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Contractual liability of a doctor in private practice for medical errors in Polish law

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Summary: 1. Contractual liability - general remarks. 2. Contracts of result and contracts of diligence. 3. Due diligence of the practitioner. 4. Grounds for the doctor's liability. 5. The presumption of fault.

Abstract: The doctor's liability for medical (medical) errors is relatively broad in theory, and the patient is in a privileged position, because – if a contract is concluded – in practice he or she can claim damages under two liability regimes. By far the more common of these liability regimes is the ex delicto regime, which is only justifiable if it is assumed that in the *ex contractu* regime no redress for non-pecuniary damage is possible, which, as has been shown, isn't justifiable. However, on the assumption that it is also possible to compensate for non-pecuniary damage in the case of a contract for medical services, the distribution of the burden of proof referred to above constitutes a significant facilitation in relation to the patient's claim under the tort regime.

Keywords: Contractual liability; medical errors.

1. Contractual liability - general remarks

An obligation consists in the fact that the creditor may demand performance from the debtor, and the debtor should fulfil the performance (Article 353 § 1 of the Civil Code). If the obligation isn't performed or is performed in an improper manner, so that the creditor's legitimate interest is not satisfied in an appropriate manner, the debtor has a duty to compensate for the damage, unless there are circumstances excluding this duty. Non-performance or improper performance of an obligation may be the result of various circumstances, often beyond the debtor's control. It should be remembered that although Polish law is aware of exceptional situations in which the debtor is liable in an absolute manner (absolute liability), i.e. without the possibility of exemption, the rule is that he has such a possibility.

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In Polish civil law, liability for damages is based on two regimes: contractual – *ex contractu* (Article 471 et seq. of the Civil Code) and tort – *ex delicto* (Article 415 et seq. of the Civil Code). This is also how a doctor's liability may develop, with contractual liability being discussed in view of the topic of the paper. However, it shouldn't be forgotten that non-performance or improper performance of a contract may also constitute a tort. While the basis for a claim for damages in such a situation is the contractual regime, liability for a tort (tortious act) can't be excluded if, at the same time, the prerequisites for tort liability have been met[2]. This is the case when the debtor breaches a general obligation arising ex lege, but also when a specific form of non-performance or improper performance of the obligation in the light of the circumstances of the case makes it possible to assume that the debtor has breached the principles of social co-existence towards a third party. Of fundamental importance here is the nature of the obligation linking the creditor and the debtor and the manner in which that obligation is functionally and substantially related to the obligatory relationship linking the debtor or creditor separately with a third party[3]. In such a situation, there is a concurrence of claims for damages, which means that the court is obliged (if the plaintiff so requests) to adjudicate the claim by applying the prerequisites of both liability regimes. However, these are relatively rare situations and in the vast majority of cases these regimes of liability are separate.

Pursuant to Article 471 of the Civil Code, a debtor is obliged to compensate for damage resulting from non-performance or improper performance of an obligation, unless the non-performance or improper performance is a consequence of circumstances for which the debtor isn't responsible. *Ex contractu* liability may therefore arise where an obligatory relationship exists between the parties, arising in particular from a valid contract. Therefore, if for some reason the contract is invalid, this regime of debtor liability doesn't apply. Furthermore, the prerequisites for such liability must exist:

(1) the event of non-performance or improper performance of the contract by the debtor;

2) the damage resulting from that event;

3) an adequate (normal) proximate cause between the event and the damage.

These prerequisites must of course also exist when we are talking about the contractual liability of the doctor. The duty to prove them (onus probandi) rests on the creditor (Article 6 of the Civil Code), so in the present case on the patient, while there is no presumption of the existence of the prerequisites of contractual liability for damages, as it is the case with respect to the debtor's fault[4], as will be discussed below. This is because the article focuses on the prerequisites of a doctor's contractual liability for medical damage.

2. Contracts of result and contracts of diligence

In the context of the topic, it is important to distinguish between obligations of result and obligations of diligence (this distinction is taken from French doctrine)[5], and consequently

[2] See e.g. judgments of the Supreme Court (in Poland): of 16 June 2010, I CSK 507/09; of 14 February 2013, II CNP 50/12.

[3] SZANCIŁO, T., in: ZAŁUCKI, M. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo C.H. Beck, Warszawa 2023, p. 1001.

[4] See e.g. judgments of the Supreme Court: of 19 December 1997, II CKN 531/97; of 10 September 2015, II CSK 587/14.

[5] See e.g. NOWAKOWSKI, Z.K., *Zobowiązania rezultatu i starannego działania*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1959, No. 2, pp. 97 i n.; DOMAŃSKI, G., *Koncepcja zobowiązań rezultatu i starannego działania a odpowiedzialność kontraktowa w prawie francuskim*, Studia Cywilistyczne 1972, Vol. XX, pp. 169 i n.; OGIEGŁO, L., *Usługi jako przedmiot stosunków obligacyjnych*, Katowice 1989, pp. 207 i n.; ROMANOWSKI, M., *Zobowiązania rezultatu i starannego działania*, „Przegląd Prawa Handlowego" 1997, No. 2, pp. 23–26; MACHOWSKA, A., *Koncepcja zobowiązań rezultatu i starannego działania i jej doniosłość dla określenia odpowiedzialności kontraktowej*, „Kwartalnik Prawa Prywatnego"

such a division of contracts, although the doctrine aptly points out that such a distinction has no normative basis and that the grounds for distinguishing between the two types of obligations aren't entirely precise[6], It's also pointed out that all obligations are obligations of care and, of these, some obligations additionally include the achievement of a result as a necessarily required element of performance[7], as well as that every contractual relationship is in essence an obligation of result, since there is always a specific result as a result of a service properly performed[8].

