orzecznictwa*, "Acta Universitatis Lodziensis. Folia Iuridica" 2016, vol. 77, p. 82.

a 'medical error' and it is also not a separate premise of criminal liability of doctors for offenses resulting from consequential crimes".[19]

In civil law, the essence of liability is damage. Investigating damages depends on assigning the doctor responsibility for the harmful event and determining the damage being in a cause-effect relationship with the event. However, the burden of liability for the damage caused by a doctor can only be discussed when he or she has made a mistake. The mere fact of making a mistake does not constitute grounds for the doctor to be held responsible.[20] As a rule, the obligation to compensate for the damage may arise only when the error is at fault by the doctor and, at the same time, the other conditions for liability for damages must be met provided for in the CC. The doctor is responsible on the basis of guilt, which can be attributed to him or her only in the event of both objective and subjective improper conduct. Due to this fact Article 4 of the ADDP obliges the physician to practice in accordance with the indications of current medical knowledge. Any deviation from these indications will constitute a violation of the principles resulting from the principles of knowledge and experience, and within its framework is the so-called medical error (element of the objective of the doctor's misconduct). The subjective element refers to the exercise of due diligence by a doctor, assessed in terms of the professional model specified in Article 355 of the CC.

In principle, the concept of due diligence also appears in the regulations that form the basis of the professional liability of a physician. In this liability, a professional misconduct is treated as an infringement. The definition of a professional misconduct under Article 53 of the Act of 2 December 2009 on medical chambers[21] indicates that every doctor as a member of a medical chamber is obliged to comply with the principles of medical ethics and the provisions related to the performance of the medical profession. In the practice of medical courts, the most important of them include Article 4 of the ADDP and Article 8 of the Polish Code of Medical Ethics.[22] In my opinion, these are the most important rules that a doctor should keep in mind at every stage of his professional activity. Pursuant to Article 4 of the ADDP a doctor is obliged to practice the profession taking into account the indications of current medical knowledge, methods and means of preventing, diagnosing and treating diseases available to him or her, while observing the principles of professional ethics and due diligence. Article 8 of the Code of Medical Ethics states that a physician should carry out all diagnostic, treatment, and preventive procedures

[19] T. Sroka, *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*, LEX/el. 2013. See also A. Dąbek, *op. cit.*, pp. 73–75.

[20] J. Sawicki, *op. cit.*, p. 68.

[21] Consolidated text, Journal of Laws 2021, item 1342, hereinafter: the AMC.

[22] Kodeks Etyki Lekarskiej, https://nil.org.pl/uploaded_images/1574857770_kodeks-etyki-lekarskiej.pdf (access: 10.1.2022).

with due diligence, devoting the necessary time to patients. It should be emphasized that these provisions contain a common term, which is "due diligence". In this case, the concept of due diligence was borrowed from civil law – Article 355 § 1 of the CC. As a result, the issue of due diligence is subject to the assessment of both medical and civil courts. Therefore, litigants may use evidence from professional proceedings in a civil trial in cases of lack of due diligence, and vice versa.

DISCIPLINARY PROCEEDINGS FOR MEDICAL PRACTITIONERS

At the beginning of the discussion of the relationship between malpractice litigation and professional responsibility (disciplinary proceedings), attention should turn to the specific features of the latter, given how the pertinent issues are regulated differently even from one European country to the next.[23] Polish legal literature often recognizes medical disciplinary proceedings[24] as quasi-criminal, adapted to the purposes of the specific institutions and belonging to criminal law in its broadest sense.[25] It must, however, be emphasized that medical professional responsibility is not identical with criminal liability. A comparison of the method of regulation of the grounds of professional versus criminal liability highlights the very general way of defining professional misconduct, for unlike in criminal proceedings, here there are no definitions of the individual (types of) offenses. For the purposes of professional responsibility, the practitioner is bound by two normative systems: (medical) ethics and law. The relationship between the two is not easy to define. Medical disciplinary proceedings are brought by the Disciplinary Prosecutor (Pol. *Rzecznik Odpowiedzialności Zawodowej*), who, if convinced that professional misconduct has occurred, requests the medical disciplinary board for punishment. In regulating the disciplinary proceedings, the lawmaker provided for two instances – District Medical Disciplinary Board (Pol. *Okręgowy Sąd Lekarski*) rules in the first instance, and the Chief Medical Disciplinary Board (Pol. *Naczelny Sąd Lekarski*) hears the appeals. At present, one can also challenge the latter's rulings with an appeal-in-cassation to the Supreme Court, where professional judges decide the case. By contrast, medical disciplinary boards of the first and the second instance are composed of medical practitioners, not judges. For this reason, the law-

