

ON THE INSUFFICIENCIES OF THE CURRENT LEGISLATIVE REGIME REGARDING PHYSICIAN-PATIENT MEDIATION IN THE PROFESSIONAL LIABILITY OF PHYSICIANS. A CRITICAL ANALYSIS OF THE POLISH SOLUTION

Accepted

5. 10. 2022

Revised

26. 1. 2023

Published

26. 4. 2023

DOMINIKA BEK, JAKUB HANC

University of Silesia in Katowice, Faculty of Law and Administration, Katowice,
Poland

dominika.bek@us.edu.pl, jakub.hanc@us.edu.pl

CORRESPONDING AUTHOR

dominika.bek@us.edu.pl

Abstract The article presents a critical opinion on physician-patient mediation conducted in the context of proceedings on the professional liability of physicians. The starting point is the Act on Medical Chambers, which provides for the possibility of conducting a mediation between the accused physician and the aggrieved patient. This regulation is unique in the region. Its specific measures, such as, for example, the choice of a mediator among physicians, have undergone a critical assessment in the literature. As a rule, the need for the functioning of mediation in the context of professional liability is not called into question. However, a thorough analysis of the assumptions of mediation and restorative justice and the function of professional liability of physicians suggests going a step further. Although the physician-patient conflict certainly requires conciliatory solutions, it seems that the disciplinary regime does not provide an adequate foundation for agreement because it is unable to secure the aggrieved person's interests.

Keywords

mediation,
professional liability,
medical chamber,
physician,
restorative justice

1 Introduction

Cases connected with physicians' legal liability for the damage caused to patients involve conflicts which, in general recognition, do indeed call for conciliatory solutions. The literature review shows that mediation is frequently the most appropriate pathway in such situations (Cybulko, 2016; Meruelo, 2008). We have discussed in depth the advantages of the conciliatory resolution of a conflict arising from medical errors elsewhere (Bek & Hanc, 2021b). The Polish legislator recognized and largely met the demand that a physician and a patient should be able to utilize mediation in the course of any proceedings in order to try to reach an amicable settlement of the case. This is possible both in civil and criminal proceedings, as will be discussed below. Mediation is also prescribed in the regulations on the professional liability of physicians and this article seeks to discuss that solution.

One important terminological reservation should be made at the outset. Legislators of various countries use a different conceptual framework to refer to the same phenomenon. The liability regime, on which we intend to focus here, is often known as “professional” or “disciplinary” liability (German: *Disziplinarrecht*). The former term was used, for example, by the Polish legislator in the Act of 2 December 2009, on Medical Chambers¹ (hereinafter: MedCh), while the latter was used, for example, by the Austrian legislator in the Act of 10 November 1998, on the exercise of the profession of physician and physicians' professional representation.² Given the content of this study, the term taken from the Polish act will be used hereinafter, while acknowledging that the term “proceedings on the professional liability” of a physician is synonymous to “disciplinary liability”.

An analysis of European regulations in the area of the professional liability of a physician shows that only the Polish legislator chose to arrange a special mediation procedure between the physician, who must mandatorily belong to a professional self-government, and the aggrieved person – the patient. It is thus a regional phenomenon, if not a global one. Despite its uniqueness, the empirical studies have so far indicated that it is not used frequently in disciplinary proceedings. Twenty -

¹ Uniform text: Journal of Laws of 2019, pos. 965, as amended.

² Bundesgesetzblatt für die Republik Österreich 1998, no. 169, as amended.

three regional medical chambers and the Military Medical Chamber operate in Poland as part of the professional self-government of physicians represented by the Supreme Medical Chamber. A study carried out by Michał Ryszard Wysocki shows that in 14 regional chambers analyzed in the years 2010-2013, screeners for professional liability initiated 5,133 proceedings in total, but only referred 42 cases (0.89 percent) to mediation. In turn, medical courts initiated 414 proceedings in total, with only 3 (0.72 percent) cases referred to mediation. The highest number of mediation proceedings were conducted within the competence of the Silesian Medical Chamber (Wysocki, 2017, pp. 82-83). Similar research results were presented by Iwona Wrześniewska-Wal. On the basis of a study titled “Mediation in medical chambers” from 2017, carried out in 13 regional medical chambers, that researcher concluded that the number of cases referred to mediation at the stage of explanatory proceedings carried out by the screener for professional liability or before a medical court is negligible, and in some chambers, there were in fact no such cases. In 2017, 3,236 cases were filed with regional screeners for professional liability, and the above study shows that mediators conducted 72 mediations, 37 of which concluded with a settlement. The Silesian Medical Chamber was again an exception as regards the use of mediation (Wrześniewska-Wal, 201, pp. 291-299).

Bearing in mind on the one hand, the uniqueness of the Polish solution, and on the other, the moderation of professional self-government bodies in its use, the regime of professional liability of physicians, and in particular the provisions on the aggrieved person and mediation, will be presented here against the background of other proceedings that provide for medical practitioners’ liability. The analysis will include the assumptions of both professional liability and mediation itself. We do not dispute the necessity of the existence of regulations allowing for specific self-control within the medical community or the need to solve amicably a conflict between physician and patient. Instead, the issue is whether it is possible to combine the former and the latter meaningfully in a single procedure.

2 An outline of various regimes of the legal liability of a physician in Poland

In the Polish legal order, as with any other citizen, physicians may bear civil and criminal liability for their behavior on general principles (Konieczniak, 2021, pp. 33-34; Wrześniewska-Wal, 2021, pp. 1-2). Where a physician is engaged under an

employment contract, employee liability may also come into play. This means that apart from professional liability, which is to be characterized below, there is no special regime of liability related to the professional practice of a physician. This approach is specific to many countries of continental Europe (for example, Koch, 2011; Bărcau, 2015).

The commission of a wrongful act, non-performance or improper performance of an obligation by a physician may give rise to his or her civil liability (Bączyk-Rozwadowska, 2011). Both these regimes are regulated by the Polish Civil Code³ (hereinafter: CivilC). The former type of liability is called delictual (*ex delicto*). For that liability to arise, it must be established that a debtor (physician) committed an act that caused damage; that there is a causal relationship between the act and damage (Article 361 § 1 CivilC); and, that the fault can be attributed to the debtor (Article 415 CivilC). The latter type of civil liability is called contractual (*ex contractu*). Under that liability, a debtor (physician) is obliged to repair any damage arising from non-performance or improper performance of an obligation, unless the non-performance or improper performance is due to circumstances for which the debtor is not liable (Article 471 CivilC). In the case of a patient's death, Article 446 § 1-4 CivilC provides the basis for the family claims. Compensation may be claimed by anyone who has incurred the costs of treatment or funeral, and also by a family member whose living standard has significantly deteriorated as a result of the patient's death. An annuity may be claimed by dependents of the deceased. It is also possible to award satisfaction to the next of kin of the deceased for the harm suffered.

Patients and their families most frequently direct their claims against the medical entity in which the physician practices his profession, either under an employment relationship or a civil law contract. In the latter case, the physician is liable for the damage jointly and severally with the medical entity engaging him or her (Robaczyński, 2021; Stępnia, 2016).

In the Polish legal order, an entity conducting medical activity is obliged to have insurance against civil liability for damages resulting from the provision of healthcare services or an unlawful failure to provide health care services. Moreover, a healthcare

³ Uniform text: Journal of Laws of 2020, pos. 17040, 2320; of 2021, pos. 1509, 2459.

provider that renders healthcare services but is not an entity conducting medical activity must also secure civil liability insurance (Serwach, 2015).

Mandatory insurance covering medical events is a new type of guarantee. Since 1 January 2012, patients in Poland can pursue claims for a medical event occurring in hospital grounds in a special, simplified out-of-court procedure before a competent Voivodship Commission for Adjudication on Medical Events. These commissions operate in accordance with the Act of 6 November 2008, on Patients' Rights and the Commissioner for Patients' Rights.⁴ The Polish model of dealing with medical events was based on the Swedish solutions (Swedish No Fault Patient Insurance – NFPI). A medical event means an infection of the patient with a biological pathogen, damage to his body or health disorder, or his death, caused by diagnostics (if it caused an incorrect treatment or delayed the correct treatment contributing to the development of the disease), treatment (including a performed surgery), or the use of a medicinal product or a medical device, where any of the above is inconsistent with the current medical knowledge. Each competent Commission does not adjudicate on fault, but it only establishes the occurrence or non-occurrence of a medical event and a causal relationship between the event and damage. However, proceedings before the Commission are not available if a medical event occurred in the grounds of a medical center or in a surgery of a private (specialist) medical practice (Frąckowiak & Frąckowiak, 2013; Porada et al., 2018).