However, such a division is justified. In a result obligation (contract), the debtor undertakes towards the creditor to achieve the result concretised in the content of the obligation (contract), e.g. a work contract[9]. The result specified in the contract is most often in a materialised form (usually a thing), but may take an immaterialised form, which consists in the creation of a certain state or situation (e.g. the creation of a state of safety through the supervision performed). In contrast, in a duty of care obligation (contract), the debtor undertakes towards the creditor to behave in a certain way (usually an action) and to exercise due diligence to achieve the purpose agreed by the parties, but doesn't undertake that this purpose will be achieved, e.g. a contract of mandate[10], or contracts for the provision of services, to which - pursuant to the reference contained in Article 750 of the Civil Code – to the extent not regulated in specific provisions, the provisions on commission are applied accordingly – the latter include, inter alia, an agreement for the provision of legal assistance, also covering representation of a party before a court of law[11], contract for the provision of medical services[12], whether the contract concluded by the healthcare facility with the National Health Fund (NFZ)[13]. A contract for the provision of medical services concerns the performance of specific medical treatments, rehabilitation, hospitalisation or diagnostic tests. It's clear that the doctor is obliged to take all possible and lawful steps to achieve the result of properly 'diagnosing' and 'curing' the patient, but his obligation doesn't include such a result.

The important aspect of the warranty for physical defects must also not be forgotten. If the contract concerns a diligent act, so that the party (the contractor) doesn't undertake to achieve a specific result, it is not considered whether the object of the contract has a physical

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2002, No. 3, pp. 683 i n.; LASKORZYŃSKI, P., KOWALCZYK, Ł., *Zobowiązania starannego działania i rezultatu – dyskusja*, „Radca Prawny" 2003, No. 6, p. 91-100; GAWLIK, Z., in: KIDYBA, A. (ed.), *Kodeks cywilny. Komentarz, Tom III. Zobowiązania. Część ogólna*, Ed. LexisNexis, Warszawa 2014, art. 471, thesis No 21.

[6] See e.g. PAJOR, T., *Odpowiedzialność dłużnika za niewykonanie zobowiązania*, Ed. Wydawnictwo Naukowe PWN, Warszawa 1982, pp. 70 et seq., pp. 164 et seq. and pp. 285 et seq.; KRAJEWSKI, M., *Zobowiązania rezultatu i starannego działania (próba alternatywnego ujęcia)*, „Państwo i Prawo" 2000, No. 8, pp. 42 i n.; BANASZCZYK, Z., GRANECKI, P., *O istocie należytej staranności*, „Palestra" 2002, No. 7–8, p. 24; POPIOŁEK, W., in: PIETRZYKOWSKI, K. (ed.), *Kodeks cywilny. Komentarz. Tom II. Art. 450-1088*, Warszawa 2021, art. 471, side No. 7; MACHNIKOWSKI, P., in: GNIEWEK, E., MACHNIKOWSKI, P. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo C.H. Beck, Warszawa 2021, art. 353, side No. 24.

[7] ZOLL, F., in: OLEJNICZAK, A. (ed.), *System prawa prywatnego. Tom 6. Prawo zobowiązań – część ogólna*, Ed. Wydawnictwo C.H. Beck, Warszawa 2014, p. 1024.

[8] DYBOWSKI, T., PYRZYŃSKA, A., in: ŁĘTOWSKA, E. (ed.), *System prawa prywatnego. Tom 5. Prawo zobowiązań – część ogólna*, Ed. Wydawnictwo C.H. Beck, Warszawa 2013, p. 198.

[9] Pursuant to Article 627 of the Civil Code, by a contract for a work of art, the ordering party undertakes to perform a specified work and the ordering party undertakes to pay remuneration.

[10] Pursuant to Article 734 § 1 of the Civil Code, by means of a contract of mandate the mandator undertakes to perform a specific legal act for the principal.

[11] See judgment of the Supreme Court of 11 August 2011, I CSK 611/10; SZANCIŁO, T., *Odpowiedzialność cywilna radcy prawnego i adwokata za błędy procesowe*, „Palestra" 2013, No. 1–2, pp. 123–132.

[12] See judgment of the Court of Appeal in Warsaw of 3 March 1998, I ACa 14/98, „Wokanda" 1998, No. 10, p. 44.

[13] See judgment of the Court of Appeal in Katowice of 20 November 2008, I ACa 595/08, OSAKat 2009, No. 1, item 1.

defect, i.e.. (art. 556[1] § 1 and 3 of the Civil Code, contained in the provisions governing the sales contract):

1) it doesn't have the qualities that a thing of this kind should have in view of the purpose specified in the contract or resulting from the circumstances or intended use;

2) it doesn't have the qualities of which the seller assured the buyer, including by presenting a sample or specimen;

3) it isn't suitable for the purpose of which the buyer informed the seller at the conclusion of the contract and the seller did not make any reservation as to such purpose;

4) it has been delivered to the other party in an incomplete condition, and in the case of installation and commissioning of the thing – whether these operations have been performed correctly.

3. Due diligence of the practitioner

The doctor's tort liability for so-called medical damage, most often in the form of bodily injury or causing health disorder, can be discussed when the doctor isn't connected with the patient by any legal relationship, in particular by contract. Furthermore, as it's argued in the doctrine, such liability occurs when the patient derives the right to healthcare directly from the provisions of the law, in particular from social security or health acts, or when the patient has concluded an agreement with the doctor, but the doctor acts outside the scope of the agreement, e.g. takes certain actions without obtaining the patient's consent, unreasonably expands the area of treatment, or carries out an intervention with a risk that is disproportionate to the expected health benefits[14].

Contractual indemnity liability of a doctor occurs when a doctor running a private medical practice (so-called free practitioner) enters into an agreement with a patient for the provision of medical services (treatment). Such an agreement may concern both above-standard (non-guaranteed) services, i.e. which the patient, being insured with the NFZ, will not receive under the general health insurance, and services covered by reimbursement from the NFZ[15]. The doctor then acts in his/her own name and on his/her own account, as a party to the contract, being liable not only for his/her own acts and omissions (Article 471 of the Civil Code), but also for the persons by means of whom he/she performs the obligation (Article 474 of the Civil Code), e.g. nurses, laboratory technicians. However, as is rightly pointed out in the doctrine, a doctor's failure to perform or improper performance of his or her contractual obligations (which are within the scope of the contract), resulting in medical damage, is in principle a tortious act[16], which in practice means that in most cases there is a concurrence of compensation claims. This means that the patient then has the right to choose the doctor's liability regime, and regardless of his or her choice, he or she can only obtain a single indemnity that covers the damage caused in full.