[23] E. Zielińska, *Odpowiedzialność zawodowa lekarza i jej stosunek do odpowiedzialności karnej*, Warszawa 2001, p. 67.

[24] There are similar proceedings in other professions: lawyers (advocates, counsellors-at-law, notaries) and judges.

[25] A. Bojańczyk, *Z problematyki relacji między odpowiedzialnością dyscyplinarną i karną (na przykładzie odpowiedzialności dyscyplinarnej zawodów prawniczych*, "Państwo i Prawo" 2004, no. 9, p. 17; M. Laskowski, *Czy odpowiedzialność dyscyplinarna jest rodzajem odpowiedzialności karnej?*, "Themis. Polska Nova" 2013, no. 1, pp. 95–97.

maker introduced Article 112 § 1 of the AMC, mandating that the provisions of the CCP apply to disciplinary proceedings for medical practitioners *mutatis mutandis*. Therefore, the assessment of the fairness of such proceedings must account for the non-judicial composition of such boards.[26] Basic similarities between criminal and disciplinary liability for medical practitioners are not restricted to having a set of procedural principles in common but also include the penalties that can be imposed. Disciplinary law enumerates these in Article 83 § 1 of the AMC. They include a financial penalty that is close in character to fines imposed under the CC. Some of the penalties are very severe, sometimes more so that the penalties and punitive measures handed down in criminal proceedings. One example is Article 83 § 1 (7) of the AMC, providing for even permanent disqualification.

Summing up the specificity of professional liability, it should be noted that medical courts are not the common administration of justice, panels in the first and second instance are non-legal panels. The provisions of the CCP are applied in all proceedings before medical courts, also in evidentiary proceedings. Despite these differences, the evidence that forms the basis of factual findings in a medical court may be valuable material for a civil court. In my opinion, in civil medical malpractice cases, the most important evidence is: medical documentation, expert opinion and decisions issued by other courts, including a medical court.

MEDICAL RECORDS

It is expedient to complete the necessary medical records documenting the treatment prior to bringing the action before civil court. In accordance with Article 23 of the Act of 6 November 2008 on patient rights and Patient Rights Ombudsman[27] the patient has the right to request extracts from or copies of medical records from the medical establishment. The AMA provides that "medical documentation" means "medical documentation referred to in the provisions of the Act of 6 November 2008 on the patient rights and the Patient Rights Ombudsman". This must be regarded as a logical error, given how despite another amendment the provisions still contain no legal definition of medical records. In general, medical records should be understood to mean a set of documents containing information that is medical in character.[28] On the other hand, the APRPRO itself, in Chapter VI "The patient's right to medical records", only lays down the rules for the disclosure, storage, processing and takeover of medical records in the event of ending the medical establishment's activities. Executive legislation enacted under the APRPRO, the

[26] Decision of the Supreme Court of 8 May 2014, SDI 12/14, LEX no. 1466242.

[27] Consolidated text, Journal of Laws 2022, item 1876, hereinafter: the APRPRO.

[28] U. Drozdowska, *Dokumentacja medyczna*, Warszawa 2011, p. 22.

