MEDICINE, LAW & SOCIETY
Vol. 14, No. 1, pp. 135–152, April 2021

CAN A PATIENT'S DEATH GO UNPUNISHED? MEDIATION WITH THE DECEASED PATIENT'S FAMILY IN CRIMINAL CASES INVOLVING A MEDICAL ERROR

DOMINIKA BEK[1] & JAKUB HANC[2]

[1] University of Silesia, Faculty of Law and Administration, Arbitration and Mediation Center of Silesia, Katowice, Poland. E-mail: dominika.bek@us.edu.pl
[2] University of Silesia, Faculty of Law and Administration, Katowice, Poland, Katowice, Poland. E-mail: jakub.hanc@us.edu.pl

CORRESPONDING AUTHOR
dominika.bek@us.edu.pl

Accepted
11. 01. 2021

Revised
13. 03. 2021

Published
23. 04. 2021

Abstract A medical error resulting in a patient's death is one of the most difficult experiences in the professional practice of medical personnel. A healthcare professional faces the suffering and grievances of the deceased patient's relatives and, at the same time, the prospect of legal liability including a criminal penalty and prohibition from practising a profession. This article attempts to address the issue of the necessity and usefulness of applying such far-reaching consequences in all cases of the patient's death caused through a fault attributable to a healthcare professional. It argues for the widest possible use of mediation in cases of medical error, in particular in criminal law cases. It focuses on reasonable expectations of the deceased patient's family and the need for the improvement of standards of health protection in similar cases. This perspective makes it possible to conclude that a criminal penalty for the perpetrator of an error is not always in the public interest. As regards the possibility of using mediation in cases involving a medical error, this article refers to the Polish normative tradition, although the dilemma highlighted in its title is certainly of a universal and transnational nature.

Keywords
medical error, medical mediation, criminal liability, prohibition from practising a profession victim-offender mediation

https://doi.org/10.18690/mls.14.1.135-152.2021

University of Maribor Press

1 Introduction

A patient's death is an extremely difficult and dramatic situation, not only for the deceased patient's family but also for those who cared for the decedent during the time of illness. Medical personnel have to deal not only with their own emotions, but often also with the understandable grief, and increasingly with the grievances, of the deceased patients' relatives. Where there is a suspicion that a medical error contributed to the patient's death, the doctors and nurses may face legal consequences, the most severe of which is a criminal penalty, often combined with a prohibition from practising a medical profession. The question arises whether such severe responses are indeed necessary in those cases.

It could be argued that a patient's death resulting from a healthcare professional 's fault reflects poorly on his or her competence. Even an unintentional violation of a legally protected right that leads to the loss of human life may appear reprehensible. The family of the deceased patient also often calls for the imposition of a penalty.

However, the circumstances surrounding medical errors vary widely. One tragic error may not necessarily equate with a lack of competence or professionalism. Medical education is a lengthy, arduous and costly process, and many health systems struggle with chronic shortages of specialists. From a social perspective, is the punishment and exclusion from the profession of a person making a medical error undisputedly the most beneficial solution? Should the error instead form the basis for establishing better procedures and precautionary measures that can help to avoid similar events from recurring?[1] Will the punishment indeed bring the family of the deceased patient relief and satisfaction? Or, will compensation as well as a constructive discussion with the professional making an error and his or her sincere apologies prove more important? What is the right place to settle cases involving medical errors: a courtroom or a mediation room?

Our attempt to address these questions will be preceded by a brief outline of three different cases in which criminal liability for a patient's death was considered. Account will be taken of the extent to which the parties to a conflict concerning a medical error have access to mediation and what benefits they may derive from it. We will also seek to establish appropriate situations under which restorative justice tools might be appropriate substitutes to criminal penalties for unintentional acts that nevertheless lead to patient death.

[1] This question refers to so-called Just Culture to be further discussed below.

2 Factual descriptions

a) Case no. 1[2]

Parents took their 4-year-old daughter to a municipal hospital. Upon referral to the pediatric department, the parents told the head of the department only that their child had drunk some preparation (wood impregnating agent), the name and composition of which they did not know because it was not stored in the original packaging. The parents did bring the liquid with them to the hospital. Although conscious during the examination, the girl had some black marks on her lips and it could be inferred from her appearance and general condition that she was suffering from acute poisoning. The head of the department did not order an analysis of the chemical composition of the substance. He ordered the parents to take the bottle with the preparation. Instead, the department head ordered that the standard procedures in the case of poisoning be followed, such as gastric lavage and symptomatic treatment. The girl vomited blood all night and had severe diarrhea. Her condition was systematically worsening. The nurses informed the head of the department on her condition, yet he did not come to see her, nor did he change the terms of the order he had previously signed.

The next day, during the morning department round, some doctors said that the chemical composition of the preparation the girl had drunk should be examined, but the head of the department did not see the need for it. The girl's parents were nonetheless instructed to provide the name and composition of the preparation. That afternoon, the head of the department contacted a specialized poison center and ordered that the girl be transported there. Later that same afternoon, she underwent hemodialysis. She died after having spent 13 days in a specialized toxicological center. The immediate cause of death was multi-organ failure from acute poisoning with chromium and copper salts. A toxicological examination showed high toxic levels of chromium and copper in the parenchymal tissues.

A medical court concluded that the department head failed to exercise due diligence from both a diagnostic and therapeutic standpoint. Moreover, the court held that he not only failed to show sufficient determination in investigating the identification of the agent that caused the child's poisoning but also failed to inform the parents of the possible threat to their daughter's life.

[2] The presented factual description is inspired by a judgment of the Court of Appeals in Poznań of 10 August 2011, I ACa 1082/10, LEX no. 898633. There was no possibility to hold the doctor criminally liable in that case because he died. Moreover, the patient suffered poisoning on her grandparents' recreational plot drinking wood impregnating agent contained in a Coca-Cola bottle.

