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# Legal Situation of a Doctor as an Insured Perpetrator In the Field of Medical Insurance

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Civil liability insurance are becoming increasingly important, within the scope of medical activity. The dynamic expansion of this area is a result of the growing number of damage claims made by the patients and the patients' families. The claimed amounts are also becoming gradually increased. In practical terms, most of the medical errors are a direct result of the medical activity or activity of the healthcare entity. Meanwhile, the doctor must perform his tasks, on the basis of the employment contract, as well as on the basis of a civil law agreements commonly referred to as contracts, or in circumstances when he/she is running a separate, individual or group practice. Each of the aforesaid employment forms has a significant impact on the legal position in which the doctor is placed, as an insured perpetrator. The healthcare entity may bear a joint and several responsibility with the direct perpetrator, moreover, Civil Liability insurance policy may also cover, within the scope of the offered protection, the damage caused by the doctors on the patients, or in case of injuries caused by other members of medical personnel employed by the given healthcare facility. Another issue is seen in the problem of potential settlements between the entities responsible, also referring to the recourse claims.

The present paper aims at indicating the complex legal situation in which the doctors are placed as insured perpetrators of damage, within the area of Civil Liability insurance, and at analyzing the position taken by doctor in the patient-doctor relationship, as well as in the relationship between the patient and the healthcare entity. The author also strives to analyze the legal position in which the doctor is placed as a perpetrator of damage, in case of the insurance required due to medical incidents. The chance of facing recourse claims is also scrutinized within the present paper.

**Keywords:** civil liability insurance, medical events insurance, medical errors, medical incident, therapeutic activities, form of performing the doctor's profession.

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## 1. Introduction

Growing number of medical errors and malpractice and claims filed in against the persons who work as medical professionals lead to emergence of a circumstance, in which not only the issue of responsibility of the medical professionals shall be considered, but also the impact of the legal form of the professional activity on the legal position of the aforesaid subjects in case of medical insurance, shall be scrutinized. As it turns out, not every person who renders medical services is a subject to the Civil Liability insurance obligation, while the medical incidents insurance, introduced on January 1st 2012, became a non-compulsory insurance even for the medical entities<sup>1</sup>. Moreover, statements emerge, suggesting that the Civil Liability insurance shall be volun-

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<sup>1</sup> The basis for changing the profile of the Civil Liability insurance to an obligatory one, with a reference to the subjects performing the medical business activities, including the damage

tary, in case of any medical errors or malpractice. Meanwhile, being protected by insurance may – in an era in which the claims and services are a subject to higher and higher amounts – have a very significant practical and legal meaning. For that reason, the situation of the insured perpetrator is going to be a subject for the present considerations, in case of circumstances emerging in which such practitioner bears civil liability or when those circumstances suggest that a medical event occurred. Outside the aforesaid scope, personal and voluntary insurance of personal character, as well as the insurance concerning the equipment at the doctor's office are placed<sup>2</sup>. The consideration shall cover the legal situation in which the insured doctor is placed, even though similar set of rules is also applicable in case of nurses or midwives.

## **2. Civil Liability Insurance – General Description**

Within the medical insurance category, the civil liability insurance still bears the basic meaning. It is referred to as an insurance of the liabilities, contrary to the property insurance, also referred to as an insurance of assets. Civil liability borne by the insured party is a subject to this insurance, concerning the potential damage that could potentially be caused to a third party. Hence, here we are referring to an obligation of rectifying the damage that could possibly occur in the future, a debt which is non-existent at the moment when the Civil Liability contract is being signed. However, it is impossible to establish in advance, whether the obligation to rectify the damage would even emerge, and if yes, when such obligation would appear, and what amount would follow. Thus, it becomes increasingly difficult to select a proper Civil Liability insurance. It is also quite peculiar of the Civil Liability insurance, that the insurer is only responsible and only within the scope which is the same as the one referring to the responsibility for damage borne by the insurance holder. If no grounds exist for taking over the responsibility of the insured perpetrator, for example due to the fact that no malpractice emerged, also responsibility of his insurer is excluded, even if the patient was exposed to damage. The responsibility of the insurer has an ancillary nature, as a consequence, he will only become obliged to compensate the damage only to the extent, to which the insured perpetrator is responsible for such damage.

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which is a consequence of provision of medical services or illegal cessation of providing such services is seen in the Article 25 of the April 15th 2011 Act on Medical Activity (unified text, Dz. U. [Journal of Laws] 2015, item 618, with further amendments), and the implementing acts that followed the aforesaid Act and were issued on its basis.

<sup>2</sup> The personal insurance may be of high significance, in cases when accidents emerge which, in a temporary way, may make it impossible for the doctor to continue his professional activities. Thus, numerous insurers create offers targeted at the doctors who, practicing their profession, are forced to temporarily cease their activities. The insurance regarding the property – doctor's office or medical equipment – also plays a significant role here, not only due to the fact that loss of that equipment may make it impossible to continue the medical activity and render the relevant services, but also for the reasons related to the growing value of such equipment. However, the specific nature of this type of insurance forms a need to create a separate analysis on that subject.

