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# Submission Term Regarding a Request to Evaluate a Medical Event – Legal and Practical Doubts

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The Act of Nov. 6th 2008, on the Patient's Rights and on the Commissioner for Patients' Rights, provides a separate procedure of claiming damages and compensation, should a medical event occur (Chapter 13a). This out-of-court medical injury compensation procedure, from the very beginning of its existence, has been dubious, when it comes to its interpretation. The doubts refer both to the substance of the law (definition of a medical event, relation between a medical event and the medical malpractice, term of the state-of-the-art medical knowledge), as well as to the legal-formal issues, related to the procedures undertaken by the commission.

The main topic of the article herein is seen in one of the basic issues related to determining the term, within which the medical event evaluation request shall be submitted. After an analysis of the current legal solutions is carried out, the author comes to a conclusion that they should be refined in the upcoming period, so that a situation is avoided in which the individual commissions apply varied interpretations, differentiating, in this way, the legal status of the request submitting parties.

**Keywords:** medical event, request submission term, evaluation of medical events, Commissions for Evaluation of Medical Events, limitation, expiration, mediation-conciliation proceedings.

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## 1. Introduction

The procedure of claiming damages and compensation, in circumstances, within which the medical events emerge, has been regulated within Article 67a and following provisions (Chapter 13a) of the Act of Nov. 6th 2008, on the Patient's Rights and on the Commissioner for Patients' Rights<sup>1</sup>. Based on the Swedish solutions, from the very beginning since it was implemented, the Polish procedure has raised numerous concerns, within the scope of interpretation. Moreover, many doubts have been raised, when it comes to the substance of the legal regulations.<sup>2</sup> Usually, the legal solutions have referred solely to the term of a "medical event", also within the scope of defining a medical malpractice, determining the current state of the art in the field of medicine, lack of guilt on the part of the responsible entity and the legal profile of the medical

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<sup>1</sup> Unified Text, Dz. U. [Journal of Laws] 2012.159, with further amendments. The Act mentioned above is going to be hereinafter referred to as the "Act".

<sup>2</sup> See Collection of articles, edited by E. Kowalewski, *Kompensacja szkód wynikłych ze zdarzeń medycznych* [Compensation of injury resulting from medical events]. *Problematyka cywilnoprawna i ubezpieczeniowa* [Problem of civil law and insurance], and the therein referenced texts, covering the discussed thematic scope. Toruń, 2011. Cf. M. Nesterowicz, *Prawo Medyczne, Wyd. XI rozszerzone* [Medical Law, 11th Edition, Expanded], Toruń 2015. By the same author: *Ubezpieczeniowe i gwarancyjne modele kompensacji szkód wyrządzonych przy leczeniu*, [Insurance- and Guarantee-based Therapy Injuries Compensation] *Prawo Asekuracyjne* 2002, vol. 2, p. 3. and following.

events insurance<sup>3</sup>. Less attention has been given to the legal-formal issues or procedural problems, related to the proceedings carried out by the Voivodeship Commissions for Evaluation of Medical Events<sup>4</sup>. Meanwhile, in practical terms, the above issue has raised numerous doubts, which leads to a situation in which some norms may be interpreted in a way which is different and varies, depending on the Commission which is responsible for issuing the interpretation. This would cause the emergence of more objections, referring to the simplified Polish compensation procedures regarding the injuries caused by medical malpractice<sup>5</sup>.

Among numerous issues, the practical operations undertaken by the Commissions are, to a more and more significant extent, dependent on interpretation of the term which allows the injured party to initiate a procedure, the aim of which is to evaluate a medical events. Submission of a request, for such a procedure to be carried out, is conditioned by two terms. According to the content of Article 67 c. of the Act, the request may be submitted within the period of one year, starting from the day when the person who submits the request found out about the infection, bodily injury, health disorder or death of the patient. However, the period described above cannot be longer than 3 years, starting from the day when the medical event described above occurred. The implementation of a double period referring to the claims related to the ability of claiming compensation for the damages imposed on a person is only one of the problems. Subsequent issues include the legal profile of the term, and restrictions, referring to determining the beginning of the term, options of suspending the term, or even a way of determining the proper period, should the claims be made by the successors of the patient. The number of doubts regarding the interpretation of the above term requires us to briefly present the issue then.

## 2. Legal Profile of the Term for Submitting a Request to Evaluate a Medical Event

During the initial period, within which the Act entered into force, when the terms described above did not expire, the issue discussed was not perceived as specially dubious or unclear, despite the lack of precision contained within the statutory definitions. Currently, when in numerous cases not only a year expires, starting from the moment when a specific type of injury occurs, but also when three years pass starting from the date when the medical event takes place, it has turned out that the basic concerns refer

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<sup>3</sup> E. Kowalewski, Ubezpieczenie pacjentów z tytułu zdarzeń medycznych – blaski i cienie, [Insurance for the Patients, Referring to the Medical Events – Glimmers and Shadows] (in:) Kompensacja... [Compensation...], page 93 and following. Cf. W.W. Mogiński, Ubezpieczenie pacjentów z tytułu zdarzeń medycznych a ubezpieczenie OC szpitala [Medical Events Insurance for the Patients and the Civil Liability Insurance of the Hospital] (in:) Kompensacja... [Compensation...], page 111 and following. M. Serwach, Ubezpieczenia z tytułu zdarzeń medycznych w teorii i w praktyce [Medical Events Insurance – Theory and Practice], Prawo Asekuracyjne 2012, Vol. 4, p. 4 and following pages.

