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Determining the title to appear before court in cases of indemnity for damages caused to patients

Piotr Stępnia

Department of Medical Law, Poznan University of Medical Sciences, Poland

ABSTRACT

The issue of the title to appear before court mentioned in the title, is poorly known both to patients and to medical staff, in particular to doctors. However, in practice this is very important because of the growing number of cases of this type pending before the regional medical adjudication committees, as well as common courts. For that reason, it is worth discussing legal regulations in this field. This is also the purpose of the author of this publication.

Keywords: damages caused to patients, courts, legal regulations.

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The issue of the title to appear before court is related to the issue of compensation for patients for the damage caused during the provision of medical services. Nowadays, it is one of the most important issues of medical law. In the civil law doctrine, the title to appear before court is defined as the right to seek legal protection in the lawsuit¹. This means that both a person performing the medical profession and patient may be the plaintiff or the defendant. The problem of legitimacy is present in every procedure but it plays a particu-

larly important role in the civil process. In this process that institution has been founded and developed.

The concept of the title to appear before court is related to another civil concept, i.e. the ability to undertake legal action in civil proceedings (capacity to sue or to be sued). It has a character of absolute prerequisite. This means that if a patient or a doctor haven't this capacity or they have been deprived of it, they can't take part in the action for damages. This term refers to an ability to undertake legal actions related to prosecution a claim in a court. The Code of Civil Procedure grants capacity to sue or to be sued to the following persons²:

1. physical person who has a capacity to enter into legal actions (patients, medical staff)³,
2. legal person and organizational units, so-called imperfect artificial person (health care entity).

Referring the issue of the title to appear before court to cases related to defective granted health ben-

¹ Cf. W. Dolecki, *Postępowanie cywilne*, Warszawa 2005, p. 43; A. Klein, *Elementy zobowiązaniowego stosunku prawnego*, Wrocław 2005, p. 125 et seq.

² Article 65 § 1 of the Code of Civil Procedure.

³ Adults who are not legally incapacitated have full capacity for legal acts (article 11 of the Civil Code).

efits, it should be pointed out that this issue is of prime importance in the action for damages. These are cases brought by patients to common courts not only in connection with medical errors but also with other circumstances related to the functioning of health care entities. These errors, as well as the circumstances indicated, can lead to certain health damage. The substance of the trial is to present the states of two parties and its aim is to resolve the dispute. On the one hand, it's the state of person performing the medical profession (for example a doctor), on the other – a patient who has been harmed due to mismanaged medical services. In this situation an important issue but not always easy to resolve is the question of defining both parties of the dispute, and in particular determining who the defendant is. The plaintiff is a patient or his heirs under specified conditions.

The correct determination of the defendant requires careful examination of many circumstances. Especially the legal basis for the implementation of a particular medical service. The legal basis may be very different, but usually it is based on a specific contract. The contract may be a civil contract so defined by the regulations of the Civil Code (contract, mandate contract) or an employment regulated by labor law. The category to which the contract is assigned, influences the granting of legitimacy to participate in the process of person performing the medical profession who has provided a particular medical service. It is worth emphasizing that the title to appear before court doesn't constitute a general attribute of this person. It is not a permanent feature. Therefore, it must be assessed in each process because it constitutes a special right or obligation to appear before a court as a party in a particular case. In view of the above, the fact of being the perpetrator of the harm suffered by the patient doesn't prejudge the need to act as the defendant. There must be other factors that determine the participation or not, in the process, in particular, the appropriate employment relationship of a person practicing a medical profession, especially a doctor. This relationship determines the existence of passive capacity to be a party in a lawsuit. It is a type of legal obligation and concerns the defendant, justifying his presence in a process in this capacity. Determining who has this capacity is crucial for the patient. It influences the possibility of using his right of action. It means the same as the right to sue and conduct a particular process. If this can't be determined, the patient is at risk of dismissing the claim. Therefore, the court must assess whether the potential parties so the plaintiff and the defendant have the appropriate legitimacy or not, at the time of adjudication on the