Articles 183[1]-183[15] of the Polish Civil Procedure Code⁵ provide for the possibility of conducting a mediation, which by definition is voluntary. It may be pre-court (agreed) or court mediation. In a mediation agreement, the parties define in particular the subject of mediation, the identity of the mediator or the method of selecting the mediator. A mediation procedure is conducted before the initiation of proceedings – based on the parties' mediation agreement, and also during the proceedings with the approval of the parties – on the basis of a court order on referring the case to mediation.

A mediation procedure may be conducted by a natural person with full capacity for legal acts and enjoying full public rights. An active judge may not be a mediator,

⁴ Uniform text: Journal of Laws of 2020, pos. 849; of 2022, pos. 64.

⁵ Uniform text: Journal of Laws of 2021, pos. 1805, 1981, 2052, 2262, 2270, 2289, 2328, 2459; of 2022, pos. 1, 366, 480.

while a retired judge may be. Additional requirements are laid down in the Polish Act of 27 July 2001, on the system of common courts,⁶ which prescribes in Article 157a that a permanent mediator is a person who meets the requirements set out in Article 183 [2] § 1 and 2 of the Civil Procedure Code, has expertise and skills in the area of conducting mediation, has attained 26 years of age, knows the Polish language, has not been validly sentenced for an intentional crime or an intentional fiscal crime, and was entered in the register of permanent mediators kept by the Chief Judge of a regional court.

Mediators must be impartial when conducting mediation. They are therefore obliged to immediately disclose to the parties circumstances that may raise doubts as to their impartiality (Korybski, 2018).

A mediation procedure is not held in public. The mediator, the parties and other persons taking part in it are obliged to keep confidential facts learned during the mediation procedure. The parties can release the mediator and other persons taking part in mediation proceedings from that duty. Reliance in the course of proceedings before a court or an arbitration court on proposals for a settlement, proposals for mutual concessions or any other declarations submitted in mediation proceedings is ineffective.

Minutes of mediation proceedings must be drawn up. They include the place and time of mediation proceedings, names, surnames (designation) and addresses of the parties, the mediator's name, surname, and address, as well as the result of mediation. The minutes are signed by the mediator. In the case where the parties reached a settlement before the mediator, it is attached to the minutes. The parties sign the settlement agreement, and the inability to sign is recorded by the mediator in the minutes. By signing the settlement agreement, the parties give their consent to making a request to the court for its approval, of which the mediator informs the parties.

A settlement reached before the mediator, after its approval by the court, has the legal force of a settlement reached before a court. A settlement reached before a mediator which was approved by appending an enforceability clause to it is an enforceable title.

⁶ Uniform text: Journal of Laws of 2020, pos. 2072; of 2021, pos. 1080, 1236; of 2022, pos. 655.

A physician's criminal liability occurs when he or she commits a criminal offence that is a crime or a misdemeanor. A medical error, which is marked by a violation by a physician of the rules pertaining to the legal good in the form of the patient's life or health, is nearly always an underlying cause of the actualization of that type of liability. Therefore, the most frequent legal qualification of that conduct includes unintentional offences under chapter XIX (Crimes against life and health) of the Polish Criminal Code⁷ (hereinafter: CC), such as: causing of death (Article 155 CC), causing bodily harm (grievous – Article 156 § 2 CC or medium or minor – Article 157 § 3 CC), or exposition of a human to an immediate danger of loss of life or sustaining a grievous bodily harm (Article 160 § 3 CC). Intentional offences connected with an unlawful termination of pregnancy (Article 152 CC), and causing a bodily injury or a life-threatening health disorder to a conceived child (Article 157a CC) are additional grounds for criminal liability. A physician may also perpetrate the offence of the performance of a medical procedure without the patient's consent (Article 192 CC), which involves a breach of the aggrieved persons' decision-making autonomy. A physician may perpetrate offences related to the performance of a public function (for example, passive bribery – Article 228 CC), or of a general nature such as defamation (Article 212 CC) of another physician or insulting (Article 216 CC) a patient.

Criminal proceedings may also be referred to mediation pursuant to Article 23a of the Code of Criminal Procedure⁸ (hereinafter: CCP). The court or a court referendary, and in preparatory proceedings – a prosecutor or any organ conducting the proceedings - may on the initiative or with the consent of the accused and the aggrieved party refer the case to an institution or an authorized person to conduct a mediation procedure between the aggrieved party and the accused. The procedure should last no longer than one month, and its period is not included in the duration of preparatory proceedings. The CCP does not restrict the possibility of referring a case to mediation according to the type of criminal offence attributed to the accused (Sitarz, 2017). The participation of the aggrieved party and the accused in mediation proceedings is voluntary, and the authorized organ accepts the consent of the parties to participate in the proceedings, explains to them the objectives and principles of

⁷ Uniform text: Journal of Laws of 2021, pos. 2345, 2447.

⁸ Uniform text: Journal of Laws of 2021, pos. 534, 1023, 2447.

mediation proceedings, and informs them of the possibility of withdrawing their consent until the completion of proceedings.

Mediation proceedings are conducted by a mediator, who must act in an impartial and confidential manner. The exclusion of a mediator is governed by the same provisions as in the case of the exclusion of a judge – by law (*iudex inhabilis*) or upon request (*iudex suspectus*). Additionally, a professionally active judge, public prosecutor or public prosecutor assessor, trainee in those professions, lay judge, court referendary, assistant to a judge or prosecutor, or an officer of an institution authorized to prosecute crimes cannot act as a mediator.

When the mediation is concluded, the institution or person authorized for the purpose draws up a report on the results of the mediation. In the event of an amicable settlement, the settlement agreement signed by the accused, aggrieved person and mediator is attached to the report (Moll et al., 2020a; Moll et al., 2020b).

In criminal cases, pursuant to Article 53 § 3 CC, the court is obliged to take into consideration the positive results of a mediation procedure or a settlement between the aggrieved party and the perpetrator. The court is not bound by the settlement, yet it should shape its decision, if possible, in such a manner as not to undermine the agreement of the parties (Bek, 2015; Kuźelewski, 2009: 350; Wójcik, 2010, p. 384). A settlement is frequently the basis for the court's decision to apply different forms of a mitigation of criminal liability – for example, Article 60 § 2 point 1 CC provides for the possibility of applying an extraordinary mitigation of penalty if the aggrieved person and the perpetrator have reconciled, the damage has been redressed or the aggrieved person and the perpetrator have agreed on the manner of redressing the damage. This means that a mediation settlement cannot remain indifferent to the content of the judgment. The parties thus gain some influence on a court decision, and at the same time, the settlement is a civil law contract and it may additionally be appended with an enforceability clause by the court (Article 107 CCP).

Notably, in the case of a patient's death, the CCP provides for the institution of the acquisition of rights vested in the deceased by his next of kin or a person who is dependent on the deceased (Article 52 § 1 CCP). In practice, this makes it possible to conduct the mediation proceedings, and consequently, reach a settlement between

the physician and the deceased patient's family. The Polish Supreme Court also held that in the case of the aggrieved person's death, the next of kin can reconcile with the perpetrator of crime.⁹ Then, in our opinion, possible forgiveness takes place not in the name of the aggrieved party, but of his next of kin (Bek & Sitarz, 2015, p. 94).

Mediation proceedings conducted as part of civil and criminal proceedings create concrete opportunities for reconciliation between the physician (a perpetrator or a debtor) and the patient, although it is difficult to ignore their certain limitations. The real addressee of claims in civil proceedings is very frequently not the physician, but the medical entity. The physician may therefore take part in mediation proceedings, but his presence is not necessary for the parties to reach a settlement. In turn, the difficulty of mediation conducted as part of criminal proceedings lies in the fact that its underlying cause is the commission of a prohibited act and the related possibility of applying the strictest sanction available in a democratic state, that is, a penalty of imprisonment.

3 Essence and purpose of the professional liability of a physician

An analysis of normative regulations shows that legislators in European countries rarely state the objectives of professional liability proceedings or their functions. A reconstruction of those variables is therefore based on an analysis of the entirety of provisions covering that regime of liability.

It seems that professional liability is part of the family of repressive law, is connected with mandatory membership in a professional self-government, and it also has three distinctive features:

1. is a response to a breach of the rules of practicing a profession or ethical standards relevant to a given profession,
2. the list of sanctions for a breach of the indicated rules contains the most severe penalty in the form of deprivation of the right to practice a profession,

⁹ 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 Article 66 § 3 CC).