Regulation of the Minister of Health of 6 April 2020 on the types, scopes and templates of medical documentation and methods of processing,[29] defines the scope of the basic information that must be included in the patient's individual medical records, as well as the rules for keeping the records. The consequence of the variety of medical records is that the patient is not always in a position to decide whether it is complete and sufficient to pursue the claims.

In civil litigation, medical records are viewed as a private document. This was confirmed relatively recently by the Supreme Court in the judgment of 28 March 2018.[30] In accordance with procedural rules (Article 245 of the CCP), private documents provide evidence that the signatory has agreed with the contents of the statement. Similarly to official documents, medical records benefit from the presumption of authenticity, i.e. originating from the identified issuer. Therefore, any party that denies the authenticity of a private document or claims that the signatory's statement contained in it does not originate from the signatory must prove such facts. Private document is one of the proofs enumerated in the CCP, evaluated the same as any other proofs. The court evaluates whether the evidence in the form of medical records deserves credit due to its individual characteristics and subjective circumstances or not. The outcome of the evidence consists in either accepting the documentary evidence as credible or denying its credibility, with appropriate consequences for its significance in determining the factual basis of the decision.[31] It should be remembered that in the medical documentation itself, there are also other evidence of the official value, e.g. parents' divorce judgment in the child's medical records.

EXPERT OPINION FROM MEDICAL DISCIPLINARY PROCEEDINGS

In civil medical-malpractice litigation, expert opinion is the most expensive evidence that also significantly prolongs the proceedings. Moreover, there are shortages of experts in a variety of fields and some refuse to provide opinions for the court due to their professional obligations. Requesting opinions from academic and research institutes does not solve the problem, as those offer very distant dates for the completion of their expert studies.[32] Things being so, the decisive importance from the claimant's perspective may belong to the expert opinions found in the files

[29] Journal of Laws 2022, item 1304.

[30] IV CSK 123/17, LEX 2539867. See more about this judgment in R. Tymiński, *Znaczenie dowodu z dokumentacji medycznej w sprawach cywilnych o błąd medyczny – refleksje na tle praktyki i orzecznictwa sądowego*, "Medyczna Wokanda" 2018, nr 11, pp. 123–137.

[31] Judgment of the Supreme Court of 15 September 2011, II CSK 712/10, LEX no. 1129100.

[32] U. Drozdowska, *Dopuszczalność wykorzystania tzw. opinii prywatnych*..., p. 135.

of the disciplinary case. This is all the more so because an expert witness may be appointed by either the Disciplinary Prosecutor or the board. The first stage of the disciplinary proceedings is conducted by the Disciplinary Prosecutor, who conducts investigation and explanatory activities. During the explanatory activities the Disciplinary Prosecutor should aim for a full explanation of the case by processing evidence that may include an expert opinion. It ought to be remembered that the Disciplinary Prosecutor is a medical practitioner relying on specialist knowledge and practical experience, often being capable of properly compiling a request for punishment with a justification consistent with the Prosecutor's medical knowledge. Hence, in accordance with Article 71 of the AMC, the Disciplinary Prosecutor may appoint one or more experts in order to explain issues requiring special knowledge, but has no obligation to do so. In one of the many civil cases involving medical malpractice studied by the author of this article, the District Court in Warsaw relied on the records of the case handled by the Disciplinary Prosecutor (RO-68/2011) and especially the opinion of the expert witness appointed in relation to the correctness of the prosthetic treatment.[33] Different provisions apply to the medical board, which is, however, also staffed by medical practitioners. As regards calling expert witness, Article 59 § 2 of the AMC provides that an expert witness or specialist must be consulted if special knowledge is required to determine facts of material significance to the resolution of the case. This is consistent with criminal cases and literature, where it is emphasized that even where the court does have such special knowledge, it should still call an expert witness, as the contents of the court's special knowledge are not accessible to the parties, which are therefore not in a position to the verify such knowledge, and furthermore because the procedural authority should not combine decision-making and expert roles.[34] Any other conclusion would deprive the parties of the opportunity to ask questions and offer criticism, depriving the inculpated practitioner of the right to conduct a defence.

