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# Medical Insurance in Polish and French Legal Systems

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In the present article, the author presents the origin of medical insurance and causes of its development. She discusses the solutions adopted by Polish and French legislators. She presents conditions of civil liability insurance in French legal system as well as doubts expressed by legal doctrine. Further, the author compares the scopes of insurance protection within civil liability medical insurance in Polish and French legal systems both on the plain of subjective, objective, temporal and financial aspects. She highlights some interesting issues concerning the amount of the insurance sum and the term of indemnifiable accident.

In the end, the author presents *de lege ferenda* demands for Polish legislator, pointing out that parallel functioning of civil liability insurance and insurance against medical events, in connection with which many unanswered questions arise, is inappropriate.

**Keywords:** medical insurance, civil liability insurance, insurance, medical accidents, simplified model of compensation of losses caused by medical malpractice, losses caused by medical malpractice, French system of medical insurance.

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## 1. The origin of medical insurance

Nowadays, similarly to the majority of European systems, an essential role in Polish and French legal systems is played by the medical insurance. Its development is tied both to the dynamic development of medical knowledge, evolution of healthcare services and with the rise in liability for losses caused by medical malpractice, and, as a consequence, with the rise in amounts of adjudged benefits. It is a well-known mechanism of exerting mutual influence: the greater the possibility to perform more and more complex or specialist medical procedures, the greater the probability of loss on the side of the patient, thus liability of the entity conducting medical activity<sup>1</sup>. Therefore, in order to give the aggrieved parties an additional warranty that they will obtain due indemnity, and at the same time to enable the perpetrator of the loss to freely conduct his or her activity, which won't be charged with the necessity of paying a high benefit, medical insurance was introduced. At first, voluntary civil liability insurance was used. After some time, as always when there is a rise in liability of a particular entity and when the need for greater protection of third parties (of patients in this case) is recognized, the insurance was changed from optional to compulsory. As a result of existence of compulsory civil liability insurance, the aggrieved patient has the possibility to choose between two obliged entities, in particular, he or she obtains a second, usually

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<sup>1</sup> Within the scope of development of civil liability itself, see B. Lewaszewicz-Petrykowska, *Nowe tendencje w zakresie cywilnej odpowiedzialności zawodowej*, (w:) *Rozprawy z polskiego i europejskiego prawa prywatnego*, Kraków 1994, s. 190. Also, see M. Sośniak, *Cywilna odpowiedzialność lekarza*, Warszawa 1989, s. 98 and further, and M. Nesterowicz, *Prawo medyczne*, wyd. IX, TNOiK, Toruń 2010; M. Safjan, *Prawo i medycyna*, Warszawa 1998; K. Bączyk-Rozwadowska, *Odpowiedzialność cywilna za szkody wyrządzone przy leczeniu*, TNOiK, Toruń 2007.

more solvent debtor in the form of an insurer. Moreover, the question arises if introduction of compulsory medical insurance does not indirectly increase the number and amount of claims for damages and if it does not influence the position of judicature, for which it may also be important that the benefit won't be paid by the directly obliged party conducting medical activity, but by a professional in the field of insurance, whose aim is to offer insurance protection for other entities<sup>2</sup>.

As a result of development of medicine, it becomes more and more frequent to view civil liability insurance as an insufficient instrument of the patients' protection. Therefore, it seems justifiable to introduce a model called *no fault insurance*. Such solution has been adopted, most of all, in Scandinavian systems, where the NFPI system is successful<sup>3</sup>. In this model, two separate types of medical insurance may be distinguished: *first party*, usually treated as a personal insurance for patients and *third party*, a civil liability insurance of exactly specified entities existing on the market of medical services, which covers losses that the patient might suffer during treatment process<sup>4</sup>. Recognizing the need to extend protection of the patient, French legislators also searched for an optimal way of solving the problem of appropriate compensation for the losses caused by medical malpractice. Eventually, France opted for a different model of extended scope of civil liability insurance, complemented with strict liability of the state in exactly specified cases, based on the principle of equity.

The present article addresses the topic of legal regulations provided for in Polish and French legal systems, where, in reference to similar motives, different solutions have been adopted (the Polish model seems to have a "mixed" character).

## 2. Polish model of insurance

### 2.1. Medical insurance and its types

Medical insurance, similarly to other types of civil liability insurance, was not compulsory in the beginning. First medical insurance that became compulsory was an insurance of the entity accepting the order on healthcare benefits for losses caused during provision of those benefits<sup>5</sup>. It was introduced at the end of 1998<sup>6</sup>. Entities that could apply for this insurance included non-public healthcare units, persons exercising medical profession as part of training (individual or specialist) as well as persons possessing expert qualifications for providing healthcare benefits of a given type, who met

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<sup>2</sup> In other European legal systems it often turns out that the insurer controls the proceedings seated in the "back seat", because active involvement could lead to higher compensation amounts.

<sup>3</sup> Decisive value shall be attributed to the Swedish model implemented on Jan. 1. 1997, in line with the patient's rights act (*Patientskadelgag*). Implementation of the regulations of that Act caused the insurance for the benefit of the patient become compulsory, for all entities that dealt with rendering the medical services within the territory of Sweden.

<sup>4</sup> Regarding the Swedish system – see M. Nesterowicz, *Szwedzki system ubezpieczenia na rzecz pacjentów*, *Prawo i Medycyna* 2002, nr 12, s. 124 and C. Oldertz, *The Swedish Patient Insurance System – eight years of experience*, part one, *Medico – Legal Journal* 1992, No 52, s. 45 and n.