Emergence of the liability for damage on the part of the insured person is an indispensable, but also insufficient premise for emergence of liability for the insurer. It is required that the debt of the person insured is contained within the limits of protection granted by the insurer, while the incident, on the basis of which the injured person claims damage, must meet the statutory requirements of the definition of the insurance event, within the meaning given to the said term within the content of the corresponding agreement<sup>3</sup>. Thus, the scope of civil liability borne by the insured doctor, and the liability of the insurer, cannot be viewed as equal. Usually, the liability borne by the insurance company is limited, for instance due to the common application of the exclusion/restrictive clauses, pertaining to the scope of the provided protection. However, it is also possible that a reversed context emerges, in which responsibility borne by the insurance company will be expanded, as compared to the scope of responsibility borne by the doctor. Not only is the said subject obliged to provide compensation, but also to cover the additional expenditure. The said expenditure includes, above all: spending required to be covered by the insured party, for the purpose of fulfilling his obligation resulting from the Civil Liability insurance agreement; cost of remuneration paid to the appraisers, selected to determine the circumstances in which the incident took place, its causes and extent of the damage; cost of defence against the third party claims, including the cost of the court procedure, provided that the dispute has emerged due to the request or consent of the insurer.

In practical terms, a situation may occur, in which civil liability borne by the doctor, and liability borne by the insurer, do not completely overlap. The differences may concern both the subject or amount scope, as well as the time scope of protection provided, whereas this is dependent on the profile of the insurance, and on its having compulsory or voluntary character. Within the former cases, corresponding limitations or exclusions of and from the insurance have been defined by the Legislator himself. However, providing an answer to the question as to what is not covered within the scope of responsibility of the insurer, one should indicate that in case of the compulsory civil liability insurance, in general, damage resulting in loss, destruction or damaged property has been excluded from the scope of protection. In order to protect the patient's belongings (usually being left at the doctor's office) or the equipment remaining at the doctor's office, it is required that a separate theft, flood or other random events protection insurance agreement is concluded. The insurer, moreover, does not bear responsibility for the damage resulting from a variety of penalties, including so called contractual penalties, imposed both by the National Health Fund, as

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<sup>3</sup> Conditions of the Doctor's Civil Liability Insurance (as well as of the Civil Liability Insurance pertaining to the entities which carry out medical activities) are regulated by the December 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 (Dz. U. [Journal of Laws] 2011, No. 293, item 1729).

well as by the medical entities which act as employers or customers, within the framework of so called “contracts”<sup>4</sup>.

Furthermore, a relevant meaning is also seen in definition of the amount limits, referring to the insurance. On one hand, the Patient suffering from injury shall receive benefits up to the amount of the injury caused to him, on the other though, the insurer bears liability only up to the amount defined by the insurance agreement, also referred to as the minimum amount of coverage or the sum insured. This amount is defined individually by the Parties (Civil Liability insurance with voluntary surplus) or defined by the indicated implementing rules (obligatory Civil Liability insurance). When defining the amount scope of insurance protection, one should also remember that the sum insured constitutes the upper limit of responsibility borne by the insurer. However, if in a specific case, higher compensation for damage is determined by the court, for the material damage of the caused damages exceeding the statutory or contractual amounts, the doctor shall be responsible on his own. Denomination of the sum insured, besides the relevant amount, also entails one more “trap”. Namely, the said sum may be defined for a single, or for all of the events occurring during the term of the insurance. Definition of a specific amount as “*per one occurrence*” means that the insurer is responsible within the limits of the same sum insured, due to every separate incident; in cases when “*in the annual aggregate*” definition is provided, this leads to a situation in which the insurance benefit paid out by the insurer due to another event, diminishes the amount of the contractually defined insurance sum, until the said sum is depleted<sup>5</sup>. In the latter case, the material ramifications of responsibility for damage, after the amount limit is depleted, are to be covered by the doctor himself.

The compulsory profile of the insurance means that not only the doctor who meets the statutory requirements is under obligation of being in possession of such insurance, as the insurer also has no right of rejecting a proposal to conclude the agreement with the doctor, if only such insurance is managed by that insurer. Contrary to other types of insurance (Civil Liability car insurance for instance), lack of proper Civil Liability insurance does not lead to emergence of material sanctions. The doctor who has no compulsory Civil Liability insurance will not be able to conclude a contract with the National Health Fund, related to rendering of health services financed from the state budgetary fund. Proper actions may also be undertaken by the supervisory body or by the Regional Medical Chamber. Moreover, a real threat emerges,

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<sup>4</sup> In order to protect the injured party from excessive exclusions, the legislator also restricted a lack of possibility for contract-based limitation of the provided catalogue within the area of the compulsory insurance, on the part of the insurance company.

<sup>5</sup> C.f. E. Kowalewski. 2002. “Umowa ubezpieczenia” [Insurance Agreement], Bydgoszcz–Toruń: Oficyna Wydawnicza Branta, pp. 275. C.f. M. Serwach. 2007, in: E. Kowalewski, D. Fuchs, W. Mogilski, M. Serwach, “Prawo ubezpieczeń gospodarczych” [Economic Insurance Law], Bydgoszcz–Toruń: Oficyna Wydawnicza Branta, pp. 405; M. Krajewski. 2004. “Umowa ubezpieczenia. Komentarz do art. 805–834 KC” [Insurance Agreement. Commentary referring to Articles 805–834 of the Civil Code], Warszawa: C.H. Beck.

since a need may arise that the doctor compensates the damage caused to the patient on his own, and covers it with the assets contained within his personal property.

### **3. Impact of the Legal Form of the Professional Activities on Civil Liability Referring to the Damage from which the Patient Suffers**

The regulations of the Act on Professions of Doctor and Dentist refer to three basic forms of practising the medical profession<sup>6</sup>. These include individual doctor's practice, individual specialized doctor's practice, and group doctor's practice. The Legislator additionally clarified the regulations, stating that the group practice cannot be established within a medical entity, on the basis of an agreement concerning provision of health services (Article 50a of the The Act on Professions of Doctor and Dentist)<sup>7</sup>.