Thus, the question arises whether expert opinions drafted in relation to medical disciplinary proceedings can legally be used in civil malpractice litigation. It is worth noting that so far there have been no *expressis verbis* regulations indicating the possibility of using an expert opinion from other proceedings.[35] Currently it is

[33] Judgment of the District Court for Warsaw Praga-Północ, II C 787/11, unpublished (research project of the Department of Law, Economics and Management of the Public Health Care School of the Centre for Postgraduate Medical Education: Analysis of legal decisions concerning medical errors).

[34] T. Grzegorczyk, [in:] *Kodeks postępowania karnego. Komentarz*, ed. T. Grzegorczyk, Warszawa 2008, p. 448 and the case law referred to therein; judgment of the Supreme Court of 3 May 1982, I KR 319/81, LEX no. 1400161.

[35] Uzasadnienie rządowego projektu ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw, Druk nr 3137, https://orka.sejm.gov.pl/Druki8ka.nsf/0/166CCC44490F3965C1258384003CD40A/%24File/3137-uzas.pdf (access: 21.4.2020).

regulated by the new provision of Article 278[1] of the CCP,[36] which states that the court may admit evidence from the opinion drawn up at the request of a public authority in other proceedings provided for by the law. The possibility of using expert opinions prepared in other civil, criminal, administrative and other official matters in civil proceedings has been introduced.[37] The possibility of using such an opinion was left to the decision of the court.

In my opinion, this provision also makes it possible to use an expert opinion in proceedings relating to professional liability of doctors. Self-government professional liability bodies are a group of persons practising a specific profession who, with the consent of the state, are entrusted with the administration of some public affairs. By means of an act, the state handed over a fragment of its empire of power to the professional self-government and thus it received the status of a public entity.[38]

The current doctrine positions as to the conditions governing the use of opinions from another case in a civil trial remain in force. Firstly, admitting evidence from an opinion issued in other proceedings by the court must be done in such a way that the fundamental principles of the CCP: directness and adversariality are respected. Consequently, the use of an opinion from another case is possible provided that neither party reports that as to this opinion, and does not demand that this evidence be repeated in the pending proceedings in a civil case.[39] Departure from this requirement requires the express request of the parties. Secondly, taking into account an expert opinion issued in other proceedings requires at least a request of one of the parties. Then, in accordance with the principle of directness, an opinion from another proceeding should be attached to the files of the pending case in order to enable the parties to familiarise themselves with evidence taken in other proceedings.[40] This excludes surprising the parties with the use of conclusions or considerations of this opinion, at first glance unrelated to subject of a given civil process.[41]

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[36] Act of 4 July 2019 amending the Act – Code of Civil Procedure and certain other acts (Journal of Laws 2019, item 1469).

[37] K. Knoppek, *Dowody i postępowanie dowodowe w sprawach cywilnych po nowelizacji postępowania cywilnego z 4.7.2019 r.*, "Palestra" 2019, no. 11–12, p. 80.

[38] Judgment of the Supreme Court of 17 May 2000, I CKN 724/98, LEX no. 42952.

[39] Judgment of the Supreme Court of 30 May 2008, III CSK 344/07, LEX no. 490435; A. Turczyn, [in:] *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz*, ed. O. Piaskowska, LEX/el. 2020.

[40] Judgment of the Supreme Court of 10 November 1966, II PR 269/66, LexPolonica no. 317696.

[41] J. Misztal-Konecka, *Proces cywilny a opinia biegłego wydana w innym postępowaniu*, "Przegląd Sądowy" 2012, no. 11–12, pp. 57–58.