<sup>4</sup> Defining the profile of the Commissions for Evaluation of Medical Events (hereinafter referred to as the “Commissions”) also constitutes an interesting issue. Cf. E. Bagińska, Działalność wojewódzkich komisji do spraw orzekania o zdarzeniach medycznych a wykonywanie władzy publicznej [Activities of the Voivodeship Commissions for Evaluation of Medical Events and Exercising the Public Authority], (in:) Kompensacja... [Compensation...], page 145 and following.

<sup>5</sup> More information on that issue; M. Serwach, Problematyka zdarzeń medycznych w praktyce orzekających komisji, podmiotów leczniczych oraz ich ubezpieczycieli [Problem of Medical Events in Practice of the Investigation Commissions, Medical Entities and their Insurers], Wiadomości Ubezpieczeniowe 2012, vol. 4. pp. 3 and following pages.

to the definition of the legal nature of the statutory term. It has not been precisely determined whether the above refers to the period of limitation, or a term which solely makes it possible, if complied with, to initiate the proceedings. Meanwhile, solving the conflict issue above bears a significant meaning, from the point of view of correctness of the applied proceedings. This is because this would enable us to determine, whether submission of a request, once the aforementioned term expires, entitles the head of the Commission to reject the motion, or whether the Commission shall initiate a procedure, and not meeting the deadline may become a burden imposed on, the hospital or the insurer during the proceedings. The limitation of legal proceedings is raised as an allegation submitted by the party. Without this allegation, the case shall undergo a recognition process. Nonetheless, the definition used in Article 67 c is a good argument against this concept: “motion is submitted”. This suggests that the term granted to define a deadline allowing us to use a simplified damages claim assertion procedure in medical cases of formal-legal (proceeding-based) profile may be seen here<sup>6</sup>. Meanwhile, interpreting the statutory period as a period of limitation is supported by the fact that from a legal/formal point of view, the request may be returned/rejected solely in two situations: when it is incomplete or when no payment for it has been made. Should an option exist to return the request, due to the fact that it was overdue, this circumstance shall also be defined by this catalogue<sup>7</sup>.

It shall be noted that the raised issue has been settled neither by the doctrine, nor by the judicial decisions. Some authors assume that we deal with a term of limitation here. This stance has been taken by D. Karkowska, even though it lacks in clarity. On one hand, Karkowska assumes that “expiration of the term of limitation is a circumstance which follows, existing at the moment when the procedure is initiated”<sup>8</sup>. On the other hand though, she claims that expiration of the term should be treated as a formal obstacle for recognizing the motion, requesting that a medical event is evaluated. According to Karkowska “identifying such a circumstance may take place both at the initial stage of the proceedings, covering the examination of the formal premises making it possible to continue the proceedings, as well as at the later stages, in front of the Commission. This should effect in a return of the motion, without recognition”. However, it is very hard to conform with the latter statement. Returning the motion without recognition may only take place within the initial phase of the procedure, within which the request is being examined for formal and material correctness, but solely within the scope of making the emergence of a medical event probable. Should the proceedings be initiated, besides issuing the ruling on that problem, it may also be cancelled, or even suspended, in specific situations.<sup>9</sup> No legal option exists to return the motion without recognition.

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<sup>6</sup> Nonetheless, it should be noted that the way in which the term is defined as double, which begins at the point defined by the moment when subjective knowledge is acquired by the party which submits a motion on one hand, and objective fact when a medical event emerged on the other, is similar to the definition contained in Article 442<sup>1</sup> of the Civil Code.

<sup>7</sup> It should be noted though, that the request will be returned also under other conditions and in other cases which are not defined by the Act, including: lack of competent jurisdiction of the Commission, submission of a motion/request directed against a subject other than a hospital (e.g. private medical practice) and, above all, submission of a request referring to an event which occurred before the Act entered force, i.e. before Jan. 1st 2012.

<sup>8</sup> D. Karkowska, Act on the Patient’s Rights and on the Commissioner for Patients’ Rights. Commentary, 3rd Edition, LEX 2016.