<sup>5</sup> When it comes to the compulsory insurance, c.f. M. Orlicki, *Ubezpieczenia obowiązkowe*, Wolters Kluwer, Warszawa 2011.

<sup>6</sup> Regulation issued by the Minister of Finances on Nov. 17<sup>th</sup> 1998, regarding the general conditions for obligatory civil liability insurance of an entity accepting the orders regarding the health services, covering the injuries occurring in connection with the said services (Dz. U. [Journal of Laws] 1998 r. item 921).

additional conditions specified in separate regulations<sup>7</sup>. However, the insurance had a narrow scope, in particular, its sums ranged from PLN 50.000 to 200.000. It was replaced with other medical insurance types introduced successively. As a result, by the end of 2011, there were three parallel compulsory civil liability insurance types. Those types were regulated in a few implementing acts, most of all, in the order of the Minister of Finance of Dec. 23<sup>rd</sup> 2004 on compulsory civil liability insurance of the entity accepting the order for health benefits<sup>8</sup>. This type of insurance was valid from Jan. 1<sup>st</sup> 2005. The next compulsory civil liability insurance became normalized in the order of the Minister of Finance of Dec. 28<sup>th</sup> 2007 on compulsory civil liability insurance of healthcare providers<sup>9</sup>. It came into force on Jan. 9<sup>th</sup> 2008 and it concerned all dentist physicians who concluded so-called contracts with voivodship departments of the Polish National Health Fund (NFZ). The most recent civil liability insurance of physicians and dentist physicians exercising their profession on the territory of the Republic of Poland was valid from Jun. 12<sup>th</sup> 2010<sup>10</sup> and it concerned all physicians, even those who only were in charge so-called private practices, i.e. provided health benefits commercially. As a result of such scattering of different regulations concerning the obligation of insurance, a given entity had to possess one or even two compulsory insurance plans, depending on whether he or she provided health benefits commercially or as part of public healthcare system as well.

In 2011, in order to clarify the binding legal status of medical insurance, new regulations were enacted, which significantly influence the shape of compulsory civil liability insurance aimed at physicians, nurses, midwives and healthcare entities<sup>11</sup>. New regulations implemented in the act on medical activity and an implementation act Dec. 22<sup>nd</sup> 2011<sup>12</sup> issued on its base by the Minister of Finance, abrogated the above-mentioned regulations. Another two medical insurance types were introduced in their place:

- 1) civil liability insurance of the entity conducting medical activity, covering losses resulting from provision of health benefits or unlawful non-feasance to provide health benefits;
- 2) civil liability insurance of healthcare provider who provides healthcare services, but does not constitute an entity conducting medical activity.

At the same time, starting from Jan. 1<sup>st</sup> 2012, a new insurance was introduced – the insurance against medical events specified in regulations of the act of Nov. 6<sup>th</sup> 2008 on the patients' rights and the patients' rights spokesman<sup>13</sup>. Doubts regarding the charac-

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<sup>7</sup> Obviously, all of those entities shall have a status of a subject which accepts the orders pertaining the health services, as defined in the medical law regulations.

<sup>8</sup> Dz. U. [Journal of Laws] 2004 r. item. 2825.

<sup>9</sup> Dz. U. [Journal of Laws] 2008, item. 10.

<sup>10</sup> Dz. U. [Journal of Laws] 2010, item. 515. Until the moment when the said insurance became a part of the law, the obligation to conclude a proper agreement was not tied to the doctors employed on the basis of an employment agreement, or on the basis of a relation of civil law, doctors running their individual practice and self-employed persons rendering the medical services. Currently, the doubts regarding the insurance obligation are related to the former group of entities.

<sup>11</sup> These are based on delegation of Article 17 section 1 and Article 25 section 1 of the Apr. 15. 2011 medical services act, (Dz. U. [Journal of Laws] 2011, item.159, with further amendments)

<sup>12</sup> Dz. U. [Journal of Laws] 2011, item 1729.

<sup>13</sup> Dz. U.[Journal of Laws] 2009. item 417.

ter of this insurance and its terms and conditions will be discussed in further part of the article<sup>14</sup>.

### 2.2. Compulsory civil liability insurance of the entity conducting medical activity

From the point of view of healthcare entities and persons exercising medical profession, decisive are regulations of the Minister of Finance of 22 December 2011 on compulsory civil liability insurance of an entity conducting medical activity<sup>15</sup>. These regulations specify a detailed scope of insurance protection for losses resulting from provision of healthcare services or unlawful nonfeasance to provide healthcare services. Civil liability insurance includes civil liability of the entity conducting medical activity on the territory of the Republic of Poland for losses caused by the action or nonfeasance of the insured party which took place during the insurance protection period. Liability of the insurer, however, is not of an absolute character, as it is limited to specified amounts, i.e. sums guaranteed, also referred to as the insurance sums. These sums amount as follows: for physicians and dentist physicians EUR 75,000 in reference to a single event and EUR 350,000 in reference to all events<sup>16</sup>. Analogous sums have been provided for in the case of entrepreneur healthcare entities (previous non-public healthcare units). The minimum sum guaranteed in the case of non-entrepreneur healthcare entities amounts to EUR 100,000 for a single event and EUR 500,000 for all events the effects of which are covered by the insurance agreement. In the case of nurses and midwives, these sums amount to an equivalent of EUR 30,000 and EUR 150,000 respectively.

If a given healthcare entity conducts more than one type of activity or conducts medical activity in more than one form, the amount of the minimum sum guaranteed in the case of civil liability insurance of such entity constitutes an equivalent of the highest minimum sum guaranteed specified for conducted types of medical activity or for the forms of conducted medical activity.