THE USE OF EXPERT OPINION – PRACTICAL ANALYSIS

The aim of the study was to answer the question of how many compensation cases are conducted in parallel with cases in medical courts, and then how many cases were used as evidence in the case when an expert opinion prepared for the purposes of professional proceedings was used (the decision to appoint an expert was issued by a District Disciplinary Prosecutor or a medical court). The analysis covered cases in two first-instance medical courts in Warsaw and Lodz. Not without significance was the fact that the jurisdiction of these medical courts covers the largest medical chamber in Poland, i.e. the District Medical Chamber in Warsaw. The Central Register of Physicians shows that the District Medical Chamber in Warsaw associates 33,892 doctors and dentists, of which 30,733 are actively practising.[42] The District Medical Disciplinary Board in Lodz, by its jurisdiction, includes the Chamber, which associates 14,797 practising doctors and dentists (10,918 of which are actively practising the profession).[43]

The study was divided into three stages. In the first stage, the research was based on the analysis of court files from 2015–2018. Only those cases related to the lack of due diligence in the patient's diagnostic and treatment process were selected. Out of these cases, there were those in which a parallel civil trial was pending and these were separated. Then they were divided according to specialization. In the third stage, the use of expert opinions was analyzed.

Turning to the analysis, the District Medical Disciplinary Board in Warsaw recognized 148 cases of lack of due diligence at that time, and 21 (14.19%) civil cases were pending in parallel with these proceedings. Detailed analysis of cases related to the failure to exercise due diligence show that most, as many as 10 (23.8%) civil proceedings were conducted in 2016. These were matters in the field of: two in orthopaedics, two in psychiatry, one in surgery and the other in conservative dentistry and prosthetics. Only in half of them, the civil court had expert opinions prepared for the purposes of professional proceedings. In one of these cases, District Disciplinary Prosecutor accused four doctors of omitting the fact that they did not extend the diagnosis to a CT of the cervical spine despite the risk of an injury to this area during a road accident in February 2010 (a head-on car collision) in which the patient took part. The charge was brought against doctors based on the opinion of an expert traumatologist orthopaedist. Due to discrepancies in the assessment of whether a professional misconduct has been committed, the District Medical Disciplinary Board

[42] Naczelna Izba Lekarska w Warszawie, *Zestawienie liczbowe lekarzy i lekarzy dentystów wg przynależności do okręgowej izby lekarskiej i tytułu zawodowego z uwzględnieniem podziału na lekarzy wykonujących i niewykonujących zawodu*, 3.1.2022, https://nil.org.pl/uploaded_files/1641220880_za-grudzien-2021-zestawienie-nr-01.pdf (access: 9.1.2022).

[43] *Ibidem*.

decided to admit evidence from an expert opinion in the field of emergency medicine, which was prepared and submitted to the District Medical Disciplinary Board on 11 May 2015. In this situation, the District Medical Disciplinary Board had to take into account the fact that pursuant to Article 63 (4) of the AMC, the punishability of the act was statute-barred after 5 years from its commission.[44]

In 2015, only one opinion from professional proceedings in a case resolved in the field of gynaecology and obstetrics was used. In this case, the doctor did not exercise due diligence after the surgery to remove the patient's uterus, he abandoned the urological consultation, despite the fact that the patient had hematuria for several days. During the operation on 26 January 2012, the patient suffered from damage to the urinary organ which was not diagnosed during the patient's stay in the ward, which postponed the urological procedure. As a result, intraoperative obstruction of the right ureter in the lower section was found (the ureter was probably ligated during gynecological surgery), forcing urologists to transplant the ureter and remove the malar kidney. The medical court took into account the opinion of an expert gynaecologist-obstetrician, which clearly showed that in the event of haematuria after the surgery, a urological consultation should have taken place during the patient's stay in the hospital as well as an ultrasound examination, and the accused doctor had not ordered such consultations and tests. The aggrieved party filed a claim with the District Court in Radom, attaching an expert opinion against the Poviat Medical Centre for compensation and a pension in connection with medical malpractice in the defendant hospital in which the operating doctor was the accused (case I C 1579/14).[45]

