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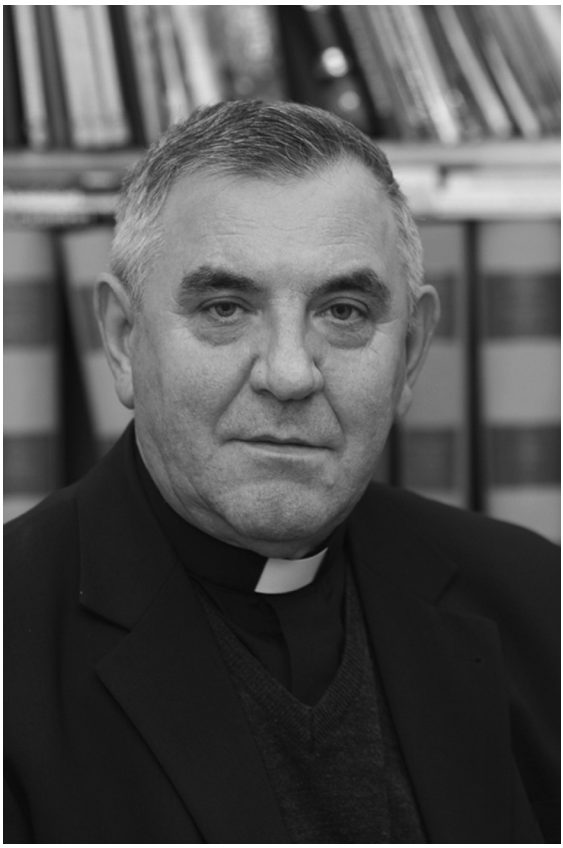

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1. Introduction.

It is a truism to say that in today's world medicine is extremely complex and organized in a comprehensive way. This entails many consequences, the possibility of adverse effects being the most important from the point of view of every human being. This often results in irreversible states that must be compensated in some way. The legislator is trying to create regulations that will balance the values and interests that will be the most optimal. Legislative acts such as the Civil Code (hereinafter: k.c.)[1] or the Law on Patient Rights and the Patient Rights Ombudsman (hereinafter: PrPacjU)[2] create an opportunity for victims to claim their rights through specific legal instruments. The legislator decided to introduce Provincial Commissions for Medical Events to medical law, which were established by the Act of 28.4.2011 on amending the Patients 'Rights and Patient Rights Act and the Compulsory Insurance Act, Insurance Guarantee Fund and the Polish Motor Insurers' Bureau[3] . In-depth analysis should be given to solutions referring to ADR methods that are present or irrationally not

[1] The Act of 23 April 1964. The Civil Code, (consolidated text: Journal of Laws of 2017, item 459, as amended).

[2] The Patient Rights and Patient Rights Ombudsman Act of 6 November 2008, (consolidated text: Journal of Laws of 2017, item 1318, as amended).

[3] Journal of Laws of 2011, No. 113, item 660.

applied in this legal structure. It is not unambiguous for the said Commissions to adjudicate on Medical Events and to qualify certain solutions for a specific method of alternative dispute resolution. Undoubtedly, the aim of introducing the above-mentioned institution was to simplify and accelerate the process of obtaining compensation and redress for the so-called medical events.

2. Provincial Commissions for Adjudication of Medical Events and negotiations.

In order to consider whether the Commissions for Adjudication of Medical Events provide elements referring to negotiations, it is necessary to understand this concept in depth. As Grzegorz Skrzypczak points out, "negotiations" have their Latin roots originating from the word *negotium*, which means "interest"[4]. This means that you can talk about this method only if there are at least two entities with at least a minimal contradictory demand in relation to a deficit good. *Prima facie*, this comment seems prosaic, but in many situations the opposite interests in fact turn out to be convergent, which negates the use of negotiation institutions. It is worth recalling here the definition of this phenomenon as a "conflict resolution process in which two or more dependent parties, with partially conflicting interests, discuss differences between them and try to make a joint decision on matters important to them"[5]. As I have indicated in the literature, the negotiation consists of three stages: the preparation phase, the proper stage of negotiations and the implementation of the agreement reached thanks to negotiations[6]. Importantly, no entity appears in the negotiations that would be impartial and neutral. Usually, negotiations are the first stage in the event of a dispute between the parties. One can use the example of a *multi-step* clause, which consists in using the least institutionalized methods first, going one by one to more and more complex and formalized ones[7].