As far as contractual liability is concerned, the subject matter of the contract is important, i.e. what specifically the doctor undertook to do, whereby the doctor's obligation is to exercise the due diligence required of a professional (professional standard), which follows from Article 355 § 2 of the Civil Code. While every debtor is obliged to exercise due diligence in the so-called basic measure (Article 355 § 1 of the Civil Code), the professional (so-called heightened) standard of required diligence results from the very fact of conducting business

[14] See NESTEROWICZ, M., *Kontraktowa i deliktowa odpowiedzialność lekarza za zabieg leczniczy*, Ed. Państwowe Wydawnictwo Naukowe, Warszawa-Poznań 1972, p. 73; SOŚNIAK, M., *Cywilna odpowiedzialność lekarza*, Ed. Wydawnictwo Prawnicze, Warszawa 1977, p. 37.

[15] GOŁACZYŃSKI, J., in: KATNER, W.J. Katner (ed.), *System prawa prywatnego. Tom 9. Prawo zobowiązań – umowy nienazwane*, Ed. Wydawnictwo C.H. Beck, Warszawa 2023, p. 447.

[16] See e.g. NESTEROWICZ, M., *Podstawy prawne zabiegów lekarskich w świetle orzecznictwa Sądu Najwyższego*, „Palestra" 1976, No. 1, p. 115; DROZDOWSKA, U., *Problematyka podstaw odpowiedzialności cywilnej zakładów opieki zdrowotnej – wybrane zagadnienia*, „Radca Prawny" 2002, No. 3, p. 22.

or professional activity. Thus, professional diligence cannot be referred to the diligence of a non-professional[17]. The assessment of such diligence is much stricter than the diligence generally required. This is due to the fact that the essence of business activity is the requirement to possess the necessary expertise in a specific field, whereby it isn't just a matter of purely formal qualifications, but any standard of requirements for the particular area of activity being carried out. Thus, we are dealing with significantly increased expectations of skill, knowledge, meticulousness and reliability, prevention and ability. The term "diligent businessman's standard" is used, which includes, among other things, knowledge of the applicable law and its implications for the business activity in question[18]. In particular, due diligence on the part of the debtor, determined taking into account the professional nature of his or her business, includes knowledge of the applicable law and the consequences thereof in respect of his or her business activity[19]. As a general rule, therefore, it can be assumed that this type of due diligence on the part of the debtor does not imply exceptional diligence, as due diligence must be adapted to the person acting (type of activity), the subject matter to which the activity relates and the circumstances in which the activity takes place[20]. The measure of diligence referred to in Article 355 § 2 of the Civil Code should be referred exclusively to the sphere in which the debtor conducts business activities.

Therefore, the obligations of the doctor as a professional, regardless of the content of the contract, also include all duties resulting from his/her profession, as well as the duty to ensure safe treatment conditions[21] and this regardless of whether we are talking about a paid or unpaid legal act[22]. In fact, as follows from the provisions of the Act of 6 November 2008 on Patient's Rights and Patient's Ombudsman[23] the patient has the right to, inter alia : (a) to health services conforming to the requirements of current medical knowledge; (b) to demand that the doctor providing him with health services consult another doctor or convene a medical consultation; (c) to have health services provided immediately due to a threat to health or life; (d) to health services provided with due diligence by entities providing health services in conditions corresponding to the professional and sanitary requirements set out in separate regulations, and in providing health services medical professionals are guided by the principles of professional ethics set out by the competent self-government of medical professions; (e) to consent to the provision of certain health services or to refuse such consent, after obtaining relevant information (art. 6(1) and (3), Article 7(1), Article 8, Article 16). It should be borne in mind, however, that by consenting to a procedure (operation), the patient assumes a risk which includes the usual post-operative complications and not complications and damages resulting from the doctor's mistake[24].

Due diligence is objectified, so that the individual characteristics of the debtor who is to perform the service are irrelevant.

4. Grounds for the doctor's liability

4.1. Non-performance or improper performance of a contract

Contractual liability occurs when the debtor fails to perform an obligation or performs it in an improper manner. Non-performance of an obligation occurs when performance has not taken place and there are circumstances excluding subsequent performance, i.e. when the

[17] See e.g. judgments of the Supreme Court: of 22 September 2005, IV CSK 100/05; of 17 January 2017, IV CSK 143/16.
[18] See e.g. judgments of the Supreme Court: of 17 August 1993, III CRN 77/93, OSNC 1994, No. 3, item 69; of 26 April 2022, II CSKP 585/22, OSNC-ZD 2023, No. 2, item 24.
[19] Judgment of the Supreme Court of 17 August 1993, III CRN 77/93, OSNC 1994, No. 3, item 69.
[20] Judgment of the Supreme Court of 25 September 2002, I CKN 971/00.
[21] NESTEROWICZ, M., *Prawo medyczne*, Ed. Dom Organizatora TNOiK, Toruń 2019, p. 96.
[22] See judgment of the Supreme Court of 11 December 1986, IV CR 424/86.
[23] Consolidated text OJ 2022, item 1876 as amended; hereinafter: PrPacjU.
[24] See judgment of the Supreme Court of 19 October 1971, II CR 421/71.