In 2018, in parallel to the proceedings before the District Medical Disciplinary Board, two compensation proceedings were conducted and in each of them the opinion of an expert in professional proceedings was used. The first case concerned the treatment of poorly conducted dental treatment in the period of 5 years (2011–2016), consisting in repeated rinsing of the gingival pockets and prescribing antibiotic therapy without determining the cause of the ailments and commencing appropriate and effective therapy, which resulted in pain complaints that lasted several years and the destruction of the teeth that were the pillars of permanent prosthetic restorations. In this case, the dentist was punished with a reprimand, and the opinion of an expert appointed by District Disciplinary Prosecutor was used in civil proceedings.[46] In the second, the charge was brought against the resident

[44] Decision of the District Medical Disciplinary Board in Warsaw of 11 June 2015, OSL 630. 45/13, unpublished.

[45] Decision of the District Medical Disciplinary Board in Warsaw of 14 May 2015, OSL 630. 42/14, unpublished.

[46] Decision of the District Medical Disciplinary Board in Warsaw of 22 February 2018, OSL 630. 47/18, unpublished.

doctor who had doubts after the X-ray examination about the fracture of the patient's spine (Th12) among many the CT examinations. Six months later, the patient was diagnosed with a spine fracture. The first expert, the opinion of whom was in the evidence of the civil case, decided that, apart from the CT examination, the doctor should have also consulted an experienced orthopedist and left the patient in the ward for further observation and diagnostics. However, the opinion of another expert orthopaedic traumatologist clearly indicated that there had been a cause--and-effect relationship between the spine injury and the previous physical activity undertaken by the patient in the form of several hours of horse riding, three times a week. The proceedings were discontinued due to the statute of limitations.[47]

Table 1. Number of cases heard by the District Medical Disciplinary Board in Warsaw in 2015–2018

<table>
<tr><th>Year</th><th>2015</th><th>2016</th><th>2017</th><th>2018</th></tr>
<tr><td>All matters regarding the lack of due diligence conducted at the District Medical Disciplinary Board</td><td>44</td><td>42</td><td>35</td><td>27</td></tr>
<tr><td>Parallel civil cases</td><td>5</td><td>10</td><td>6</td><td>2</td></tr>
<tr><td rowspan="8">Division of civil cases by specialization</td><td>conservative dentistry and prosthetics – 4</td><td>orthopaedics – 2</td><td rowspan="2">infectious diseases – 1</td><td>orthopaedics – 1</td></tr>
<tr><td rowspan="7">gynaecology and obstetrics – 1</td><td>psychiatry – 2</td><td rowspan="7">conservative dentistry and prosthetics – 1</td></tr>
<tr><td>surgery – 1</td><td>child psychiatry – 1</td></tr>
<tr><td rowspan="4">conservative dentistry and prosthetics –5</td><td>internal diseases – 1</td></tr>
<tr><td>surgery – 1</td></tr>
<tr><td>orthopaedics – 1</td></tr>
<tr><td>conservative dentistry and prosthetics – 1</td></tr>
<tr><td rowspan="2">Using an expert opinion from professional proceedings in a civil trial</td><td rowspan="2">gynaecology and obstetrics – 1</td><td rowspan="2">5, but in 1 case conducted by the Medical Disciplinary Board 2 expert opinions were used (orthopaedics and emergency medicine)</td><td rowspan="2">3</td><td>conservative dentistry and prosthetics – 1</td></tr>
<tr><td>orthopaedics – 1</td></tr>
</table>

Source: own research.

[47] Decision of the District Medical Disciplinary Board in Warsaw of 13 December 2018, OSL 630.32/17, unpublished.

In the District Medical Disciplinary Board in Lodz, the allegation of lack of due diligence was raised in 77 cases, and in three (3.89%) civil proceedings were pending simultaneously. A detailed analysis in individual years shows that in 2015 and 2016, there were no parallel civil cases among the analysed cases. In 2017, 19 cases concerning the lack of due diligence in the diagnostic and treatment process were conducted, and two (10.52%) civil cases were conducted simultaneously. In 2018, 16 cases were conducted, and one (6.25%) civil case was handled at the same time. Two cases concerned faulty prosthetic treatment. In both cases, acquittals were passed and expert opinions were not used in the civil trial. One cardiology case was related to a physician's failure to diagnose pericarditis.[48] Two expert reports were used.