3. liability is imposed by a so-called brethren court (a court of peers), that is, a body composed of representatives of the same profession as the accused (Bek et al., 2019: 250; Giętkowski, 2013, p. 51-60).

The professional liability of physicians in Poland meets these criteria. Article 53 MedCh provides that members of medical chambers are subject to professional liability for a breach of the principles of medical ethics and regulations related to the performance of the medical profession, which is referred to as professional misconduct. Although the Polish legislator used conjunctive “and”, it is assumed in the literature it has the meaning of “or”, that is, it functions as an alternative (Zielińska, 2021, pp. 871-872; Niedziński, 2020, p. 768). Thus, the basis of the professional liability of physicians is a breach of their ethical principles (laid down in the Code of Medical Ethics) and regulations related to the practice of profession (laid down, among other things, in the Act of 5 December 1996, on the professions of physician and dentist).¹⁰

An assessment of the conduct of a physician who committed professional misconduct is made by representatives of the same profession; a so-called brethren court. Cases relating to professional liability of physicians are considered – in accordance with competence – by regional medical courts or the Supreme Medical Court. The same is true of the accuser – the screener for professional liability is also a representative of medical self-government (Bek et al., 2019, p. 113).

The list of sanctions in the Polish regulation contains a penalty of deprivation of the right to practice a profession (Article 83 sect. 1 MedCh). It is an eliminatory penalty – the final imposition of that penalty results in permanent removal from the list of members of a regional medical chamber, without the right to apply for a re-registration. A penalized physician is entered in the register of Penalized Physicians and Dentists, and a mention of the imposition of the penalty of deprivation of the right to practice a profession is not subject to expungement (Bek et al., 2019, p. 121).

The format of professional liability proceedings is designed to safeguard the proper performance of professional tasks by a physician, with professional self-government bodies simultaneously ensuring observance of professional ethics. A considerable

¹⁰ Uniform text: Journal of Laws of 2021, pos. 790, 1559, 2232; of 2022, pos. 583.

role is played here by the element of individual prevention – the threat of the initiation of professional liability proceedings is intended to contribute to practicing the profession with greater focus and diligence, which should lead to fewer wrong medical decisions (Zielińska, 2001, pp. 395-396). Given that it belongs to repressive law, the existence of a separate professional liability of a physician is intended to safeguard not only the interests of professional self-government, in the form of preserving the good image of the community as a whole, but also the interests of third persons, that is, patients (Sarnacka, 2015, p. 109). It is clear that the aim of professional liability proceedings is the self-cleansing of professional self-government from those who – due to committed acts – can no longer practice the profession of physician because they have lost the qualities required by law for the provision of given services. As a rule, professional liability does not carry out the compensatory function, which means that the position of the aggrieved person is weaker than in other liability regimes based on generally applicable laws (Bek et al., 2019, pp. 106, 114).

4 Role of the aggrieved person in proceedings on the professional liability of a physician

A study on the role of the aggrieved person in various professional proceedings carried out by a team of researchers from the Faculty of Law and Administration of the University of Silesia in Katowice has shown irrefutably that – in most general terms – it is not a leading role (Bek et al., 2019, p. 313). Based on professional regulations subjected to an analysis, three model solutions to the issue of the aggrieved person can be distinguished:

- a) complete omission of the aggrieved person and his or her rights;
- b) taking into account the aggrieved person and some of his or her procedural rights;
- c) considering the aggrieved person and his or her substantive-legal rights and procedural rights.

The second of the indicated solutions is the most common. In that case, the provisions envisage the role of a party to proceedings for the aggrieved person and confer on him or her narrower or broader procedural rights, completely ignoring measures aimed at securing his or her claims. In essence, the aggrieved person is

seen as one of the primary sources of evidence allowing for punishment of the perpetrator of professional misconduct. Procedural rights are sparingly given to aggrieved persons, mainly to ensure their activity in the proceedings.

The regulation of physicians' professional liability seems to fit into the most common of these categories. Pursuant to Article 57 item 1 MedCh, aggrieved persons include a natural person, legal entity or organizational unit without a legal personality whose legal interests have been directly violated or threatened by professional misconduct. Polish literature observes that although a patient is most frequently the aggrieved person, it is also possible that it will be another physician because the Code of Medical Ethics also governs the relations between physicians (Kozik, 2013, p. 31). Pursuant to Article 56 MedCh, the aggrieved person is one of the parties to the proceedings on professional liability, and the argument to the contrary (Rej-Kietla & Przybyłek, 2018, p. 219), that the aggrieved person is none of them, has no basis in the regulations.

The Act on Medical Chambers, directly or indirectly, defines the aggrieved person's procedural rights. Article 112 point 1 contains a reference to the appropriate application of the provisions of the CCP. However, in the context of proceedings involving professional liability, the provisions of criminal procedure referring to the private accuser are not applicable.

An attempt to capture the scope of appropriate use of the CCP requires a reconstruction of the shape of matters regulated in the Act on Medical Chambers. The Act shapes *expressis verbis* the situation of the aggrieved person as a party and simultaneously the main personal source of evidence. He can be heard as a witness (Article 71 item 1 MedCh), but also request that specific evidence be taken by the organ conducting the proceedings on the professional liability of physicians (Article 59 item 1 MedCh). The aggrieved person has the right to take part in the examination of a witness, expert or specialist who is unable to appear at the place of examination due to an insurmountable obstacle (then the medical court orders an examination of that person by one of its members, as provided for in Article 60 item 4 MedCh.).

The aggrieved person has some influence over the conduct of proceedings. For example, the person must be informed if a physician is referred to a competent medical court for a request for punishment (Article 75 item 2 MedCh). The person

also is entitled to lodge a complaint about the decision on the refusal to initiate an investigation and also has the right to review the case files (Article 68 item 1 MedCh). As a party to the proceedings, the aggrieved person has the right to lodge a complaint to the Supreme Screener for Professional Liability if the person contends the duration of the proceedings conducted by a regional screener for professional liability has been excessive (Article 76 item 4 MedCh).

The aggrieved person has the right to appeal against a decision of the regional medical court to the Supreme Medical Court within 14 days from the date of service of the decision (Article 90 item 1 MedCh). Accordingly, the aggrieved person is served a decision of the medical court with instructions on the time limit and manner of appeal within 30 days from the date of its pronouncement (Article 89 item 5 MedCh). In turn, a decision of the Supreme Medical Court is served on the parties within two months from the date of its pronouncement (Article 94 item 2 MedCh). The aggrieved person who is served with a final decision closing proceedings on the professional liability of a physician by the Supreme Medical Court (Article 107 point 2 MedCh) has the right to bring an appeal in cassation to the Supreme Court within two months from the date of service of the decision (Article 95 item 1 MedCh). This right of the aggrieved person is the realization of the constitutional right to a court of law and judicial review of judgments in disciplinary cases (Kulesza, 2012, p. 1676, 1685). The cassation must be made through an advocate/legal counsel, which is provided for in Article 98 item 2 MedCh. Additionally, the aggrieved person has the right to lodge a request for the resumption of proceedings, which must be drawn up and signed by an advocate or legal counsel (Article 102 item 1 and Article 104 MedCh).

Certain substantive legal rights of the aggrieved person are suggested in the provision of Article 82 item 2 MedCh, which stipulates that the interest of the aggrieved person must be considered in the case of optional discontinuance of proceedings if the imposition of a penalty on the accused is obviously pointless in view of the type and level of penalty finally imposed for the same act in other proceedings prescribed by law (*sui generis* “absorptive discontinuance”). Moreover, the appropriate application of the provisions of criminal law (under Article 112 point 2 MedCh) leads to the conclusion that when a penalty is imposed, the positive results of a mediation procedure conducted between the aggrieved person and the perpetrator, or a settlement reached by them, should be considered also in professional liability

proceedings (Article 53 § 3 CC). However, the provisions of the Act on Medical Chambers do not envisage any measures capable of satisfying the aggrieved person's expectations for reparation of damage or harm.

5 General characteristics of mediation provided for in the Act on medical chambers

In general, mediation is not an institution frequently used in proceedings of a professional nature. However, there are times when its use promotes the interest of a professional group represented by the perpetrator of a delict. Professional liability is often associated with conduct that offends the dignity of the profession in question and, consequently, undermines public trust, harms the reputation not only of the perpetrator, but also of the entire group of which he or she is a member. An unresolved conflict between representatives of a given professional/social group, or a representative of that group, and an external agent can lead to the perpetuation of a negative opinion of a particular group, despite the imposition of professional sanctions for misconduct. Among the regulations on professional liability one can distinguish those that (Bek et al., 2019, pp. 315-316):

- a) expressly provide for mediation;
- b) indirectly allow mediation by making a reference to the appropriate application of the criminal code;
- c) do not allow such measures at all.