All the characteristics listed above are not reflected in the activities of the Commission for the adjudication of Medical Events. Even the body established under the Act, I decide to strike out the possibility of negotiations at the stage

[4] G. Skrzypczak, *Prawnik a sposoby rozwiązywania sporów. Negocjacje i mediacje – wprowadzenie*, MOP 2004, No. 4, p. 196, Legalis.

[5] J. Kamiński, *Negocjowanie techniki rozwiązywania sporów*, Warszawa 2003, p. 16.

[6] G. Skrzypczak, *Prawnik… op. cit.* ,p. 196.

[7] M. Skibińska, *Mediacja a inne alternatywne formy rozwiązywania sporów na tle spraw rodzinnych – część* I, ADR 2016, No. 1, p. 71.

of proceedings before the Commission. In my opinion, the discussed form of alternative dispute resolution should apply at the stage preceding the proceedings before the Commission for adjudicating on Medical Events. It seems reasonable to consider the introduction of a normative provision imposing an obligation on the aggrieved party to propose compensation and redress in relation to the entity that caused the damage. In many cases this would result in a very quick and satisfactory end to the dispute for both parties. It is impossible to notice here the negative consequences of such a potential obligation on the person affected by the so-called medical event. In the case of civil litigation, the legislator chose the postulated path under art. 187 § 1 point 3 of the Code of Civil Procedure (hereinafter: kpc)[8]. Pursuant to this provision, *the claim should satisfy the terms of the pleading, and should also include: information whether the parties have attempted mediation or other out-of-court settlement of the dispute, and if such attempts have not been made, explain the reasons for their failure.* If the legislator wants to lighten the courts and cause faster and more efficient resolution of disputes, he should reach for the institution of negotiation which he did not do in the case of the Provincial Commission for the adjudication of Medical Events.

3. Provincial Commissions for Adjudication of Medical Events and mediation.

Mediation is a method of alternative dispute resolution in which the third party - mediator - participates. He should have the skills required to carry out an effective dispute diagnosis[9]. This is undoubtedly a very effective opportunity to reach a consensus, especially in such delicate matters as those in the field of medicine. It is worth pointing out here why mediation should be an important element of the Provincial Commission for Adjudication of Medical Events. Firstly, due to the very confidential nature of matters affecting medical law, this method is the most appropriate way to resolve the dispute in an alternative way. As a rule, every victim, due to the essence of the subject matter, wants to get as little information as possible into public information. Secondly, the nature of the matter is based on a very complicated matter, which due to its complex nature requires a thorough analysis both in the sphere of substantive law and

[8] The Code of Civil Procedure of November 17, 1964. (consolidated text: Journal of Laws of 2016, item 1822, as amended).

[9] P. Sołtysiak, *Mediacja jako alternatywna metoda rozwiązywania sporów*, Zeszyty Naukowe Instytutu Administracji AJD w Częstochowie 2012, No. 2(6), p. 11.

procedural law. Such disputes last a very long time, which is not beneficial for either party. A person who suffered due to the so-called a medical event seeks to compensate for damage as quickly as possible. Thirdly, due to the great influence of jurisprudence on this branch of law, mediation is often a better option than an unpredictable and long dispute[10]. Finally the most importantly, mediation is based on trust in the mediator, as a professional and capable of achieving a positive solution to a dispute for two parties. "The basic task of the mediator is to help the parties achieve a mutually recognized agreement in the implementation of the principle of party autonomy. The conciliator should make it easier for the parties to communicate and encourage them to look for alternative dispute solutions"[11]. This leads to the conclusion that the mediator should act as a kind of "helper", who, emotionally uninvolved in the dispute will help in the development of a position acceptable to both parties. medical events cannot be overestimated, because each case has a great delicacy that deserves special treatment. Thanks to this approach, you can often put all emotions aside and conduct a substantive discussion that will end the dispute.

On the other hand, one cannot forget about the negative sides of mediation. According to Andrzej Szumański, the fundamental disadvantage of this method is voluntariness[12]. It manifests itself in three aspects. In the first place, in order for mediation to take place, there must be such a will of the parties. Then, the enforceability itself is again dependent on the parties, because the decision does not have any legal penalty in the event of non-enforcement. Unless mediation ends with a settlement, which will be legally effective in the light of applicable law. Finally, there may be an unexpected extension of the dispute due to mediation, which will prove ineffective.