Civil liability insurance does not cover all losses. The following losses remain beyond the scope of protection contained in that insurance: 1) injuries caused by the entity conducting medical activity after deprivation or during suspension of the right to conduct medical activity; 2) losses caused by damaging, destruction or loss of items; 3) losses caused by payment of contractual penalties; 4) losses resulting from warfare, marshal law, riots and unrest, as well as from terrorist acts. Moreover, regulations con-

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<sup>14</sup> The insurance related to the medical accidents, and legal character of that insurance, have both been, for a long time, a matter of interest within the insurance doctrine. See E. Kowalewski, *Obowiązkowe ubezpieczenie pacjentów od następstw zdarzeń medycznych*, Wiadomości Ubezpieczeniowe 2011, nr 1; and *Ubezpieczenie pacjentów od następstw zdarzeń medycznych – blaski i cienie*, (in:) *Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa*, E. Kowalewski (eds.), TNOiK, Toruń 2011; M. Serwach, *Charakterystyka i zakres odpowiedzialności za zdarzenia medyczne*, Prawo Asekuracyjne 2011, nr 3 oraz *Zasady i tryb ustalania odszkodowania i zadośćuczynienia w przypadku zdarzeń medycznych*, Prawo Asekuracyjne 2011, nr 4; E. Kowalewski, W. Mogiński, *Istota i charakter ubezpieczenia pacjentów z tytułu zdarzeń medycznych*, Prawo Asekuracyjne 2012, nr 1.

<sup>15</sup> Dz. U. [Journal of Laws] 2011 r. No. 293, item. 1729.

<sup>16</sup> The above refers to the doctors who render the medical services through their self-employment, as individual or specialized and as a group medical practice. It does not matter whether the doctor is self-employed, or whether he/she runs an individual practice, or individual practice at the location where the doctor is called, solely at a business run by the medical entity, or as a specialized practice of as similar profile. Analogous amounts have been provided for the dentists who carry out their medical activities as a Civil Partnership, general partnership or partnership, as a group medical practice.

tained in the order of the Minister of Finance concern, in particular, liability of the insurer for losses resulting from benefits from the scope of plastic or cosmetic surgery. Civil liability insurance does cover losses caused by plastic surgery procedures or cosmetic procedures only if they are performed due to a congenital defect, injury, disease or if they occur as an effect of its treatment. Such damage may only be covered by an additional voluntary civil liability insurance. If such services are commercial in character and serve only as a way of improving the physical and mental state of a given person, they need to be covered by an additional insurance or a separate contractual clause. This is linked with the necessity to pay an additional fee.

### 2.3. Insurance against medical accidents

Medical accidents insurance was introduced into the Polish insurance system in January 2012<sup>17</sup> and it was compulsory at the beginning. The obligation to possess such insurance so-called insurance for the patient, concerned only hospitals as defined by the act on medical activity. It further became reclassified in a particular way. Formally, its legal classification has not been changed, but the term “obligation” of insurance is being redefined successively<sup>18</sup>. Thus, a question may arise about the character of this insurance, if it is still compulsory, but without the “obligation” to possess it, or if it is voluntary<sup>19</sup>. Acceptance of specific legal classification influences numerous fundamental issues from the point of view of insurance, coming down to the doubts concerning regulations that should currently be applied to this insurance: regulations of the act on compulsory insurance, Insurance Guarantee Fund and the Polish Motor Insurers Bureau<sup>20</sup> of May 22<sup>nd</sup> 2003 (as in the case of all compulsory insurance), or regulations of the Polish Civil Code concerning the insurance agreement (as in the case of voluntary insurance).

Another doubt is connected with the fact that apart from regulations contained in the act on insurance activity, any implementing regulations specifying particular terms and conditions of this insurance have not been implemented. Only in the regulation issued by the Minister of Health on 27 June 2013 on the detailed scope and conditions of specifying the benefit amount in the case of a medical event, the method for calculating the benefit due for the applicant has been clarified<sup>21</sup>.

At the same time, the legislator provided for three variants of the insurance against medical events. The basic solution is as follows: “*in the case of the insurance sum in the insurance period not longer than 12 months, in reference to all medical events in a hospital the effects of which are covered by the insurance agreement, it shall be made conditional on the number of beds in a hospital and on the insurance sum in reference to*

<sup>17</sup> When it comes to practical application of the insurance and works of the commission, dealing with evaluation of the medical events, see M. Serwach, *Ubezpieczenia z tytułu zdarzeń medycznych w teorii i w praktyce*, Prawo Asekuracyjne 2012, nr 4. The aforementioned problems were also being discussed by the Polish Constitutional Tribunal.

<sup>18</sup> Currently, the deadline, within which the obligation to conclude the agreement regarding the medical events insurance is to be met, has been prolonged until Dec. 31<sup>st</sup> 2016. This insurance shall have a “compulsory character”, starting from Jan. 1<sup>st</sup> 2017.

<sup>19</sup> Moreover, a question arises whether the personal accident insurance may even be compulsory, and whether a term of “imposed insurance” exists. In the latter case, see M. Orlicki, *Przymusowe ubezpieczenia następstw nieszczęśliwych wypadków*, (in:) *Studia ubezpieczeniowe*, J. Handschke (eds.), Poznań 2009, s. 399.

<sup>20</sup> Unified text – Dz. U. [Journal of Laws] 2013, item 392, with further amendments (hereinafter referred to as compulsory insurance act).