The regulation from the Polish Act on Medical Chambers falls within the first of these categories and – it is important to point out – as one of very few professional regulations, it explicitly provides for the possibility of referring a case to mediation. This possibility is missing, for instance, in the provisions governing the liability of representatives of other medical professions – nurses and midwives, laboratory diagnosticians or physiotherapists.

Pursuant to Article 113 item 1 MedCh, a screener for professional liability – in the course of explanatory proceedings or a medical court during the proceedings before it – may, on the initiative or with the consent of the parties, refer the case to a mediation procedure between the aggrieved person and the accused. It should be recalled that pursuant to Article 56 MedCh, the parties at the stage of explanatory

proceedings are: the aggrieved person and the physician concerned, and at the judicial level – the aggrieved person, the accused and the screener for professional liability. This terminology leads to the conclusion that mediation is possible in a professional liability procedure only after the physician has been indicted (when he or she is “the accused”), and that at the level of proceedings before a medical court, consent to mediation should be given by the screener for professional liability, as well as by the aggrieved person and the accused (Bek & Hanc 2021a, pp. 48-49; Wrześniewska-Wal, 2016, p. 144).

The Act on Medical Chambers does not contain a list of cases suitable for mediation or a list of circumstances preventing the conduct of mediation. As a rule, every case concerning the professional liability of a physician can be referred to mediation as long as there are at least two parties to it and they both give their consent to mediation. In line with the doctrine of criminal law, mental disturbances of one of the parties precludes mediation. Further, mediation will be substantially hindered by an aggressive or demanding attitude of any of the participants, an imbalance between them, and the denial by the defendant (here the accused) of the basic facts of the event on which the accusation is founded (Bek & Sitarz, 2015, pp. 94-97; Rękas, 2011, pp. 10-11).

The Act on medical chambers envisages the manner of the selection of mediator for the purposes of professional liability proceedings. Pursuant to Article 113 item 3 MedCh, a medical council elects for a single term of office (which lasts four years – Article 14 item 1 MedCh) a trustworthy physician, who acts as a mediator in the medical chamber. A screener for professional liability, his deputy and a member of a medical court cannot be a mediator.

A mediation procedure is in principle carried out in a relevant local medical chamber. However, an organ that referred the case to mediation (screener for professional liability or medical court) may indicate a different chamber in the case where there are circumstances that preclude the mediator from performing this function or the aggrieved person or the accused requests the appointment of another mediator (Article 113 item 4 MedCh). It can therefore be concluded that the indicated medical chamber becomes competent only to the extent of conducting mediation proceedings, and not the entire professional liability proceedings, although the

content of the provision in question is not precise in that regard (Bek & Hanc, 2021a, p. 52).

A mediator-physician is obliged to draw up a report on the conduct and results of mediation procedure after its completion. The report is attached to the case file in the professional liability proceedings (Article 113 item 5 MedCh).

A mediation procedure should not last longer than two months and this period is not included in the duration of explanatory proceedings (Article 113 item 2 MedCh).

The legislator prescribes that the provisions of the CCP on mediation proceedings shall apply accordingly to mediation proceedings (Article 113 item 6 MedCh), primarily Article 23a CCP and the Regulation of the Minister of Justice in the matter of mediation in criminal cases of 7 May 2015, which was issued on its basis.¹¹ At the same time, it should be recalled that Article 112 point 2 MedCh, Article 53 § 3 CC, which provides for a conciliatory directive, shall apply to the professional liability of physicians.¹² This makes it possible to benefit to a wide extent from the achievements of the doctrine of law and criminal procedure in the area of mediation.

6 Critical remarks made in the literature on mediation envisaged in the Act on Medical Chambers

The introduction of mediation into professional liability proceedings of physicians may *prima facie* appear to be an innovative and progressive solution. Nonetheless, even supporters of restorative justice frequently express skepticism about the adopted measures.

One of the most frequently highlighted shortcomings is a lack of regulation of the impact of the mediation settlement and its contents on the conduct and method of completing proceedings on the professional liability of physicians. None of the negative procedural prerequisites under Article 63 MedCh¹³ can be used directly in

¹¹ Journal of Laws of 2015, pos. 716.

¹² “While imposing a penalty, the court also takes into consideration the positive results of the mediation between the aggrieved person and the perpetrator or the settlement they have reached during the proceedings held before a court or a public prosecutor.”

¹³ “Proceedings on the professional liability of physicians shall not be initiated, and initiated proceedings shall be discontinued, if: 1) the act has not been committed or there is no data sufficiently justifying suspicion of its commission; 2) the act does not constitute professional misconduct or the laws provide that the perpetrator does

response to an agreement between the physician and the aggrieved person. As a result, despite the concluded settlement, the screener for professional liability should bring the case to a medical court, which, pursuant to Article 82 item 1 MedCh,¹⁴ cannot discontinue the case (Luty, 2018, p. 182; Rajca & Nowosielska, 2011, p. 152) only based on a settlement. Iwona Wrzeńska-Wal (Wrześniewska-Wal 2020, p. 135) notes that due to “legislative deficits,” where a settlement is reached, medical courts take advantage of the optional discontinuance of proceedings envisaged in Article 82 item 2 MedCh.¹⁵ Although the conclusion of a settlement suggests that the interest of the aggrieved person truly does not oppose discontinuance, a settlement does not have an impact on the fulfillment of the other prerequisites listed in Article 82 item 2 MedCh. A settlement does not mean that the severity of the misconduct is reduced, nor does it constitute “a final penalty imposed for the same act in other proceedings provided for by law,” which would make the punishment of a physician pointless. It is therefore difficult to conclude that the analyzed measure was correct *de lege lata* (Bek & Hanc, 2021a, p. 53). The legislator, despite demands raised by medical chambers and announcements of changes,¹⁶ has not remedied that shortcoming.

The lack of any basis to discontinue proceedings on the professional liability of a physician as a result of a concluded settlement means that it is crucial to examine the impact settlement has on response measures ordered by the medical court. Clearly, the reference to Article 53 CC contained in Article 112 point 2 MedCh includes a conciliatory directive. Consequently, when imposing a penalty, the medical court “also takes into consideration the positive results of a mediation procedure conducted between the aggrieved person and the perpetrator” (Bek, 2015, pp. 73-83). However, the Act on Medical Chambers does not provide a basis for waiving the imposition of penalty. It is only possible to impose a lighter penalty out of those

not commit professional misconduct; 3) the accused has died; 4) the punishability has expired; 5) the proceedings on the professional liability of physicians as to the same act of the same person has been validly terminated or previously initiated proceedings are pending.”

¹⁴ “If the circumstances listed in Article 63 item 1 points 3-5 are found after the commencement of the trial, the medical court shall discontinue the proceedings. If the circumstances listed in Article 63 item 1 points 1 and 2 are found, the medical court shall issue a ruling acquitting the accused, unless the defendant was insane at the time of the commission of the act, in which case the medical court shall discontinue the proceedings.”

¹⁵ “The medical court may discontinue the proceedings in the case of a minor misconduct or if it were manifestly pointless to impose a penalty on the accused due to the type and level of penalty finally imposed for the same act in other proceedings provided for by the laws, and the interest of the injured party does not oppose it.”

¹⁶ See: <https://www.prawo.pl/zdrowie/mediacje-lekarza-i-pielegniarki-beda-rozwiazywac-spory-z,498218.html>

listed in Article 83 MedCh.¹⁷ At the same time, the medical court has no available measures to satisfy the expectations of the aggrieved person that were accepted by the accused physician in the settlement (Bek & Hanc, 2021a, pp. 54-55). Therefore, the only benefit from a settlement in the context of proceedings on the professional liability of a physician can be derived by the very physician, and that is a mitigation of liability. This argument is reinforced by the fact that Chapter 6 of the Act on Medical Chambers does not even mention a settlement. It imposes on the mediator only the duty to draw up a report on the conduct of the mediation procedure and its results, not the duty to send a settlement (Article 113 item 5 MedCh). By way of comparison, Article 23a § 5 CCP provides explicitly that the settlement agreement signed by the accused, aggrieved person and mediator is attached to the report on the conduct and results of the mediation procedure. Additionally, the construction of proceedings on the professional liability of a physician precludes the possibility of appending an enforceability clause to the provisions of the settlement or introducing those provisions into a ruling of the medical court (Daniluk-Jarmoniuk, 2018, p. 402). The medical self-government does not have concrete legal measures at its disposal to support the process of the performance of a settlement (Wrześniewska-Wal, 2018, p. 289). Hence, the view expressed in the literature that “due to the lack of a relevant legal provision, the settlement reached under Article 113 item 1 MedCh between the patient and the physician should be performed on a voluntary basis” (Wrześniewska-Wal, 2020, p. 135). It seems that the aggrieved person’s only option of asserting the fulfilment of the obligations contained in the settlement is through civil proceedings (Bek et al., 2019: 126, 316; Cybulko, 2016, p. 596; Daniluk-Jarmoniuk, 2018, p. 402). However, from the perspective of professional liability, the aggrieved person has no interest in seeking to reach a mediation settlement. Such a solution obviously inhibits the development of mediation provided for in the Act on Medical Chambers.