Table 2. Number of cases heard by the District Medical Disciplinary Board in Lodz in 2015–2018

Year	2015	2016	2017	2018
All matters regarding the lack of due diligence conducted at the District Medical Disciplinary Board	19	23	19	16
Parallel civil cases	0	0	2	1
Division of civil cases by specialization	0	0	cardiology – 1 conservative dentistry and prosthetics – 1	conservative dentistry and prosthetics – 1
Using an expert opinion from professional proceedings in a civil trial	no	no	no	cardiology – 2

Source: own research.

Summing up, it should be noted that in the analysed four-year period, in the case of the lack of due diligence cases conducted by both medical courts, in parallel with these proceedings 23 civil proceedings were pending. The conducted research shows that 13 opinions from professional proceedings were also used in civil proceedings.

THE MEDICAL DISCIPLINARY BOARD'S RULING AND THE CIVIL LITIGATION

Doubts surfaced as to whether medical disciplinary boards could be regarded as judicial bodies in the light of the Polish Constitution. However, the general consensus in literature was that they fulfilled all of the criteria of judicial status, as

[48] Decision of the District Medical Disciplinary Board in Lodz of 3 December 2017, Wu 2/17, unpublished.

they exercised public activities consisting in the resolution of legal conflicts and imposition of penalties.[49]

In practice, though, the questions arose: Are the rulings of disciplinary boards of evidentiary significance in civil courts? Are there legal grounds to regard such rulings as preliminary rulings in civil proceedings?

Answering the first question, there is no doubt that professional liability is public and legal and the decision of the medical court is an official document (Article 244 § 2 of the CCP). The second question requires a more detailed discussion of the relationship between civil and criminal procedure. In Polish civil procedure, the findings of a final and unappealable criminal conviction are binding on the civil court (Article 11 of the CCP). To the extent of being so bound, the court has no way of making any findings and especially any findings to the contrary. This is regardless of whatever evidence (witness testimony, the parties' statements, expert opinions) the civil court would be making such findings. The findings contained in the criminal sentence with regard to the commission of the criminal offence are decisive here. However, the provision of Article 11 of the CCP is a *lex specialis*, which means it should be interpreted strictly or even narrowly, so as to avoid extending the scope of the circumstances being verified and evaluated by the civil court.[50] According to both literature and judicature, there are no grounds whatsoever for the rulings of medical disciplinary boards to be afforded the status of preliminary rulings in the understanding of Article 11of the CCP. Such significance, in a narrowly defined scope, belongs to convictions handed down in criminal proceedings defined in the strict sense. Medical practitioners' professional responsibility, in turn, is recognized as having only the quasi-criminal character. The position of the courts is that the civil court is not bound by the findings contained in the rulings issued in criminal-administrative proceedings, tax authorities' rulings,[51] rulings of disciplinary boards,[52] or pension boards.[53] Thus, the evidentiary significance of the ruling of a medical disciplinary board in civil litigation is only such that it points toward the fact that such a ruling was made, which needs to be accounted for in the facts of the case.[54]

The practice of the civil courts is consistent with this position. In a civil case concerning the root-canal treatment of a tooth covered with a prosthetic crown, the documents submitted by the claimant contained two rulings from the Chief Med-

[49] E. Zielińska, *op. cit.*, pp. 105–106).

[50] Judgment of the Supreme Court of 8 January 2004, I CK 137/03, LexPolonica no. 389974; judgment of the Supreme Court of 20 July 2007, I CSK 105/07, LexPolonica no. 1510422.

[51] Judgment of the Supreme Court of 25 March 1970, II PR 192/69, LEX no. 1137.