<sup>21</sup> Dz. U. [Journal of Laws] 2013 r. item 750.

*a single hospital bed*". The insurance sum referring to a single hospital bed amounts to no less than PLN 1000. If healthcare entity possesses an accreditation certificate in the scope of hospital services, the insurance sum in reference to a single hospital bed is reduced by 10%. Making the minimum insurance sum conditional on the equivalent of a product of the number of beds in a hospital allows us to acknowledge that it is also acceptable to reduce the amount indicated in a given insurance agreement. However, the amount of the insurance sum cannot be less than PLN 300,000.

Another variant of insurance consists in introduction of so-called aggregated conditional franchise to the insurance agreement, in a specified amount not higher than 50% of the insurance sum. Conditional franchise is defined as total amount of all benefits on account of medical events that took place during the insurance protection period, for which the liability of the insurer is excluded. At the same time, legislators provided for division of the burden of repairing losses, as the hospital "*shall pay the benefits on account of medical events that took place during the insurance protection period up to the amount of aggregated conditional franchise remaining on participation of this healthcare entity*" (Article 25 § 1e section 1 of the act on medical activity<sup>22</sup>). In case of transferring the appropriate payment, healthcare entity is obliged to notify the insurer about this fact within 14 days from the day of making the payment. The insurer "*shall pay the benefits on account of medical events that took place during the insurance protection period, in case healthcare entity pays the benefits on account of medical events that took place during the insurance protection period in the total amount equivalent to the amount of aggregated conditional franchise*" (art. 25 § 1e section 2 of the act on medical activity). It is also possible to introduce a third solution into the agreement on insurance against medical events. This solution consists in proportional co-payment of healthcare entity in the specified amount not higher than 50% of the insurance sum. The amount of co-payment suggested by legislators is extremely high, the more so because it is to be calculated from the insurance sum, and not from the amount of due benefit.

What is more, the described conditions of the insurance, as it seems, will apply only if they become compulsory. Actually, it would not be legally justifiable for legislators to invade that far in the sphere of contractual freedom in the case of an insurance which does not need to be concluded by specific entities, but which solely depends on the will of the parties to the insurance agreement.

### **3. Medical insurance in French legal system**

Similarly as in case of the Polish legal system, in French legal system the medical insurance has been in development for many years. Currently, among numerous legal regulations, decisive is the act of 4 March 2002 on the patients' rights and on quality of healthcare system (du 4 mars 2002 *relative aux droits des malades et la qualite du systeme de sante*), known as the Kouchner act<sup>23</sup>. This act confirms that civil liability of a physician and of other persons exercising medical profession is generally based on the principle of fault. At the same time, the act provides for some special cases of liability with no fault, the responsibility for which also belongs to the insurer as part of compulsory civil liability insurance. Moreover, the above-mentioned act introduced a system of

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<sup>22</sup> Apr. 15<sup>th</sup> 2011 Act on Medical Activity (unified text, Dz. U. [Journal of Laws 2015], item 618, with subsequent amendments).

<sup>23</sup> Mar. 2002 Act has been amended by the 2004–810 Act, implemented on Aug. 13<sup>th</sup> 2004, and with the 2009–879 Act, implemented on Jul. 21<sup>st</sup> 2009.

state liability as part of so-called social solidarity for faultless losses caused by medical malpractice. This type of liability is based on the principles of equity (*la solidarite nationale*)<sup>24</sup>. Strict liability for losses caused by medical malpractice, unknown within the Polish legal system, is used in the case of some hospital infections and losses resulting from use of faulty or defective medical equipment. Characteristic for the French system is also a dichotomous division of compensation systems depending on healthcare entity. If the entity obliged to compensate for the loss is a private entity, which provides health services commercially, potential disputes between this entity and the patient are resolved by the civil court. In the case of public entities, which provide healthcare services free-of-charge, administrative procedure is appropriate.

It needs to be stressed that, on the basis of regulations contained in the Kouchner act, it has been assumed that civil liability insurance will be compulsory for all entities existing in the health protection system, from medical facilities to professional practices, i.e. professionals working as freelancers in a given field of medicine. Subjective scope of civil liability insurance obligation, however, is extremely broad, as it covers all natural and legal persons who perform actions as part of broadly understood treatment process, diagnosis or preventive treatment procedures. Legal status of the facility does not matter here, thus it concerns both public and private entities. Apart from that, the insurance covers losses resulting from medicinal products or medical devices. It is unclear if the insurer should be liable in the case of violation of the patient's rights which does not result in a loss suffered by the person (body injury, grave disturbance of health, death). Most frequently, such doubts are linked with the violation of the obligation to obtain conscious consent from the patient by the physician or with the right to information. In such cases, it is usually required that, apart from violation of the obligation to give information, a concrete loss suffered by the person took place<sup>25</sup>.

Interestingly, the French legal system accepts that the scope of a specific insurance is to be determined by stipulations made by the parties to a given insurance agreement. It is even assumed that insurers possess certain freedom in specifying conditions of insurance and introducing exclusion clauses or clauses limiting liability. Perhaps this is the reason why those stipulations are frequently questioned before the court and become an object of disputes between parties to the insurance agreement. Within the basic scope, however, civil liability insurance always includes both tort and contractual civil liability, but only within the scope of medical activity which has been declared by a given entity while concluding the insurance agreement. Otherwise the insurer may refuse to pay the insurance benefit<sup>26</sup>. Exceptions to this rule are urgent situations with the need to save the patient's life. In such cases, if a given entity exceeds the scope of its medical activity or specialization (e.g. in case of physicians), the indemnity will be paid by an appropriate state fund. The scope of the insurance protection generally excludes losses suffered as a result of intentional fault of the insured party. Classic limitation of liability of the insurer also includes subjectively specified losses: caused by the insured party to itself, to the spouse, to ascendants, descendants or siblings. In practice, the insurers, apart from general exclusions, tend to provide for special clauses, which refer to exactly specified losses that may be caused while providing healthcare services by per-

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<sup>24</sup> See Y. Lambert-Faivre, *La loi n°2002-303 du 4 mars 2002 relative aux droits des malades et a la qualite du systeme de sante*, D.2002.136.