In the opinion of medical experts, although the head of the department made medical errors, even a correct reaction would probably not have saved the girl. To be effective, the use of hemodialysis and administration of chelating agents must be initiated within the first three-six hours before the ingested poison enters the bloodstream. The application of that procedure at a later time has little therapeutic effect and has a minimal impact on an otherwise poor prognosis. The doctor clearly had no information on the type and composition of the poison at the time of the girl's admission. Nor did he have the possibility to perform a specialized toxicological analysis and make a reliable diagnosis of poisoning with heavy metal salts. Under those circumstances, the best option would have been to quickly diagnosis the condition and then to implement a therapy limiting the toxic effects of metal ions in order to bring the patient to a clinical state appropriate for a liver and kidney transplant. However, even assuming that procedure had been performed, the patient's chance of survival was minimal.

b) Case no. 2

In 2015, in the Upper Silesian Child Health Centre in Katowice, instead of administering a six-month-old child crushed liquid medication through the nasogastric tube, a nurse mistook the openings and injected them intravenously into the cannula. The girl immediately turned blue and stopped breathing. She died despite efforts to resuscitate her. An autopsy indicated that the cause of death was acute respiratory and circulatory failure. The nurse was charged with unintentionally exposing a human to an immediate danger of loss of life - Art. 160 § 3 of the Criminal Code (hereinafter CC). In a non-final judgment (II C 873/16), recognizing the responsibility of the medical institution, the Regional Court awarded PLN 250,000 in compensation to each of the deceased child's parents.[3]

c) Case no. 3

On 27 August 2019, a 33-year-old woman reported severe abdominal pain after undergoing a planned ovarian surgery. Two days later the woman was again taken to surgery to remove what the family was told was a foreign body. The patient died on 5 September. Her close relatives learned from reviewing the death certificate that the removed foreign body was a surgical spoon. The most appalling fact was that the retained surgical spoon was 30 cm long and weighed approximately 0.5 kg.[4] The ovarian surgery had been performed by two

[3] See https://www.rp.pl/Ubezpieczenia-i-odszkodowania/309279919-Sad-pol-miliona-zlotych-za-tragiczny-blad-szpitala.html; https://katowice.wyborcza.pl/katowice/7,35063,25243234,wyrok-w-glosnej-sprawie-malej-zosi-pol-miliona-za-smierc-corki.html

[4] See https://www.polsatnews.pl/wiadomosc/2019-09-18/zawieszono-lekarza-ktory-w-ciele-33-latki-zaszyl-lyzke-chirurgiczna/; https://www.rp.pl/Spoleczenstwo/190919371-Konin-W-ciele-kobiety-zaszyto-lyzke-chirurgiczna-Zmarla.html

experienced gynecologists, including the head of the department of gynecology. The hospital's director admitted to not only the initial error but also that there were indications that the doctors' decision to remove the tool also was wrong, given that the patient was probably not yet stable enough for a second surgery. Indeed, even the first operation carried a serious risk. Accordingly, the second surgery should not have taken place so soon after the first.[5]

3 Room for mediation between healthcare professional and deceased patient's family

Mediation is not only a basic alternative dispute resolution (ADR) method but also the main tool of Restorative Justice (Wilk & Zawiejski, 2015). Mediation is generally defined as "a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution" (Garner, 2004: 1003). Put differently, mediation is "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction." (Riskin, 1985: 24; see also McMullen, 1990: 373; Martin, 2003: 311) These general definitions are sometimes supplemented with additional elements pointing to, e.g., the confidentiality of mediation and the professional preparation and qualifications of the mediator (Cyrol, 2013: 21; Jenkins et al., 2014: 16; Sitarz, 2015: 21-22). Mediation understood in that sense may function as an extrajudicial method of resolving various conflicts. Given that interpersonal relations are subject to legal regulation, a large number of those conflicts involve the judicial authorities and mediation often becomes an element of the complex process of the restoration of social order.

Human death is never socially or legally neutral. Where there are grounds to suspect that a third person(s) contributed to death, a conflict with the deceased's family is as likely as the involvement of law enforcement authorities. A medical error leading to a patient's death may give rise to liability at various levels and each of them allows for the use of mediation. Leaving aside the liability of the medical facility and insurance carriers, this article focuses mainly on the liability of individual healthcare professionals. Under the Polish legal order, if a doctor or a nurse makes a medical error, they may be held civilly, professionally (disciplinary action) and criminally liable.

[5] See https://poznan.wyborcza.pl/poznan/7,36001,25201391,polkilograma-lyzke-chirurgiczna-zaszyli-w-brzuchu-33-letniej.html

Concerning civil liability, a key principle is that claims are made by families against insured healthcare providers, typically against the hospital where the patient died. Under Polish law, such family claims are based primarily on Art. 446 § 1-4 of the Civil Code.[6] Both those who incurred medical and/or funeral costs and family members whose life situations have deteriorated significantly due to the patient's death may seek compensation. A dependent of the deceased may apply for an annuity. It is also possible to award compensation to the closest family members for their harm suffered. Claims against the hospital may be pursued in court, but also in simplified out-of-court proceedings – within the framework of operations of the competent Voivodship Commission for the Adjudication on Medical Events[7] (Frąckowiak & Frąckowiak, 2013). Where a healthcare professional is employed on the basis of a civil law contract, that professional may be held liable for damages jointly and severally with the employer institution (Nesterowicz, 2014: 23-24). Sometimes a patient's death might occur in connection with, for instance, activities of an outpatient clinic or individual (specialist) medical practice. In such cases the proceedings before the Commission are not available. All medical facilities, individual medical, nurse and physical therapy practices are covered by compulsory civil liability insurance.[8] Consequently, a healthcare professional who made a medical error is normally not personally liable to the patient's family. However, the approach (tactics) taken by the professional during the proceedings is not without significance concerning both the course of the proceedings and his or her situation. The Civil Procedure Code (CPC) allows both for pre-trial (contractual) and court mediation. A representative of the medical profession – even if not a party to the proceedings – may participate in it (Art. 183^1 et seq. CPC). A settlement agreement concluded before a mediator and approved by the court has the legal force of a settlement agreement concluded before the court and may thus become an enforceable title (Art. 183^{15} CPC). Court proceedings then become devoid of purpose (initiated proceedings are discontinued - Art. 355 CPC).

