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Mediation in judicial process relating to medical errors as an additional mechanism to ensure the constitutional right to judicial protection in Poland

Suitability mediation in resolving civil disputes has been confirmed in many practical situations. In the literature mediation has been described as a social phenomenon.

It is believed that the emergence of mediation is closely connected to the history of inter- states relations, where the conflict between them was resolved by independent third person (or institution). These were the people that everyone trust and who tended to reconcile the disputants, and is advantageous to both parties services.

Currently, mediation is interpreted as a way to resolve conflicts, the goal of which is an agreement that can satisfy each party to the dispute[1]. Due to the lack of common terminology, fixed by law, the doctrine offers a variety of definition for mediation. However legal opinio communis said that the parties have to come to an agreement, and the mediator must be accompanied in reaching such agreement[2].

Development of methods of alternative dispute resolution is increasingly commented in the legal literature[3]. However in the Polish-language publications there is lack of studies about the place of mediation in medical disputes, sespecially in cases of medical errors.

[1] *See* A. Jakubiak-Mirończuk, Alternatywne a sądowe rozstrzyganie sporów sądowych, Pub. Business Kluwer Polska, Warszawa 2008, p. 42, see also R. A. Baruch Bush, Joseph Folger, The promise of mediation: the transformative approach to conflict, Wiley Publishers, San Francisco 2005, s. – P. 7–37.

[2] *See* J. G. Merrills, International Dispute Settlement, ed. 4, Pub. Cambridge University Press, Cambridge 2005. – P. 29.

[3] *The* process of expansion of the field to mediate see B. Stańdo-Kawecka, Prawo karne nieletnich: od opieki do odpowiedzialności, Pub. Wolters Kluwer Polska, Warszawa 2007. – P. 102.

From this point of view, the debate about use of mediation in medical disputes is particularly important, as this topic has been widely discussed in the international literature[4]. Obviously, the potential of mediation in medical disputes is also important for Ukraine.

The need to apply mediation in judicial proceedings related to the medical error is a result of the fact that such lawsuits road, and decisions of the courts are not always valued by stakeholders as fair. Moreover, such processes in Poland and other countries are quite lengthy.

A growing sense of justice in the Polish society is the fact that in 2010, the Commissioner for Patient received 28,735 applications, including treatment aimed at Human psychiatric patients in writing. In response to treatment, according to art. 51 § 2 of the Law «On the rights of the patient and the Commissioner for Human patient» was published 2228 regulations on the possibility of the applicant or patient legal aid[5].

The bill on amendments to the law «On the rights of the patient and the Commissioner for Patient», as well as in some other laws says that on average, the proceedings on the claims for medical errors duration is 4 years. However, there are ten-year process[6].

The studies conducted by the legislator, shows that in 2001 and 2006, show how in this field has increased awareness of the law of patients. In 2000, 64% of respondents believed that if they or their families in the treatment process would damage the health caused by the alleged error or negligence of medical staff, they would have filed a lawsuit in a medical trial. In 2006, the figure was already 74% (up 10%). In 2000, an action for damages in the courts because of a medical error was set 60% of the Poles, and in 2006 already 72% (up 12%).

Studies show that the amount of compensation for damage to health has been steadily increasing. Thus, for example, infection with jaundice in 2000, the amount of compensation for damage was around 168,000 PLM, and in 2006 – 345 825 PLN. In the case of death of the amount of compensation of harm, as in 2000, and in 2006 was around 500,000 PLN (to 512 000 PLN and 502 944 PLN). The largest amount that the state paid the patient is 600 thousand PLN excluding interest (HIV infection), and the benefit to the victim, as a rule, is 4 – 6000 PLN per month[7]. Ministry of Justice of the Republic of Poland has provided information that in 2001 – 2009 years in the courts each year was examined about 330 cases for damages caused to the health service[8].

The growth of civil justice increases the number of appeals to the court. At the same time, it should be noted that cases involving medical errors, especially outraged society and weaken trust to the doctors[9].