<sup>9</sup> Suspension of the procedure may occur in circumstances when, in connection with the same event, a procedure with a subject of professional liability has been initiated, referring to the person whose profession is medical, or in case when a criminal proceeding is initiated, in cases

A different stance has been exhibited by J. Chojnacki, claiming that an option for substantial recognition of a motion which is expired is also dubious.<sup>10</sup> No proper reference exists, when it comes to relevant regulations existing within the Civil Code. Besides that, as the author claims, after referring to a plea of limitation, the Commission shall issue a judgement, that no medical event has occurred. Thus, we may see that the results of a specific case could be decided upon not by the substance, but by the formal reasons. It seems though, that the conclusion made by the author is far-fetched. In the case which is referenced, it would be permissible to cancel the proceedings, without reaching a substantial resolution and issuing the judgement referring to the case. This option is also being considered by J. Chojnacki. However, he comes to a conclusion that expiration of the limitation period is not a consequential circumstance, as it is a condition which exists at the moment when the proceedings are initiated.<sup>11</sup> The author claims that expiration of the term should be treated as a formal premise for recognizing the motion, requesting that a medical event is evaluated. The occurrence of this circumstance, in his opinion, should lead to return of the motion, without recognition. He postulates though, that this issue shall be regulated within the regulations developed by the Commission. Not questioning the relevance of the postulate, it seems that it should be directed to and received by the legislator, for further consideration. In other case, a dangerous setting may occur, in which the individual commissions treat the aforementioned matters differently, following their own regulations. Meanwhile, certainty of law and the rule of equality require that all potential applicants are placed in an analogous legal situation within that scope.

Considering the varied interpretations, one should assume that the term defined by Article 67 c of the Act does not constitute a term of limitation, in a meaning given to that term by the provisions of the Civil Code. Not only is such a conclusion backed up by the literal interpretation, but it is also supported by the lack of a proper reference to the Civil Code regulations.<sup>12</sup> One may wonder then, whether the claims submitted by the applicants to the Commission, even though the goal of those claims is to achieve reparation of a damage to a person, have a damages-focused profile, and whether the nature of those claims is civil-legal. Assuming that the term discussed might be treated as a term of limitation, would create a situation in which the Commission, unless the hospital or the insurer used the limitation argument, would have to settle the case in a substantial way. It seems then, that the legislator was willing to implement a clearly defined temporal framework, making it possible to use the conciliation-mediation process which constitutes an alternative for the civil procedure, in a conventional meaning of the term. Another issue is posed by the difficulties, when it comes to precisely defining whether – in the specific actual circumstances – the statutory term expired, as the term starts at the moment when the applicant becomes aware of the bodily injury, health dis-

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referring to offences (Article 67 b, section 2). Cancellation of the proceedings takes place above all in a situation, when the applicant withdraws his motion, when the applicant dies during the proceedings, or when power of attorney granted by the successor is revoked (Article 67 l).

<sup>10</sup> J. Chojnacki, (in:) D. Karkowska, J. Chojnacki, *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych* [Proceedings in front of Voivodeship Commissions for Evaluation of Medical Events], Wolters Kluwer 2014, page 166.

<sup>11</sup> The author shows that Article 350 of the Code of the Civil Procedure, which is indicated in the regulations of the Patient's Rights Act, makes it possible to cancel the proceedings, once they are rendered devoid of purpose. The statutory term suggests, in his opinion, that here we mean solely the consequential conditions.

<sup>12</sup> Submission of a motion interrupts "solely" the term of civil-legal limitations, which would be a proof of the fact that this act is treated in a way analogous to a procedure in which action is started and lodged to a Civil Court, which means that it is interpreted as an action, the direct goal of which is to have a claim.

order or infection (*a tempore scientiae* term). These circumstances have a subjective nature. Moreover, no solution exists, when it comes to a problem of assessing the situation when the motion has been submitted after one year, but before three years passed, starting from the moment when the medical event occurred. The issues described herein will be a subject of further discussion.

### 3. Length of the Term for Submitting a Motion to the Commission, to Evaluate a Medical Event

It shall be noted that the term to assert claims, within a procedure in front of a Commission, seems to be too short. Taking into account the fact that the simplified claims assertion mode, in front of the Commission, was to become an alternative for the court proceedings, one should note that the term contained within the Article 442<sup>1</sup> § 3 of the Civil Code, referring to the procedures of claiming damages, with a reference to the personal injury, is defined as three years, starting from the date when the injured person became aware of the damage, and of the person who is obliged to repair the damage. The introduction, in case of the medical events, of the *a tempore facti* term, may lead to an emergence of a relevant dissonance between the situation in which the patient is, between the Commission and Court proceedings. It may turn out, in particular, that the patient loses a chance to claim damages or compensation in front of the Commission, but he or she will still be able to employ a court procedure within that scope. Not only may this situation emerge in case of adult patients, but it may be the case applicable, above all, regarding children. Here, the limitation term cannot expire before two years pass, until the child reaches the age of 18 (Article 442<sup>1</sup> § 4 of the Civil Code). This solution may be justified by a condition that a minor cannot claim damage on his own, while his legal representative, for numerous reasons, may not utilize his rights and entitlements.<sup>13</sup> It is difficult to define the reasons, for which the situation faced by the children differs so significantly, depending on the type of undertaken procedure.<sup>14</sup>

