

A medical error as a basis for physician's professional liability

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Summary

Medical procedures should be undertaken and applied with due thoroughness, in accordance with current medical knowledge and rules of medical ethics, available methods and means of prevention, recognition and treatment of diseases. The imperative of carrying out the work *lege artis* incorporates all the steps of the diagnostic and treatment process, which means, the doctor should act by this rule in terms of prophylaxis, diagnosis, treatment and long-term prognosis.

Depending on the treatment stage the doctrine and case-law introduce a distinction between a diagnostic error (in identification), a therapeutic error (in treatment) and a prognosis error (in prediction).

Determining whether or not a physician performed a particular medical treatment in a way which is in conflict with the rules of medical knowledge and art leads to a problem connected with assessing their guilt. The doctor may be held professionally liable only when the two following requirements are met: proving the medical error and proving the doctor guilty of it.

Key words:

professional liability,
medical error,
diagnostic error,
therapeutic error,
prognosis error

Introduction

Professional liability is a type of corporate responsibility, limited subjectively only to people who pursue a particular profession of public trust and are members of a given professional self-government. It disciplines doctors to do their work properly and accurately. They are supervised by relevant bodies of the physicians' self-government – like the Commissioner of Professional Liability and the Medical Court.

Medical procedures should be undertaken and applied with due thoroughness, in accordance with current medical knowledge and rules of medical ethics, available methods and means of prevention, recognition and treatment of diseases (art. 4 u.z.l. [1]). The imperative of carrying out the work *lege artis* incorporates all the steps of the diagnostic and treatment process. Therefore, the doctor should act by this rule in terms of prophylaxis, diagnosis, treatment and long-term prognosis. A failure to follow the indications of current medical art and knowledge will lead to the possibility of charging the doctor with professional misconduct called “the medical error” and of holding them professionally responsible for it. According to Article 53 of the *Act of 2 December 2009 on the Chambers of Physicians* [2], the members of the Chambers of Physicians are subject to professional liability for the violation of medical ethics and of the rules connected with performing a doctor's job. It is to be noticed that the behaviour of the physicians themselves can constitute a basis for holding them liable under civil law (for compensatory damages) or under criminal law. If they have an employee status, they may also be held liable (as an employee) materially or disciplinarily. Professional liability is independent of other kinds of legal responsibility which are connected with committing a given act.

A medical error – notion analysis

The notion of “medical error” has not been statutorily defined and its interpretation is given by the legal doctrine, authorities of medical sciences and by judicial decisions. Not only are there discrepancies

in terms of the definition of the discussed notion but also in terms of the terminology, as a number of terms are used: a physician's error [3], a medical error [4], a therapeutic error [5], a medical art error [3] or an error in medical art [6].

The definition I have adopted states that a medical error is a medically incorrect (i.e. inconsistent with the current medical knowledge and art) way of performing a particular medical procedure. Indications of medical science and knowledge should be judged by their status which existed at the moment of undertaking procedures and not at the moment of their assessment [7]. A medical error can relate to the diagnosis, the choice of a treatment method or the way of carrying out a medical procedure (diagnostic error, therapeutic error and prognosis error). It is an objective category dependent only on the current state of medical knowledge. Any individual qualities (age), abilities (work experience) or skills of a particular doctor should be analysed as late as at the moment of determining their fault.

The assessment of the legitimacy of a medical procedure with regard to available methods, measures of prevention, diagnosis and treatment requires specialist knowledge. That is why a necessity of referencing to medical knowledge and practice is the principal element differentiating the medical error from other cases of the violation of the rules of caution. This, in turn, dictates the need for specialist medical knowledge or utilising expert witness' statements. On the other hand, an ordinary mistake or medical procedure that has the features of a breach of common rules of caution can be determined just by anyone.