debtor hasn't performed at all or has performed an object other than that which arises from the wording of the obligation[25].The situation is different when the debtor performs the service, but does so in a manner contrary to Article 354 § 1 of the Civil Code, i.e. contrary to what the parties agreed and not in compliance with the social and economic purpose and principles of social co-existence, and if there are established customs in this respect – also in a manner not in compliance with these customs. Wrongful performance of an obligation occurs when the debtor's behaviour was intended to fulfil the obligation, but the result does not meet the requirements of the performance to which the debtor was obliged[26]. In the case of contracts, improper performance may relate to the time of performance as well as to the 'quality' of the performance, and this concept will be defined differently for contracts of result and contracts of care. In the case of contracts for the provision of medical services, in practice it is usually a question of improper performance of the obligation and a consideration of whether the doctor exercised due care in performing the contract. The degree of fault of the doctor is irrelevant, i.e. whether we are dealing with unintentional fault (negligence or gross negligence) or intentional fault (with direct or possible intent) of the debtor. Since intentional fault occurs when the debtor either intends to breach an obligation of behaviour incumbent on him or, foreseeing the possibility of such a breach, agrees to do so, i.e. when he was aware that his behaviour was in breach of a specific obligation, unintentional fault is primarily to be considered in relation to the doctor. This occurs when the debtor hasn't exercised due care, although he should and could have done so. In particular, a circumstance that excludes the fault of the doctor (debtor) can't be the fact that he accepted a contractual order in a size or in a timeframe that doesn't correspond to the capabilities of his personal or his enterprise. As a rule, no fault can be said to exist in relation to such a debtor if he already knows at the time of the conclusion of the contract that he will not be able to perform at all or adequately the obligation he undertakes in the contract[27]. In other words, a doctor is liable under Article 471 of the Civil Code when he or she can be charged with culpability, even if only in the form of recklessness or negligence. It's therefore reasonable to refer fault to the possibility to charge the debtor with a breach of due care within the meaning of Article 355 of the Civil Code.

The above remarks apply when the debtor's liability is based on the principle of fault and not on the principle of risk (i.e. when the provisions provide for the possibility for the debtor to discharge himself from liability by proving one of the exonerating prerequisites) or the absolute liability principle, also called – not quite correctly – the guarantee principle (when the debtor cannot discharge himself from liability by proving an exonerating prerequisite). However, the principle of fault is the guiding principle of the contractual liability regime, according to which the liability of the debtor is formed in the absence of other indications[28].

The concept of "medical error" (German: Unkunst) first appeared in Article 134 of the Constitutio Criminalis Carolinae of 1532, according to which a doctor was criminally liable if he unintentionally and without intent (German: unvorsätzlich) caused the death of a patient due to a lack of diligence (German: Unfleiss) or ignorance of the principles of the art of medicine (German: Unkunst)[29]. Finally, this concept was limited to cases of objective contradiction of the doctor's action with the rules of conduct binding on him in the sphere of diagnosis and therapy. A breach of the rules of medical knowledge (lex artis medicinae), causing bodily injury, disorder of health or death of a patient, affects only the unlawfulness of the action (act or omission) of the doctor, while the other circumstances of the damage (e.g. resulting from age, inexperience of the doctor, urgency of the situation in which he/she carried

[25] See e.g. PAJOR, T., *Odpowiedzialność dłużnika*…, 1982, p. 92; ZOLL, F., in: OLEJNICZAK, A. (ed.), *System*…, vol. 6, 2014, p. 1134.
[26] See e.g. judgment of the Court of Appeal in Łódź of 16 April 2014, I ACa 1231/13; judgment of the Court of Appeal in Warsaw of 19 February 2016, I ACa 715/15; judgment of the Court of Appeal in Białystok of 20 September 2017, I ACa 254/17.
[27] See judgment of the Supreme Court of 27 January 1972, I CR 458/71, OSNC 1972, No. 9, item 160.
[28] See e.g. judgment of the Court of Appeal in Szczecin of 9 May 2013, I ACa 213/13.
[29] See SOŚNIAK, M., *Cywilna odpowiedzialność*…, 1977, p. 65.

out the procedure), as subjective elements, are subject to assessment only in connection with the analysis of the perpetrator's guilt[30]. It has also been accepted in case law that medical malpractice is an act (omission) of a doctor in the field of diagnosis and therapy which is not in accordance with the science of medicine to the extent available to the doctor. Negligence on the part of the doctor with regard to his/her duties to surround the patient with care and with regard to the organisation of hygiene safety and care of the patient does not constitute medical malpractice[31].

In the literature and case law there is a widespread division of medical (medical) errors according to the criterion of actions in connection with which the damage is caused into diagnostic (diagnosis), prognosis (prognosis) and treatment (therapeutic) errors[32]. It's also possible to divide according to a mixed, subject-object criterion, i.e. the person carrying out the medical activity and at the same time the type of this activity, into decision-making, executive, organisational and consultative error[33]. Any such occurrence may give rise to liability on the part of the medical practitioner, provided that it is culpable.

4.2. Damage

In order for the liability in question to arise, there must be damage on the part of the creditor (patient) within the meaning of Article 361 § 2 of the Civil Code, according to which, in the absence of a different provision of the law or a contractual provision, compensation for damage includes the loss which the injured party has suffered and the benefits which they could have achieved if the damage had not been caused to them. Thus, this refers to both forms of property damage, i.e. both the actual loss (*damnum emergens*) and the lost benefits (*lucrum cessans*), which doesn't apply to potential damage[34].

Damage in the form of *damnum emergens* can be proven relatively easily by the patient. As far as lost profits are concerned, on the other hand, a claim for damages may specifically include the profit that was assumed by the injured party, although in practice proving it poses evidentiary problems because, like any damage in the form of lost profits, although hypothetical in nature, it should be proved with such probability that it can be assumed that it would have occurred in the normal course of things. If the profit hasn't been agreed by the parties in the contract (which is very rare in practice) or has not been specified, e.g. in the tender documentation, the injured party must show what part of the agreed remuneration exceeds the costs (including personnel, administrative, material, labour, etc.), taking into account, for example, the circumstance that labour and material have been used for the performance of another contract, resulting in a benefit that he wouldn't have obtained if he had had to perform the contract concluded with the debtor (principle of compensatio lucri cum damno). In most cases, these determinations require special knowledge and therefore the admission of expert evidence (Article 278 § 1 of the Code of Civil Procedure).