Another often-criticized aspect of the regulation under Article 113 MedCh is appointing a physician as a mediator. Pursuant to Article 113 item 3 MedCh, it must be “a trustworthy physician” appointed by a medical council for a single term of

¹⁷ “1. The medical court may impose the following penalties: 1) an admonition; 2) a reprimand; 3) a fine; 4) a ban on holding managerial positions in health care organizational units for a period of one to five years; 5) restriction of the scope of activities in the practice of the profession of physician for a period of six months to two years; 6) suspension of the right to practice the profession for a period of one to five years; 7) deprivation of the right to practice the profession, as referred to in Article 5 points 3-3c. 2. Imposing a penalty provided for in item 1 point 5 or 6, the medical court may additionally impose a penalty listed in item 1 point 4.”

office. The nebulous requirement that it must be a “trustworthy” person does not alter the fact that the mediator is still a representative of the same community as one of the parties, and his or her competences are evaluated by a self-government body. The tasks of the Supreme Medical Council and regional medical councils include, among other things, the representation and protection of professional interests of members of physicians' self-government (Article 39 item 1 point 3 MedCh), and every decision made by a medical council should meet this criterion. Therefore, it is not surprising to see widespread doubts as to the objective and subjective impartiality of the mediator-physician (Bek et al., 2019, pp. 126, 316; Daniluk-Jarmoniuk, 2018, pp. 396, 399, 400; Gmurzyńska & Morek, 2011, p. 64; Luty, 2018, pp. 180-181; Rajca & Nowosielska, 2011, p. 152; Trapszyc, 2021, pp. 102-103; Wysocki, 2015, pp. 87-88). Meanwhile, the mediator's impartiality is one of the most important principles of mediation (Bialecki, 2012, p. 43; Sitarz, 2015, p. 25; Wójcik, 2010, pp. 354-358),¹⁸ and it is also enumerated among the principles of mediation in cases relating to medical events (Moskal & Waszkiewicz, 2017). With the simultaneous fundamental assumption of the voluntary nature of mediation (Krasuń, 2020),¹⁹ the lack of trust of the aggrieved person in the impartiality of the mediator-physician must nullify the settlement reached through mediation (Bek & Hanc 2021a, pp. 57-74).

A shortcoming of a secondary nature, but of major practical importance, is the lack of a provision on who bears the costs of mediation (Bek et al., 2019, p. 126). The costs of mediation in criminal cases are borne by the State Treasury. In civil cases, the costs of mediation are borne by the parties. It seems that according to the principles of the Act on Medical Chambers, possible costs of mediation (including the mediator's remuneration) under Article 113 MedCh, should fall to the responsibility of the medical self-government. This has not been directly decreed. One may even assume that since the mediator is a physician and the very procedure takes place within a medical chamber – he or she acts *pro bono*.

¹⁸ See: Standard III, “Standary prowadzenia mediacji i postępowania mediatora” of 26 June 2006 - <https://www.gov.pl/web/sprawiedliwosc/dokumenty-rady>.

¹⁹ See: Standard I pkt C, “Standary prowadzenia mediacji i postępowania mediatora” of 26 June 2006 - <https://www.gov.pl/web/sprawiedliwosc/dokumenty-rady>.

7 Essence and objective of physician-patient mediation against the background of mediation in general

Coming to the end of these reflections, it should be reiterated that the use of mediation in disputes concerning the physician's liability is a highly desirable solution and is not called into question in this article. Still, the question remains whether the professional liability of physicians is the space where the full potential of mediation can be realized. Even the elimination of all the identified drawbacks of the current legislative measures does not guarantee that mediation will live up to the hopes placed in it.

The drafter of the Polish Act on Medical Chambers justified the measure adopted in Article 113 MedCh by pointing out that "the use of mediation procedure can, in many cases, replace explanatory proceedings or proceedings before a medical court and can make it possible to settle the case without a lengthy procedure and reduce the cost of proceedings."²⁰ These advantages are also highlighted in the literature. Even in the declaratory layer, it is primarily the economics of proceedings that is seen as an objective of mediation in the context of the Act on Medical Chambers. This aspect is undoubtedly important for both the aggrieved person and the accused physician and medical self-government bodies. However, reducing the role of mediation to this one function amounts to a serious simplification and drastic diminution of the assumptions at the core of restorative justice. In any case, even that objective is not properly achieved *de lege lata* because – as explained above – a settlement does not make it possible to discontinue proceedings on the professional liability of a physician.

Mediation is intended to be a non-binding method of resolving disputes, which involves a third party attempting to help the disputing parties reach a mutually acceptable solution (Garner, 2004, p. 1003). In more detailed terms, mediation is a voluntary, confidential method of resolving disputes without excessive formalism by means of direct communication, in the course of which the parties, assisted by an impartial, neutral and properly prepared person, look for mutually satisfactory understanding in order to reach a mutually acceptable settlement (Cyrol, 2013, p. 21; Jenkins, Smilov & Goodwin, 2014, p. 16; Sitarz, 2015, pp. 21-22). The primary

²⁰ See: <http://ww2.senat.pl/k7/dok/sejm/044/2151.pdf>

objective of mediation understood in this manner is the resolution of a conflict between the parties in a way that is satisfactory to them both.

In terms of restorative justice, the aggrieved person's needs – damage and its repair – come to the fore (Wilk & Zawiejski, 2015). It is rightly noted in the literature that “first and foremost, the interests of the aggrieved person should be taken into account here because mediation, and other instruments of restorative justice, should only be used when it is in the interest of the victim of the crime” (Wrześniewska-Wal, 2017, p. 138). At the same time, it is important that the manner in which the damage is repaired is acceptable and real for the perpetrator. A settlement of a conflict requires that neither party has the impression of having been hurt by the content of the settlement. The aggrieved person and perpetrator of damage should be the main beneficiaries of mediation. Furthermore, the benefits are often mutual and change the optics of the dispute. Mediation provides space for dialogue and allows one to see the other party's perspective. In the case of mediation related to medical errors – it allows the physician to see more clearly the consequences of his or her error, but also explain its causes (Bek & Hanc, 2021b, pp. 143-145). To meet this objective, mediation must be an authentic dialogue between the parties, and it requires equivalence between the partners (Bek & Sitarz, 2015, pp. 96-97). The correction of minor imbalances in power between the parties is one of the mediator's tasks (Bargiel-Matusiewicz, 2015, pp. 72-77). Balance, along with the aforementioned voluntary nature of mediation and the mediator's impartiality, is the cornerstone of agreement. To resolve a conflict, it is extremely important to ensure the performance of the settlement – repair of damage according to the agreed arrangements.

8 Mediation with the emanation of authority

The Polish model of mediation in the context of the professional liability of a physician, prompts one to look at another factor that gives an indication of inequality embedded in it. The Constitution of the Republic of Poland²¹ provides that professional self-governments may be established by law to represent persons practicing public trust professions and oversee the due performance of those professions within the limits of public interest and for its protection.

²¹ Journal of Laws of 1997, no. 78, pos. 483, as amended.

The interpretation of the provisions of the Polish Constitution leads to the conclusion that the systemic nature of professional self-governments, including medical self-government, means that they are a component of the institutional structure of the state. Those self-governments have a fixed place within the public administrative structure. The medical self-government, as with any other professional self-government, is equipped with the powers of public administration, which it exercises in the same manner as public power is exercised in general. An important attribute of self-government authority is the fact that it is legitimized directly by persons forming a given professional self-government, that is members of a given professional corporation. The conferral of the competences to fulfil public tasks on professional self-governments is based on the assumption that individuals affiliated with professional corporations will resolve their professional problems in a more competent manner than government administration officials. The professional self-government of physicians thus represents persons practicing a public trust profession on an individual as well as collective level – as a specified collectivity characterized by clearly defined interests and close community ties (Szydło, 2016, pp. 428, 441, 449). As Marek Szydło rightly points out, the professional self-government is an entity suspended between the state and the public – on the one hand, it performs tasks entrusted to it by the state and is subject to state supervision, and on the other, it is an entity separate (independent) from the state in the legal sense, bringing together members of the public bound together by a specific professional bond (Szydło, 2016, p. 449). Although the same author also argues that the tasks of professional self-government include undertaking mediation or intermediation in disputes or conflicts between members of a professional self-government and persons using services rendered by members of the corporation (Szydło, 2016, p. 442), it does not appear that a mediation procedure in the context of the professional liability of a physician is the best platform for the exercise of those constitutional powers.