As stated by the Supreme Court, the neglect of duties such as taking care of patients as well as organising safety, hygiene and medical care are not recognised as medical errors [8]. Due to the above, the following examples are not considered medical errors: incorrect identification of a patient, which led to performing a serious surgery on a wrong patient; [9] not following the rules of asepsis (not washing hands before the procedure, using unsterile tools); [10] leaving a foreign body in the operating field (gauze swabs, a surgical sheet, an atraumatic needle); [10] a poorly executed injection, a blood transfusion with a wrong blood type, a swap of a medicine leading to

administering a wrong medication to the patient, cutting a bile duct during a gallbladder removal surgery; [11] an anaesthesia which led to an accidental puncture of the pleure; [12] a swap of the results of diagnostic examination, [13] mistakes when filling out the medical history records. [14] The aforementioned breaches (classified as doctors' breaches of the duty of due thoroughness and caution) can still be sanctioned in professional liability procedures because a medical act performed without due thoroughness may constitute a professional offence due to the violation of Article 4 u.z.l. and Article 8 MCE. [15]

It is also incorrect to recognise surgical complications as mistakes in medical art. Postoperative or intraoperative complications that often occur during serious operations are independent of physicians' complying with the established medical standards and procedures. [16]

Types of medical errors

Depending on the treatment stage the doctrine and case-law introduce a distinction between a diagnostic error (in identification), a therapeutic error (in treatment) and a prognosis error (in prediction).

A **diagnostic error** is an incorrect recognition of a patient's state of health. It usually results from wrongly interpreted symptoms which serve as the basis for the diagnosis. Such a mistake is all the more dangerous since it very often significantly influences further treatment process.

Medical law authorities divide medical errors into positive diagnostic ones, consisting in mistakenly identifying a non-existent disease, and into negative diagnostic errors, when the doctor does not recognise a patient's disease. [11] Some researchers additionally recognise the third kind of error – a mixed error, when the doctor actually recognises the disease but a different one to the disease that the patient suffers from. [17]

A positive diagnostic error rarely constitutes a basis for criminal liability but is undoubtedly a basis for the doctor's professional liability, no matter whether it caused negative effects on a patient's life or health, or if it was fixed during any further diagnosis or treatment.

There can be all sources of diagnostic errors: a superficial, careless examination of the patient, not conducting specialised tests which help in applying an appropriate therapy, an incorrect interpretation of the examination results or finally the abandonment of holding a solid medical history.

Diagnostic errors have often been subjects of ruling of the Supreme Court and common courts of law. In the judgement of 18 February 1972 [18] the Supreme Court classified a diagnostic error as the action of a doctor who mistakenly diagnosed a rheumatoid arthritis as tuberculosis. This improper diagnosis resulted in a wrong choice of compulsory long-lasting anti-tuberculosis treatment, which, in turn, led to health loss and inability to work.

Another case of a diagnostic error was a wrong diagnosis of breast cancer based on palpation only without conducting essential histopathological tests and an oncologist consultation, which resulted in the unnecessary amputation of both breasts while the patient suffered just from benign nipple dysplasia. [19]

In the judgement of 8 February 2006, [20] the Court of Appeal in Poznan acknowledged a diagnostic error when no CTG examination was conducted and consequently, a wrong decision was taken to choose natural delivery as the method of completing the birth, when in fact a Caesarian section was necessary. As a result, the young plaintiff suffered from hypoxic-ischemic encephalopathy, which in turn led to a 100% permanent health damage.

It should be observed that not every incorrect diagnosis will be classified as a medical error. The doctor will not be held responsible if wrong recognition of a disease was justified by the apparent symptoms, [21] especially when they objectively gave legitimacy to giving a particular diagnosis which proved to be faulty. [22]

A therapeutic error happens when a wrong way or method of treatment are chosen. It is often a consequence of a previous incorrect diagnosis but it can also occur when the patient was diagnosed properly. [23]

There are many examples of therapeutic errors: prescribing a wrong medication or an inaccurate dose of medicine, not instructing the patient about its usage and not informing or informing them poorly about how the medicine interacts with other drugs.

The doctor cannot evade responsibility by relying on the fact that all the necessary information is included in the leaflet that accompanies the medication.