Actual loss and lost profits are forms of pecuniary damage and can undoubtedly be claimed under the contractual regime, regardless of whether they are damage to property (both forms of damage) or personal injury (actual loss only). It can be said that pecuniary damage is damage relating to the economic sphere of a civil law subject and, using colloquial language, damage that can be expressed in money. Its remedy consists either in the

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[30] BĄCZYK-ROZWADOWSKA, K., in: BAGIŃSKA, E. (red.), *System prawa medycznego. Tom 5. Odpowiedzialność prywatnoprawna*, Ed. Wydawnictwo C.H. Beck, Warszawa 2021, pp. 226-227.

[31] Decision of the Supreme Court of 1 April 1955, IV CR 39/54, OSNC 1957, No. 1, item 7.

[32] See e.g. NESTEROWICZ, M., *Prawo medyczne*, 2019, p. 256; SOŚNIAK, M., *Błąd rozpoznania jako podstawa odpowiedzialności lekarza*, „Prace Prawnicze Uniwersytetu Śląskiego" Vol. II, Katowice 1971, pp. 221 et seq.; judgment of the Court of Appeal in Łódź of 2 February 2017, I ACa 1411/12.

[33] MAREK, Z., *Błąd medyczny odpowiedzialność etyczno-deontologiczna i prawna lekarza*, Ed. Wydawnictwo Medyczne, Kraków 2007, p. 75.

[34] See e.g. judgment of the Court of Appeal in Katowice of 17 January 2001, I ACa 1094/00, „Wokanda" 2002, No. 2, pp. 33-38; judgment of the Court of Appeal in Poznań of 8 March 2007, I ACa 29/07.

restoration of the previous state of affairs (natural restitution) or in the payment of an appropriate sum of money (compensation). In the case of a medical injury, the former is in principle out of the question, so that the doctor's liability is reduced to the payment of compensation equal to the actual loss and lost benefits - in the amount proven by the patient.

The issue of non-pecuniary damage (which can only be personal injury), i.e. damage that does not relate to the economic sphere of the subject of civil law and cannot be converted into money, is different. The form of redress for such damage is compensation. This is because it is traditionally accepted that reparation of non-material damage is not covered by the principle of full reparation of damage expressed in Article 361 § 2 of the Civil Code, and is only possible under the tort regime of liability for damages[35] – in relation to the directly injured party, these are situations involving bodily injury or health disorder, deprivation of liberty, inducement by deception, rape or abuse of a relationship of dependence to submit to a sexual act, violation of a personal good (Articles 444, 445, 448 of the Civil Code), as well as the so-called prenatal damage (Article 4461 of the Civil Code). The view was expressed that in the de lege lata contractual regime only property damage is at stake, as this regime does not allow for the claiming of compensation for non-material damage[36], although a view has also been expressed in the doctrine that it is permissible to award damages for infringement of personal rights under the regime of contact liability[37].

It should be assumed that when the claim is based on Article 471 of the Civil Code, and the parties do not contractually extend the scope of the debtor's liability, the rule is that there are no grounds for awarding the creditor compensation for the harm suffered (non-material damage). Such claims may be based on the provisions of the applicable law[38]. Nevertheless, since damage constitutes any kind of impairment of legally protected goods, and therefore also goods of a non-material nature, contractual liability for non-material damage can also be considered. This is particularly true for certain types of contracts, including contracts for the provision of medical services. The fact that these are contracts creating an obligation of diligence and not an obligation of result is irrelevant to the issue at hand. Indeed, in cases in which claims for damages related to the negative consequences of surgical procedures are filed, issues arise relating to, inter alia, the correctness of the consent given for the operation, the correctness of the performance of the operation, as well as the basis (tort or contractual) of the liability of the healthcare facility or physician[39]. The effect of the

[35] See e.g. judgment of the Court of Appeal in Warsaw of 8 September 2009, VI ACa 201/09; CZACHÓRSKI, W., *Prawo zobowiązań w zarysie*, Ed. Państwowe Wydawnictwo Naukowe, Warszawa 1968, p. 148; MASŁOWSKI, Z., in: RESICH, Z., *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo Prawnicze, Warszawa 1972, t. II, p. 1104; SZPUNAR, A., *Ustalenie odszkodowania w prawie cywilnym*, Ed. Wydawnictwo Prawnicze, Warszawa 1975, pp. 86 i et seq.; JASTRZĘBSKI, J., *Glosa do wyroku SN z 17 grudnia 2004 r., II CK 300/04*, „Przegląd Sądowy" 2006, No. 9, pp. 162–163; KRYLA-CUDNA, K., *Zadośćuczynienie pieniężne za szkodę niemajątkową powstałą wskutek niewykonania lub nienależytego wykonania umowy*, Ed. Wydawnictwo C.H. Beck, Warszawa 2018, pp. 62–64; GUTOWSKI, M., in: GUTOWSKI, M. (ed.), *Kodeks cywilny. Komentarz. Tom II. Art. 353-626*, Ed. Wydawnictwo C.H. Beck, Warszawa 2022, art. 471, side No. 13.

[36] ZAGROBELNY, K., w: GNIEWEK, E., MACHNIKOWSKI, P. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo C.H. Beck, Warszawa 2021, p. 1104.

[37] See e.g. REZLER, J., *Naprawienie szkody wynikłej ze spowodowania uszczerbku na ciele i zdrowiu (według prawa cywilnego)*, Ed. Wydawnictwo Prawnicze, Warszawa 1968, pp. 31 i n.; SAFJAN, M., *Naprawienie krzywdy niemajątkowej w ramach odpowiedzialności ex contractu*, in: PYZIAK-SZAFNICKA, M. (ed.), *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara*, Ed. Kantor Wydawniczy Zakamycze, Kraków 2004, pp. 273 i et seq.; TRZASKOWSKI, R., *Zadośćuczynienie za krzywdę związaną z niewykonaniem lub nienależytym wykonaniem zobowiązania*, „Przegląd Sądowy" 2006, No. 5, pp. 32 i et seq.; POPIOŁEK, W., in: PIETRZYKOWSKI, K., *Kodeks cywilny. Komentarz. Tom II. Art. 450-1088*, Ed. Wydawnictwo C.H. Beck, Warszawa 2015, p. 48.