In contemporary legal system, claims related to medical errors are civil matters within the meaning of Art. 1 of the Civil Procedure Code of the Republic of Poland. This means, above all, the admissibility proceedings on such claims, and the fact that the disputed claims regarding medical errors, refer to the state court jurisdiction[10].

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[4] *Bibliography* will be presented in later sections of the study.

[5] *See* Report on the implementation of tasks results from the act of 6 november 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta oraz przestrzegania praw pacjenta na terytorium Rzeczypospolitej Polskiej, 8 December 2011 r. – P. 11–22.

[6] *Government* Justification a bill amending the law on patients' rights and patient Ombudsman and other acts., Sejm Paper, Vol. 3488 z dnia 15-10-2010 r. – P. 2.

[7] *Government* Justification…, Vol. 3488 z dnia 15-10-2010 r. – P. 2.

[8] *Government* Justification … – P. 18.

[9] *See* B. L. Remakus, The Malpractice Epidemic: A Layman's Guide To Medical Malpractice, ed. 2, Pub. Ashley Books Inc., Lincoln 2004. – P. 150.

[10] *Justification* of the bill.

Prima facie problem for patient laid in legal costs, which are about 5% of the price of a civil action, but not less than 30 PLN and not more than 100 thousand PLN[11].

New alternative way to resolve disputes is a medical procedure before the Provincial Medical Commission. The legislator is of the opinion that this is the negotiation process-mediation[12]. Such commissions differentiated. Provincial Committee consists of experts in the field of medicine and law, which are the representatives of the medical and legal authorities, and authorized patient organizations operating in the province, representatives of the Ministry of Health and the Commissioner for Patient Right. After the meeting, Provincial Medical Commission shall issue a written decision on the medical incident or its absence. Consideration of the application does not exceed four months from the date of receipt of application. At the same time, the legislation provides for the possibility to apply for a retrial. This right belongs to the applicant in Poland, hospitals, and insurance companies[13].

However, between mediation and meetings of the Provincial Medical Commission there is a fundamental difference. In mediation the parties works on the agreement. Process before the Provincial Commission – is a special procedure – some procedural form of Arbitration. The Commission shall determine the facts, acts in accordance with selected provisions of the Civil Procedure Code, and finally gives a resolution in writing of the medical incident or its absence.

In this regard, it is worth to justify the benefits of mediation in medical disputes. For example, in the U.S. advertising mediation shall have the following objectives: to promote personal confidence to medicine, to strengthen this position by improving the image of physicians with high quality, trust medical expertise. As a result, patients are increasingly avoiding lawsuits with physicians. Therefore, this method helps in the broad sense the entire health care system[14].

The opposite situation occurs in the case of the traditional process. It is believed that the behavior of the person affected to determine the next economic model: the victim make investment decisions based on the chance for a refund or economic values through the judicial process. The expenses on the process should include legal costs, the probability of failure (risk management), other costs (fees a trustee), and other economic variables which justify the behavior of the plaintiff. In such situation, the confrontation of the parties can only worsen[15].

The experience of other legislators shows that health service mediation is also beneficial. Everyone knows that public hospitals are under tremendous pressure to budget constraints. Not given in the budget to outsource to specialists in alternative dispute resolution, hospitals rely on traditional risk management system, which has its limitations and high costs.

Mediation can provide the medical dispute to choose its own funds in order

[11] *Art*. 13 Act of 28 July 2005 r. The court costs in civil cases (Dz.U.2005.167.1398).

[12] *In* the author's opinion, to say that it is proceeding amicably-mediation is not entirely accurate. Analysis of the leads to the belief that seeking to determine appropriate reimbursement seems to amicably-arbitration.

[13] *Goverment* Justification … – P. 1–11.

[14] *See* R. Gatter, Institutionally sponsored mediation and the emerging medical trust movement in the U.S, Medicine and Law, Vol. 23, 2004. – P. 201.

