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CIVIL LIABILITY FOR A NURSE'S MEDICAL FAULT. SELECTED ISSUES[2].

Abstract:
This argument is a comparative study of liability for a medical fault committed in the performance of a nurse's work. The work is a consideration of a theoretical-dogmatic nature, based largely on the provisions of Polish legislation. The interest in the chosen topic of medical fault is considerable due to the broad basis for independent liability in both civil law, criminal law and disciplinary form. Due to the considerable complexity of the activities, decisions and actions entrusted that characterise the nursing profession, practitioners are exposed to a real risk of error, and therefore the issue indicated has become the apex for the present analysis of the selected type of liability - civil legal.

Keywords:
medical fault, financial liability, adverse behaviour, claim.

The aim of this paper is to attempt to introduce and characterise collectively the issue of civil liability for a nurse's medical fault using current legislation and literature.

In order to analyse the leading theme, it is first necessary to introduce and systematise the basic concepts for looking at the indicated topic. It is worth considering the basic definition of " medical fault ", medical malpractice" or "medical malpractice". The scope of the term is nominated by the words used in it, the terms are often used interchangeably, treating them as synonyms. They

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are colloquially used depending on whether they refer to an alleged error by a doctor or medical personnel. As a general rule, everyone in the medical profession is at risk of making a medical/ medical fault, not in every case it may be a medical/medical malpractice fault, because, not all medical professionals are doctors, but every doctor represents the medical profession [1]. However, for the purposes of this paper, I believe it is appropriate to approximate the theory of PhD R. Kędziora which suggests as the broadest concept, indicated for use in contemporary literature, the term " medical fault " in relation to a wider number of designators and " medical fault " in relation to an error committed by a doctor. He also points out that the possible interchangeable use of the term "malpractice" results from the archaic formulation of the subject matter, which has been established over the years by judicature, legal language and public awareness. The indicated norms do not have a legal definition contained in the current legislation, while the legislator, introduced a broader concept in Art. 3 ust. 1 pkt 1) Act o Prawach Pacjenta i Rzeczniku Praw Pacjenta [2] (uppirp). Namely, a 'medical event', and according to the statutory definition it is *occurring during or as a result of the provision or nonprovision of healthcare:*

a) infection of a patient by a biological pathogen,
b) personal injury or disorder of the patient, or
c) death of the patient

- which could have been avoided with a high probability if the healthcare service had been provided in accordance with current medical knowledge or if another diagnostic or therapeutic method had been used, unless there was a foreseeable normal consequence of the use of a method to which the patient had given informed consent[2].

The literature abounds with a multitude of more or less elaborate definitions, but from the point of view of this study it is worth quoting the concept proposed by PhD P. Zielińskiego, who held that "a medical fault is an act or omission of a medical professional that is incompatible with the current state of medical knowledge and practice, committed against a patient inadvertently, in the process of providing him with health services"[3]. In addition, it should be noted, the dispute in the doctrine, which suggests different classifications of medical faults. Universally typology distinguishes four types of errors: diagnostic, therapeutic, technical and organizational error. At the same time, for the purposes of this brief work, it should be briefly assumed that diagnostic error and therapeutic error are predominantly related to the process of performing treatment services contrary to accepted norms, behavior and medical knowledge. In contrast, technical error and organizational error usually result from violations of the rules of prudence, knowledge, negligence or mistake [4].

Most importantly, the mere occurrence of a medical fault is not sufficient for the occurrence of civil liability, which is essentially property liability. For the occurrence of liability for damages resulting from a medical fault, it is necessary that there be a so-called logical sequence of cause and effect. The literature on the subject shows that it happens that a patient considers as a medical fault a different result of the nursing services provided to him than the one he expected. It is impossible not to point out that an unfavorable result, can be caused by the inability to prevent adverse effects on the health or life of the patient, it is not necessarily the result of inadequate action of medical personnel. Many times, for objective reasons that lie beyond the causal capacity and current knowledge of even the most experienced and professional nurses.