substance of the dispute at the latest. It would seem that establishing a capacity to sue is only a simple formality. However, it isn't always a simply formality. The case is complicated, e.g. in case of patient's death. According to article 445 § 3 of the Civil Code a claim for compensation passes to the heirs only when it was considered in writing, or the action is brought during the life of the injured person. However, it should be noted this concerns a non-material damage, so harm. The Polish legal system provides the possibility of indemnification for harm only exceptionally. Therefore, it is difficult to obtain indemnification in this kind of process. It is difficult to imagine a situation in which a patient predicting his death as a result of mismanaged medical services, brings an action. Moreover, it would be premature because it would be before the actual occurrence of harm. He hasn't got a substantive capacity. It means that he has a subjective right or legal interest that can be protected by the court. This interest can be proved only after suffering harm, and not in relation to the probability of its experience. It means in each case a future and uncertain event. This can't be the basis for the formulation of a court action⁴.

However, it is important to distinguish situations when the plaintiff claims compensation for material damage, so for real harm to health. In such cases the rules of granting a right to sue to persons other than the injured person indicate article 446 of the Civil Code. It is worth pointing out its contents in entirety. Thus, according to § 1 of this provision if, as a result of bodily injury or health disorder the patient dies, the person obliged to repair the damage, should pay medical and funeral costs to the person who incurs these costs. Moreover, the person for whom the deceased had a statutory maintenance obligation may request from the person obliged to compensate (e.g. a doctor) a pension calculated according to the victim's needs and to the earning and financial possibilities the deceased person throughout the probable duration of the maintenance obligation. The same pension can be demanded by other close relatives to whom the deceased person voluntarily and permanently provided means of subsistence if it follows from the circumstances that the principles of community life so require.

A very important regulation is § 3 of this provision. This regulation recognizes a right to sue in cases of compensation to the closest members of the deceased's family if, as a result of his death, their liv-

⁴ Cf. W. Siedlecki, Z. Świeboda, *Postępowanie cywilne, Zarys wykładu*, 2 edition, Warszawa 2000, p. 87.

ing standard has deteriorated significantly. The claim for compensation goes to them regardless of whether the claim is brought during his life or not. However, the patient's heirs can be only compensated when the patient could receive a compensation if he lived at the time of the judgment. In addition, the compensation may only be to the extent that it corresponds to the damage that occurred up to the day of his death⁵. Therefore, the circle of persons who can have a right to sue is severely restricted in this case. Similarly, the court may also grant a right to sue to seek a monetary recompense for the harm suffered (§ 4).

In addition, it must also be pointed out that the absence of a right to sue or capacity to be sued leads in principle to the dismissal of claim. However, there is a possibility of avoiding such far-reaching consequences. If it turns out that the patient filed the suit against the person who shouldn't be the defendant in the case, the court at his request or the defendant's request (doctor, other medical practitioner) will call the right person to take part in case. This situation will take place, among others, after examination by the court the employment relationship which connects the person who provides medical services as a result of which a patient suffers damage (including harm) with a health care entity.

Discussing the importance of the issue of the title to appear before court for today's healthcare market, it is important to note that in practice patients bring a suit against medical staff. It is relatively rare that the defendants are medical entities. This is probably due to a lack of knowledge of legal regulations concerning claims related to defective performance of health care services and – in a way right directly combining the damage – with the person who led to this.

Anyway, the possibility to assign a capacity to be sued depends on the nature of the employment relationship in the medical entity which isn't known by patients generally. Therefore patients and medical staff should be informed about the nature of the employment relationship. This would make it easier to identify the process parties correctly. Such information could be available for example in the form of brochures available to interested people. Both patients and people practicing a medical profession have the right to use, in the possible action for damages, formal objections, in particular a lack of capacity to be sued. It is worth raising always this kind of objection, regardless of whether

⁵ Resolution of 7 judges of the Supreme Court of October 26, 1970, III PZP 22/70, OSN CP 1971, no. 7–8, pos. 120.

liability rules for damage arising out of the provision of health services is only in the field of civil law, or some aspects are regulated by labor law.