<sup>25</sup> S. Boussard, *Les vicissitudes de la perte de Chance dans le droit de la responsabilite hospitalier*, RFDA 2008, p.1023.

<sup>26</sup> N. Gombault, *La situation de l'assurance medicale*, RDSS 2010, p. 51.

sons exercising medical profession of a given specialization. For example, civil liability insurance agreements of dentists usually exclude, in terms of the insurance protection, losses linked with embedding implants and resulting from so-called implant prosthodontics. In numerous cases, it is also pointed out that there is no insurance protection for patients in case of prescribing drugs which have not been formally put on the market.

If an entity subject to compulsory insurance does not conclude a civil liability insurance agreement, such entity may be punished with sanctions, both criminal (obligation to pay a certain fine), disciplinary and occupational (e.g. prohibition to exercise a profession specified as an additional penalty).

French legal system provides for interesting solutions with regard to specification of the amount of the sum guaranteed. Pursuant to art. 1142–2 § 4 of the public health code, it is acceptable to indicate, in a given insurance agreement, individually specified financial limits of the insurer's liability. However, for persons exercising medical profession, minimum limits have been introduced. Before 2012, those limits amounted up to EUR 3,000,000 for a single event and EUR 10,000,000 for all events that could take place during the insurance period, which generally lasts 12 months. Although it might seem that those amounts are extremely high, there were cases where in a given actual state they proved insufficient. Thus, the decision was made to increase the minimum amounts of sums guaranteed up to EUR 8,000,000 for a single event and EUR 15,000,000 for all events in the insurance period. This change was passed with acknowledgment of French doctrine, the more so because those amounts have not been exceeded yet in any actual state. In order to avoid situations in which the insurers would impose exorbitant insurance fees to compensate the risk resulting from high amounts of the sums guaranteed, a Central Tarification Bureau was created. Its task is to monitor rates of insurance fees and to fix those rates on a maximum level acceptable.

When it comes to territorial range, insurance protection generally covers losses caused within the territory of France as well as in French departments, in the Principality of Monaco and in the Principality of Andora. However, it is permissible to extend the range "to the whole world", usually except for effects of medical procedures performed in the USA and Canada.

In the French legal system, a significant role is also attributed to an institution of the National Bureau for Indemnities for Medical Accidents – ONIAM (*l'Office National d'Indemnification des Accidents Medicaux*), a specially created state fund which pays benefits indirectly or directly on the principles of substitution. Direct payment is made, among others, in the case of losses resulting from hospital infections which cause death or permanent injury to the patient in the extent exceeding 24% or in the case of so-called medical accidents. Situations where ONIAM is directly obliged to pay the benefit are known as therapeutic risks (*les aleas therapeutiques*)<sup>27</sup>. Subsidiary liability of this entity will apply in situations where there are no funds from civil liability insurance in the scope of surplus above warranty resulting from the sum guaranteed which has been depleted. Thus, ONIAM constitutes a specific guarantee fund which either substitutes the insurer or acts on the principles of state solidarity<sup>28</sup>.

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<sup>27</sup> Y. Lambert Faivre, *La reparation de l'accident medical: obligation de securite oui alea therapeutique*, Dalloz 2001, No 7, p. 58 i n.

<sup>28</sup> S. Hocquet-Berg, *Responsabilite medicale et solidarite nationale: d'un rapport de subsidiarite a une logique de substitution*, Melanges en l'honneur de F. Chabas, Bruylant 2011, p. 415.



French law stipulates that the patient may take legal action or initiate conciliatory proceedings conducted by Regional Conciliatory Committees. In the last case, the two-stage proceedings are conciliatory in character and their aim is to indicate the source which should pay the indemnity in a specific actual state: the insurer or ONIAM.

#### 4. Comparing solutions adopted within both legal systems

Both within the Polish, as well as within the French law, the insurer of the therapeutic agent or of the medical professional, is one of the subjects that may bear responsibility for injuries or death caused by medical malpractice. The insurer's liability within that scope has an accessory character, since the insurer is only responsible for the injuries and only within the scope, within which the injury caused by the medical institution is also detrimental for the insurance holder. Moreover, the event which leads to emergence of the injury must fall within the scope of insurance protection provided by the specific insurance company.

The accessory character does not mean that the civil liability of the insured perpetrator and the liability of the insurer may be treated in a tantamount manner. The liability of the insured perpetrator must be contained within the limits of protection provided by the insurer. Moreover, an insurance incident must occur – an event which, within the insurance agreement, is defined by the parties as a cause which would justify the insurer's liability. Scope of the insurance protection is defined by the insurance sum (also referred to as the sum guaranteed) indicated in the agreement, constituting the upper limit of the insurer's liability. At the moment when the insurance incident occurs, the injured party has a right to file in legal-insurance claims, directly against the insurer. These claims are classified as a specific legal figure within the doctrine, which is not being considered to be a traditional construction of a tort or professional liability (*actio directa*). Within the scope of the relationship between the injured person and the insurer, the injured person takes a specific legal position, since he is entitled to submit two separate claims. These claims are tightly correlated, as they exist next to each other until one of the claims is settled. The insured person cannot receive two separate compensation amounts, and the decision on the way of realizing the compensation is taken by himself, filing claims against the insured party or the insurer, or against both those subjects at the same time. Should both subjects be accused, no grounds exists to adopt joint and several liability of both the perpetrator, as well as the insurer. In a situation in which two debtors, on the basis of separate and different legal relationships tying them to the creditor, are required to perform one and the same obligation against the creditor, *in solidum* liability structure may be applied.