A mediation procedure as part of proceedings on the professional liability is conducted by an organ being an element of the public administration structure – a medical court, which is a medical chamber organ. In turn, despite the most sincere declarations, a mediator is not a person (as is the case with a civil or criminal procedure) who does not represent the interests of any of the parties. A mediator is in fact a physician, who must mandatorily be a member of a professional self-government. For the sake of argument, it is the same situation as that of, for

example, proceedings on the professional liability of an advocate in which the mediator would be another advocate.

Mediation in the context of the professional liability of physicians somewhat resembles mediation in administrative proceedings. A certain similarity that exists between them is the objective difficulty (or even impossibility) of taking into consideration the power factor in the context of restorative justice procedures. This lack of balance in fact constitutes the inequality between the parties, which is alien to mediation. At the same time, it is widely recognized in Polish science that in the case of the administrative and judicial-administrative mediation, the major obstacle to the application of the idea of restorative justice is a lack of trust between the parties and organs of administrative proceedings. The Polish form of mediation in administrative and judicial-administrative proceedings has come under widespread criticism due to the legislator's failure to take proper account of the specificity of that branch of law (Firlus & Klonowski, 2018; Kocot-Łaszczyca & Łaszczyca, 2018; Suwaj, 2019). It is clear that an administrative decision cannot be equated with a ruling of a medical court. An administrative decision shapes the situation of an individual in an obvious way. This is impossible in proceedings on the professional liability of physicians because those proceedings in fact take place within a corporation. However, in the case of both an administrative decision and a medical court judgment – the possibility of the application of the content of a settlement is severely limited, which may nullify the content of the settlement in combination with the lack of adequate enforcement provisions. The above drawbacks of mediation proceedings call into question the place of that procedure as part of proceedings on the professional liability of physicians.

Moreover, the limited rights of the aggrieved person in proceedings on the professional liability of a physician seem, in the context under consideration, to confirm his or her *de facto* subordinate role. On the one hand, the aggrieved person is certainly an important personal source of evidence, whose reliable evidence may in extreme circumstances be the basis for depriving a physician of the right to practice a profession. On the other hand, where disciplinary proceedings are initiated as a result of information sent by the public prosecutor's office, in view of the conducted criminal proceedings, a subsequent examination, or examinations, of the aggrieved person may lead to secondary victimization. In addition, the aggrieved person is not able to control the factors affecting the indicated process. Secondary

victimization may be caused by institutional contexts (Bjørnholt, 2019), which may be reflected in proceedings on professional liability because they can be the second, independently conducted proceedings in the same matter.

The lack of adequate empowerment of aggrieved persons in proceedings on professional liability makes it possible for them to perceive their presence in these proceedings, as well as in mediation proceedings, as a relation based on subordination to a medical chamber, which can hardly be considered a mechanism that squares with the idea of restorative justice.

9 Conclusions

An analysis of the regulations governing mediation in the context of the professional liability of physicians makes it hard to dismiss the impression that mediation, and even the very aggrieved person, is treated in an instrumental rather than subjective manner. Ensuring that the objectives of restorative justice are met under the conditions created by the Polish Act on Medical Chambers seems to be futile. Although some authors have suggested that one of the objectives of proceedings under that Act is also to secure the interests of patients (Sarnacka, 2015, p. 109; Zielińska, 2021, p. 861), there is, in fact, little indication of this in reality. The tasks of medical self-government bodies include, among other things, the representation and protection of individual and collective interests of chamber members (Article 25 point 3 MedCh), the representation and protection of professional interests of members of medical self-government (Article 39 item 1 point 3 MedCh), and providing assistance in the exercise of the right of chamber members to enjoy the protection and legal assistance of medical chamber bodies in matters connected with practicing the profession of physician (Article 25 point 5 in conjunction with Article 9 item 1 point 3c MedCh). The procedural rights of aggrieved persons are primarily aimed at improving the evidentiary process and are subordinate to the tasks of self-government (Bek et al., 2019, pp. 318-319). By contrast, mediation has a negligible impact on the conduct of proceedings, and as it seems, it is not taken very seriously even by the legislator itself – Chapter 6 MedCh, which is devoted to mediation proceedings, consists of two articles, only one of which relates to mediation (Bek & Hanc 2021a, p. 56).

Given the above, clearly the Act on Medical Chambers requires amendments. The question is in what direction. Should there be a place for a settlement and compensation in the context of proceedings on the professional liability of physicians?

An apology to the aggrieved person, having his or her forgiveness and repairing the damage may, on the one hand, have an educative effect on the perpetrator of a delict, and on the other, protect public trust in representatives of a given profession (Bek et al., 2019, p. 318). In this regard, they correspond to the functions of disciplinary proceedings. However, disciplinary proceedings are not the appropriate forum for pursuing claims related to damage and harm suffered by the patient. The protection of the property and non-property interests of the injured party/aggrieved person is well served by civil and criminal law. These areas should be steered towards the widest possible use of amicable methods of dispute resolution, including mediation and settlement. It seems that there is no need to double existing measures known from common courts in the Act on Medical Chambers (Bek et al., 2019, pp. 314, 319).

A solution conducive to the coherence of the legal system would be to take into consideration, in the context of the professional liability of physicians, a physician-patient settlement reached in civil or criminal proceedings. A physician who achieves reconciliation with a patient contributes to the repair of damage and harm, acts for the benefit of the medical community and fosters the restoration of public trust. Consequently, the accused deserves a more lenient treatment by “the brethren court”. The physician’s conciliatory attitude should therefore be another ground for the optional discontinuance of proceedings introduced to Article 82 item 2 MedCh. That measure would be a tangible incentive for a physician to seek an agreement with the patient. In turn, the patient’s interests would be adequately safeguarded by the civil, or possibly criminal, regime. Notably, the lack of an automatic translation of a settlement into the mandatory discontinuance of proceedings on the professional liability of a physician would also make it possible to take into account the other objectives of those proceedings.

Previous studies have frequently highlighted the specificity of the role of mediator in broadly understood medical mediation. Persons harmed by medical errors often feel a great sense of injustice, and their pursuit of claims is marked with great

emotionality. They suffer much more from harm (for example, the inability to perform certain everyday activities, such as having a wash or combing their hair independently) than actually sustained damage (for example, in the form of a loss of elbow efficiency due to a defectively performed orthopedic procedure). Obviously, it is extremely difficult to find common ground for a settlement in such cases (Laskowska-Hulisz, 2021, p. 82). This does not mean, however, that for this reason a physician-mediator is a better candidate for a mediator than a person entered in the register of permanent mediators kept by a regional court. This is because mediators are not allowed to assess the case on the merits and it is not their role to determine whether the physician committed a professional misconduct. Mediators do not need to have specialist knowledge of medicine to make it easier for the parties to reach a settlement. Further, they do not have to (and actually should not) examine a breach of the principles of medical ethics, provisions connected with practicing a profession and rules of the art of medicine (Bek & Hanc, 2021a, pp. 71-72). This is all the more important because most frequently patients do not expect revenge or a guarantee of a high compensation. They tend to be interested in the fulfilment of three important needs: getting information about what happened, apologies from the physician or the medical facility (also possibly from the medical chamber), which will be a form of showing respect, and finally, the expectation of a change in conduct that will prevent the occurrence of future errors (Gmurzyńska & Morek, 2011, pp. 65-66). These needs may be fulfilled in the context of mediation in a civil or criminal case, but also during an informal talk between the parties to the conflict. Simply substituting a physician-mediator with a mediator from outside the circle of physicians does not remove all the drawbacks of mediation contained in the Act on Medical Chambers, and it would generate additional costs. It does not appear that doubling the institution of mediation along the lines of other proceedings was necessary in that situation.

The above postulates do not mean that mediation should be eliminated entirely from the Act on Medical Chambers. The institution of mediation embedded in the structures of professional self-government, created by respected representatives of the profession, offers great space for resolving disputes involving self-government members (Bek et al., 2019, p. 318). In the case of two physicians in conflict, it may be easier to balance the parties, and the impartiality of a physician-mediator does not raise greater concerns. Such a mediation procedure could precede a decision on whether to indict the physician. This solution would require a separate analysis.