Discussing the problem of determining the capacity to be sued, so a capacity to appear before the court as a defendant, it is worth noting that at present doctors are employed in public hospitals on the basis of contracts and contracts of employment. The first is a type of civil law agreement, the second is a kind of privileged agreements visible among others in the elements of immunity in the field of civil liability. On the other hand, the standard of employment in non-public hospitals, or clinics and private clinics is employment on the basis of civil law, i.e. contracts, contract of mandate or contracts for the provision of medical services. However, the last type of employment contracts doesn't provide protection against civil liability. This is the exclusion of immunity in this regard. In other words, these agreements don't deprive a capacity to be sued but they exclude the vast majority of circumstances that allow to rely on its absence in the action for damages. It follows the conclusion that the importance of the type of employment of medical staff is clearly increasing nowadays due to the liability for damages⁶. Therefore, it is worthwhile to discuss different types of medical staff's employment and consequences of civil liability for damage caused to patients due to mismanaged health care services.

The first type is employment contract-based job that is essential but it is gradually limited nowadays. It arises as a result of the conclusion of a contract of employment which the principles and essence are determined by the norms of the Labor Code. A worker within the meaning of the Labor Code is only a person employed on the basis of an employment contract, employment relationship based on appointment, nomination, agreement for co-operative employment (article 2 of the Labor Code).

A feature that distinguishes the contract of employment from the so-called civil contracts (contract, contract involving performance), is a specific subject of this contract. In fact, it is work performed personally, under the conditions of subordination, in a place designated by an employer, as well as at his risk⁷. During the

⁶ Widely about this i.a. P. Stępnik, Prawne aspekty odpowiedzialności cywilnej zakładu opieki zdrowotnej oraz jego personelu (in:) Sprawne zarządzanie zakładem opieki zdrowotnej, M. Głowacka, J. Galicki (ed.), Poznań 2010.

⁷ Cf. Judgment of the Supreme Court of 18 June 1998, I PKN 191/98, OSP 1999, no. 10, pos. 184; also: Kodeks pracy. Komentarz (ed.) B. Wagner, Gdańsk 2004, p. 35.

analysis the characteristics of the contract of employment of medical personnel, it is worthwhile to note that its nature and legal status determine the relationship of authority. The organization of medical entities is based on that relationship. The relationship of authority between a person practicing a medical profession (e.g. a doctor or a nurse) is regulated by two legal regulations, located in different areas of law, but complementary to each other. The first one is article 430 of the Civil Code, second article 120 §1 of the Labor Code. Article 430 of the Civil Code states the following:

who, on his own account, entrusts the performance of action to a person who, while performing the action, is subjected to his management and is obliged to follow his instructions, is liable for damage caused by a fault of the person during the performing of the entrusted action.

This regulation governs the rules of liability of a superior for a subordinate (e.g. a medical entity that entrusts the operation). Therefore, follows from the wording of mentioned regulation, a material premise of liability for damage is the relation of authority and subordination between them. Therefore, a supervisor is a medical entity. The medical entity, on its own account, entrusts the performance of an action to doctors and nurses, person who, while performing the action is subject to his management. They are also obliged to follow a superior's instructions. They perform the tasks entrusted to them to the account and risk of the medical entity which employs them.

The rule above is confirmed by article 120 § 1 of the Labor Code. It states that in the event of causing harm to a third party by the employee during the performance of his duties, only the employer is obligated to compensate damage. This means that the medical staff haven't got a capacity to be sued in cases of compensation for damages caused to patients during the provision of medical services. Consequently, this capacity is granted to the employer who is the supervisor.