Within the Polish legal context, persons who are carrying out therapeutic activities may have two types of insurance: civil liability insurance agreement and medical events insurance. The civil liability insurance has a basic value, since this insurance is obligatory<sup>29</sup>. Therapeutic agents (public and private) and persons whose occupation tied to rendering of the medical services (including doctors running their own practices – individually or in groups, nurses and midwives) are covered with an obligation

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<sup>29</sup> The medical insurance that had been present earlier was abrogated in that way (the insurance based on the regulation issued by the Minister of Finances on Dec. 28th 2007, regarding the obligatory civil liability insurance of the service provider, providing the healthcare services and

of getting insured. Detailed conditions pertaining the medical civil liability insurance have been defined by the executive regulations issued on the basis of the regulations contained in the Act on Medical Activity<sup>30</sup>. This solution, according to which the insurance conditions are additionally defined by the legislative body in the secondary legislation is generally adopted, in case of all of the compulsory insurances<sup>31</sup>. Civil liability of the insured party is being covered with the medical insurance, including all injuries that are related to the process of providing health services, both through acting (resulting from rendering the medical services) as well as through omission (being not in line with the law, regulating the conditions for abandonment of rendering the healthcare services).

In the French law, the obligation of concluding a civil liability insurance agreement by specific medical entities has been introduced by Article L 1142–2 of the Public Health Code, adopted on Mar. 4th 2002, and Article L 251–2 of the Insurance Code. The situation in France is similar to the Polish law, since the insurance obligation includes both the medical facilities (public and private) as well as the person who work as a liberal medical professional, including doctors, midwives and so called medical assistants (e.g. nurses). The insurance coverage includes damage resulting from the injuries occurring when the insured carries out the medical procedures, according to the scope of the undertaken medical activities, indicated in the insurance policy. Should the insurance holder carry out specific actions outside the scope of his medical activities or the specialization, but in so called emergency situations, compensation for damage is going to be paid for the patient with the use of the special ONIAM fund. Within that scope, the first difference between the two legal systems appears. In case of the Polish law, it does not matter whether the injury occurred within the scope of the medical activities carried out, since the emergence of the injury took place shall occur in relation to the rendered medical services, or in relation to stopped rendering which constitutes a breach of the legal provisions. In practical terms, medical facilities do not start therapy outside their activity profiles, and in case when no option exists to start a specific therapy, the patient is usually delegated to a facility, at which the required health services are executed and available.

When one compares the scope of responsibility of the insurance company, within the scope of the medical civil liability insurance coverage, it shall be noted that both within the Polish, as well as within the French law, the employees of the insured subjects are also covered with the insurance<sup>32</sup>. Within the Polish law, liability of the superior for an injury caused by his employee results from the Civil Code regulations (Article 430 of the Civil Code). The Labour Code additionally states that, should the employee cause injuries to the third person, while performing the work obligations, the responsibility for compensation is borne solely by the employer (Article 120 of the Labour Code). Within the French legislation, according to the case law initiated by the Cassa-

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the regulation issued by the Minister of Finances on Apr. 26th 2010, within the scope of compulsory civil liability insurance for doctors and dentists working within the territory of Poland).

<sup>30</sup> Here, we mean the regulations from the aforementioned Dec. 22nd 2011 regulation issued by the Minister of Finances, regarding the issue of compulsory civil liability insurance for the subjects which carry out medical activities.

<sup>31</sup> There is one exception within that scope – the insurance due to medical incidents, conditions for which are defined by the Act on Medical Activity.

<sup>32</sup> However, in case of the French law, the personal scope of the insurance obligation is significantly wider, since it additionally covers rehabilitators, laboratory diagnosticians and all persons that are involved in the therapy process related to the patient.

tion Court in 2004, in case of the injury caused by the doctor – employee, then liability in front of the third parties is borne by the employing medical subject, no matter whether the injury was caused within organizational order, or as a result of an erroneous decision taken by the doctor (erroneous diagnosis, incorrect treatment)<sup>33</sup>. In both legal systems, the liability of the medical institution – the employer – is limited in two cases, in case of intended injury, or in case when the doctor acted outside the limits defined by his work obligations. Scope of responsibility in this case, borne by the insurance company, is statutorily defined, within both legal orders. This scope is limited to personal injury. Moreover, on the basis of the general insurance-related regulations (Polish Act on Compulsory Insurance and the French *Code des Assurances*), the insurer does not bear responsibility, should the injury be caused intentionally. Injuries occurring within the war or social unrest (strike, riots) periods have also been excluded from the scope of coverage.

The basic differences between the solutions adopted in the French and Polish legal systems are related, above all, to the possibility of implementation of additional limiting clauses, or clauses which exclude the responsibility borne by the insurer. Secondly, there is also an option of limiting the periodic and financial scope of protection, provided within the framework of the compulsory Civil Liability insurance. In the Polish law, the Civil Liability insurance covers any injuries that are statutorily defined, without an option of contractually limiting the liability of the insurance company. The Legislator, thus, has removed any freedom remaining in the hands of the Parties of a Civil Liability agreement. Within the French law, besides the statutory definition of a catalog of responsibility limiting clauses referring to the Civil Liability insurer, additional exclusions are applied, defined by the specific provisions, the purpose of which is to tailor the Civil Liability insurance to the needs of a specific person who is being insured.