However, it is clear that the Polish attempt at bringing mediation within the proceedings on the professional liability of a physician provides an important warning for those legislators of continental Europe whose model of disciplinary liability is based on assumptions similar to those found in the Polish Act on Medical Chambers.

Legislation, case law, websites and other sources

- Act of 10 November 1998 on the exercise of the profession of physician and physicians' professional representation (Bundesgesetzblatt für die Republik Österreich 1998, no. 169, as amended).
- Act of 17 November 1964 - Civil Procedure Code (Uniform text: Journal of Laws of 2021, pos. 1805, 1981, 2052, 2262, 2270, 2289, 2328, 2459; of 2022, pos. 1, 366, 480).
- Act of 2 April 1997 - The Constitution of the Republic of Poland (Journal of Laws of 1997, no. 78, pos. 483, as amended).
- Act of 2 December 2009 on Medical Chambers (Uniform text: Journal of Laws of 2019, pos. 965, as amended).
- Act of 23 April 1964 - Civil Code (Uniform text: Journal of Laws of 2020, pos. 17040, 2320; of 2021, pos. 1509, 2459).
- Act of 27 July 2001 on the system of common courts (Uniform text: Journal of Laws of 2020, pos. 2072; of 2021, pos. 1080, 1236; of 2022, pos. 655).
- Act of 5 December 1996 on the professions of physician and dentist (Uniform text: Journal of Laws of 2021, pos. 790, 1559, 2232; of 2022, pos. 583).
- Act of 6 June 1997 - Code of Criminal Procedure (Uniform text: Journal of Laws of 2021, pos. 534, 1023, 2447).
- Act of 6 June 1997 - Criminal Code (Uniform text: Journal of Laws of 2021, pos. 2345, 2447).
- Act of 6 November 2008 on Patients' Rights and the Commissioner for Patients' Rights (Uniform text: Journal of Laws of 2020, pos. 849; of 2022, pos. 64).
- <http://ww2.senat.pl/k7/dok/scjm/044/2151.pdf> (January 25, 2023).
- <https://www.prawo.pl/zdrowie/mediacje-lekarza-i-pielgniarki-beda-rozwiazywac-spory-z-498218.html> (25 January 2023).
- Regulation of the Minister of Justice in the matter of mediation in criminal cases of 7 May 2015 (Journal of Laws of 2015, pos. 716).
- Resolution of the Supreme Court of 30 September 2003, I KZP 19/03, OSNKW 2003, no. 9-10, pos. 78.
- Standardy prowadzenia mediacji i postępowania mediatora of 26 June 2006* – <https://www.gov.pl/web/sprawiedliwosc/dokumenty-rady> (January 25, 2023).

References

- Bączyk-Rozwadowska, K. (2011). Medical Malpractice and Compensation in Poland, *Chicago-Kent Law Review* 86(3), pp. 1217-1261.
- Bărcan, C. (2015). The liability forms of the medical personnel, *Romanian Journal of Ophthalmology* 59(2), pp. 93-96.
- Bargiel-Matusiewicz, K. (2015). Komunikacja w mediacji: prawidłowości, problemy, możliwe rozwiązania, In: Sitarz, O. (ed.) *Metodyka pracy mediatora w sprawach karnych*, Difin, pp. 53-77.
- Bek, D. & Hanc, J. (2021a). Rola mediacji i mediatora w postępowaniu w przedmiocie odpowiedzialności zawodowej lekarza, *Przegląd Prawa Medycznego* 3(1-2), pp. 41-78. <https://przegladprawamedycznego.pl/index.php/ppm/article/view/122>.

- Bek, D. & Hanc, J. (2021b). Can a patient's death go unpunished? Mediation with the deceased patient's family in criminal cases involving a medical error. *Medicine, Law & Society* 14(1), pp. 135-152. DOI: <https://doi.org/10.18690/mls.14.1.135-152.2021>.
- Bek, D. & Sitarz, O. (2015). Mediacja w sprawach karnych – krok po kroku, In: Sitarz, O. (ed.) *Metodyka pracy mediatora w sprawach karnych*, Difin, pp. 79-175.
- Bek, D. (2015). The Mediation Settlement as a Directive of the Level of Sanction, In: Dukiet-Nagórska, T. (ed.) *The Postulates of Restorative Justice and the Continental Model of Criminal Law. As Illustrated by Polish Criminal Law*, Peter Lang, pp. 73-113, doi: 10.3726/978-3-653-04442-3.
- Bek, D., Hanc, J., Jaworska-Wieloch, A., Sitarz, O., Zawiejski, P. (2019). *Odpowiedzialność dyscyplinarna w systemie polskiego prawa represyjnego. Analiza aspektów materialnoprawnych na przykładzie wybranych pragmatyk zawodowych*, Poltext.
- Bialecki, M. (2012). *Mediacja w postępowaniu cywilnym*, Wolters Kluwer.
- Bjornholt, M. (2019). The social dynamics of revictimization and intimate partner violence: an embodied, gendered, institutional and life course perspective, *Nordic Journal of Criminology* 20(1), pp. 90-110. DOI: <https://doi.org/10.1080/14043858.2019.1568103>.
- 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*, 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.
- Daniluk-Jarmoniuk, A. (2018). *Odpowiedzialność zawodowa lekarza*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej.
- Firlus, J.G. & Klonowski, K. (2018). Legal and Non-Legal Justifications for 'Administrative Mediation' – Remarks on Polish Administrative Praxis, *Białystok Legal Studies* 23(2), pp. 111-124. DOI: 10.15290/bsp.2018.23.02.08.
- Frąckowiak, L. & Frąckowiak, H. (2013). Organization and functioning of Regional Commission for Evaluation of Medical Events after a year of operation, *Polish Annals of Medicine* 20(1), pp. 39-42, DOI: <https://doi.org/10.1016/j.poamed.2013.07.002>.
- Garner B.A. (ed.), (2004). *Black's Law Dictionary* (St. Paul: Thomson/West).
- Giętkowski, R. (2013). *Odpowiedzialność dyscyplinarna w prawie polskim*, Wydawnictwo Uniwersytetu Gdańskiego.
- Gmurzyńska, E. & Morek, R. (2011). O problemach dotyczących rozstrzygnięcia spraw o błędy lekarskie i o roli mediacji, *ADR. Arbitraż i Mediacja* 3, pp. 42-76.
- Jenkins, R.C., Smilov, A.E. & Goodwin, M.A. (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.
- Koch, B.A. (2011). Medical Malpractice in Austria, *Chicago-Kent Law Review* 86(3), pp. 1027-1052.
- Kocot-Łaszczyca, A. & Łaszczyca, G. (2018). *Mediacja w ogólnym postępowaniu administracyjnym*, C.H. Beck.
- Koniczniaik, P. (2021). Relacje między różnymi reżimami prawnymi odpowiedzialności, In: Dukiet-Nagórska, T., Liszewska, A. (eds.) *System Prawa Medycznego. Tom III. Odpowiedzialność prawna w związku z czynnościami medycznymi*, Wolters Kluwer, pp. 33-55.
- Korybski, A. (2018). Legal Status of Mediator in Mediation Proceedings in Civil Cases, *Studia Iuridica Lublinensia* 27(3), pp. 143-162. DOI: 10.17951/sil.2018.27.3.143-162.
- Kozik, M. (2013) Odpowiedzialność zawodowa lekarzy, In: A. Fiutak et al., *Odpowiedzialność prawna pracowników medycznych. Przepisy - Przykłady - Orzecznictwo*, C.H. Beck, pp. 3-91.
- Krasuń, A. (2020). Realizacja zasad postępowania mediacyjnego w sprawach pracowniczych, *ADR. Arbitraż i Mediacja* 3, pp. 45-54.
- Kulesza, C. (2012). Ewolucja zasad odpowiedzialności dyscyplinarnej lekarzy w kontekście gwarancji rzetelnego procesu, In: Kardas, P., Sroka, T., Wróbel, W. (eds.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla. Tom II* (Warszawa: Wolters Kluwer), pp. 1673-1693.
- Kuźelewski, D. (2009). Wpływ prawa karnego materialnego na mediacje między pokrzywdzonym i oskarżonym – wybrane aspekty, In: Cwiąkałski, Z., Artymiuk, G. (eds.) *Współzależność prawa*