[38] See e.g. judgment of the Supreme Court of 17 December 2004, II CK 300/04, OSP 2006, No. 2, item 20; judgment of the Court of Appeal in Gdańsk of 9 October 2012, I ACa 484/12.

[39] Judgment of the Supreme Court of 9 August 2005, IV CK 69/05.

non-performance or improper performance of a contract for medical services is the violation of the personal good of the other contractual party (the patient), then one must also speak of the fulfilment of the elements of a tort. The doctor doesn't only fail to fulfil his contractual obligations at that time. The action (omission) of the doctor of the contractual party may lead to a violation of the patient's personal good, which is included in the open catalogue of these goods contained in Article 23 of the Civil Code. (in particular health). In such a situation, the liability for non-performance or improper performance of the contract covers material and non-material damage[40].

In addition, pursuant to Article 4(1) of the PrPacjU, in the event of a culpable violation of a patient's rights, the court may award the injured party an appropriate sum as monetary compensation for the harm suffered on the basis of Article 448 of the Civil Code. This doesn't apply to a culpable violation of the patient's right to: 1) to keep valuables in a depository of a medical entity providing inpatient and outpatient health care services; 2) to be informed about the type and scope of health care services provided by the entities providing health care services; 3) to have access to medical documentation concerning his/her state of health; 4) to report adverse reactions to medicinal products.

4.3. Proximate cause

There must be a normal (adequate) proximate cause within the meaning of Article 361 § 1 of the Civil Code between the non-performance or improper performance of an obligation and the resulting damage. Since the damage is supposed to "result" from the breach of an obligation, Article 471 of the Civil Code presupposes the existence of a proximate cause between the debtor's non-performance or improper performance of an obligation and the creditor's damage. On the basis of this provision, the debtor is therefore, in principle, only obliged to compensate for the damage suffered by the creditor as a normal consequence of the non-performance or improper performance of the obligation[41].

Pursuant to Article 361 § 1 of the Civil Code, the party liable for damages is liable only for the normal consequences of the act or omission from which the damage resulted. The examination of the existence of an adequate proximate cause is a two-stage process. In the first stage, an assessment is made as to whether there is a proximate cause between the events under examination (*the conditio sine qua non test*) and, if there is such a link, the second stage examines whether it is a link of an adequate nature ("normal" proximate cause). This means that there is a proximate cause within the meaning of this provision only if the relationship between the event under examination and the damage meets the criterion of "normal consequences". It's therefore a question of links that are objectively normal, typical, average, expected in the usual order of things. Simply put, it's a causal connection in the colloquial sense, i.e. that without the event indicated as the cause, there would have been no damage[42]. It's a well-established view in case law that a consequence is a "normal" effect of

[40] Another example is a contract for the provision of travel services and the possibility of claiming compensation for a so-called wasted holiday (see Resolution of the Supreme Court of 19 October 2010, III CZP 79/10, OSNC 2011, No. 4, item 41; judgment of the Supreme Court of 24 March 2011, I CSK 372/10, OSNC-ZD 2012, No. A, item 21; judgment of the CJEU of 12 March 2002, C-168/00, Simone Leitner v. TUI Deutschland GmbH & Co. KG., EU:C:2002:163). Currently, the possibility to claim compensation is provided for by Article 50(2) of the Act of 24 November 2017 on tourist events and related tourist services (consolidated text of the Journal of Laws of 2022, item 511 as amended), which is the result of the implementation of EU law.

[41] Judgment of the Supreme Court of 15 October 2009, I CSK 84/2009, OSNC 2010, No. 4, item 60.

[42] See e.g. the judgment of the Supreme Court of 9 February 2001, III CKN 578/00, OSNC 2001, No. 7-8, item 120; KOCH, A., *Związek przyczynowy jako podstawa odpowiedzialności w prawie cywilnym*, Ed. Państwowe Wydawnictwa Naukowe, Warszawa 1975, pp. 63 i 72.

an event if, in the given set of relations and conditions and in the ordinary course of things, without special circumstances, the damage is the ordinary consequence of that event[43].

The damage may be the result not only of an act of the wrongdoer, but also of an omission on the part of the wrongdoer, i.e. a failure to perform a duty incumbent on him, which in the case of contractual liability is most often the source of the damage. As rightly pointed out in the doctrine, in such a situation *the conditio sine qua non test* is modified, as it consists in examining whether, had the correct (ordered) action been taken instead of the omitted one, the chance of the damage occurring would have been significantly reduced. It is not required to state unequivocally that, had the prescribed action been taken, the damage would certainly not have occurred, it's sufficient to prove that the prescribed action would have significantly reduced the likelihood of the damage occurring. At the same time, the required (ordered) action must be feasible for the subject to whom it is ordered to be carried out[44]. The case law, as an example, points to the consideration of whether, if an ambulance with resuscitation equipment, rather than an ordinary ambulance, had been sent to a person who had suffered a heart attack, and that person had been transported immediately to an intensive care unit, the chance of saving his or her life would have increased, except that there can be no certainty, however, that resuscitation in such an ambulance would have been successful[45].

An example of the exclusion of normality of sequelae as a result of the above test can be found in the facts of Barnett v. Chelsea and Kensington Hospital Management Committee (1969). Three people called the hospital in the morning about health problems caused by drinking tea. The nurse who answered these calls consulted a doctor who decided that the matter wasn't urgent and there was no need to intervene, and that the patients should consult their own doctors. One of these patients did not manage to consult another doctor as he died of arsenic poisoning, which was the cause of his health problems. The court found that the doctor had breached his duties by failing to examine the patient, but even if he had done so and the patient had received medical care, it would have been impossible to save his life[46]. Thus, although there was a failure of due diligence on the part of the doctor, the lack of causation eliminated his liability for the injury.