Liability of a nurse for a medical fault nominates the occurrence of three absolute prerequisites altogether [5]:

- *first, there must be a harmful event nominating liability in the form of a tort or a failure to perform or improper performance of an obligation incumbent on the nurse in this case,*
- *second, there must be an injury of a pecuniary (personal or property) or non-pecuniary (non-material) nature;*
- *third, there must be a normal (adequate) causal relationship between the event and the resulting damage* [6].

Fundamentals of the employment and responsibility

The guiding principles for the practice of the profession by nurses are determined by the Act o zawodach pielęgniarki i położnej dated 15 lipca 2011 r [7]. It is a rule from the Act that the nursing profession is an autonomous medical profession. Significantly, the aforementioned independence of the nursing profession constitutes the various forms in which it provides its services, pursuant to Art. 19 ust. 1 Act o zawodach pielęgniarki i położnej:

- on the basis of an employment contract,
- on the basis of an employment relationship,
- on the basis of a civil law contract,
- within the framework of voluntary work,
- within the framework of professional practice.

It is the form of employment that determines the type of liability incurred by the nurse for any medical fault he or she may commit.

In practice, nurses carry out doctor's orders, but on the basis of the Regulation of the Minister of Health of 28 February 2017, there is a wide range of activities listed as a closed catalogue that they can carry out on their own without a doctor's order, based on their own competence and as a result of making their own decisions.

According to practice, the most common form seems to be the employment contract. Such an employment relationship nominates the liability of the

treatment facility in the first instance for any medical fault of the nurse. Importantly, however, the medical establishment that incurs liability to cover the damage caused by the error has a 'recourse claim' against the nurse under Article 441 of the Civil Code (k.c.) for the damage to the property it was forced to cover as a result of the nurse's breach or failure to fulfil the imposed employment duties [8]. From the provisions of Art. 119 kodeksu pracy (k.p.) [9] implies a limitation of the amount of the potential claim provided that the indicated error was unintentionally caused, in which case the employer may claim on the basis of the said recourse from the nurse the amount he paid to, for example, the patient or the patient's family. However, the nurse's repayment may not exceed three months' salary. In the case of intentional damage, the provision indicated does not apply, and therefore there is no limitation on the amount of the employer's property damage liability under Art.122 k.p. the nurse is liable for the costs up to the actual payment made by her employer in the first place. Therefore, ultimately, the liability of the contracted nurse is of an employee nature as the employee bears the financial consequences resulting from the damage to the employer's property, but in most cases, due to an unintentional error, the liability is limited.

In the situation of the provision of work by a nurse as interpreted by the Art. 33 Act date 15 kwietnia 2011 r. o działalności leczniczej (dalej u.dz.l.) in the framework of the individual practice of a nurse exclusively in a medical establishment on the basis of an agreement with the medical entity operating that establishment or in the individual specialised practice of a nurse exclusively in a medical establishment on the basis of an agreement with the medical entity operating that establishment. Any liability for damage arising from the unlawful performance or non-performance of health services by the nurse shall be borne jointly and severally by the healthcare provider and the nurse party to the contract. These contracts are civil law contracts, the essence of which is generally defined in Article 734 of the Civil Code. In the case of these contracts, unlike an employment contract, the contractor does not perform his work under the direction of the principal. A civil law contract is work on one's own account, which also nominates a different way of responsibility for a wrongful act on one's "own account".

The nursing profession is a job with great responsibility and risk, not only in the sense of having power over human life, but also the consequences incurred for possible deviations from the norms of behaviour prescribed by law and knowledge or expectations. This short study aimed to address a polemic on an extremely important topic concerning the types of responsibility indicated in selected aspects and the differences between their bases. Due to the complexity of the subject matter and the number of types of actual liability of the nurse, this study provides an impulse to deepen the consideration of the complex legislation.

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