The most important difference – from the practical point of view – is related to definition of an insurance incident. Within the Polish law, in case of all of the compulsory insurances, including the medical Civil Liability insurance, *triggers act committed* term is applied. As a result of the above, the insurer shall bear responsibility, should, during the insurance protection period, an event (act) occur that would be a source for injury (malpractice or negligence). Should the above condition be met, this would mean that damages may be claimed by the injured person against the insurer, within the identical prescription period, within which the damages may be raised against the insured perpetrator (depending on the liability regime, tort or professional liability). Within the French legislation, the primary role is played by the definition of an insurance event, meaning that the insurance event occurs when claims are made by the injured person. In case of medical insurance, the above definition is modified, by a so called follow-up guarantee clause. According to the content of the clause, within the period for which the insurance agreement or 5 years after such agreement is terminated or expires, the injured person must submit his claims – only in such case, the insurer is going to bear responsibility. The term has been prolonged for another 10 years, if the insured person ceased to render the therapeutic services. The event, being a source for the injury, must also occur throughout the insurance period of validity.

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<sup>33</sup> J. Ambialet, *Responsabilite du fait d'autrui en droit medical*, Paris 1965.

Another difference stems from the difference in the amounts of insurance sums, which define the financial limits for the insurance coverage. Within the Polish legislation, the minimum insurance sum has been separately defined for all of the subjects obliged to be insured. The sum in question is relatively small. Within the French law, a demarcation line has been drawn between the medical facilities, and the persons who work as a medical professional. In the latter case, the minimum insurance sums have been defined in millions of Euro (EUR 8,000,000 and EUR 15,000,000). In case of the medical facilities, no amount limits of insurer's liability are defined. The insurance sums applied are usually of contractual character. In both cases, the guarantee sum has been separately defined for a single and for all incidents that may occur throughout the insurance term. Contrary to the French solutions, the Polish conditions related to the aforementioned medical insurance create a number of doubts. Firstly, the minimum insurance sums seem to be too low, not only with a reference to the potential claims, but also within the scope of the provided benefits. If the highest benefit resulting from a medical procedure is contained in an amount of PLN 5 million, the obligatory amount of EUR 100 thousand per a single incident (ca. PLN 400 – 450 thousand) and EUR 500 thousand for all of the incidents (PLN 2 – 2.5 million) seems to be insufficient, particularly due to the fact that granting of the benefits, in an amount close to PLN 1 million, is not a rare case. The insurance sum also seems to be too low when it is compared to other conditions of the compulsory insurances. Of course, any subject may acquire additional insurance, however, not in every case is the level of awareness within that scope high. Often, the assets required to cover the insurance payments are also insufficient. Lack of proper coverage may lead to personal responsibility of the subject carrying out the therapeutic activities – and thus removing one of the causes for introduction of compulsory medical insurance.

The latter difference refers to the manner in which compensation is realized, if the injured party starts conciliation/mediation proceedings, via the Commission (Regional Commission for Evaluation of Medical Accidents, Commissions de conciliation et d'indemnisation des accidents médicaux). Within the French law, introduction of the said system did not lead to emergence of a need of implementation of yet another medical insurance. In the Polish law, on Jan. 1st 2012, new medical accidents insurance is provided for. The cause of this, probably the most significant when it comes to its effects, discrepancy is placed within a different approach towards the simplified damage claim and compensation mode, related to the medical malpractice. Within the French law, the injured person may use out-of-court settlement procedure, which does not change the status quo – the only purpose of this procedure is to determine whether the liability exists in case of the given subject, and what are the grounds for that liability. The Polish legal science and practice additionally raises doubts related to the mutual civil liability relationship with the medical injuries liability. If the hospital signs an insurance agreement related to the medical injuries, the facility is not burdened with a requirement of paying the damages or compensation for the patient, should a medical accident occur. According to the rules, the medical entity also stays out of the proceedings carried out by the commission. In case when a relevant insurance is missing, or at the moment when the insurance sum is depleted, the medical entity gains the rights and obligations of the insurer, within the scope of the proceedings carried out. The medical facility, particularly, is obliged to propose an damages or compensation amount for the injured subject, and should that proposal be accepted by the injured person, the facility is obliged to pay the benefit. Lack of medical accidents insurance forces the hos-

pital (medical accidents liability has been limited to hospitals) bears full financial liability arising in connection with the accident.

In the French law, no separate insurance, related to medical incidents, exists. If the commission comes to a conclusion that a specific subject that carries out medical operations is responsible for the situation, a statement is submitted to the insurer of the perpetrator, who shall pay the benefit, as a part of the compulsory civil liability insurance. In unique situations, when the damages cannot be paid by the insurer (lack of insurance), or when no liability exists, the benefit may be realized with the use of the ONIAM funds. Moreover, in cases when the insurer refuses to pay the compensation, or when the compensation amount proposed is abnormally low, the court, when analyzing the damage claims of the patient, may impose a penalty of up to 15% of the granted benefits, on the insurer. This amount is paid to ONIAM.