It could seem that the form of carrying out the professional activity by the doctor shall not bear a relevant significance, from the point of view of his civil liability for the damage caused. Meanwhile, it has a decisive impact on the legal situation of the persons who are pursuing a medical profession. His liability is also indirectly dependent on the profile of the legal relationship connecting the doctor and the patient, in particular, it is dependent on whether the doctor acts independently, or on behalf and in line with the interest of the medical entity. Crucial role here is also played by determining what regime of civil liability of the person who renders healthcare services shall apply here. The source of the Doctor's liability may be seen in the obligation existing between the Parties (an agreement concluded between the patient and the doctor) or a tort, defined as illegal actions undertaken by the doctor, or actions defying the law, medical ethics or principles of social co-existence.

#### **3.1. Legal Situation of Persons Employed on the Basis of an Employment Contract**

Up until recently, the most common form of performing the doctor's tasks, similarly as it happened in case of the remaining persons who work in the medical profession, was based on employment at a certain healthcare facility. In such case, Doctor's liability is shaped analogously as the responsi-

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<sup>6</sup> The rules concerning the performance of the professional activity by the doctors are defined by the 1996 Act on the Medical Profession and Profession of the Dentist (unified text, Dz. U. [Journal of Laws] 2015, item 464, with further amendments), while the medical activity is covered within the Act on Medical Activity mentioned above (Article 18). C.f. M. Dercz, T. Rek. 2012. "Ustawa o działalności leczniczej. Komentarz" ["Act on Medical Activity. Commentary"], Warszawa: Wolters Kluwer; J. Kubiak-Nowak. 2012. "Ustawa o działalności leczniczej. Komentarz" ["Act on Medical Activity. Commentary"], Warszawa: C.H. Beck.

<sup>7</sup> More information related to the rules of carrying out the medical profession, and doctor's legal responsibility: c.f. M. Nesterowicz 2013. "Prawo medyczne" [Medical Law], 10th edition, Toruń: TNOiK [Scientific Society for Organization and Management]. Compare: R. Kubiak. 2014. "Prawo medyczne" [Medical Law], Warszawa: C.H. Beck; M. Kopeć (eds.). 2016. "The Act on Professions of Doctor and Dentists.", Warszawa: Wolters Kluwer; E. Zielińska (eds.). 2014. "The Act on Professions of Doctor and Dentists. Commentary", Warszawa: Wolters Kluwer.

lity borne by all of the employees. No separate agreement is concluded between the doctor and the patient, and the doctor carries out his work on behalf and at the cost of his employer. As a consequence, in line with the content of Article 120 of the Labour Code, should the employee cause an injury to the third party, during the performance of his work obligations, solely the employer is obliged to compensate for the said damage<sup>8</sup>. Material-legal basis for that is seen in the Article 430 of the Civil Code, the regulations of which foresee harsh responsibility borne by the superior over his subordinates, based on the rule of risk (for the other person's action and guilt)<sup>9</sup>. At the moment when the patient receives the benefit paid by the healthcare facility acting as the employer, the said Party may submit recourse claims against the employee responsible. In other words, he may ask the doctor to cover the amount paid to the injured third party, in order to provide compensation for the damage caused by the doctor, who, in this case, takes on a role of the perpetrator. The amount of that claim has been tied to the type of fault of the direct perpetrator. In a situation in which the Doctor caused the injury involuntarily, was negligent or reckless, the employer may request a reimbursement in a maximum amount tantamount to the amount of three-months pay<sup>10</sup>. Had the damage caused been intentional, when the doctor was willing to create the said damage (*dolus directus*), or when he accepted a chance of the damage to emerge (*dolus eventualis*), the employer may request a return of the whole amount paid out<sup>11</sup>. This conclusion is confirmed by Article 122 of the Labour Code. According to this regulation, should the employee cause injury intentionally, he or she shall be obliged to rectify the damage in the full amount. As numerous authors suggest, the statutory statement may lead to a conclusion which is placed even further, suggesting that the employee who is guilty of the intentional damage, shall rectify the damage himself. Intentional injury caused to the patient also creates numerous negative ramifications also in the field of insurance. Even if the doctor is insured, with a Civil Insurance policy, any intentional damage caused by the insured person are not covered by the said in-

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<sup>8</sup> According to Art. 120 § 2., in front of the employer who compensated for the damage caused to the third party, the employee is solely responsible in line with the provisions of the Labour Code.

<sup>9</sup> In order to apply the said regulation, three prerequisites need to be met: 1) Subordination relationship resulting from the fact that the subject responsible is a superior who has an ability to issue orders and guidelines for the other person; the subordinate is the direct perpetrator of the injury, with the said subordinate being obliged, when performing his work, to follow the aforesaid orders and guidelines; 2) Damage was caused, when the subordinate was performing the delegated actions; 3) Damage was caused due to the subordinate's fault. This regulation is also treated as an example of the most strict responsibility described within the Civil Code. The superior is responsible on the principle of risk, and no circumstances may be referred to, that would allow him to avoid the liability in question.

<sup>10</sup> The doctor's remuneration/pay is the amount he earns at the given medical facility on the date when the injury is caused; if the doctor was employed at more than a single facility, the salaries are not being summed up.

<sup>11</sup> *Dolus directus* means that the doctor imagines the result in a form of damage, and that this is his intention. *Dolus eventualis* is a circumstance emerging, when the doctor imagines the result in a form of damage, and accepts the eventual emergence of that damage.

surance<sup>12</sup>. When one assesses the legal situation in which the employed doctor is placed, one should also take into account the fact that the said doctor shall also bear the financial responsibility for the emerging injury also in cases when the healthcare facility goes bankrupt or is liquidated<sup>13</sup>.