[15] *E. A. Dauer* I L. J. Marcus, Adapting Mediation To Link Resolution Of Medical Malpractice Disputes With Health Care Quality Improvement, Law And Contemporary Problems, Vol. 60: No. 1. –P. 202.

to implement their individual needs[16]. Tracking these decisions in disputes about medical malpractice, one will notice that it is the lack of dialogue between doctor and patient is the cause of filing a claim. Process before the Provincial Medical Commission, although it is more convenient for the patient, it also has a distinct character of the confrontation.

Research conducted in New York, are also unexpected information that the average mediation lasts 2.34 hours, with the average amount paid was $ 111.000 redress[17].

It seems that mediation is a great chance for patients who, for economic reasons refuse lawsuits against doctors, because they have no money for legal fees or other expenses[18]. Mediation can afford a far greater number of people. These patients want as quickly as possible get the money at the lowest cost[19]. From this perspective, the process before Voivodeship Commission also looks like a reasonable alternative to traditional litigation system.

Some representatives of the doctrine expresses concerns about the lack of legal regulation of the profession of mediator, since not even the minimum requirements defined by its competence. Some point to the fact that the composition of practicing mediators include people with different education, intellectual capacity and training. In addition, a number of accusations voiced in the absence of objective control, heterogeneity of the methods, and even depending on the whims of mediation mediators[20].

In the author opinion, such arguments cannot be accepted, because now every professional mediation center has its own standards for the mediation process, as well as coordinating mediators for all their diverse personality[21].

It seems that all parties of the dispute which is solved in the mediation process, can feel the final winners. However, the question still remains – why mediation is not as popular and widespread as it could be? In English literature indicate factors such as lack of trust in the other side, the so-called therapeutic illusion, religious views, externalization of the conflict, unstable family situation, the lack of confidence in the power of law[22] and the phenomenon that is called BATNA[23].

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[16] *See* Law Reform Commission, Consultation Paper Alternative Dispute Resolution, Pub. Law Reform Commision, Dublin 2008, p. 218–219, also Lord Woolf in his report Access to Justice z 1996 expressiss verbis said that «NSome victims simply want more explanation or apology than financial compensation, but are forced to chronic litigation, because there is no other way to solve problems.» Par. 14, report available: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm

[17] *C. S. Hyman* and C. B. Schechter, Mediating Medical Malpractice Lawsuits Against Hospitals: New York City's Pilot Project, Health Affairs, 25, no. 5 (2006). – P. 1394.

[18] *S. Sybblis,* Mediation in the Health Care System: Creative Problem Solving, Pepperdine Dispute Resolution Law Journal, Volume 6 | Issue 3, 2012. – P. 11.

[19] *P. E. Bernard,* Mediating with an 800 – Pound Gorilla: Medicare and ADR, Washington and Lee Law Review, Volume 60 | Issue 4. – P. 1429.

[20] *See M. L. Moffitt,* Schmediation and the dimensions of definition, Harvard Negotiation Law Review Vol. 10, 2010, p. 77, the author even does not hide his distaste for mediation.

[21] *Mediation* Centre at OIRP Warsaw has such rules available at: http://www.osrodekmediacji.info.pl/przepisy.html#REGULAMIN_OSRODKA_MEDIACJI The vast majority of mediators is authorized solicitor or advocates.

[22] *See T. M. Pope,* E. A. Waldman, Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure, Ohio State Journal On Dispute Resolution, Vol. 23: – I 2007. – P. 143.

[23] *«best alternative to negotiated agreement»,* see. S. Shortell i A. Kaluzny's, Healthcare Management: Organization Design and Behavior, Pub. Delmar Cengage Learning,Clifton Park NY, 2012. – P. 214.

As the practice in the United States proved the legal regulations concerned alternative dispute resolution in medicine, did not meet the expectations facing it. Legislator a priori estimates which requirements are most important to the patient. Generally, findings are that the most important monetary factor. It is certainly important, but it is also important damage resulting from the patient, have not been able to establish a dialogue with doctor. So nor American law was able to reflect these expectations, as well as the every other one[24].