It should be noted that in the case of the Provincial Commission for Adjudication of Medical Events there are no mechanisms referring to pure mediation. Interestingly, the authors of the bill amending PrPation in the project's justification indicated that the proceedings before the voivodship commission for adjudicating on medical events is a *sui generis* proceeding, which is a conciliatory-mediated procedure "[13]. In fact, this was the *ratio legis* of the use of this

[10] E. Gmurzyńska, R. Morek; *O problemach dotyczących rozstrzygania spraw o błędy lekarskie i o roli mediacji*, ADR 2011, No 3, pp. 45-46.

[11] A. Moskal, K. Waszkiewicz, *Zastosowanie alternatywnych metod rozwiązywania sporów w sprawach dotyczących zdarzeń medycznych*, ADR 2017, No. 3, p. 45.

[12] A. Szumański, *Koncyliacja jako forma rozstrzygania sporów gospodarczych*, MOP 1997, No. 2, pp. 60.

[13] H. Frąckowiak, *Postępowanie przed Wojewódzką Komisją do spraw orzekania o zdarzeniach medycznych*, 2016, C.H. Beck, Wyd. 1, § 2. I. *Wojewódzka Komisja do spraw orzekania o zdarzeniach*

quasi-judicial[14] body[15]. It is difficult to talk about the organ that is the Provincial Commission for the Ruling of Medical Events as a mediator. After all, the Commission is not seeking an agreement that would be mutually recognized by the parties to the dispute[16]. This solution must be assessed very critically. If the mediation significantly accelerates in many cases the resolution of the discussed cases, it seems incomprehensible that this method will not be included in the Act of 28.4.2011 on amending the Patient Rights and Patient Rights Law and the Compulsory Insurance Act, Insurance Guarantee Fund and the Polish Office Motor Insurers. I believe that the Provincial Commissions for Adjudication of Medical Events should be able to refer a particular matter to mediation, which would be conducted by an experienced mediator in the matters of so-called medical events. It seems obvious that a person educated in this matter would often, much faster and more effectively lead to the resolution of the dispute. It would be beneficial for the victim, the doctor (hospital) and the entire state apparatus. This is the next one, immediately after the lack of a normative basis for conducting negotiations by the victim and the entity responsible for the so-called medical event of irrational failure to implement ADR methods into the Polish legal order.

4. Provincial Commissions for Adjudication of Medical Events and arbitration.

Arbitration in the vast majority of cases is used in disputes regarding international trade. Due to its indisputable advantages, it leads in many situations to very positive decisions for two sides of each trade contract. Such features as: flexibility, confidentiality, speed or professionalism influence the high popularity of this dispute resolution method[17]. It is easy to see that the aforementioned

medycznych – Status Komisji i charakter prawny postępowania kompensacyjnego z tytułu zdarzeń medycznych, Legalis.

[14] J. Sadowska; *Postępowanie przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych. Komentarz do art. 67a–67o ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta*. (in:) I. Kunicki (ed.), Warszawa 2016, K*omentarz do art. 67e*, nb. 3, Legalis.

[15] Justification of the bill from 28.4.2011 on the amendment of the Patients 'Rights and Patient Rights Act and the Act on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor Insurers' Bureau of October 15, 2010, print no. 3488 of the Sejm of the Republic of Poland, VI term, pp. 1-2.

[16] *Ibidem,* pp. 1-2.

[17] See. Tadeusz Szurski, *Arbitraż - skuteczny sposób likwidowania sporów*, MOP 1998, No. 12, p. 468.

attributes of arbitration are also desirable in matters related to broadly understood medical law. The legal basis for the operation of arbitration is in principle an agreement (either separate from the main one or an arbitration clause in the main contract). In the event of disputes regarding medical errors, the victim may choose traditional civil proceedings before a common court or an application to the Provincial Commission for Adjudication of Medical Events. This remark already leads to reflection indicating the inability to qualify the Provincial Commission for Adjudication of Medical Events as a form of pure arbitration. If the injured party chooses compensation and redress in the form of submitting the application, the other party cannot challenge or disagree with the proceedings before the Provincial Commission for Adjudication of Medical Events. There is no voluntariness here, understood as the possibility for two sides to choose the solution to the dispute (in this case in the form of arbitration). It is worth noting, however, that in the literature[18] there is a differently understood voluntary attitude, which could adhere to the discussed institution. It is about the *opt-out* option, which allows you to understand voluntarily, as an opportunity to reject an agreement obtained through alternative dispute resolution. I am talking about regulation from art. 67k PrPacjU, which after the ruling on the so-called a medical event by the Provincial Commission for Medical Event Assessment requires the insurer to *submit an offer of compensation and redress to the entity submitting the application.* However, art. 67k (3) of the PrPAC provides that: *if the insurer fails to submit within the time limit referred to in para. 2, the offer of compensation and redress, the insurer is obliged to pay them in the amount specified in the application, not higher than specified in paragraph. 7*. The last key provision for the assessment of voluntariness understood in the above-outlined form is art. 67k par. 5 PrPacjU: *the entity submitting the application within 7 days from the date of receipt of the proposal specified in para. 2 submits, through the provincial committee, the insurer about its acceptance or rejection.* The literal interpretation prompts us to *opt-out*. Indeed, the entity submitting the application may not accept the insurer's proposal. As Hanna Frąckowiak[19] claims when abusing the law, the insurer may also offer such a minimum amount that in reality the victim will not be able to accept such a proposal, which implies the fact of rejecting it. However, the issue not addressed by this author is the possibility of rejecting the insurer's proposal if he proposes the maximum amount specified in the Act.