However, in the doctrine of medical law the question of the autonomy of doctors during provision of medical services raises doubts⁸. They are professionals prepared to perform medical tasks in the course of specialized studies as well as obtaining specific specialization. They have a wide range of autonomy in making

medical decisions⁹. Nevertheless, it must be assumed that it only covers strictly medical activities related to the application of medical art. This isn't applied to activities that accompany them, such as technical and organizational issues (e.g. choice of operating block, type of medical equipment used, scheduling and operating rules, team selection, selection and protection of tool, etc.). In this regard, decisions are taken by the authority of the medical entity, i.e. their superior.

An important consequence of the above-mentioned characteristics of employment of doctors, nurses, midwives, and other medical professions is the specific regulation of the civil liability of medical personnel for the damage caused to patients in connection with the provision of health services. They are defined by article 114–122 of the Labor Code.

Generally it can be estimated that an employee of a medical entity who, due to failure to perform or improper performance of work obligations, has caused harm his employer due to his fault, shall be liable for financial responsibility according to the principles which are clearly mitigated as compared with the general civil law system. One element of this mitigation is the transfer of capacity to be sued to the employer. According to the content of article 114, and article 120 § 1 of the Labor Code in particular, he is entitled to employment immunity. This immunity excludes the capacity to be sued¹⁰. This means that a doctor, nurse or paramedic can't be a party to the lawsuit. When they are sued, it is enough to declare that they have been performed a defective medical service as a staff member of a hospital, a clinic, a laboratory, etc. to evade participation in the case. As a consequence, the court calls the medical entity who employs them. However, it should be noted that the employment of staff in such way is associated with a certain economic risk which can be minimized by promoting alternative employment relationship.

However, the principles of civil liability relieve doctors, nurses, midwives, etc. from the obligation to diligent and careful provision of health services is very beneficial. On the contrary, they must be performed in accordance with the best medical knowledge, with the due care required in certain medical circumstances. Violation of these rules allows to talk about the unlawfulness of the employee's action and his guilt. This is the basis of his civil liability, at the same time the con-

⁸ Śliwka M. Zakres odpowiedzialności podmiotu leczniczego wobec pacjentów. In: Pasowicz M. (ed.). Zarządzanie podmiotami leczniczymi. Kraków 2012; p. 221.

⁹ Bieńka G. (ed.). Komentarz do kodeksu cywilnego. Warszawa 2005; p. 365.

¹⁰ Dzienis P. Odpowiedzialność cywilna za szkody wyrządzone przy udzielaniu świadczeń zdrowotnych. In: Górski A, Dzienis P Bieńka G (eds.). Regulacje prawne w ochronie zdrowia. Białystok 2006; p. 173.

ditions sine qua non of this liability. However, a medical entity must investigate whether the following conditions exist at the same time to apply to a subordinate or to a court for compensation:

1. a person who provided health care services acted unlawfully, i.e. the person has failed to perform or improperly performed employee duties, which consisted of conscientious medical help¹¹;
2. there is a causal link between the harm done to the patient and this unlawful act. It is therefore concluded that it is important that an employer, i.e. a medical entity, checks the doctor's qualifications and draws up a detailed description of employee responsibilities. This will prevent it from finding out whether a doctor violated unlawfully his obligations. This description becomes particularly important if the injury was caused to the patient not by mistake but because of the circumstances caused by doctor's or nurse's fault (for example, they were late for surgery, the doctor didn't monitor long enough and intensive patient health after medical treatment, etc.);
3. the doctor's action, a nurse's or other medical practitioners' action was culpable. This issue should be developed more.