Should the injury be caused by more than one doctor (e.g. by the operating surgeon and by the anesthesiologist), each of those doctors shall be liable in front of the healthcare facility playing the role of the employer, for part of the injury, in line with the degree of fault, or the degree to which the given doctor made a contribution to the emerging injury. If it remains impossible to establish the degree of guilt, or degree of contribution of the individual doctors to the injury caused to the patient, the responsibility borne by them shall be equal. The circumstances that justify the situation in which a specific doctor shall be responsible, and which would justify the amount of the granted benefit, shall be proven by the entity which issues a recourse claim.

### **3.2 Legal Situation of an Entity which Concludes a Civil Law Agreement, the Subject of Which is Defined as Rendering of Healthcare Services**

The situation, in which the Doctor concludes a Civil Law contract with the healthcare facility, also commonly referred to as contract, is of different shape. In such case, the doctor bears the joint and several responsibility for the injury caused to the patient. Joint and several responsibility means that the injured person may, on his own, issue requests for compensation of the injury from the doctor himself, who is the perpetrator of damage, from the healthcare facility, or the said damages claim may also be addressed to both of the aforesaid entities at the same time. All of the several and joint debtors are obliged, until full settlement of the injured patient's claims is achieved. When the benefit is paid to the injured person, there is one more issue to be settled, namely the settlement of the compensation between the parties held responsible<sup>14</sup>. If the injury resulted solely from a malpractice, incorrect action or negligence on the part of the doctor who was rendering the specific service, the healthcare facility may ask the doctor to return the whole amount that was paid out. Should both subjects be recognized as responsible, the settlement between the co-responsible persons shall be concluded in line with the relevant circumstances, especially

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<sup>12</sup> Within the framework of the compulsory Civil Liability insurance, the aforesaid principle is expressed by Article 11 of the May 22nd 2003 Act on Compulsory Insurance, Insurance Guarantee Fund and the Polish Motor Insurers' Bureau (Unified text: Dz. U. [Journal of Laws] 2013, item 392, with further amendments). In case of the voluntary insurance, all of the general Civil Liability insurance conditions proposed within the Polish insurance market foresee an analogous solution.

<sup>13</sup> This conclusion is confirmed by the Judgement of the Supreme Court issued on April 11th 2008, in which the Supreme Court claims that the insured person may claim damages compensation directly from the employee, with a reference to the injury caused by the employee unintentionally by tort, occurring when the said employee performed his work obligations, in case when the place of employment is unable to pay out the receivable compensation (II CSK 618/07).

<sup>14</sup> If one of the several and joint debtors covered the claim, he may ask the remaining debtors to return the relevant parts of the damages paid.

with a reference to the guilt of both parties, and should no possibility exist to determine the guilt, in line with the contributions made to the emergence of the subject injury<sup>15</sup>.

### **3.3. Legal Situation of an Entity Rendering the Healthcare Services on the Basis of So Called Contract Concluded with the National Health Fund**

The doctor may also render healthcare services, financed with the use of the state budget. In order to do so, the doctor in question concludes a relevant agreement with the director of the branch of the National Health Fund, also referred to as the contract. The procedure related to conclusion of such agreements with the service providers (vendors, healthcare providers), the mode related to that procedure, and remedies available to the Party are all a subject to detailed regulations of the Aug. 27th 2004 Act on health care services financed from public funds<sup>16</sup>. The healthcare providers do not have to provide the contracted services in person, they may use subcontractors to do so, on the basis of a separate agreement<sup>17</sup>. Contrary to the cases discussed above, no other entity (besides the insurer) is responsible in front of the party injured for the damage caused. This issue has an analogous shape, in case when the healthcare provided by the doctor has a private and commercial character.

### **3.4. Responsibility of a Person Involved in Group Practice**

A group practice may be established in a form of a civil partnership or as a limited liability partnership. Selection of the specific form, in a substantial way, determines the extent of the potential civil liability.

The civil partnership, as the name suggests, is a partnership established in line with the Civil Code, and defined by Articles 860–875 of the said legal document. It is usually formed in line with Article 860 of the Civil Code, on the basis of an agreement, within which the partners are obliged to achieve a common business goal through acting in a defined manner, particularly through making relevant contributions<sup>18</sup>. The discussed partnership is characterized by a lack of legal personality which, as a consequence, leads to a situation in which the partners themselves are involved in the turnover operations, instead of the company itself as a separate legal entity. The company's assets constitute a shared property of all of the partners, and for the time when the partnership

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<sup>15</sup> Full recourse claim is only possible when the Party who compensates the damage, for which it is responsible, despite the lack of guilt, has a right to recourse against the perpetrator, if the injury was caused by the perpetrator (Article 441 § 3 of the Civil Code).

<sup>16</sup> Dz. U. [Journal of Laws] 2004, No. 210, item 2135.

<sup>17</sup> In the previous state, the healthcare provider who provided the services related to healthcare was a subject to a separate Civil Liability insurance obligation, regarding the injury caused during the process of rendering the healthcare services. Conditions of the said insurance are regulated by the December 28th 2007 regulation issued by the Minister of Finances, see the regulation regarding the issue of compulsory civil liability insurance for the healthcare providers which carry out medical activities (Dz. U. [Journal of Laws] 2008, No. 3, item 10).

<sup>18</sup> The articles of association shall take a written form. The contribution made by the partner may come in a form of property or other rights, or through provision of services. It is presumed that contributions made by the partners are of an equal value.



retains its validity, these assets are treated as separate from the personal assets of each of the partners<sup>19</sup>.