Besides that, one should also remember that the discussed regulation does not make any references to the absolute personal limitation injuries (*tempore facti*), as it happened in case of the previously valid Article 442 of the Civil Code. The reason for implementing a proper change was seen both in the critical voices of the representatives of the legal science, as well as in the doubts raised by the judicature. However, above all, the stance taken by the Constitutional Tribunal was the factor of the highest value, since the organ came to a conclusion that such a solution was not compliant with the Constitution.<sup>15</sup> The legislator, once again introduced a regulation into the Polish

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<sup>13</sup> Lack of knowledge may be a reason for such a situation, especially when it comes to the knowledge that claiming damages on behalf of the child is possible. Sometimes, the guardian worries about or is inclined not to initiate court proceedings, or he is even convinced that the benefit is unobtainable, or that the guardian is not entitled to receive damages, in the given actual circumstance.

<sup>14</sup> If the discussed regulation has a purpose of raising the level of protection applicable in case of the minors, when his statutory representative does not perform the duties concerning the representation of the child. It is hard to indicate the reasons, for which an analogous protection mechanism is not applied in case of the simplified mode within the damage claims are made, should the proceedings be carried out in front of a Commission.

<sup>15</sup> Z. Radwański, Przedawnienie roszczeń z czynów niedozwolonych w świetle znowelizowanego art. 442 k.c. [Limitation of claims arising from delicts in the light of the amended Article 442 of the Civil Code], MP 2007, vol. 11, pp. 591 and following. Judgement by the Constitutional Tribunal issued on September 1st 2006 had a decisive value here. (SK 14/05, Dz. U. [Journal of

law, which may limit the rights of some patients.<sup>16</sup> It may turn out that the patient, due to expiration of a three-year long term, which starts to run from the moment when the bodily injury, health disorder, infection or death occurs, loses a chance to use the simplified procedure, applied in the process of claiming the damages in front of a Commission, despite the fact that he or she did not become aware of the medical event before the term expired. This type of situation may arise, above all, should a nosocomial infection occur. The incubation period for the pathogen may be quite long, and above all, the disease may be developing without any visible symptoms. The three-year term, starting from the occurrence of the medical event, seems to be too short, also considering the duration of the term itself.

#### **4. Problems Related to Identification of the Statutory Term**

Numerous practical problems stem from the need of determining, whether the one-year term provided for by Article 67 c of the Act expired. This is tied to the interpretation-related difficulties, indicated by the case law containing a similar assessment of the actual status, on the basis of the guidelines resulting from the Civil Code, but also due to the way in which the conclusions are formulated. It should be remembered that the proceedings carried out by the Commission, in their basic assumption, were to have as formalized profile, as practically attainable. Hence, the request may be submitted by the applicant in person; he or she does not have to employ a professional proxy or other specialist working in the given field, to settle the case. The motion itself, comes in a form to be filled in. The patient's task is to indicate the circumstances and conditions which are required for the procedure to be initiated, including the personal data, the healthcare entity, amount of the damages claimed etc., along with substantiation of existence of the medical event. At no point does a requirement, or even a reference, exist to precisely indicate the term defined by the Article 67 c of the Act. Obviously, the head of the Commission, when deliberating whether the specific motion may be approved, checks whether the event did not happen before Jan. 1st 2012, also analysing the medical records, or other documents provided by the applicant. Nonetheless, in many cases the documents above do not specify the date on which the patient became aware of the bodily injury, health disorder or infection. It should also be noted that the patient's health may change, and it is often difficult to provide a time-reference, pertaining to the injury. The above particularly concerns a health disorder, the character of which may be evolving. The circumstance in question also applies to an infection caused by a biological pathogen which may exhibit its presence after some time passes, following the medical procedure or hospital stay. Even in cases when bodily injury is disputed, it may turn out that this injury cannot be seen as a single event, and that the final result of the therapy is an effect of a number of events and additional conditions

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Laws] No. 164, item 1166), claiming that the regulation contained within the Article 442 § 1, second sentence, of the Civil Code, is not compliant with Art. 2 and 77 sec. 1 of the Constitution of the Republic of Poland, due to the fact that it rids the injured person of his right to claim damages for an injury taken by a person, which (injury) has been revealed after 10 years, from the date when the event which was the cause of injury took place. The Constitutional Tribunal decided that this regulation would not remain in force, starting from December 31st 2007.