[52] Judgment of the Supreme Court of 5 December 1967, II PR 438/67, LEX no. 15142.

[53] Judgment of the Supreme Court of 10 July 1980, II UZP 10/80, LEX no. 15671.

[54] Judgment of the Court of Appeals in Katowice of 10 April 2015, I ACa 1016/14, LEX no. 1682866.

ical Disciplinary Board: one that was not final and unappealable, remanding the case for reconsideration by the District Medical Disciplinary Board and the other sustaining the ruling after the District Medical Disciplinary Board's hearing. Both were admitted into evidence.[55] In a different case concerning the implantation of an artificial right-eye lens, the District Court rejected the credibility of the ophthalmologist's testimony concerning the correctness of his treatment. The court found that the doctor took no action to treat the complication that arose after surgery but merely set another date for appointment, thus exposing the patient to deterioration of her health condition (sight impairment). Thus, the court shared the view of the Chief Medical Disciplinary Board, whose final and unappealable ruling found the doctor guilty of professional misconduct and imposed the penalty of reprimand.[56]

CONCLUSIONS

The increase in the number of malpractice actions for damages before civil courts is linked not only to the patients' increasing awareness of their rights but also the rapid development of medical science, including new technologies, and the associated risk. The situation confronts both the litigating parties and the judges with new challenges relating to the evaluation of evidence. Due to procedural economy, the problem of the use of evidence gathered in other proceedings surfaces; these include medical disciplinary proceedings. Significant importance in civil cases involving medical error belongs to evidence from medical records, witness opinions and the use of the rulings of medical disciplinary boards. In my opinion, this is due to the fact that in professional proceedings the concept of due diligence has been borrowed from civil law – Article 355 § 1 of the CC. This common core, the issue of due diligence of a physician is subject to assessment by both medical courts and civil courts.

In these trials, three pieces of evidence are the most important: medical records, an expert opinion and a ruling from other courts. The practice so far shows that the diversity of medical records means that the patient is not always able to assess whether he or she already has full medical records, which will become the basis for pursuing claims. Professional conduct gives the patient this opportunity. However, there is no doubt that, in practice, a medical court decision is a directional one.

[55] Judgment of the District Court for Warsaw-Mokotów, I C 51/08, unpublished (research project of the Department of Law, Economics and Management of the Public Health Care School of the Centre for Postgraduate Medical Education: Analysis of legal decisions concerning medical errors).

[56] Judgment of the District Court for Warsaw Praga-Północ, II C 575/09, unpublished (research project of the Department of Law, Economics and Management of the Public Health Care School of the Centre for Postgraduate Medical Education: Analysis of legal decisions concerning medical errors).

Moreover, such a judgment, together with the opinion of experts from professional proceedings, is an important piece of evidence for a civil court.

The above research indicates that civil courts had such evidence, even before the introduction of the new provision of Article 278[1] of the CCP. The introduction of this provision legitimises a long-used practice. There is no doubt that professional proceedings constitute the "foreground to civil proceedings", and in both trials the basis for adjudication may have been one and the same expert opinion.

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ABSTRAKT

W artykule opisane zostały zasady wykonywania zawodu lekarza, które nie tylko opierają się na przestrzeganiu przepisów prawa, lecz także mają swoje umocowanie w deontologii zawodowej. Należy przyjąć, że jedną z najważniejszych zasad, o jakiej lekarz nigdy nie może zapominać na każdym etapie swojego profesjonalnego działania, jest zasada zachowania należytej staranności. Kwestia należytej staranności lekarza podlega ocenie zarówno sądów lekarskich, jak i sądów cywilnych. W opracowaniu wskazano prawne i faktyczne możliwości wykorzystania dowodów z postępowania przed sądem lekarskim w cywilnym procesie o błąd medyczny. Analizie poddano następujące dowody: dokumentację medyczną, opinię biegłego i orzeczenia wydane przez inne sądy.

Słowa kluczowe: należyta staranność; deontologia zawodowa; błąd medyczny; lekarze