[6] Art. 446. § 1. If, as a result of bodily harm or health disorder, the wronged party dies, the person obliged to remedy the damage shall reimburse the medical and funeral costs to the person who incurs them. § 2. A person with respect of whom the deceased had the statutory obligation of maintenance may demand an annuity from the person required to remedy the damage, calculated in accordance with the needs of the wronged party and the earning and financial possibilities of the deceased for the likely duration of the maintenance obligation. Such annuity may also be claimed by other persons related to the deceased whom the deceased voluntarily and permanently provided with means of subsistence if it follows from the circumstances that the principles of community life so require. § 3. The court may also award an appropriate compensation to the closest family members of the deceased if his death resulted in a significant deterioration of their living standard. § 4. The court may award an appropriate sum as satisfaction to the closest family members of the deceased for the wrong suffered.

[7] Operating pursuant to the Act of 6 November 2008 on the rights of the patient and the Patients Ombudsman, uniform text: Journal of Laws of 2020, pos. 849.

[8] Art. 17. sect. 1 point 4; Art. 18. sect. 1. point 5; Art. 19. sect. 1 point 7; Art. 19a. sect. 1 point 5 of Act of 15 April 2011 on Medical Activity (uniform text: Journal of Laws of 2020, pos. 295, as amended).

By contrast, the risk of professional liability directly affects the person making a medical error. Disciplinary liability is possible for representatives of various medical professions, including doctors,[9] nurses and midwives.[10] The strictest disciplinary sanction that may be imposed on a doctor or nurse is the deprivation of the right to practice the profession, which may be considered a severe penalty seriously interfering with the professional's personal and financial situation. However, the disciplinary regulations neither envisage a special role for the wronged party nor any measures that may compensate the patient or the patient's family for monetary claims (Bek et al., 2019: 313-319). The Act on Medical Chambers (hereinafter AMC) – as one of the acts that govern the professional liability of doctors and dentists – expressly foresees the possibility of referring a case to mediation. Pursuant to AMC Art. 113 sect. 1: "The screener for professional liability during the investigation procedure or the medical court during the proceedings before the medical court may, on the initiative or with the consent of the parties, refer the case to mediation proceedings between the wronged party and the defendant." A doctor indicated for a given term of office by the medical council is a permanent mediator in disciplinary proceedings, which may raise some concern in the wronged party as to the mediator's impartiality. The solutions laid down in Chapter 6 of the AMC drew a great deal of criticism (Bek et al., 2019: 125-126, 316; Cybulko, 2016: 595-596). One cannot fail to appreciate the attempt to take into account Alternative Dispute Resolution in professional proceedings involving doctors. Such attempt was not made in the case of the Act on Self-Governance of Nurses and Midwives. Mediation in the disciplinary proceedings of that professional group is not excluded, but in practice it is highly difficult (Bek et al., 2019: 143).

These liability regimes, when viewed through the prism of the doctor's conflict with the deceased patient's family, reveal that none of them allow for an actual meeting of the persons concerned so that their respective views can be expressed and opinions exchanged with the goal of trying to reach resolution of the dispute through dialogue. In Polish civil proceedings, given the current regulatory scheme, the person making a medical error is normally not the key figure as they are not sued directly. Rather, it is typically the medical facility as employer of the professional that must address the claims. While the professional's participation in mediation with the patient's aggrieved relatives may indeed be valuable, settlement can be reached in the professional's absence. Mediation in the context of medical disciplinary proceedings allows for the healthcare professional to meet the patient's family. Nonetheless, the significance of the settlement agreement concluded between them remains a contentious issue because it cannot directly affect the shape of a disciplinary court decision (Bek et al., 2019: 316).

[9] Act of 2 December 2009 on Medical Chambers (uniform text: Journal of Laws of 2019, pos. 965, as amended).
[10] Act of 1 July 2011 on Self-Governance of Nurses and Midwives (Journal of Laws of 2011, no. 174, pos. 1038, as amended).

Mediation in criminal proceedings may serve as a meeting platform between the healthcare professional charged with criminal wrongdoing as the result of an alleged error and the deceased patient's family. Since it is the person making a medical error, not the wronged party, that remains the central figure during the criminal proceedings, these two figures become equal during a mediation procedure. The legislator took into account the impact of a mediation settlement on the conclusion of the process.

A medical error may clearly become a matter of interest to law enforcement authorities if a crime is suspected. Cases involving fatalities may lead to a charge of unintentionally causing death – Art. 155 CC or unintentional exposition to an immediate danger of loss of life – Art. 160 § 3 CC. Even in a criminal case, and regardless of the alleged type of prohibited act at issue, it is possible to refer a case to mediation on the initiative or upon consent of the parties concerned – Art. 23a § 1 of the Code of Criminal Procedure (hereinafter CCP).