<sup>16</sup> This action is clearly a contradiction to the actions undertaken by the legislator himself, who consequently gets rid of situations in which the term would start to run, before the bearer of the rights becomes aware of the injury, or of the option of asserting the specific claims. This tendency has also been expressed by abolishing, on April 13th 2007, the Article 819 § 2 of the Civil Code.

and circumstances – including a need for performing a repeated surgery, removing the damaged organ or removing an organ different than the one which has undergone the medical procedure.<sup>17</sup> As duly stressed by the judicial case law, there is no need for the injured person, who learnt about the damage, to know the extent of the damage, in order for the *a tempore scientiae* term to begin.<sup>18</sup> The injured person may acquire knowledge of the consequences of a medical event which led to an injury only after specialized examination is carried out, determining that a disease or illness exists, identifying the severity of the disease, and its cause, and determining the knowledge about a person who would be required to repair the damages.<sup>19</sup> Following analogous assumptions contained within the judgement issued on April 16th 1999, the Supreme Court came to a conclusion that the date which begins the term of limitation is the date when the injured person acquires the aforesaid knowledge on the basis of a reliable and authoritative certification issued by a competent medical entity”.<sup>20</sup> As a consequence, the awareness of the injured person pertaining to the injury, required to determine the *a tempore scientiae* term start, does not constitute a reconstruction of the actual status of the awareness of the injured person. Instead, it is seen as assignment of the awareness of the fact that the injury existed, on the basis of circumstances that are verifiable in an objective manner.<sup>21</sup> Considering the guidelines resulting from the judicature who made the assessment on the basis of an analogously defined term, one should take into account the fact that the moment proper, required in order to define the beginning of the running of the three-years-long period of limitation, is the moment of “getting acquainted”, when the injured person “becomes aware of the negative consequences of the event, indicating the fact that an injury occurred”, in other words, when the aggrieved party is in possession of “awareness of the injury suffered”.<sup>22</sup>

Even more doubts arise, within the scope of the issue of assessing the twin-character of the discussed term. More and more often, in the real world, it happens that the request is submitted after one year, but before three years have passed, since the moment when the medical event takes place. Even if the situation, in which no possibility exists to assert claims once the three-years deadline expires, does not raise any doubts,

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<sup>17</sup> In one of the analyzed cases, during a gynaecological procedure, the structure of the uterus was perforated. There was a need to carry out another surgery, during which ureter was additionally penetrated. Kidney damage occurred, creating a need of applying dialysis and replacement renal therapy. Then, it turned out that the damaged section of the ureter, due to the death of tissues, had to be replaced within a specific section. This has been done with the use of an implant. So, in this case, a number of correlated events took place, in different sections of the body of the patient.

<sup>18</sup> Resolution of the Supreme Court (7) issued on February 11th 1963, III PO 6/62, OSN 1964 [Supreme Court Case-Law], Vol. 5, item 87; Judgement by the Supreme Court, issued on Nov. 24th 1971, I CR 491/71, OSN 1972, vol. 5, item 95 and judgement by the Administrative Court [SA] in Gdansk, issued on Oct 21st 2011, I ACa 625/11, LEX nr 1112459.

<sup>19</sup> Judgement by the Supreme Court, issued on May 19th 1999, II UKN 647/98, OSNP 2000, vol. 15, item 589; Judgement by the Supreme Court issued on February 19th 2003, V CKN 207/01, LEX vol. 78272; Judgement by the Supreme Court issued on January 13th 2004, V CKN 172/03, LEX vol. 182118.

<sup>20</sup> II UKN 579/98, PiZS 1999, vol. 10, page 40.

<sup>21</sup> Judgement by the Supreme Court, issued on Dec. 8th 2004, I CK 166/04, LEX vol. 277853; Judgement by the Supreme Court issued on October 21st 2011, IV CSK 46/11, LEX vol. 1084557.

<sup>22</sup> Resolution adopted by seven judges of the Supreme Court on 11th February 1963, so called legal rule – III PO 6/62, LexisNexis vol. 315291, OSNCP 1964, vol. 5, item 87). The same stance was taken by the Supreme Court in its judgement issued on September 18th 2002, III CKN 597/2000 (LexisNexis vol. 1423462).

it is disputable how the borderline cases should be viewed, when the *a tempore scientiae* term expires, while the *tempore facti* term is still valid.

### **5. Submission of a Request to Indicate a Medical Event Seen as a Circumstance which Interrupts the Running of the Term of Limitation Regarding the Civil Code Claims**