Discussing the concept of guilt in general, it should be stated that it is a deviation from the required diligence in certain circumstances during the performance of professional activities. The diligence is required in all professional activities performed by medical staff regardless of its category. It follows that the guilt of a doctor, a nurse or a midwife, etc., is stated when comparing their medical performance with the accepted model, there are deviations from it. In other words, a good doctor, a nurse, is someone who, in identical conditions, would avoid harming the patient. Their guilt can appear in three forms:

1. negligence. This refers to the lack of due diligence and caution during the performance of professional activities, in particular the deviation from accepted procedures, premature cessation of treatment,
2. awkwardness and inattention,
3. forgetfulness or omission, e.g. omission of necessary diagnostic tests, lack of precaution in predicting the effects of surgery, failure to inform the patient of necessary rehabilitation, necessity of continuation of treatment, control tests, etc.¹²

¹¹ Conscientious and careful execution of employee obligations is imposed by article 100 of the Labor Code.

¹² Serwach M. Przesłanki odpowiedzialności cywilnej lekarza za szkodę wyrządzoną pacjentowi w orzecznictwie sądów polskich. *Prawo i Medycyna*. 2006;4.

It is worth noting that the specific form and degree of the fault are irrelevant for the purpose of establishing liability for damages. According to the general jurisdiction of the common courts and the doctrine of civil law, a doctor is responsible for every form of civil guilty and regardless of its degree¹³. It should be assumed that the above applies also to a nurse and midwife as a higher qualified, specialized staff.

Discussing the importance of guilt for liability for injury to patients, it should pay attention to the difference between doctor's or nurse's guilt and a mistake in medicinal art¹⁴. An example of such a mistake is the medication error. This type of error itself doesn't determine whether the action is culpable. In the jurisprudence the concept of error is defined narrowly for a long time. It only refers to a doctor's act or omission in the field of medical diagnosis and therapy, which is contrary to the principles of medical knowledge, but within the scope available to the doctor¹⁵. It is worth emphasizing this last part, because according to it, medication error constitutes an objective element of guilt¹⁶. In other words, this is due to a doctor's activity who violates the principles of medical knowledge. However, it can be – and it is usually – completely independent of a particular person. More precisely, it is independent of his individual characteristics, inclinations and skills, as well as the circumstances in which he undertook activities in the field of diagnosis and therapy. In a such situation, it can't cause his civil liability. For the incurrence of liability for damage, it is necessary a subjective fault simultaneously. This is the case when a doctor doesn't give due diligence in providing health care services. The error arises when a doctor is aware of the duty to act diligently but doesn't perform it. Even worse, when such consciousness doesn't exist, though he should have it. Thus, for example, civil liability doesn't arise in the case of a misdiagnosis in a healthy person, justified by the symptoms present. There is no damage if as a result of this misdiagnosis, the treatment was taken and in the event of a real illness would be appropriate, and this treatment didn't bring negative consequences for the person besides transient ailments. We can't ask for a doctor to be infallible, as well as stop him or

¹³ Chodzi tu także o winę najlżejszą. Cf.: Nesterowicz M, op. cit., p. 277; Zajdel J. *Prawo medyczne dla kardiologów*. Łódź 2009; p. 149.

¹⁴ Cf. Judgement of the Supreme Court, April 1, 1955, case number: IV CR39/54, public. W OSN 1957/1, pos. 7.

¹⁵ Kokot R, Banasiewicz M. Z problematyki karnej za błąd w sztuce lekarskiej. *Nowa kodyfikacja prawa karnego*, vol. XXIV. Wrocław 2009; p.71.

¹⁶ Marek Z. *Błąd medyczny*. Kraków 1999; p. 110.

her from making decisions about treatment in doubtful situations. It would be difficult to prove that he violates patients' interests¹⁷.

In addition to all that was said above about the benefits of employment contract-based job what is evident in the employee's benefit principles of determining his civil liability, it is worthwhile to give some remarks about the solidarity. This is the situation when more than one person have a capacity to sue or to be sued. In our field of interest, it involves the patient and the medical staff and the medical entity which employs them on the employee's rights. However, the subject of a patient's claim is only one benefit, i.e. the payment of compensation. Its fulfillment expires the entire joint and several liability. It is easy to notice that on the basis of such construction the patient could sue both the doctor and the hospital. He could also choose to sue some entity in particular or both simultaneously.