In the event of the death of the wronged party, there may be doubts as to whether mediation is even possible. The CCP provides that the closest relatives of the deceased wronged party have the right to pursue a claim on behalf of the deceased (Art. 52 § 1 CCP). This means in practice that it is admissible to proceed with mediation and that the person making an alleged error and the victim's family may reach a settlement agreement. Similarly, the Polish Supreme Court held that in the event of the wronged party's death, their next of kin may achieve reconciliation with the perpetrator.[11] Then, in our opinion, possible forgiveness occurs not on behalf of the deceased wronged party, but on behalf of the family (Bek & Sitarz, 2015: 94). The fact that the relatives of the deceased suffered a great loss does not exclude openness to understanding and even forgiveness. A study conducted by Jan Malec shows that every sixth respondent who lost a loved one as a result of murder forgave the perpetrator after some time (Malec, 2006: 117-118). There is a likelihood that this tendency will be greater in the case of death caused unintentionally.

In criminal cases, the court is obliged to take into account the positive results of the mediation or settlement agreement concluded between the wronged party and the perpetrator (Art. 53 CC). The court shall not be bound by the contents of the settlement agreement but on the other hand it shall shape its decision in such a manner as not to thwart, to the extent possible, the agreement between the parties (Bek, 2015; Bieńkowska, Kunicka-Michalska, Rejman & Wojciechowska, 1999: 926; Kużelewski, 2009: 350; Wójcik, 2010: 384). The parties' reconciliation often is central to the court's decision to apply various forms of mitigation of criminal liability (Bek, 2015). This implies that a settlement agreement is, and should be, relevant to the content of the judgment. Through a conciliatory settlement, the

[11] See Resolution of the Supreme Court of 30 September 2003, I KZP 19/03, OSNKW 2003, no. 9-10, pos. 78. (in relation to the provision of Art. 66 § 3 CC).

parties have some influence on the court's decision in the criminal case. At the same time, a settlement agreement constitutes a civil law contract and the court may additionally append a declaration of enforceability to it (Art. 107 CCP). Although the Polish regulations concerning mediation in criminal cases give rise to numerous reservations among academic writers (Bek & Sitarz, 2016), and mediation has not gained as much popularity as would be desirable,[12] it clearly provides an opportunity for the person who made an error to meet the family of the deceased patient and such a meeting may bring tangible benefits.

4 Benefits derived from mediation between health professional and family of the deceased patient

A resolved conflict is always of significant value, not only for those involved in it, but also for those who are close to them and even society. The use of mediation as a means to avoid court proceedings is almost always beneficial. However, the criminal procedure in Poland is designed in such a manner that in the case of crimes prosecuted ex officio, such as unintentionally causing death (Art. 155 CC) or exposition to an immediate danger of loss of life (Art. 160 § 3 CC), a reconciliation between the parties does not release law enforcement authorities from the obligation to initiate and conduct criminal proceedings. The issue is who – the healthcare professional and the patient's family – may benefit from the participation in mediation, particularly in a criminal case.

The family of a deceased patient often want to talk about their pain and, at the same time, seek clarifications and apologies (Cybulko, 2016: 598-599; Robenholt, 2005: 1016). The person who made a medical error often also has a similar need to give explanations and find forgiveness, or at least gain some understanding for the actions and decisions taken. There is usually no place for that in a courtroom. First, the parties address the court, not each other. Second, the court sometimes limits the parties' free expression not strictly related to the subject of the dispute. Finally, some clarifications and remorse do not always fit in with the defensive strategy adopted by the healthcare professional, his or her lawyer or the medical facility in which the error occurred. The literature rightly highlights that court proceedings tend to be exhausting for the parties and also prevent them from going through a process of "purification" and normal contact in the future (Galton, 2000: 321; Gmurzyńska, Morek, 2011: 65). Mediation is confidential and informal and thus creates a platform for an honest conversation. It provides an opportunity for an oftentimes highly emotional release of grievances and it helps the wronged parties to cope with anger and to grieve the death of a loved one. It also allows the person who made an error to explain his or her conduct, express regret and make apologies (Meruelo, 2008: 304). The death of a patient is a difficult

[12] In Poland, out of over 300,000 cases tried in common courts of first instance yearly, only approximately 4,000 are referred to mediation; retrieved from, https://isws.ms.gov.pl/pl/baza-statystyczna/roczniki-statystyczne-gus/).

experience for a treating doctor or nurse, and not only for the relatives of the deceased. That difficult experience, in a sense, connects the opposite sides of the process. A well-conducted mediation procedure helps to achieve that perspective.

An important aspect of disputes involving medical errors obviously is related to the issue of compensation and satisfaction for the patient or members of his or her family. As indicated above, financial compensation rests within the domain of civil proceedings and is usually enforced against the insurer of the medical facility where the medical error allegedly occurred. These cases tend to be rather long-lasting and complicated. It often is in the best interests of both the relatives of the deceased patient and the accused healthcare professional to temporarily ensure that the most urgent material needs (e. g. funeral expenses) of the wronged parties are met. In some cases, the relatives may hold other, nonstandard expectations of the accused or, conversely, the healthcare professional may need to redress the harm personally by doing the relatives of the victim of the error a favor. Mediation makes it possible to arrange the details of that nonstandard compensation so that it satisfies the expectations of all parties to the conflict. The court often lacks such options. A commitment made on a voluntary basis is more likely to be fulfilled than the one imposed in a court judgment. At the same time, the declarations contained in the settlement agreement are legally binding and thus prevail over oral promises made sometimes only to appease the family members of the deceased patient.