It has been clarified in the case law of the Supreme Court that bodily injury or health disorder constituting a complication (consequence of a complication) related to the treatment undertaken can't, as a rule, be seen as a consequence of the failure to provide due information about the complication. There could only be a proximate cause between the two if there were sufficient grounds for assuming that, had proper information been provided, the patient would have refused to consent to the service[47]. In general, in practice in so-called medical cases, in many situations it isn't possible to assume with certainty a proximate cause between the injury of an injured person undergoing treatment in a medical facility and the conduct of the medical personnel. In this connection, the case law emphasises that the court then assesses whether, in the light of the facts established in the case, there is a sufficiently high probability that such a link exists. The basis for its construction is the recognition, based on life experience, that there are circumstances in the light of which such an inference is justified (res ipsa loquitur). However, a sufficiently high degree of probability of the existence of such a relationship must be demonstrated for liability for damages to be accepted[48]. In such a case, it is possible to speak of a hypothetical rather than a certain causal relationship. This approach, however, is

[43] See e.g. judgment of the Supreme Court of 26 January 2006, II CK 372/05, OSP 2008, No. 9, item 96.
[44] SOBOLEWSKI, P., in: OSAJDA, K. (ed.), *Kodeks cywilny. Komentarz*, Ed. Wydawnictwo C.H. Beck, Legalis 2023, art. 361, thesis No. 29.
[45] See judgment of the Supreme Court of 24 May 2005, V CK 654/04.
[46] See ROGERS, W.V.H., *Winfield & Jolowicz on Tort*, Ed. Sweet & Maxwell, London 1989, p. 132.
[47] See e.g. judgments of the Supreme Court: of 5 July 2018, I CSK 550/17; of 19 June 2019, II CSK 279/18.
[48] See judgment of the Supreme Court of 3 April 2019, II CSK 96/18.

(rightly) a convenience for the patient, who would otherwise often be deprived of the possibility of successfully claiming medical damages.

It's only if the debtor acts intentionally with the aim of breaching an obligation that liability can arise, despite the lack of a proximate cause link between his conduct and the creditor's damage; the debtor is then charged with all the consequences of his conduct, regardless of whether they can be qualified as being in an adequate proximate cause link with that conduct – the so-called principle of absolute liability for damage caused intentionally[49]. In any situation, however, it's irrelevant whether the debtor foresaw the fact of the damage and its extent (amount).

5. The presumption of fault

Non-performance or improper performance of an existing obligation may be caused by circumstances for which the debtor is responsible and for which he is not. Since the contractual liability of the doctor is based on the principle of fault, it follows from Article 471 of the Civil Code that, in order to be relieved of liability in connection with the contract, the doctor must demonstrate that the non-performance or undue performance of the obligation was a consequence of circumstances for which he or she isn't responsible. While it is for the patient to prove all the prerequisites of the doctor's contractual liability for damages, and failure to prove any of the prerequisites must result in the dismissal of the patient's claim, the burden of proof is shaped differently when it comes to exemption from this liability. Accordingly, the acceptance of liability of the debtor on the basis of Article 471 of the Civil Code isn't dependent on the creditor proving that the improper performance of the obligation is a consequence of circumstances for which the debtor is responsible. It's the debtor, in order to free himself from liability, who should prove the existence of such factual circumstances which, in the circumstances of the case, would give grounds for assessing that the non-performance or improper performance of the obligation was a consequence of circumstances for which he isn't responsible[50]. The patient's demonstration of the three prerequisites for the doctor's liability updates the need for a defence on his part as debtor. The debtor (here: the doctor) may, of course, present evidence contrary to that of the creditor demonstrating the prerequisites of contractual liability, but may also show that the non-performance or improper performance of the obligation is a consequence of circumstances for which he or she isn't responsible[51]. This is because we are dealing here – as it is commonly accepted in the judicature and doctrine – with the so-called presumption of debtor's fault, i.e. a reversal of the principle of the burden of proof, according to which the burden of proving a fact rests on the person who derives legal consequences from this fact (Article 6 of the Civil Code and Article 232, first sentence of the Civil Procedure Code). Such a presumption stems from the fact that it would often be difficult for the creditor to prove the reasons for which the debtor failed to perform an obligation or performed it improperly, as the creditor is usually not involved in the actions undertaken by the debtor. The debtor, on the other hand, can prove the circumstances that caused the breach of the obligation. Furthermore, Article 471 of the Civil Code is intended to protect the creditor (strengthening his position), who acts in trust in the other party to the legal relationship. If it were placed on the creditor to prove that the non-performance or improper performance of the obligation was caused by circumstances for which the debtor was responsible, this would undoubtedly significantly worsen the situation of the creditor. In many cases, the establishment of such a circumstance requires special knowledge, so expert evidence is necessary.

[49] See BORYSIAK, W., in: OSAJDA, K. (ed.), *Kodeks…*, 2023, art. 471, thesis No. 70.
[50] See e.g. judgments of the Supreme Court: of 9 January 2002, V CKN 630/00; of 5 December 2008, III CSK 211/08.
[51] See e.g. judgments of the Supreme Court: of 18 February 2009, I CSK 327/08; of 24 June 2013, II PK 344/12; judgment of the Court of Appeal in Lublin of 19 February 2013, I ACa 717/12.