Another issue refers to the impact of submitting a claim in proceedings in front of the Commission, on the terms within which claims may be asserted via the court proceedings. According to Article 67c, section 3 of the Act, submission of a request, which led to issuing of an evaluation of the medical event, interrupts the term which leads to limitation of the claims, defined by the Civil Code regulations and resulting from the events contained within the application. The legislative body's statement which narrows down an option of applying the article solely in case when a situation occurs, in which evaluation of a medical event is issued, seems to be incorrect. Obviously, placing a motion should have an effect of interruption of the term of limitation referring to the Civil Law claims, the aggrieved party, hoping that a positive settlement will occur after the Commission finalizes the procedure, would probably not try to settle the dispute in a Court. Even if such a step was taken, the proceedings in front of the Commission would be cancelled. In practical terms, it occurs more often that the applicant considers the court procedure, should the result of the proceedings be negative for him. If the applicant comes to a conclusion that the Commission's decision was not correct, he cannot appeal to Courts against a negative decision, he may only submit a request, asking the Commission to reconsider, or a complaint, claiming that the decision made by the Commission breaches the law. Regardless of all the issues pertaining to justification of such a solution, in case of which all decisions are issued by the Commission (even if the composition of that organ may differ), even the decision referring to the unlawful way of proceeding, it is not justified to reject the patient's will to settle the dispute in a Civil Court, due to expiration of the term of limitation, in a situation when a conciliation-mediation procedure is finalized, and the aggrieved party would like to revise the result of the above procedure, along with his legal status, in a court procedure.<sup>23</sup> If the decision is positive for the patient, the interruption of the term of limitation of the Civil Law claims may be justified only in cases, when despite the fact that the medical event was evaluated, the proceedings do not come to a definitive end, because the patient rejects the proposed compensation or damages amount. In other cases, the party submitting the request, whose claims are effectively settled, has no option of asserting another claim in court. By accepting the proposed benefit this person waives the right to claim further damages or compensation for damage in money, for the incurred injury, that could result from the events defined by the Commission, within the scope of the extent of the injury that was revealed until the date when the request was placed (Article 67, section 6). Considering the indicated restrictions, one should assume that placing a request, in any case, both in case when as a result of analyzing the motion the Commission issues a decision determining a medical event, as well as in a situation when a decision according to which no such event occurred is issued, should interrupt the term of limitation of the Civil-Law claims. The above procedure is

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<sup>23</sup> Within other European legal systems, assuming that similar ways of compensating the injuries caused by medical malpractice, an option of verifying the stance of the Commission by the Civil Court has been adopted, a form of appeal, regarding the decision issued throughout the simplified procedure.



similar to the one applied as in case, when a request is placed in a situation, in which the proceedings in front of a commission are cancelled, or when the submitted request is returned without recognition. Yet another issue is related to a definition of the moment when the term of limitation of the Civil-Law claims is restarted. It is not in every case, that this moment should be defined as the moment when the ultimate final decision is made by the Commission (resulting from the patient's request, or from reconsideration of the patient's request). Issuing a decision regarding a lack emergence of a medical event may have such an effect. Should the case be considered by the Commission positively, but at the same time proposal made by the hospital or its insurer is rejected, the term should start at that very moment.

### 6. Application Deadline Available to the Successor of the Deceased Patient

An incredibly complicated legal situation emerges, when the patient dies. In such case, his successors may submit a proper claim.<sup>24</sup> Disregarding the issues related to the doubts which refer to the way in which the legal status of the successor is determined, a problem emerges, when it comes to a definition of the term itself, and of the beginning of the term. The legislature assumes that the one-year-term begins at the moment when the patient dies, not at the moment when the inheritor becomes aware of this fact, even though that this person may become aware of the fact that he is a successor of the patient in a, more or less, longer period, starting from the moment of death. At the same time, the legislator notes that the term cannot be longer than three years, starting from the date of the event which resulted in patient's death.<sup>25</sup> If one interpreted the Article 67 c of the Act literally, one could come to a conclusion that a situation may occur in which the second term begins, or even expires, in some specific cases. The death of the patient may occur after some time starting from the event itself.<sup>26</sup> Above all though, Article 67c section 4 of the Patient's Rights Act contains information, that in case when the patient dies, the term remains inactive until the moment when the succession procedures are finalized. The regulation makes it viable to consider one of the following concepts:

- 1) Literal, assuming that until the succession proceedings are settled, the indicated term does not begin at all. Another question arises in such case, whether the analogous interpretation should be adopted, if the successors do not start the co-

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<sup>24</sup> Assuming such a solution does not seem to be justified. The succession proceedings may last for many years, from the date of the death of the patient. It may also turn out that the successors, for some period of time, do not undertake any steps, in order to confirm their legal status. The doubts related to determination of the entities which have a right to submit a request, should the patient die, have been discussed by M. Serwach: *Charakterystyka i zakres odpowiedzialności za zdarzenia medyczne* [Characteristics and Scope of Responsibility for Medical Events], *Prawo Asekuracyjne* 2011, vol. 3, pp. 21 and following pages.

<sup>25</sup> For the sake of comparison, the term for limitation of a claim, in line with art. 446 § 3 of the Civil Code starts at the moment when the relative of the dead person becomes aware of the damage in a form of significant deterioration of his life position, e.g. in case when such a person did not know the scope and permanence of the consequences of the injury (Judgement by the Supreme Court, issued on 12th January 2001, III CKN 1071/98, LexisNexis vol. 388340).