From the perspective of the defendant, the tangible benefits he or she may obtain in the criminal trial become a prime concern. Where the defendant does not plead guilty, mediation may be seen as a danger and the very participation in it may be perceived as self-incrimination. Where the health professional expects an acquittal, they tend to be rather reserved about the idea of mediation. However, the absence of admission of guilt is not in itself an obstacle to mediation in a criminal case. It does not render mediation irrelevant. Mediation will not be possible where the defendant questions the basic facts and, for instance, claims against the charges that he or she did not make the diagnosis or did not operate on the patient. Mediation can be an opportunity in other cases of non-admission of guilt. The mere fact of entering into a mediation procedure, and even properly worded apologies, do not constitute an admission of guilt and do not undermine the adopted line of defense (Bek & Sitarz, 2015: 92-93). Where the doctor is convinced that he or she did not make the error, or that the error did not lead to the patient's death, but they still face criminal charges, it is possible that they have not yet had a chance to calmly explain the whole situation to the deceased's family. It may also be the case that although the doctor's conduct did not amplify any danger to the patient, he or she still has a sense of guilt and needs to apologize as a form of cathartic release. In cases where the health professional's guilt is not seriously in question and the defendant does not expect an acquittal, participation in mediation and, if

at all possible, the conclusion of a settlement agreement, makes it more likely that the court will strive to find solutions more favorable to the perpetrator than might otherwise be the case. It is in fact possible to apply the conditional discontinuance of proceedings both in the case of a charge under Art. 155 and Art. 160 CC, and although these serve to confirm the perpetrator's guilt, it does not constitute a conviction. The application of that measure implies that the health professional has no criminal record and may thus avoid the possibility of being prohibited from practising a profession. The absence of a conviction allows the professional to avoid stigmatization, which of course is critical to most people, and especially professionals.

This scheme is beneficial not only for the professional/defendant but also for society. If, due to the settlement agreement, the court comes to the conclusion that a penalty is not necessary, the health professional stands a better chance of keeping his or her job. In contrast to a traditional trial resulting in a conviction, a well-conducted mediation procedure does not undermine the health professional's confidence in his or her skills (Taylor, 2003: 348; Gmurzyńska, Morek, 2011: 73). One tragic error may not necessarily imply that the professional is unfit to remain in the profession. The training of specialists takes many years and is very costly; and their work is invaluable. The painful introspection required to sort out and through the consequences of one's own error, and coming to grips with such errors, and otherwise conducting an in-depth analysis for the purpose of submitting clarifications, may clearly result in the professional conducting more careful work, perhaps even much better work, in the future. The improvement of the system so that it is more conducive to the professional avoiding errors in the future also will help address the expectations of wronged persons and even the society at large (Marcus, 2002: 454; Gmurzyńska, Morek, 2011: 67).

From a larger societal perspective, mediation provides positive patterns of communication between healthcare professionals and their patients. It has been recognized for years that the traditionally paternalistic doctor-patient relationship is not conducive to an agreement. It is still too often the case that the patient and his or her family find it difficult to obtain pertinent information on the methods the doctor and the rest of the medical team used for treatment, what the alternative treatment methods available were, and the reasons for the choices actually made. When treatment ends in a tragic failure, it is often very hard for the medical professional to suddenly engage in dialogue with the deceased patient's family and convince them that the tragic outcome was absolutely unavoidable. Mediation helps to overcome that outdated way of thinking (Galton, 2000: 321; Gmurzyńska & Morek, 2011: 66).

5 Culpability for medical errors – possible penalties and punitive measures and justification for their application

The most tragic consequence of committing a medical error is a patient's death. A criminal law assessment of such conduct in almost all cases implies liability for unintentionally causing death, for which the continental systems most often provide a penalty of imprisonment, though it is difficult to see full uniformity in that respect. For instance, under Polish criminal law, the commission of the indicated crime ordinarily leads exclusively to a sentence consisting of the deprivation of liberty for a term between three months and five years (Art. 155 CC). By contrast, the Romanian criminal law prescribes a penalty of the deprivation of liberty for a term between one and five years for unintentionally causing death, except that where the perpetrator's act also consisted in failing to comply with the regulations or measures securing the performance of a given profession, trade or specific activity, then the term of imprisonment is increased from two to seven years. In the event that the act resulted in the death of two or more persons, the indicated limits of the sentence shall be increased by a half (Art. 192). Sanctions work differently in the German criminal law system. In Germany, the crime of unintentionally causing death carries a penalty of deprivation of liberty for a term of up to five years or a fine (§ 222). The Austrian criminal law regime in this regard is slightly more nuanced, as it allows for a penalty of imprisonment for a term of up to one year or a fine of 720 daily units for unintentionally causing death, however, where the act results in the death of more than one person, the term of imprisonment may be increased to two years (§ 80). A perpetrator whose actions causes the death of a person as a result of gross negligence shall be subject to a penalty of deprivation of liberty for up to three years (§ 81 sect. 1).

The charges most often brought in that regard in Polish criminal law relate to either the unintentional exposition of a patient to an immediate danger of loss of life or to a danger of sustaining a grievous bodily harm (Art. 160 § 3 CC) punishable by a fine, limitation of liberty or deprivation of liberty for a term of up to one year.

Under Polish criminal law, the court may conditionally suspend the enforcement of an imposed penalty of deprivation of liberty, with the imposition of a probationary period, provided that the penalty imposed for the indicated act does not exceed one year, the perpetrator was not sentenced to imprisonment at the time of commission of the crime and probation is deemed by the court as sufficient to meet the aims of the punishment with regard to the perpetrator, in particular, to prevent his or her relapse into criminal behavior. In making such a decision, the court shall take into account, inter alia, the perpetrator's demeanor, characteristics, personal conditions, previous way of life and behavior after the

commission of crime (Art. 69 § 1 and 2 CC). The German Criminal Code provides for similarly restrictive conditions for probationary measures (§ 56).

Moreover, the court has the authority to apply extraordinary mitigation of the penalty in exceptional situations when even the lowest penalty for a crime would be incommensurately severe. This means in practice imposing a penalty below the lower limit of the statutory penalty or imposing a less severe penalty. The Polish legislator identifies the following circumstances which justifies the court in extraordinarily mitigating the penalty: reconciliation between the wronged party and the perpetrator with the simultaneous redress of the damage or agreeing on the manner of its redress, as well as the perpetrator's demeanor, in particular when he or she has taken efforts to redress the damage or prevent it (Art. 60 § 2 and 6 CC).