All of the partners are held jointly and severally responsible for commitments of such company, also for compensating the damage caused to the patients, with whole of their property. The patient may, considering the above, request compensation to be paid out by the doctor who caused the damage, by selected partner – doctors, or by all of the partners, collectively. There is no obligation to file in claims solely to the entity which made a medical error, even if this is done, the patient does not have to file in his damage claims, primarily, to the direct perpetrator of the damage<sup>20</sup>. This conclusion is confirmed by the judgment made by the Court of Appeals of Białystok, on October 27th 2004, within which, the said court claimed that joint and several responsibility for the injury caused to the patient is attributable to all of the partners of the civil partnership<sup>21</sup>. At the moment when the injured Party receives a compensation or other benefit, the doctor, who acts as a partner at the civil partnership, and who covered that compensation for damage for the patient, now has a so called recourse claim emerging, which means that he makes claims for reimbursement of the amount paid out in full, or partially. If the said partner bears no responsibility for the emerging incidental damage which is solely a result of faulty action or negligence on the part of his colleague, the Partner may demand reimbursement of the whole sum which was provided to the party injured. Solution as such constitutes an additional burden placed on the doctor who is held responsible in front of every patient of the partnership, for the injury caused, even if the said injury was not caused by that doctor directly. In this way, the injured person obtains additional debtor, personified by every partner at the civil partnership, while the doctor who paid damages (compensation for damage) to the patient, will need to settle this action with the remaining partner-doctors. Not only will the said partner doctors responsibility mechanism used in case of the civil partnerships be applicable against the patients, as it also refers to any other commitments or liabilities of the company, also to the liabilities resulting from the agreements concluded, and in case of the contracts signed with the suppliers of the medical materials, pharmaceuticals or dressing materials, or with service providers (disinfection, disposal of medical waste, utility fees).

Another legal form of creating a group doctor's practice is realized through establishment of a limited liability partnership. Contrary to the civil partner-

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<sup>19</sup> In front of the third parties, the partnership shall be represented by one or several partners, or, sometimes, in line with the agreement content, by all of the parties concerned: W. Czachórski. 2007. "Zobowiązania – zarys wykładu" [Liabilities – Lecture Outline], Warszawa: Lexis Nexis, p. 568.

<sup>20</sup> No legal obstacles exist for the claimant to file in his claims to other doctor, who is a partner at the civil partnership, and then, should no option of achieving the compensation exist, to make claims with a reference to another doctor, who is guilty of malpractice.

<sup>21</sup> I ACa 575/04. Medical malpractice here has been seen in prescribing injective form of Pyralgine (Metamizole) for the patient suffering from asthma, for oral use, without foreseeing a possibility of anaphylactic shock taking place, and, consequently, without foreseeing the fact that no option of provision of professional medical assistance would exist.

ship, limited liability partnership is a type of a personal partnership established in line with the commercial law, and regulated by Articles 86–101 of the Commercial Companies Code<sup>22</sup>. According to the Article 86 of the Commercial Companies Code, the said company may be established, for the purpose of performing the so called independent profession<sup>23</sup>. The limited liability partnership has no legal personality, however, which is important, it is treated as a separate, individual entity, in line with the civil law. As a consequence, such partnership may independently exist on the market, acquire rights and be committed, sue and be sued. This feature has an indirect influence on the liability borne by the partners of such company. This liability, primarily, is borne by the company itself. Only after the injured person/patient is unable to receive the compensation and rectification of the injury from the company, in a subsidiary – alternatively may submit a claim to the partners themselves. However, the primary role here is played by the provisions of the Article 95 § 1 of the Commercial Companies Code, in line with which the partner does not bear responsibility for the commitments of the company emerging as a result of practicing the profession of a doctor by other partners within the company, moreover, the partner also does not bear responsibility for the liabilities of the company resulting from actions or omissions of the persons who are employed by the company on the basis of an employment contract or other legal relationship, who were managed by another partner, when rendering services related to the subject of the company's activity.

The law in force does not provide for a situation in which the doctor renders healthcare services on the basis of a contract regarding the specific work, or therapy contract signed without registration of a professional practice, which leads to a situation in which the doctor may only conclude a voluntary civil liability insurance agreement. Another problem emerges in a situation in which the doctor manages the healthcare facility, or when he owns it. In such case, the insurance obligation is imposed on the healthcare entity itself, and, as a consequence, the doctor does not have to conclude a separate insurance agreement, unless he has a separate private practice registered, or renders the healthcare services at another healthcare establishment. Meanwhile, rendering of any healthcare services always entails a possibility of injury, hence more and more importance is gained by the civil liability insurance. However, the same statement, referring to importance, may be made, when it comes to the voluntary insurance, or additional clauses which expand the scope of insurance protection<sup>24</sup>.

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<sup>22</sup> Sep. 15th 2000 Act, (unified text, Dz.U. [Journal of Laws] 2013, item 1030, with subsequent amendments).

<sup>23</sup> For the purpose of establishing a limited liability partnership, two circumstances need to emerge – an agreement needs to be concluded, in a form of a notarial deed, and subsequently, an entry needs to be made within the National Court Registry.

<sup>24</sup> "Courtesy" therapeutics during a stay abroad, related to a trip or stay (services rendered for acquaintances) also creates a risk of emerging responsibility related to a potential injury.