<sup>26</sup> Above all though, it should be noted that the terms of asserting claims contained within the Civil Code, in case of deaths of the persons who were directly injured, have been made dependent on the ongoing succession procedures. Probably, one of the reasons for which such a solution has been adopted stems from the fact that claims submitted by persons directly injured have not been made dependent on their legal status, in a role of a successor.

urt procedure, nonetheless acquiring the certificate of succession.<sup>27</sup> Moreover, the day on which the inheritance occurs should not be interpreted as the date which finalizes the succession proceedings, instead, the day when the succession is announced to be final should be considered to be the date in question;

- 2) Interpretation, according to which the term of limitation would be withheld, until the succession proceedings are finalized.<sup>28</sup> Assumption as such has been adopted by J. Chojnacki, who states that the term of limitation regarding the claims to evaluate a medical event, related to the death of the patient, should be set in line with Article 67 c section 2 of the Act, however throughout the term of the succession procedures, the aforementioned term of limitation shall be suspended.<sup>29</sup> After the succession procedures come to an end, the term would not start from the beginning, but with inclusion of the period preceding the date when the succession proceedings were started. It should be noted though that this stance, even if it may be considered to be more rational, does not settle the issue of the statutory terms – which one of them, the one-year term or the three-year term, would be the subject term in this case.
- 3) Purposive concept, assuming that the term until the proceedings are started does not begin, and should it start, it is suspended, until the moment when the succession procedure is finalized. This concept is prone to an argument, claiming that the concept refers indirectly to the term of expiration, thus it shall be coherent with a similar legal character qualification, referring to the term itself.

An additional problem would be created by determining the term (and in what way the term should be calculated), should the successors finalize the succession procedure many years after the medical event has occurred. It was not determined, as to how the duration of the term should be calculated in a situation, when the successors, who finalized the proceedings several years after the patient died (e.g. 5 years), assert a damages claim and submit it to the Commission. Should their request be automatically rejected in such case? If so, the successors would be deprived of an option to claim a proper compensation, when carrying out the proceedings involving the Commission.

### **7. Option of Restoring the Term or Undertaking other Actions, should a Failure Occur to Meet the Time Limit**

Interpretative restriction regarding the short terms allowing the injured person to submit an application may lead to a question, whether it is permissible to initiate proceedings by the Commission, after the term expires, and whether restoration of the term will be possible. If that term was interpreted as a term of limitation of the claims, then it would be possible to consider the option of applying the principles of social interaction (Article 5 of the Civil Code).<sup>30</sup> A different qualification, assuming that here we are dealing with a procedural term, will make it possible to consider permissibility of re-

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<sup>27</sup> The certificate of succession is created by a civil law notary, on the basis of Article 1025 of the Civil Code, in connection with Article 95 A of the February 14th Act, Law on Notaries (Dz. U. [Journal of Laws] 2008, vol. 189, item 1158, with subsequent amendments)

<sup>28</sup> Such a stance is assumed by D. Karkowska, the Act....., *ibidem*.

<sup>29</sup> J. Chojnacki, Proceedings..., pp. 167. The arguments provided by the author are not clear – it is hard to assess whether he assumes that the term shall be withheld or suspended.

<sup>30</sup> Applying this regulation with a reference to the term of limitation of the process of assertion of the claims is accepted in the doctrine and in the case-law, where it is assumed that when the damage is revealed even after the term defined by Article 442<sup>1</sup> of the Civil Code expires, in special cases it is possible to refer to the legal structure of Article 5 of the Civil Code. Z. Radwański, A. Olejniczak, Zobowiązania [Obligations]. Część ogólna, Warszawa 2012, p. 676.

storing the term, should a failure occur to meet the deadline. Such an option is permitted by J. Chojnacki.<sup>31</sup> In his opinion, restoration of the term is permissible both with reference to a request for evaluating a medical event, a request for reconsideration of the case and complaint, claiming that the final ruling by the Commission is illegal. If the participant of the proceedings in front of the Commission does not carry out the above actions, not being guilty of that, the Commission, after a request is submitted, shall restore the term. The decision shall be issued by a four-person composition, the same composition in which the request was recognized eventually, within the substantial dimension. According to the author, the decision made by the Commission within that scope may be issued after a confidential hearing, and it is not admissible after one year passes, from the moment when failure to meet the deadline occurs<sup>32</sup>.

### 8. Conclusion

The presented doubts regarding the interpretation of the term, within which the request should be submitted, regarding the evaluation of a medical event show, how numerous the issues are that are not directly tied to the premises of a medical event, the lack of compliance with the medical state of art and other substantial issues, all of which have not been clearly defined. It seems that defining the term allowing us to initiate the Commission proceedings would have the basic, legal and formal character. However, varied interpretations of Article 67 c of the Act may lead to a situation, in which some commissions will return the requests without recognizing them, after the term expires, while some will carry out the proceedings until the participant refers to the plea of limitation. It seems though, that a stance may be defended, according to which the expiration of the first of the listed terms should lead to a rejection of the request, without recognition. If the Head of the Commission remains unable to evaluate when the applicant became aware of the bodily injury, health disorder, infection or death, then the case becomes significantly convoluted, and when the three-year term from the event causing the injury has not expired, the Commission shall accept the request for recognition by the Evaluating Team. As the practice shows in case of the Commissions, the presented issues and issues beyond the presented scope, pertaining to the methods of carrying out proceedings when evaluating the medical events, shall be urgently settled or regulated.