Concerning the act of unintentionally causing death and the unintentional exposition of a human to an immediate danger of loss of life or a danger of sustaining a grievous bodily harm, Polish courts may conditionally suspend the criminal proceedings if "the perpetrator's fault and the social harmfulness of the act are not substantial, the circumstances of the committed crime are indisputable, the perpetrator has no criminal record of committing a deliberate crime and his or her demeanor, characteristics, personal conditions and the previous way of life make it reasonable to expect that despite the discontinuation of the proceedings, the perpetrator will observe the legal order and, in particular, will not commit a crime" (Art. 66 § 1 CC). However, this Article emphasizes that this probationary measure should be applied in the case of unintentionally causing death only in exceptional circumstances (Zoll, 2016: 349).

Apart from criminal penalties, modern criminal law has at its disposal other penal measures that may be used to respond to a medical error. The most severe is clearly the prohibition from practising a profession. The prohibition of holding a specific position, e.g., head of the department or head nurse in a hospital, should be assessed similarly. The goal of such a measure is to exclude the perpetrator who violated the precautionary rules from social circulation to protect a legal good, which led to the result specified in the act. Unfortunately, these measures do not involve, for instance, ordering the offender to receive additional education by taking a practical or theoretical course(s) followed by an assessment examination. The prohibition from practising a profession is typically subject to time-limits – in Poland (Art. 41 § 1 and Art. 43 § 1 CC) it ranges between one to 15 years, whereas in Germany between one to five years (§ 70). Notably, German law provides that this prohibition may be imposed indefinitely in the case where it can be foreseen that the highest statutory penalty is not sufficient to ensure the public is protected from potential ongoing dangers stemming from the perpetrator's behavior.

In Poland, a permanent prohibition from practising a medical profession may be imposed by the medical court as a penalty for the commission of a professional misconduct. However, this is impossible in the case of nurses and midwives. This dichotomy is due to a ruling of the Constitutional Tribunal of 18 October 2010 (K 1/09),[13] which declared Art. 44 sect. 2[14] of the Act of 19 April 1991 on Self-Governance of Nurses and Midwives[15] unconstitutional. Unfortunately, in the course of the Tribunal's proceedings, a new act on medical chambers entered into force, which meant that a similar provision contained in the repealed regulation could not be the subject of constitutional review because it was not covered by the original application (the proceedings before the Tribunal were discontinued in that respect).

6 Summary

To conclude this contribution, it is appropriate to return to the factual descriptions outlined above, the question posed in the title, and to draw some conclusions based on the paper's analysis. The common denominator in each of the cases is their tragic ending – a patient's death. The evidence leaves no doubt that an error was made by a doctor or nurse in all those cases.

Case no. 1 stands out because there was no causal link between the identified error and an increased risk to the life of the minor patient. The doctor's error could therefore not give rise to criminal liability. However, this conclusion was reached only after criminal proceedings. The other two cases, in comparison, could have led to criminal charges being leveled followed by possible convictions. In each, the court had at its disposal the full gamut of penal measures discussed above. Further, each of the three cases could legally have been referred to mediation (at the stage of preparatory or court proceedings). Let us consider the advantages mediation would have provided in each of the three cases.

Case no. 1

In the first case, the doctor's behavior prior to the girl's death was not criminal, and consequently the court could not impose a criminal penalty on the doctor who made the error. The patient's death, in a sense, went unpunished. Fortunately for him, the doctor did not suffer the negative consequences attendant to a criminal conviction, but would most likely suffer the negative consequences of participating in criminal proceedings as a defendant. In other words, even if not convicted and sentenced, his personal and

[13] LEX no. 621593.
[14] "A penalty of prohibition from practising a profession results in removal from the list of members of the regional chamber without the right to apply for re-entry."
[15] Journal of Laws of 1991, no. 41, pos. 178, as amended.

professional images would be permanently stained from merely having had criminal charges leveled against him. In turn, when ultimately not criminally convicted, the relatives of the patient probably would have considered the discontinuation of the proceedings utterly incomprehensible. They would have considered the justice system a sham and unfair. The girl dies, the doctor made an error – why was he not punished?

Although the doctor did not admit guilt and while it was determined his actions (or inactions) were not (in legal terms) the proximate cause of death, the case could have been referred to mediation in the criminal proceedings. The medical providers' participation in mediation would not have jeopardized the doctor's chances for an acquittal. A meeting at the mediation table, as uncomfortable as even that would be, would at least have forced (allowed) the doctor to confront the suffering of the deceased girl's parents. It would surely have given him a chance to better understand the flaws and inadequacies of his conduct. At the same time, it would have offered him a chance to apologize for his too routine approach to the patient's condition. The doctor could have explained his thinking and rationale for the course of actions he took (or failed to take) and in the end could have made clear how little he could have actually done to save the girl's life. The adoption of such a consensual attitude would ultimately shine the doctor in a much better light and the girl's parents might then approach the judgment with a little more understanding. Formal court proceedings disallow such activities.

Case no. 2

In the second case, the nurse's contribution to endangering the child's life turned out to be indisputable, although the hospital initially ruled out such a possibility. The tragic error was the result of a moment of inattention combined with substandard care. These missteps, however, most likely did not stem from the nurse's lack of knowledge or skills. In a criminal case with this type of fact pattern mediation would almost always be the preferable option for all parties concerned.