### 3.5. Obligation To Conclude a Civil Liability Insurance Agreement

As it may be concluded, when getting acquainted with the above remarks, obligation related to Civil Liability insurance does not concern all of the doctors, it is applicable solely in case of doctors who have their professional practices registered. The aforesaid obligation has not been imposed on the doctors who work and perform their work on the basis of an employment contract, or on the basis of civil law agreements, without simultaneous registration of the therapeutic activity. Comparison of the discussed cases is a proof of the importance, from the doctor's point of view, of selection of a proper form which is taken by the professional activity carried out by the doctor. If the person performs his actions on the basis of an employment contract, the entity which is obliged to rectify the injury caused to the patient is the medical facility, acting as the employer. It is without any doubt, that negative effects may present themselves with a delay, should the employer file in a recourse claim. Not only are these consequences delayed, as they are also dependent on the employer's decision, and on the extra circumstances, also on the degree of fault attributed to the perpetrator. In a situation, in which the doctor concluded a Civil Law agreement (so called contract), his responsibility is joint and several with the healthcare facility. In the said case, the doctor is co-responsible, with the other party being held co-obliged to rectify the damage caused to the patient, within the full scope. Only at the further stages of the procedure, the issue of settlement between the parties emerges. In this case, another issue emerges, related to the commitments made by two separate insurers: Civil Liability insurer of the doctor, Civil Liability insurer of the healthcare entity, and a situation in which these entities raise, by and between themselves, the recourse claims.

### 4. Legal Situation of a Doctor Held Responsible for Emergence of a Medical Incident

According to the November 6th 2008 Act on the Patient's Rights and on the Patient's Rights Advocate (Chapter 13a), the regulations referring to the rules and mode in which damages and compensation are defined by the Voivodship Commission, shall be applicable with a reference to the medical incidents which are a consequence of rendering the medical services at a hospital (Article 67a, section 2)<sup>25</sup>.

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<sup>25</sup> Dz. U. [Journal of Laws] 2009, No. 52, item. 417, with further amendments. This Act will be hereinafter referred to as the Act on the Patient's rights. Amendment introducing the mode for determining the damages and compensation in case of the medical events has been introduced with the use of an April 28th 2011 Act on Amendment of the Act on Patient's Rights and Patient's Rights Advocate and the Act on Obligatory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau (Dz. U. [Journal of Laws] 2011, item 660). For more information related to the models for compensating the medical damage – see M. Nesterowicz. 2002. "Ubezpieczeniowe i gwarancyjne modele kompensacji szkód wyrządzonych przy leczeniu", [Insurance- and Guarantee-based Therapy Injuries Compensation] Prawo i Medycyna 2002, Vol. 2.

The hospital is defined within the Act on Medical Activity<sup>26</sup>. According to Article 2, section 1, subsection 9 of the said act, hospital is a healthcare institution at which the healthcare entity renders healthcare services of hospital services type. As it is suggested by the regulation to which we have made reference, the statutory definition is hard to comprehend, since it makes another reference, to another term – “hospital service”<sup>27</sup>. Solely the entity which, in a cumulative manner, meets the aforesaid conditions, bears responsibility for the medical incidents emerging.

By introducing the responsibility for emergence of a medical event, the legislator did not provide a solution referring to the legal situation in which the directly responsible entity is placed<sup>28</sup>. In most of the cases, a specific entity or, alternatively, a group of persons is held responsible for emergence of a health burden or death of the patient, since only the said group may carry out actions not in line with the current medical knowledge, resulting from an incorrect diagnosis, therapy or application of a therapeutic or medical product. Most often, doctor is the said subject, nonetheless, default may also be caused by the nurse, midwife, lab diagnostician or other person who is employed on a medical position. Lack of clear statutory solution was motivated by adoption of an assumption, according to which the medical incident may occur within the hospital area, nonetheless, the material responsibility for that incident will be borne by the hospital’s insurer. Introduction of the insurance for the patients was obligatory at the beginning, along with the legal regulation of the mode of determining the medical incident benefits. The financial implications for the medical entity could have an auxiliary meaning, should the insurance sum be depleted.<sup>29</sup>. Repealing of the obligatory character of the insurance, and the habit of not concluding, by most of the hospitals, the voluntary agreements due to medical incidents, lead to a situation in which the said hospitals bear

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<sup>26</sup> The aforesaid Apr. 15th 2011 Act on Medical Activity (Dz. U. [Journal of Laws] 2011, No. 112, Item 654).

<sup>27</sup> Hospital services are defined as all-around-the-clock complex healthcare services including diagnosis, therapy, care and recovery, which cannot take place within other stationary and 24-hour healthcare or ambulatory healthcare services. Services rendered within a period shorter than 24 hours are also seen as hospital services.

<sup>28</sup> Within the legal science, no considerations were made so far, as to what results medical malpractice may have, should that medical malpractice result in a medical incident which takes place at a hospital. When it comes to the nature and profile of the responsibility resulting from medical incidents, and Commission procedures, see: M. Serwach. 2011. “Odpowiedzialność za zdarzenia medyczne – nowe regulacje prawne” [Responsibility for Medical Events – New Legal Regulations], *Medycyna Praktyczna 2011* (vol. 1), pp. 116. Compare with E. Kowalewski, W. Mogiński. 2012. *Istota i charakter ubezpieczenia pacjentów z tytułu zdarzeń medycznych*, [Nature and substance of patients’ insurance covering the medical events] PA 2012, No. 1, p. 13 and following pages. E. Kowalewski (eds.). 2011. *Kompensacja szkód wynikłych ze zdarzeń medycznych* [Compensation of injury resulting from medical events]. *Problematyka cywilnoprawna i ubezpieczeniowa* [Problem of civil law and insurance], Toruń: TNOiK [Scientific Society for Organization and Management].

<sup>29</sup> In the later case, when the hospital did not conclude the medical incident insurance, the circumstances were unique. In any other case, the patient who was concerned in case of the given medical incident which took place at an uninsured hospital, would be deprived of the receivable benefit.

material responsibility for emergence of the medical incidents, and when they shall be obliged to rectify the damage to which the patient is subjected. This shift of the burden of paying the damages compensation from the insurer to the uninsured healthcare entity leads to a situation in which, from a practical point of view, the issue of the legal option of making settlements between the direct perpetrator and the healthcare facility may bear a significant meaning, both for the patient, as well as for the hospital in question.