The biggest enemy of mediation in the health service is traditionally negative attitude of health care entities in a medical activity[25]. The U.S. experience shows that doctors are extremely reluctant to mediation, preferring to remain outside the process. This is due to various reasons, including a reluctance to accept his own mistake[26].

It follows that it is necessary to direct action to change the thinking of the axiology of both patients and physicians and the entire health service. Such changes will eventually lead to the spread of mediation and alternative methods of conflict resolution[27]. It seems that actions aimed for promoting mediation should expect from both organizations that defend the rights of patients, and the lawyers who work in health care.

The question about the subjects of mediation, which prima facie might seem obvious, is not at all so simple. First of all, in the mediation should involve a doctor and patient is the victim, as well as a mediator.

Should she be a person with a legal background, or should be a doctor? According to the author, the second is not an option, because ab initio parties must unanimously choose a mediator, but then the behavior of the mediator, the doctor may be regarded as a defense of particular interests of doctors. The choice of a mediator-lawyer would be more acceptable solution, because it has a clear view of the functioning of the court and the execution of court decisions. Of course, «medical» mediator should be familiar with medical conflicts, including the so-called medical culture.

An illustrative example: the American medical industry is not open to working with the «general» neurotransmitters. In their view, the mediator, who works with the patients, be sure to know the subtleties of cross-cultural health care[28].

In addition, it should not be to the employment relationship with any medical institution.

In mediation should involve doctors and hospitals, or any other entity, which will be a potential defendant in the case of medical error if the conflict still goes to court. This is evident in terms of liability. And the presence of a doctor will help in clarifying the reasons for choosing a particular method of treatment, the appearance of possible complications, etc.

Some scholars hold the view of mediation that the parties to the conflict should receive legal aid. In this case, if one of the parties can assess their chances for a

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[24] *See* N. C. Meruelo, Mediation and medical malpractice- The Need to Understand Why Patients Sue and a Proposal for a Specific Model of Mediation, Journal of Legal Medicine July-September, 29 J. Legal Med 2008. – P. 285.

[25] *See* R. Gollop (red.), Influencing Sceptical Staff to Become Supporters of Service Improvement: A Qualitative Study of Doctors' and Managers' Views, 13 Quality & Safety Health Care, Vol. 13, (2004). – P. 108.

[26] *See* H. Morreim, Malpractice, Mediation, And Moral Hazard: The Virtues Of Dodging The Data Bank, Ohio State Journal on Dispute Resolution Vol. 27, 2009. – P. 109.

[27] *See* V. L. Morrison, Heyoka: The Shifting Shape Of Dispute Resolution In Health Care, Georgia State University Law Review, Vol. 21, 2005. – P. 931–963.

[28] *See* M. R. Lebed, J. J. McCauley, Mediation Within The Health Care Industry: Hurdles And Opportunities, Georgia State University Law Review, Vol. 21, 2005. – P. 914.

successful resolution of the dispute, if it is to some extent does not trust the mediator (which calls into question the meaning of mediation per se), it may use the services of a lawyer. According to the author, it is preferred that the party benefited by a lawyer before the mediation process[29].

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Thus, summing up, I can say that for many people the easiest way to get justice is trial, which can meet the patient's financial claims, but is expensive and emotionally exhaustive process. Trial with the Provincial Commission is a cheaper and faster way, but its parameters close to the court of arbitration. The parties in this situation can only be witnessed processes as unable to participate in a conciliation agreement. Process before the Provincial Commission does not grant the disputants that can provide mediation. Civil process, not including medical specifics, alienates the patient from the doctor, reinforcing the already strong conflict between them.

Completely different result provides mediation in medicine. Mediation improves communication, facilitating the exchange of information, focuses on the human aspect of the conflict, provides an opportunity for reconciliation and rapprochement[31].