- karnego materialnego i procesowego w świetle kodyfikacji karnych z 1997 r. i propozycji ich zmian*, Wolters Kluwer, pp. 341-366.
- Laskowska-Hulisz, A. (2021). Wybrane aspekty prawne mediacji w sprawach medycznych, In: Bączyk-Rozwadowska, K. & Chłudziński, B. (eds.) *Alternatywne metody rozwiązywania sporów w sprawach medycznych* (Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika), pp. 77-97.
- Luty, K.J. (2018). Principles of Mediation Based in the Law on Chambers of Physicians, *Studia Iuridica Lublinensia* 27(3), pp. 175-185. DOI: <http://dx.doi.org/10.17951/sil.2018.27.3.175-185>.
- 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.
- Moll, T. Pawłowska, E. & Woźnicka, N. (2020a). Mediation as an alternative method of dispute resolution in criminal cases - theoretical aspects, In: Semków, D. & Kulak, I. (eds.) *Przestępstwa przeciwko życiu i zdrowiu. Aspekty prawne, kryminologiczne i kryminalistyczne* (Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego), pp. 42-67.
- Moll, T. Pawłowska, E. & Woźnicka, N. (2020b). Mediation as an alternative method of dispute resolution in criminal cases - practical aspects, In: Semków, D. & Kulak, I. (eds.) *Przestępstwa przeciwko życiu i zdrowiu. Aspekty prawne, kryminologiczne i kryminalistyczne*, Wydawnictwo Uniwersytetu Rzeszowskiego, pp. 55-66.
- Moskal, A. & Waszkiewicz, K. (2017). Zastosowanie alternatywnych metod rozwiązywania sporów w sprawach dotyczących zdarzeń medycznych, *ADR. Arbitraż i Mediacja* 3, pp. 45-54.
- Niedziński, T. (2020). Pragmatyki lekarskie, In: Bach-Golecka D., Stankiewicz R. (eds.) *System Prawa Medycznego. Tom 3. Organizacja systemu ochrony zdrowia* (Warszawa: Wolters Kluwer), pp. 750-784.
- Porada, S. (2018). Provincial Commission for Adjudication of Medical Events as an alternative choice of indemnization of medical damage - functional and system analysis, *European Journal of Clinical and Experimental Medicine* 16(4): 323-329. doi: 10.15584/ejcem.2018.4.9.
- Rajca, M. & Nowosielska E. (2011). Postępowanie medacyjne w ramach odpowiedzialności zawodowej lekarzy, *Medyczna Wokanda* 3, pp. 145-153.
- Rej-Kietla A. & Przybyłek E. (2018). Przewinienia zawodowe lekarzy w orzecznictwie Okręgowego Sądu Lekarskiego, In: Kmiciek B. (ed.) *Prawo i medycyna. Między standardem a odpowiedzialnością. Tom 1* (Warszawa: Think&Made), pp. 213-242.
- Rękas, A. (2011). *Mediacja w polskim prawie karnym*, Ministerstwo Sprawiedliwości.
- Robaczyński, W. (2021). Podmioty odpowiedzialne za szkody medyczne, In: Dukiet-Nagórska, T., Liszewska, A. (eds.) *System Prawa Medycznego. Tom III. Odpowiedzialność prawna w związku z czynnościami medycznymi*, Wolters Kluwer, pp. 271-290.
- Sarnacka, E. (2015). Models of professional liability of health care workers in Poland - de lege lata and de lege ferenda propositions, In: Sarnacka, E. (ed.) *Health law. Selected issues* (Jastrzębie Zdrój: Black Unicorn), pp. 109-126.
- Serwach, M. (2015). No Fault Insurance System in Polish Law and Other European Legal Systems, *Prawo Asekuracyjne*, 82(1), pp. 33-45.
- Sitarz, O. (2015). O mediacji w ogólności, In: Sitarz, O. (ed.) *Metodyka pracy mediatora w sprawach karnych*, Difin, pp. 13-38.
- Sitarz, O. (2017). Ograniczenie możliwości przeprowadzenia mediacji wynikające z podstawowych zasad prawa karnego materialnego. In: Mazowiecka, L., Kalus, W. & Tarwacka, A. (eds.) *Z problematyki wiktymologii. Księga dedykowana Profesor Ewie Bienkowskiej*, Wolters Kluwer, pp. 337-348.
- Stępnia, P. (2016). Civil liability of doctors and the employment relationship, *Journal of Medical Science* 85(1), pp. 54-60. DOI: <https://doi.org/10.20883/jms.2016.8>.
- Suwaj, R. (2019). Mediation as a new form of settling administrative matters in Poland, *Przegląd Ustawodawstwa Gospodarczego. Business Law Journal* 858(12), pp. 18-26. DOI 10.33226/0137-5490.2019.12.4
- Szydło, M. (2016). In: Safjan, M. & Bosek, L. (eds.) *Konstytucja Rzeczypospolitej Polskiej. Tom I. Komentarz. Article 1-86* (Warszawa: C.H. Beck), pp. 424-464.

- Trapszyc, J. (2021). Sposoby pozasądowego rozwiązywania sporów medycznych. Specyfika mediacji, In: Bączyk-Rozwadowska, K. & Chludziński, B. (eds.) *Alternatywne metody rozwiązywania sporów w sprawach medycznych* (Toruń: Wydawnictwo Uniwersytetu Mikołaja Kopernika), pp. 98-113.
- Wilk, L., & Zawiejski, P. (2015). The Concept of Restorative Justice, In: Dukiet-Nagórska, T. (ed.) *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. (ed.) *System Prawa Karnego. Tom 1. Zagadnienia ogólne*, C.H. Beck, pp. 350-413.
- Wójcik, D. (2010). Rola mediacji między pokrzywdzonym a sprawcą przestępstwa, In: Marek, A. (ed.) *System Prawa Karnego. Tom 1. Zagadnienia ogólne*, C.H. Beck, pp. 350-413.
- Wrześniewska-Wal, I. (2016). Mediacja lekarz - pacjent - alternatywna forma rozwiązywania sporu, *Fides et Ratio* 26(2), pp. 139-145. <https://fidesetratio.com.pl/ojs/index.php/FetR/article/view/759>.
- Wrześniewska-Wal, I. (2017). Mediacje w odpowiedzialności zawodowej lekarzy. Analiza i propozycje zmian w kierunku obligatoryjności, In: Antolak-Szymanski, K. (ed.) *Mediacje obligatoryjne*, Difin, pp. 135-147.
- Wrześniewska-Wal, I. (2018). *Postępowanie przed sądami lekarskimi w praktyce*, Wolters Kluwer.
- Wrześniewska-Wal, I. (2020). *Odpowiedzialność lekarza w orzecznictwie sądów lekarskich*, Wolters Kluwer.
- Wrześniewska-Wal, I. (2021) Malpractice-related deaths resulting from failure of due diligence. Decisions of Polish medical disciplinary boards, *Archivum Medycyny Sądowej i Kryminologii* 71(1), pp. 1-7. DOI: <https://doi.org/10.5114/amsik.2021.104969>.
- Wysocki, M.R. (2015). Praktyczne aspekty stosowania postępowania mediacyjnego w ustawie o Izbach Lekarskich (article 113) w latach 2010-2013, *ADR. Arbitraż i Mediacja* 2, pp. 77-89.
- Zielińska, E. (2001) *Odpowiedzialność zawodowa lekarza i jej stosunek do odpowiedzialności karnej*, Liber.
- Zielińska, E. (2021) Odpowiedzialność zawodowa, In: Dukiet-Nagórska, T., Liszewska, A. (eds.) *System Prawa Medycznego. Tom III. Odpowiedzialność prawna w związku z czynnościami medycznymi*, Wolters Kluwer, pp. 859-892.

Povzetek v slovenskem jeziku

Članek predstavlja kritično mnenje o mediaciji med zdravnikom in pacientom, ki poteka v okviru postopkov o poklicni odgovornosti zdravnikov. Izhodišče je Zakon o zdravniški zbornici, ki predvideva možnost izvajanja mediacije med obtoženim zdravnikom in oškodovanim pacientom. Ta predpis je edinstven v regiji. Njegovi specifični ukrepi, kot je na primer izbira mediatorja med zdravniki, so bili v literaturi deležni kritične ocene. Potreba po delovanju mediacije v okviru poklicne odgovornosti praviloma ni postavljena pod vprašaj. Vendar pa temeljita analiza predpostavk mediacije in restorativne pravičnosti ter delovanja poklicne odgovornosti zdravnikov nakazuje, da naj se gre korak naprej. Čeprav spor med zdravnikom in pacientom vsekakor zahteva pravne rešitve, se zdi, da disciplinska ureditev ne daje ustrezne podlage za dogovor, saj ne more zavarovati interesov oškodovanca.