In terms of joint and several liability, provisions of the labor law radically adjust the scope of such liability in favor of the doctor. They exclude his joint and several liability with the employing entity. He benefits from the loss of his capacity to be sued in the action for damages¹⁸. This means that in every case when a doctor is employed on the basis of an employment contract, only the medical entity is responsible for any errors and omissions made by him, in particular for errors in medicinal art. This applies to any entity, whether public or non-public (e.g. hospital, medical co-operative, and even private clinics).

In summary, the civil liability of medical personnel for defective treatment, negligence, etc., employed on the basis of a contract of employment, has been greatly reduced by the provisions of labor law. This is manifested in the transfer of his legitimacy to appear before the court as defendant to the medical entity, e.g. hospital. The hospital has only the right of recourse against the staff. However, it may only use it when the damage done to the patient has been compensated. This means that it must first occur in the process itself, based on the capacity to be sued.

The regulations on civil liability for damage caused to patients while providing medical services on the basis of employment based on civil law contracts, are much less favorable. A mandate contract is an exam-

ple of civil law contract currently used in the medical services market. Its essence is defined in article 734 § 1 and 735 § 1 of the Civil Code. So, in accordance with article 734 § 1 and article 735 § 1 of the Civil Code, under the mandate contract, the mandatory commits to perform a specific legal act for the mandator. If neither the contract nor the circumstances indicate that the mandatory has committed to perform the mandate contract without remuneration, remuneration is due for performing the mandate. It follows from the above provisions that the contract of mandate is distinct from the contract of employment. The point is, in particular, that the mandatory (doctor, nurse, etc.) does not work – does not provide medical services under the direction of the mandator (medical entity) but entirely on his own account. In addition, they are not obliged to perform it at the place indicated by this entity. However, the result of the exclusion from the relationship of supremacy is that the mandatory retains a capacity to be sued, both group and individual. As a consequence, they can be sued alone or together with the medical entity (the principle of solidarity) in the process of compensation for damages caused to the patient.

This situation is much less favorable for medical staff, especially doctors, nurses and midwives. The injured patient can only sue the doctors, e.g. in the situation when the medical entity employing them becomes e.g. insolvent. In a such case, a doctor will be obliged to pay the full amount even if the compensation was awarded from the hospital and the doctor jointly and severally.

A similar situation exists in the case of employment based on the contract. In both cases, the doctor has a capacity to be sued (beside the medicinal entity who employed him). Doctors' civil liability on the basis of such legitimacy is unlimited in principle. This means that in the event of injury they are personally responsible, i.e., the entire property. It is therefore worth insuring yourself against the risk of such liability. Insurance excludes the capacity to be sued.

By concluding a short overview of the issue of determining the title to appear before court in action for damages because of the harm caused to patients during and in connection with provision of health services, it is worthwhile to formulate the general conclusions, summarizing the most important theses.

The modern labor market and medical services is very flexible. This is reflected in the legal regulations governing the risk of harm to patients using these services. Their development and simultaneous differentiation of the level of protection from civil liability is the

¹⁷ A similar position was taken by the Supreme Court in its judgment of 8 December 1970 in case II CR 543/70; public. OSN 1971, pos. 136.

¹⁸ Cf. art. 120 § 1 of the Labor Code: in case of causing damage to a third party by an employee while performing employment duties, only the employer is obliged to repair it.

consequence of the rules of market economy. This has its advantages and disadvantages indicated above.

So, the legal solutions discussed above allow to conclude different employment contracts depending on the needs of employers, doctors, nurses, midwives, etc. Each of them must however evaluate and decide what he wants to achieve through a specific agreement. Different employment contracts give not only different benefits, such as remuneration, but involve different risks..

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Correspondence address:

Piotr Stępniański
Department of Medical Law
Poznan University of Medical Sciences, Poland
11 Smoluchowskiego Street, 60-179 Poznań, Poland
email: pstepniak@ump.edu.pl