To some extent, purpose medicine and mediation realize the same goals. Benefits to the health service in terms of risk management also confirmed by studies. Summa summarum all of society benefits. No additional legislative regulation of mediation. Provisions set out in the Civil Procedure Code of Poland, is quite enough[32].

De lege ferenda, in the author opinion, should be to prevent the mediation process before the voivodship commissions. This will move the Patient from the perspective of an observer on the position of the participants of the process and allow it to influence the outcome. Studies show that the legislation currently does not have time to watch the changing needs of society, properly representing patients' expectations.

As shown, the obstacles to the introduction of mediation often only seem serious. Mediator professional should level out the differences in the economic, social, cultural, and other potential parties to the dispute[33]. At the same time, the problem is the confrontation between the consciousness of lawyers standing on opposite sides of the process.

And, most importantly, mediation is useful to patients – the people affected, their families, on the one hand and on the other hand – the doctors and the health system. In addition, mediation improves public perception of health services and from this point of view is beneficial to society as a whole. Obviously, given the above cited arguments in favor of the use of mediation in medical disputes in Poland, Ukraine burn considering a similar experience in reforming the relevant industry legislation.

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[29] *See* J. M. Nolan-Haley, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking, 74 Notre Dame Law Review. – P. 775.

[30] *In* the presence of a lawyer during the mediation, the role of see S. Hardy, O. Rundle, Mediation for Lawyers, Pub. CCH Wolters Kluwer Business, Sydney, 2010.

[31] *See* E. Galton, Mediation Of Medical Negligence Claims Symposium: Medical Malpractice Dispute Resolution, Capital University Law Review, Vol. 28, 2000. – P. 321.

[32] *In* terms of the obligation to mediation see F. Yee, Mandatory Mediation: The Extra Dose Needed to Cure the Medical Malpractice Crisis, Cardozo Journal Conflict Resolution, Vol. 7, 2005–2006. – P. 393.

[33] *See* A. McMullen, Mediation and Medical Malpractice Disputes: Potential…

Мендик Б. Медіація в судових спорах, пов'язаних з лікарськими помилками, як доповнення конституційного права на судовий захист

Стаття присвячена актуальним проблемам теорії і практики впровадження медіації в судовий процес, пов'язаний з медичними помилками як додатковий правовий механізм забезпечення конституційного права на захист. Розглянуто переваги та недоліки законодавчого регулювання медіації та діяльності пов'язаних з нею юридичних органів у Польщі. У висновках запропоновано шляхи і засоби для вдосконалення посередництва у Польщі.

Ключові слова: медіація, інститут посередництва, медичний спір, пацієнт, Комісія пацієнтів Воєводства з вирішення медичних спорів.

Мэндык Б. Медиация в судебных спорах, связанных с врачебными ошибками, как дополнение конституционного права на судебную защиту

Статья посвящена актуальным проблемам теории и практики внедрения медиации в судебный процесс, связанный с медицинскими ошибками как дополнительный правовой механизм обеспечения конституционного права на защиту. Рассмотрены преимущества и недостатки законодательного регулирования медиации и деятельности связанных с ней юридических органов в Польше. В заключении предложены пути и средства для совершенствования посредничества в Польше.

Ключевые слова: медиация, институт посредничества, медицинский спор, пациент, Комиссия пациентов Воеводства по решению медицинских споров.

Mendyk B. Mediation in judicial process relating to medical errors as an additional mechanism to ensure the constitutional right to judicial protection in Poland

The article devoted to actual problems of the theory and practice and introduction of mediation in litigation process related to medical errors as an additional legal mechanism to ensure the constitutional rights of defense. The advantages and disadvantages of legislative regulation of mediation and related to it legal enforcement in Poland. At last it present the ways and means to improve the mediation process in Poland.

Key words: mediation, mediation institute, the medical dispute, the patient Voivodeship patient Commission for resolving medical disputes.