Had the criminal case been referred to mediation, the parties would have been able to listen to each other and show understanding. The nurse's clarifications, remorse and apologies would have paved the way for a possible agreement between the parties. Reconciliation and a settlement agreement would have made it possible for the nurse to avoid criminal penalty and even – though in the case of the death of a child, it is highly unlikely – conditional discontinuance of the criminal proceedings. Under this approach, the nurse would be able to return to work relatively quickly and it would be feasible for her to promptly take necessary

and appropriate steps to improve her performance standards.[16] And from the perspective of the wronged party, a settlement agreement in a criminal case would not vitiate the financial liability of the hospital, so that just compensation would still be readily available.

Case no. 3

The last factual description is a tragic example of gross negligence on the part of the medical team. Leaving a large steel foreign body in the patient's body, compounding that initial error by making another wrong decision to re-operate too soon after the first surgery and the lack of proper communication with the deceased patient's family, when considered together, reflect striking incompetence by the hospital's medical staff. Cases such as this call for full inquiry by the criminal justice system. Yet, even then, and even when it becomes necessary to punish medical professionals criminally, there might still be a place for mediation. Often, even a severe criminal penalty fails to adequately address the expectations of the wronged party. In this type of case, mediation makes it possible to identify these expectations and, in so far as it is realistic, to fulfil them. It may be that even a more lenient penalty for the perpetrators will then satisfy the aggrieved party's social sense of justice.

The analysis set forth in this contribution, including the various studies cited, help explain why persons wronged by medical errors often do not feel they have received appropriate justice just because the medical professional receives a criminal penalty. Even if we put the needs of the deceased patient's family on a par with the larger societal expectations of what constitutes "justice" in such cases, compelling arguments can be made that "calls for justice" can be satisfied through means different from administering severe criminal penalties. Fair and reasonable settlement agreements are fully in line with the demands of so-called *Just Culture*. This "settlement in lieu of punishment" model aims "to create an environment where learning and accountability are fairly and constructively balanced" (Dekker, 2018: cover). Similar to Restorative Justice, this concept focuses on the future and proposes "prospective responsibility" (Sharpe, 2003). Sidney Dekker notes that "(...) Not only should accountability acknowledge the mistake and the harm resulting from it, it should also lay out the opportunities (and responsibilities!) for making changes so that the probability of recurrence is reduced" (Dekker, 2017: 135). Although the death of a human is the most dramatic result of a medical error, it should be borne in mind that it also is necessary to learn from mistakes so as to help prevent future errors. Ultimately, there may be cases in which a patient's death caused through fault attributable to a healthcare professional goes unpunished. However, in such cases it remains crucially important to fully compensate the victim's family and to ensure all necessary and proper steps are taken to help minimize the possibility of the same (or even other) errors recurring. Mediation most often will aid in advancing all of these goals and almost always will do so in an environment less emotionally charged and much less expensive than is the case in the traditional civil or criminal courtroom.

[16] A solution could involve the introduction of two types of syringes fitting the opening of a cannula and a tube (https://katowice.wyborcza.pl/katowice/7,35063,25243234,wyrok-w-glosnej-sprawie-malej-zosi-pol-miliona-za-smierc-corki.html).

Legislation, case Law (Poland)

Resolution of the Supreme Court of 30 September 2003, I KZP 19/03, OSNKW 2003, no. 9-10, pos. 78.
Judgment of the Court of Appeals in Poznań of 10 August 2011, I ACa 1082/10, LEX no. 898633.
Judgment of the Constitutional Tribunal of 18 October 2010, K 1/09, LEX no. 621593.

Legal acts (Polish)

Act of 1 July 2011 on Self-Governance of Nurses and Midwives (Journal of Laws of 2011, no. 174, pos. 1038, as amended).
Act of 2 December 2009 on Medical Chambers (uniform text: Journal of Laws of 2019, pos. 965, as amended).
Act of 6 November 2008 on the rights of the patient and the Patients Ombudsman (uniform text: Journal of Laws of 2020, pos. 849).
Act of 19 April 1991 on Self-Governance of Nurses and Midwives (Journal of Laws of 1991, no. 41, pos. 178, as amended).
Act of 15 April 2011 on Medical Activity (uniform text: Journal of Laws of 2020, pos. 295, as amended)

Websites / other sources

https://www.rp.pl/Ubezpieczenia-i-odszkodowania/309279919-Sad-pol-miliona-zlotych-za-tragiczny-blad-szpitala.html (6 January 2021)
https://katowice.wyborcza.pl/katowice/7,35063,25243234,wyrok-w-glosnej-sprawie-malej-zosi-pol-miliona-za-smierc-corki.html (6 January 2021)
https://www.polsatnews.pl/wiadomosc/2019-09-18/zawieszono-lekarza-ktory-w-ciele-33-latki-zaszyl-lyzke-chirurgiczna/ (6 January 2021)
https://www.rp.pl/Spoleczenstwo/190919371-Konin-W-ciele-kobiety-zaszyto-lyzke-chirurgiczna-Zmarla.html (6 January 2021)
https://poznan.wyborcza.pl/poznan/7,36001,25201391,polkilograma-lyzke-chirurgiczna-zaszyli-w-brzuchu-33-letniej.html (6 January 2021)
https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (6 January 2021)
https://isws.ms.gov.pl/pl/baza-statystyczna/roczniki-statystyczne-gus/ (6 January 2021)