### **4.1. Responsibility of the Healthcare Entity for Emergence of a Medical Event and Direct Liability of the Direct Perpetrator of the Damage**

It shall be stressed that lack of any statutory regulations referring to the potential settlement between the doctor and the medical entity, in cases of determining whether a medical incident took place or not, with the procedure being carried out by the Voivodship Commission adjudicating on medical events, makes the legal situation in which the uninsured hospital is placed even more difficult, with the hospital being obliged to pay the benefit to the patient<sup>30</sup>. In a situation, in which insurance protection is missing, the hospital may be particularly interested in settlement of the burden of the damage emerging with the direct perpetrator. If a specific doctor, employed on a basis of an employment contract, is the perpetrator, may wonder whether the manager of the medical entity may draw consequences against his employee, resulting from the labour code<sup>31</sup>. In such case, it should be proven that the employee, as a result of not performing or indigently performing the work responsibilities, is guilty of inflicting damage on the employer<sup>32</sup>. The employee, in such case, bears responsibility within the limits of the real loss borne by the employer, and only for normal consequences of the action or omission, which led to emergence of the given damage. On the other hand, the employer shall be obliged to prove the circumstances which would justify the responsibility borne by the employee, along with the amount related to the emerging damage<sup>33</sup>. According to Article 119 of the Labour Code, the damages are defined as the amount of the injury caused, nonetheless the said amount cannot be higher than the amount of three-months pay attributable to the employee, on the date when the injury is caused. The problem here results from the fact that the act caused by the employee must be culpable, while limitation of the scope down to 3 months pay

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<sup>30</sup> In the further part of the considerations, Commissions adjudicating on medical events shall be referred to as Commissions. For more information on the commissions, their activities, and practical implications, see 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. 3–17.

<sup>31</sup> More information on that issue: K. Jaśkowski, E. Maniewska. 2013. “Komentarz do kodeksu pracy”. [Commentary regarding the Labour Code] Warsaw: LEX .

<sup>32</sup> Breach of responsibility occurs when the employee proceeds in violation with the responsibilities with which he is burdened, or should the employee not take action, even though this shall be done.

<sup>33</sup> Such stance is also emphasized by the judiciary. See the judgment issued by the Cracow Court of Appeals on September 11th 2012. (III APa 20/12).

refers solely to involuntary guilt (carelessness, negligence). However, the commission which determines whether a medical incident took place or not does not examine the guilt attributed to a specific entity. As a consequence, in order to make it possible for the employer to make relevant claims against the doctor, seen as an employee, the employer shall prove his guilt seen in a specific action or omission which led to a situation, in which the undertaken diagnosis, therapy or surgery, or application of a therapeutic or medical products, caused a health disorder or bodily damage, biological pathogen infection or death of the patient.

Lack of clarity is deepened even further in situations, when a “contracted” doctor is held responsible for the incident. Joint and several responsibility of such doctor and the healthcare entity (Article 33 of the Act on Medical Activity) means, in fact, that the injured patient may submit his damage claims at his own will, to the doctor, to the hospital, or to both of the aforesaid subjects at once. Only after the damage is compensated in full, the issue of settlement between the persons obliged emerges. A significant meaning within that scope is carried by the provisions of the Article 441 of the Civil Code. However, the main problem is a result of the fact that the rules of so called recourse, between the joint and several debtors, are applicable should civil liability emerge (so called civil liability under tort)<sup>34</sup>. Meanwhile, within the legal science, a conflict emerges related to the character of liability pertaining to a medical event<sup>35</sup>. If the patient’s insurance has a profile different from a civil liability insurance, and takes on a form of an insurance agreement similar to personal accidents insurance agreements concluded for the patient, while the responsibility borne by the hospital has a subsidiary character, with a reference to the insurer’s responsibility, then the issue of claims between the healthcare entity, and the doctor, seen as the direct perpetrator, would not emerge. However, the main problem emerges in the fact that not only did the legislator not settle and define the character of the new insurance (civil liability or accident insurance) but also, through temporary change of the insurance’s qualification, the legislator also amplified the existing doubts, recently creating a major revolution, crossing out the legal regulations referring to the medical incidents insurance from the Act on Medical Activity<sup>36</sup>. Getting rid of proper legal regulations does not mean that the given insurance is non-existent anymore, it just became purely

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<sup>34</sup> If one of the entities is held responsible due to liability under tort, while the other, due to his contractual obligations, *in solidum* structure is permissible. In any case though, admitting that here we are dealing with civil liability, shall be seen as a prerequisite.

<sup>35</sup> E. Kowalewski, W. Mogiński, *op. cit.*, p. 3 and subsequent pages.

<sup>36</sup> Analysing the issue in a chronological manner: First an amendment of the regulations of the Act on Medical Activity entered force, which led to a relevant insurance-related change, pertaining to the medical events insurance (Dz. U. 2012, item 742). The aforesaid amendment has been introduced into the Apr. 15th 2011 Act on Medical Activity (Dz. U. [Journal of Laws] 2011, No. 112, Item 654). This led to a situation in which the medical incident insurance, starting from June 30th 2012, became voluntary, and then, starting from January 1st 2014, they again became compulsory. The term within which the medical incident insurance remains compulsory was then extended, until January 1st 2017.

voluntary. Moreover, a question emerges, whether the healthcare entity which is not in possession of such insurance, could prove that negligent actions of the doctor were not only a cause for the medical event to emerge, but also met the prerequisites for his civil liability to be seen.