### 5. Summary and *de lege ferenda* conclusions

The comparison of the medical insurances in force in the presented European legal systems shows that both legislations are using different solutions, within the scope of compensating the medical injuries. By noticing the need of increasing protection for the patients, the French law expanded the traditional meaning of the civil liability within the medical processes, with cases of liability based on risk<sup>34</sup>. Of course, increased scope of responsibility borne by the medical subject also led to increased Civil Liability insurer's responsibility, within the scope of accessory character of his liability. In the Polish law, references were made to the insurance system, however no decision has been made to expand the medical liability in cases of risk-based liability. Instead, it was decided to create a new type of insurance. The idea pursued by the Polish legislative bodies has not been successful, mainly due to the doubts related to the legal character of the insurance related to the medical incidents. Still, no resolution exists, as to whether this insurance shall be treated as a Civil Liability insurance, or whether it is closer in its character to the personal accident insurance. Agreeing that the above insurance shall be treated as a Civil Liability insurance creates a question, related to the sense of introducing another compulsory Civil Liability insurance, since the benefits could be paid in relation to the "ordinary" Civil Liability insurance. The assumption that the insurance is treated as personal insurance would lead to the issue of validity of a restriction of the obligatory character of the insurance, along with a variety of additional issues, including the definition of an insurance accident, or definition of the subject scope of the insurance and the provided insurance protection.

Defining the amounts of insurance fee is yet another issue that shall be discussed. In order to avoid a situation, in which numerous medical subjects or persons who work performing a medical profession, have not enough funds to cover a demanding insurance fee, maybe one should refer to the French solutions – in a form of the Bureau Central de Tarification, or a similar body, which would assess whether in the given actual state, a proper level of insurance fee has been established, or whether, at least, the top limit for such fee is defined. In such a case, in the Polish market conditions, a realistic threat would exist – no insurance company would decide to conclude medical accidents agreement. The most optimal solution could be then applied in a form of expansion of the medical liability and the scope of liability of the insurer,

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<sup>34</sup> The above scope would be complemented with state responsibility, on the basis of the equity principle.

within the scope of the compulsory civil liability insurance. However, it is hard to determine whether assets would be available to finance the damage not covered with that insurance or damages occurring once the insurance sum is depleted – as it happens in the French case of ONIAM. However, we may be sure that, within the Polish healthcare system an optimal solution should be found, in order to meet the needs of all of the interested subjects, including patients, medical facilities and their insurers. Such solution should actually guarantee that the benefit is paid, should a medical accident take place.

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### Ubezpieczenia medyczne w prawie polskim oraz w prawie francuskim

W ostatnim czasie widoczny jest dynamiczny rozwój ubezpieczeń medycznych w większości systemów europejskich. Rozwój ten związany jest z rozwojem wiedzy medycznej, która powoduje, że można obecnie przeprowadzać coraz bardziej skomplikowane zabiegi, z którymi łączy się ryzyko powstania niezawinionej szkody po stronie pacjenta. Kolejna kwestia to utrudnienia dowodowe, zwłaszcza w zakresie zakażeń szpitalnych oraz możliwość powstania zdarzeń, za które nie ponosi odpowiedzialności żaden z podmiotów ze względu na brak przesłanki winy. Powoduje to, że w wielu systemach europejskich przewidziane zostały różne rozwiązania wprowadzające uproszczony model kompensacji szkód medycznych. W podstawowym zakresie łączy je jedna cecha wspólna – odwołanie się do kompensacji ubezpieczeniowej. W systemie szwedzkim są to ubezpieczenia *first party*, natomiast w prawie francuskim funkcję tę pełni ubezpieczenia OC z rozszerzonym zakresem ochrony ubezpieczeniowej.

W niniejszym artykule Autorka przedstawia genezę ubezpieczeń medycznych oraz przyczyny ich rozwoju. Omawia rozwiązania polskiego ustawodawcy oraz ustawodawcy francuskiego. Przedstawia warunki ubezpieczenia OC w prawie francuskim oraz wątpliwości zgłaszane przez doktrynę prawa. Następnie dokonuje porównania zakresów ochrony ubezpieczeniowej w ramach medycznych ubezpieczeń OC w prawie polskim oraz francuskim zarówno na płaszczyźnie aspektów podmiotowych, przedmiotowych, czasowych oraz kwotowych. Ciekawe zagadnienia odnoszą się do wysokości sumy gwarancyjnej oraz pojęcia wypadku ubezpieczeniowego.

Na zakończenie Autorka przedstawia postulaty *de lege ferenda* dla polskiego ustawodawcy wskazując, że obowiązywanie równolegle obok siebie ubezpieczenia OC oraz ubezpieczenia z tytułu zdarzeń medycznych, co do którego istnieje wiele nierozstrzygniętych pytań, nie jest prawidłowe. Trudno bowiem ocenić polskie rozwiązania, jeżeli nie została rozstrzygnięta podstawowa kwestia: czy ubezpieczenie z tytułu zdarzeń medycznych ma charakter ubezpieczenia majątkowego (OC) czy też ubezpieczenia osobowego (NNW) oraz czy ma ono obecnie charakter dobrowolny (do 31 grudnia 2016 r.), czy też nadal jest ubezpieczeniem obowiązkowym z odroczonego obowiązkiem ubezpieczenia. Ustalenie tej ostatniej kwestii w znacznym stopniu zniwelowałoby zarówno zastrzeżenia interpretacyjne, jak i wątpliwości praktyczne.

**Słowa kluczowe:** ubezpieczenia medyczne, ubezpieczenia odpowiedzialności cywilnej, ubezpieczenia z tytułu zdarzeń medycznych, uproszczony model kompensacji szkód medycznych, szkody medyczne, francuski system ubezpieczeń medycznych.