References

Bek, D. (2015) The Mediation Settlement as a Directive of the Level of Sanction, In: Dukiet-Nagórska, T. (eds.) *The Postulates of Restorative Justice and the Continental Model of Criminal Law. As Illustrated by Polish Criminal Law* (Frankfurt am Main: Peter Lang), pp. 73-113, doi: 10.3726/978-3-653-04442-3.
Bek, D. et al (2019) *Odpowiedzialność dyscyplinarna w systemie polskiego prawa represyjnego. Analiza aspektów materialnoprawnych na przykładzie wybranych pragmatyk zawodowych* (Warszawa: Poltext).
Bek, D. & Sitarz, O. (2015) Mediacja w sprawach karnych – krok po kroku, In: Sitarz, O. (eds.) *Metodyka pracy mediatora w sprawach karnych* (Warszawa: Diffin), pp. 79-175.
Bek, D. & Sitarz, O. (2016) Uwagi do rozporządzenia Ministra Sprawiedliwości z dnia 7 maja 2015 r. w sprawie postępowania mediacyjnego w sprawach karnych, *Prokuratura i Prawo*, 4, pp. 144-158.
Bieńkowska, E. Kunicka-Michalska, B., Rejman G., & Wojciechowska, J. (1999) *Kodeks karny. Część ogólna. Komentarz* (Warszawa: C.H. Beck).
Cybulko, A. (2016) Potencjał mediacji w prawie medycznym, In: Namysłowska-Gabrysiak, B., Syroka-Marczewska, K., Walczak-Żochowska, A (eds.) *Prawo wobec problemów społecznych. Księga Jubileuszowa Profesor Eleonory Zielińskiej* (Warszawa: C.H. Beck), pp. 583-605.

Cyrol, T. (2013) Facylitacja a koncyliacja – jak mediować, aby robić to skutecznie, *ADR*, *Arbitraż i Mediacja*, 23(3), pp. 21-27.
Dekker, S., (2018) *Just Culture. Kultura sprawiedliwego traktowania. Między bezpieczeństwem a odpowiedzialnością* (Warszawa: Wydawnictwo Uczelni Łazarskiego).
Dekker, S., (2017) *Just Culture. Restoring Trust and Accountability in Your Organization* (London - New York: Taylor & Francis).
Frąckowiak, H., Frąckowiak, K. (2013) Organizacja i funkcjonowanie wojewódzkich komisji do spraw orzekania o zdarzeniach medycznych - rozważania na tle nowelizacji ustawy o prawach pacjenta i rzeczniku praw pacjenta, *Palestra*, 9-10, pp. 131-137.
Galton, E. (2000) Mediation of Medical Negligence Claims, *Capital University Law Review*, 28(2), pp. 321-330.
Garner B.A. (eds.), (2004) *Black's Law Dictionary* (St. Paul: Thomson/West).
Gmurzyńska, E., & Morek, R. (2011) O problemach dotyczących rozstrzygania spraw o błędy lekarskie i o roli mediacji, *ADR. Arbitraż i Mediacja*, 3, pp. 42-76.
Jenkins, R.C. et al. (2014) Mandatory pre-suit mediation: 5-year results of a medical malpractice resolution program, *Journal of Healthcare Risk Management*, 33(4), pp. 15-22, doi: 10.1002/jhrm.21138.
Kużelewski, D. (2009) Wpływ prawa karnego materialnego na mediacje między pokrzywdzonym i oskarżonym – wybrane aspekty, In: Ćwiąkalski, Z., Artymiuk, G. (eds.) *Współzależność prawa karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian* (Warszawa: Wolters Kluwer), pp. 341-366.
Malec, J. (2006) *Przestępczość – to ciekawe zjawisko. Kryminologia nieelitarna* (Warszawa: C.H. Beck).
Marcus, L.J. (2002) A Culture of Conflict: Lessons From Renegotiating Health Care, *Journal of Health Care Law and Policy*, 5(2), pp. 447-478.
Martin, E.A. (eds.), (2003) *A Dictionary of Law* (Oxford: Oxford University Press)
McMullen, A. (1990) Mediation and Medical Malpractice Disputes: Potential Obstacles in the Traditional Lawyer's Perspective, *Journal of Dispute Resolution*, 2, pp. 371-386.
Meruelo N.C. (2008) Mediation and Medical Malpractice. The Need to Understand Why Patients Sue and a Proposal for a Specific Model of Mediation, *Journal of Legal Medicine*, 29(3), pp. 285-306, doi: 10.1080/01947640802297553.
Nestorowicz, M. (2014) *Prawo medyczne. Komentarze i glosy do orzeczeń sądowych* (Warszawa: Wolters Kluwer).
Riskin, L.L. (1985) The Special Place of Mediation in Alternative Dispute Processing, *University of Florida Law Review*, 37(1), pp. 19-27.
Robenholt, J.K. (2005) What we know and don't know about the role of apologies in resolving health care disputes, *Georgia State University Law Review*, 21(4) pp. 1009-1027.
Sharpe, V.A. (2003) *Promoting patient safety. An ethical basis for policy deliberation* (New York: Hastings Center Report), pp. 1-19.
Sitarz, O. (2015) O mediacji w ogólności, In: Sitarz, O. (eds.) *Metodyka pracy mediatora w sprawach karnych* (Warszawa: Diffin), pp. 13-38.
Taylor, D.W. (2003) Assessment and Plan for Medical Malpractice, Quality Improvement Through Mediation, *DePaul Journal of Health Law*, 6(2), pp. 343-356.
Wilk, L., Zawiejski, P. (2015) The Concept of Restorative Justice, In: Dukiet-Nagórska, T. (eds.) *The Postulates of Restorative Justice and the Continental Model of Criminal Law. As Illustrated by Polish Criminal Law* (Frankfurt am Main: Peter Lang), pp. 9-26, doi: 10.3726/978-3-653-04442-3.
Wójcik, D. (2010) Rola mediacji między pokrzywdzonym a sprawcą przestępstwa, In: Marek, A. (eds.) *System Prawa Karnego. Tom 1. Zagadnienia ogólne* (Warszawa: C.H. Beck), pp. 350-413.
Zoll, A. (2016) In: Wróbel, W., Zoll, A. (eds.) *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a* (Warszawa: Wolters Kluwer), pp. 343-351.