Regardless of the remarks above, one should state that provisions contained within the agreement concluded with the doctor cannot amend or change the rules resulting from absolute rules of the law. As a consequence, potential provisions of so called contract have no significant meaning from the point of view of the patient who may direct his damage claims to the hospital, doctor or to both these entities at the same time, highlighting the civil liability prerequisites, or deciding to take way of claiming the damages/benefits due to medical event, in front of a Commission. In the latter case, the material ramifications of the medical event will be borne by the insurer or by the hospital, in a situation in which no proper insurance exists, or should the insurance sum be depleted.

As a consequence, lack of proper regulations, along with doubts resulting from interpretation of the regulations remaining in force, lead to a situation in which the healthcare entity's settlement options, involving the doctor held responsible in case of a medical event, are fairly limited. No rights as such are also ascribed to the insurer who insured the hospital with a reference to the medical events, and who paid the relevant benefit.

### 5. Conclusion

When carrying out a brief analysis of a legal situation in which a person who is working as a medical professional is placed as a subject held responsible for emergence of an injury caused to the patient, also with that person being covered by the scope of insurance protection by medical insurance, one should emphasize the varied character of that person's position, depending on the type of the insurance, and the legal form within which that person carries out his/her professional activities. In case of the Civil Liability insurance, injury caused by the doctors is also covered – doctors are the employees, thus, the doctor may only be burdened with an obligation of paying a benefit equal to the sum equivalent to the pay he receives for 3 months of work, unless the injury was caused by him as a result of voluntary action. In case as such, the doctor may face an obligation of paying the compensation in full. Neither the fact that the doctor is an employee, nor having the voluntary Civil Liability insurance would relieve the doctor of that obligation, since within the Civil Insurance, in general, the responsibility for voluntarily caused injuries is not covered. The doctor who performs his duties on the basis of a civil law agreement, bears joint and several responsibility with the medical entity, with which he concluded the agreement in question. As a consequence, the decision of the injured person has a decisive value here, since it is the injured person that decides on the entity towards which/whom the damage claims are made. Secondly, recourse claim issue is equally important, between the responsible parties: the doctor, the healthcare facility, or, alternatively, also between the insurer of the responsible party, with that insurer paying the benefit. A separate issue is seen in the

option of raising the recourse claim amounts, with a reference to the recourse claims arising between the Civil Liability insurers.

The legal situation of a doctor, as the potential perpetrator of the injury, is, in some way, equalized, should a request be submitted to determine whether a medical event took place. Should the insurance covering the medical incidents be missing, this means that, in general practice, a rule is applied according to which the hospital is held accountable for the event. This entity has no legal options of raising recourse claims against the doctor who is the direct party responsible for the injury whatsoever. It does not matter whether the doctor responsible for the injury carried out his actions on the basis of an employment contract, or civil-law contract. The healthcare entity, and the healthcare entity only, retains a capacity of drawing consequences against the doctor – employee, should simultaneous breach of his professional responsibilities be proven by the hospital. Should this be the case, one should prove that the given entity is guilty, along with definition of the degree of that guilt, which could lead to a settlement analogous to the one applicable in case of civil liability. Inclusion of the injury caused by the subject performing the medical profession at a hospital within the scope of the medical events insurance cover, and within the auxiliary responsibility of the medical entity leads to a situation in which the simplified mode for compensation of the medical injuries may be treated as implemented both with the injured patient, as well as with the persons performing the medical profession in mind.

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### Sytuacja prawna lekarza jako ubezpieczonego sprawcy szkody w ubezpieczeniach medycznych

Ubezpieczenia odpowiedzialności cywilnej odgrywają w działalności medycznej coraz większą rolę. Ich dynamiczny rozwój jest wynikiem coraz większej ilości roszczeń odszkodowawczych, zgłaszanych przez pacjentów oraz członków ich rodzin w coraz większej wysokości. W praktyce, przeważająca większość popełnianych błędów wynika bezpośrednio z działalności lekarskiej lub samego podmiotu leczniczego. Tymczasem lekarz wykonuje swoje czynności zawodowe zarówno na podstawie umowy o pracę, jak i na podstawie umowy cywilnoprawnej nazywanej potocznie kontraktem lub też prowadząc odrębną praktykę zawodową – indywidualną lub grupową. Każda z wskazanych form wpływa na pozycję prawną lekarza jako ubezpieczonego sprawcy. Podmiot leczniczy może bowiem ponosić solidarną odpowiedzialność z bezpośrednim sprawcą szkody, jak i polisa ubezpieczenia OC może obejmować zakresem ochrony szkody wyrządzone pacjentom przez lekarzy lub inne osoby z personelu medycznego zatrudnione w danej placówce. Kolejna kwestia to problematyka potencjalnych rozliczeń pomiędzy odpowiedzialnymi podmiotami oraz roszczeń regresowych.

Przedmiotem niniejszej publikacji jest wskazanie zróżnicowanej sytuacji prawnej lekarza jako ubezpieczonego sprawcy szkody w ubezpieczeniach odpowiedzialności cywilnej oraz przeanalizowanie jego pozycji w relacjach z pacjentem oraz podmiotem leczniczym. Autorka analizuje ponadto pozycję prawną lekarza jako sprawcy szkody w przypadku ubezpieczeń z tytułu zdarzeń medycznych oraz możliwość podniesienia wobec niego roszczeń regresowych.

**Słowa kluczowe:** ubezpieczenie odpowiedzialności cywilnej, ubezpieczenie z tytułu zdarzeń medycznych, błąd medyczny, zdarzenie medyczne, wykonywanie działalności leczniczej, forma wykonywania zawodu lekarza.