As indicated, this presumption is rebuttable (praesumptio iuris tantum). The prevailing view in the case law is that the debtor will rebut the presumption arising from Article 471 in fine of the Civil Code if he demonstrates a specific circumstance constituting the cause of non-performance or improper performance of the obligation for which he isn't responsible[52]. The doctrine also expresses the view that the debtor does not have to show a specific reason for the non-performance or improper performance of an obligation, as long as he shows that he exercised due diligence in a specific situation[53]. It's reasonable to combine both positions, as exculpation will occur both if the debtor demonstrates that a particular cause of the breach of duty was due to circumstances for which he isn't responsible and if he demonstrates that he exercised due care in performing the duty regardless of what the actual cause of the breach of duty was[54]. The rebuttal of the presumption of fault may also concern the demonstration of the prerequisites set out in Articles 425 or 426 of the Civil Code, which apply to both tort and contractual liability[55]. However, in the case of medical liability, the latter article doesn't apply, as it concerns the lack of liability for damage caused to a minor under the age of 13. As far as Article 425 of the Civil Code is concerned, it excludes the liability of a person who, for any reason, is in a state that prevents him/her from making a conscious or free decision and expressing his/her will, for damage caused in such a state, unless the person has suffered a mental disorder due to the use of intoxicating beverages or other similar means, provided that the state of disorder wasn't caused by his/her fault. As an example, a situation is given where a doctor couldn't refuse to help a patient even though he was obviously overworked, so that his physical or mental state prevented him from achieving an adequate standard of performance[56]. It's important that the doctor doesn't put himself in such a state through his own fault.

Summary

The doctor's liability for medical (medical) errors is relatively broad in theory, and the patient is in a privileged position, because – if a contract is concluded – in practice he or she can claim damages under two liability regimes. By far the more common of these liability regimes is the ex delicto regime, which is only justifiable if it is assumed that in the *ex contractu* regime no redress for non-pecuniary damage is possible, which, as has been shown, isn't justifiable. However, on the assumption that it is also possible to compensate for non-pecuniary damage in the case of a contract for medical services, the distribution of the burden of proof referred to above constitutes a significant facilitation in relation to the patient's claim under the tort regime. The injured party may, for example, claim compensation for pain and suffering associated with disorder of health or bodily injury as a result of the wrongful performance of the contract. If the patient bases his or her claim on Article 415 of the Civil Code, then it is the patient who must prove the doctor's fault, which in practice is often difficult and many times impossible. Despite this, in court practice, it's under the tort regime that patients claim damages far more often. In terms of evidence, however, this is difficult and

[52] See, e.g., judgments of the Supreme Court: of 20 November 1979, IV CR 376/79, OSNC 1980, No 4, item 80; of 9 January 2002, V CKN 630/00; of 5 December 2008, III CSK 211/08.
[53] See e.g. PAJOR, T., *Odpowiedzialność…*, 1982, p. 277 et seq.; SZPUNAR, A., *Odpowiedzialność cywilna. Komentarz w formie glos*, Ed. Wydawnictwo Prawnicze „Lex", Sopot 1997, p. 637.
[54] See e.g. judgments of the Supreme Court: of 9 January 2002, V CKN 630/00; of 7 July 2005, V CK 869/04; WIŚNIEWSKI, T., in: GUDOWSKI, J. (ed.), *Kodeks cywilny. Komentarz. Tom 3. Zobowiązania. Część ogólna*, Ed. Wolters Kluwer Polska, Warszawa 2018, art. 471, thesis No. 8.
[55] See, e.g., judgment of seven the Supreme Court judges of 22 October 1975, V PRN 4/75, OSNC 1976, No. 5, item 90; judgment of the Supreme Court of 24 February 1971, II PR 274/70, OSNC 1971, No. 11, item 201; SZPUNAR, A., *Glosa do wyroku SN z 24 lutego 1961 r., 2 CR 1036/59*, OSPiKA 1962, No. 7-8, item 194.
[56] See e.g. GARLICKI, S., *Odpowiedzialność cywilna za nieszczęśliwe wypadki*, Ed. Wydawnictwo Prawnicze, Warszawa 1959, p. 183.

complicated, starting with the problems of unequivocally establishing who was responsible for causing the damage and where it occurred, especially as the consequences of a medical (medical) error often become apparent after some time. Hospital infection cases, for example, are considered to be particularly complex in terms of evidence. In addition, not every failure of treatment implies liability on the part of the doctor, whether in tort or in the non-performance or improper performance of a contract. This involves demonstrating a normal causal link between the doctor's (usually) omission and the damage, as well as his or her fault. In the case of contractual liability, the patient doesn't have to prove the latter circumstance.

If the patient is able to prove the prerequisites of the doctor's contractual liability, the reversal of the burden of proof makes it relatively difficult for the doctor to absolve himself from liability on the basis of Article 471 of the Civil Code, bearing in mind the heightened measure of diligence (Article 355 § 2 of the Civil Code). A contract for the provision of medical services is entered into by a medical professional; the patient is always the weaker party to such a contract. This means that any medical error, irrespective of the doctor's will (i.e. whether he acts intentionally or unintentionally), will result in his liability for damages under Article 471 of the Civil Code, provided it was a culpable error. As rightly emphasised in the case law, not every medical error, but only a culpable one, may result in the liability of the doctor or the State Treasury, of which the doctor is an officer, for the resulting damage to the patient. In particular, there are no grounds for such liability if the erroneous identification of the disease in a healthy person was justified by the symptoms and the treatment applied, which would have been appropriate to undertake immediately in the case of a real disease, didn't have any negative consequences for that person other than transient ailments[57]. The doctor is entitled to make a mistake, as no one is infallible unless the mistake is culpable[58]. The lack of need to prove the doctor's fault in the circumstances indicated in Article 471 of the Civil Code gives the patient the opportunity to successfully pursue a claim for damages.

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[57] Judgment of the Supreme Court of 8 December 1970, II CR 543/70, OSNC 1971, No. 7-8, item 136; see also judgment of the Court of Appeal in Lublin of 17 January 2019, I ACa 133/18.
[58] NESTEROWICZ, M., *Glosa do wyroku Sądu Apelacyjnego w Lublinie z 21.2.2006 r., I ACa 69/06*, „Prawo i Medycyna" 2007, No. 4, p. 137.

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