A medical error happens as well when the doctor applies an old-fashioned, discontinued method of treatment (for example, Kristeller's procedure) [24] or when they perform an unnecessary surgical procedure (e.g. an unnecessary kidney removal surgery when in the first place anti-inflammatory and anti-bacterial treatment should have been introduced beforehand). [25]

It is also a medical mistake to continue a natural delivery despite the fact that there are outright and indisputable indications to perform a Caesarian section, as was the case in which it led to serious irreversible damage in the form of cerebral palsy and significant mental disability. [26]

A particular, and frequently committed, error is a surgical error consisting in an incorrectly performed surgery or performing it despite the existence of clear contraindications not to do that. For example, a doctor failed to examine the whole body of the patient before the operation and as a result he didn't recognize the fact that the patient had exudative diathesis constituting an absolute contraindication for the thyroid surgery. [27]

A prognosis error consists in a doctor's mistaken prediction on the patient's health. It occurs when the physician wrongly anticipates the improvement in the sick patient's health when in reality it gets worse, which the doctor should have predicted as this is how a given disease develops. Such a mistake may not influence the treatment process, but when it is accompanied by a diagnostic error and if the doctor doesn't start treating the patient or if they apply a wrong treatment method, there may occur some health problems (e.g. declaring the patient temporarily unable to work in a situation when it really is a permanent inability). The prognosis error can as well badly affect the patient's psyche. [28]

A medical error as a basis for the professional liability

When a doctor breaches the *lege artis* rules, it renders their act unlawful. The juridical doctrine presents various opinions on the model that should be the reference point for the assessment of doctors' activities and potential possibility of classifying them as medical errors. For the purpose of professional liability, the most appropriate model is the one by J. Sawicki, who assumes that what should be adopted as the measure of correspondence between the medical treatment and the indications of medical knowledge and art is the highest requirements of medical knowledge and the highest standards. A doctor's individual ability to observe the highest requirements of knowledge and standards should be judged only when assessing their guilt. [29]

Determining whether or not the doctor performed a particular medical treatment in a way which is in conflict with the rules of medical knowledge and art leads to a problem connected with assessing their guilt. The doctor may be held professionally liable only when the two following requirements are met: proving the medical error and proving the doctor guilty of it.

In principle, the doctor's responsibility for a medical error is connected with unintentional guilt, i.e. with failing to observe the rules of caution by the doctor as required in a particular situation although they predicted or could have predicted that would cause negative effects on a patient's health or life. The doctor's intentional activity can't be considered a medical error because it doesn't come down to a breach of binding rules created on the basis of current medical knowledge and art.

Proving a doctor guilty is based on the reconstruction of the doctor's motivational process in order to state whether it is possible in this particular case to accuse the doctor of a fault in their decision-making process, i.e. whether because of their personal characteristics they had a real and actual possibility of predicting that their medical treatment would cause unwanted results. [30]

At the stage of proving the doctor guilty, two elements are tested – the doctor's personal qualities and organisational and technical conditions in which they made decisions and undertook their activity in the diagnosis and treatment process. From among their individual personal qualities, the following need to be taken into account: their knowledge, work experience, individual ability to perceive and associate facts, intelligence level, age. It is also significant to consider circumstances relevant to the psychophysical state of the physician at the moment of providing health services, especially the inhibiting ones, such as fatigue, nervousness, their bad health condition or severe stress. [30] Another important element in terms of establishing the doctor's guilt is organisational and technical conditions in which the doctor made decisions, carried out their diagnosis and treatment (including hospital equipment, access to the latest research literature, training, the ratio between the number of patients and the number of medical staff).

In the process of establishing the doctor's guilt there occurs the relativization of the actual chance to fulfil the highest requirements of medical knowledge and standards (that the doctor is obliged to abide to) by taking into account individual circumstances concerning a particular doctor in a particular situation.

Classifying a medical error as a professional offence depends also on whether or not there was a causality between such unlawful, intentional decision of the doctor (action, abandonment, malpractice) and a negative effect or at least a state of an abstract threat to a third-party. It should be noted that in terms of professional liability it is not important whether the doctor's activity affected negatively a patient's health or if it caused their death. The medical procedure performed not in compliance with the rules of medical art or without due thoroughness, however, not causing negative effects on a patient's life or health, while not constituting a basis for holding the doctor criminally liable can be classified as a professional offence within the meaning of art. 53 u.z.l. and thereby it can be sanctioned on the basis of the regulations on doctor's professional liability. In terms of professional liability, what seems the most important is whether the doctor – the offender

breached particular standard procedures posing at least an abstract threat to a given good and what the extent of this breach is. [31]

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