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### References

- „Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa”, E. Kowalewski (red.), 2011, Toruń: TNOiK.
- Bagińska E. 2011. „Działalność wojewódzkich komisji do spraw orzekania o zdarzeniach medycznych a wykonywanie władzy publicznej”, w: „Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa”, E. Kowalewski (red.), Toruń: TNOiK.
- Karkowska D., J. Chojnacki. 2014. „Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych”, Warszawa: Wolters Kluwer.
- Karkowska D. 2016. „Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta. Komentarz”, wyd. 3, LEX.

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<sup>31</sup> J. Chojnacki, Proceedings..., pp. 207.

<sup>32</sup> *Ibidem*.

- Kowalewski E. 2011. „Obowiązkowe ubezpieczenie pacjentów od następstw zdarzeń medycznych”, *Wiadomości Ubezpieczeniowe* 2011 (nr 1).
- Kowalewski E. 2011. „Ubezpieczenie pacjentów z tytułu zdarzeń medycznych – blaski i cienie”, w: *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, E. Kowalewski (red.), Toruń: TNOiK.
- Kowalewski E., M. Śliwka, M. Wałachowska. 2010. „Kompensacja szkód medycznych wynikłych z „błędów medycznych”. Ocena projektowanych rozwiązań prawnych”, *Prawo i Medycyna* 2010 (nr 4).
- Mogilski W.W. 2011. „Ubezpieczenie pacjentów z tytułu zdarzeń medycznych a ubezpieczenie OC szpitala”, w: „Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa”, E. Kowalewski (red.), Toruń: TNOiK.
- Nesterowicz M. 2015. „Prawo medyczne”, wyd. XI rozszerzone, Toruń: TNOiK.
- Nesterowicz M. 2002. Ubezpieczeniowe i gwarancyjne modele kompensacji szkód wyrządzonych przy leczeniu, *Prawo Asekuracyjne* 2002 (nr 2).
- Radwański Z. 2007. „Przedawnienie roszczeń z czynów niedozwolonych w świetle znolizowanego art. 442 k.c.”, *Monitor Prawniczy* 2007 (nr 11).
- Radwański Z., A. Olejniczak. 2012. *Zobowiązania. Część ogólna*, Warszawa: C.H. Beck.
- Serwach M. 2011. „Charakterystyka i zakres odpowiedzialności za zdarzenia medyczne”, *Prawo Asekuracyjne* 2011 (nr 3).
- Serwach M. 2012. „Ubezpieczenia z tytułu zdarzeń medycznych w teorii i w praktyce”, *Prawo Asekuracyjne* 2012 (nr 4).
- Serwach M. 2012. „Problematyka zdarzeń medycznych w praktyce orzekających komisji, podmiotów leczniczych oraz ich ubezpieczycieli”, *Wiadomości Ubezpieczeniowe* 2012 (nr 4).

### Termin wniesienia wniosku o ustalenie zdarzenia medycznego – wątpliwości praktyczne oraz prawne

Przepisy ustawy z 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta przewidują odrębny tryb dochodzenia odszkodowania i zadośćuczynienia w przypadku wystąpienia zdarzenia medycznego (rozdział 13a). Tryb ten, nazywany pozasądowym modelem kompensacji szkód medycznych, od początku obowiązywania budzi wiele zastrzeżeń interpretacyjnych. Dotyczą one zarówno kwestii o charakterze merytorycznym (definicja zdarzenia medycznego, stosunek zdarzenia medycznego do błędu medycznego, pojęcie aktualnej wiedzy medycznej), jak i formalnoprawnych związanych z postępowaniem prowadzonym przez Komisję.

Tematem niniejszej publikacji jest jedno z podstawowych zagadnień związanych z określeniem terminu do złożenia wniosku o ustalenie zdarzenia medycznego. Wskazując na praktyczne znaczenie zgłaszanych wątpliwości, Autorka analizuje zagadnienia związane z określeniem charakteru prawnego terminu dowodząc, że sporne jest, czy mamy do czynienia z terminem przedawnienia czy też terminem jedynie w znaczeniu formalnoprawnym. Następnie przedstawia zastrzeżenia odnoszące się do wyznaczenia początku biegu terminu oraz możliwości jego zawieszenia, wskazuje na sposób ustalenia właściwego okresu w przypadku roszczeń podnoszonych przez spadkobierców pacjenta. Po przeprowadzeniu analizy obowiązującego rozwiązania Autorka dochodzi do wniosku, że powinno ono w najbliższym czasie zostać doprecyzowane, aby uniknąć sytuacji, w której poszczególne komisje będą stosowały różne interpretacje, różnicując w ten sposób sytuację prawną wnioskodawców.

**Słowa kluczowe:** zdarzenie medyczne, termin złożenia wniosku o ustalenie zdarzenia medycznego, komisja ds. orzekania o zdarzeniach medycznych, przedawnienie, postępowanie medycyjno-ugodowe.