[18] See. J. Mucha, *Charakter prawny postępowania przed wojewódzką komisją do spraw orzekania o zdarzeniach medycznych,* (in:) J. Wiśniewski (ed.), Obszary akademickiej wiedzy naukowej, Poznań 2012, ISBN 978-83-934497-0-5, p. 57.

[19] H. Frąckowiak, *Postępowanie… op. cit.*

It seems that this type of behavior by the applicant is unacceptable and should be assessed in terms of abuse of subjective right. Therefore, when finalizing the above considerations, one must agree that even understanding the voluntary approach so broadly, there is no reason to qualify the Provincial Commission for Adjudication of Medical Events as an ADR type.

However, it should be pointed out that the body as a whole is characterized by other features characteristic of alternative dispute resolution methods. An example is confidentiality. You can indicate here art. 67g section 5 of the PrPation, which states that *the members of the provincial committee are obliged to keep confidential information obtained in the course of the proceedings before the committee regarding the patient, including also after the membership in the committee has ceased*. This is an extremely important guarantee for every victim, especially the so-called medical event. Nobody wants his most private and intimate health matters to be publicized. As it is argued in the doctrine, this obligation is not limited in time, which is also of great importance from the perspective of the entity seeking protection[20].

The legislator also strives for efficient resolution of conflicts. The speed of proceedings is a characteristic feature of the *Alternative Dispute Resolution*, which is why some authors, comparing the characteristic features of the ADR methods and the Provincial Commission for Adjudication of Medical Events, try to count as those. Art. 67j par. 2 PrPacju says that *the Provincial commission issues a decision referred to in para. 1, not later than within 4 months from the date of submitting the application*. This is an instructional term[21] which should be assessed negatively, because the legislator only wants to strive for an efficient and quick resolution of the dispute in an apparent way. This is the next argument against the classification of Provincial Commissions for Adjudication of Medical Events to *Alternative Dispute Resolution*.

A feature often emphasized in alternative dispute resolution is professionalism. In the case of the Provincial Commission for Adjudication of Medical Events, we can speak prima facie about high professionalism. The Act requires that the adjudicating panel be composed of four persons[22]: two persons having at least higher education and a master's degree in the field of medical sciences and two persons possessing at least a higher education and a master's degree in the field of legal sciences. However, delving into this regulation, we see that

[20] J. Sadowska; *Postępowanie… op. cit. , Komentarz do art.* 67g , nb. 29, Legalis.

[21] *Ibidem*, *Komentarz do art. 67j*, nb.14, Legalis.

[22] Art. 67f par. 1 provides: Provincial commissions adjudicate in a 4-person composition.

the very matter of having a higher education and a master's degree[23] does not prejudge professionalism. Medical law is such a complicated branch of law that a formal prerequisite for higher education and obtaining a master's degree in either legal or medical science will not result in a high level of professionalism in the members of the Commission. Of course, one cannot forget about the material premise present in this provision requiring the appointment of only people who have knowledge in the field of patient's rights. In my opinion, this does not lead to the basic idea of arbitration in terms of professionalism of the arbitrator. Classical arbitration regulations allow the arbitrator to be chosen at his own discretion by the parties. This fulfills the basic purpose of any arbitration, i.e. the authority of the parties to the dispute to resolve a conflict of respectable and professional persons. In the case of the Provincial Commission for Adjudication of Medical Events, we can not talk about the professionalism of the arbitrator understood in these categories. This is the next argument against fitting this institution into arbitration.

5. Abstract

The subject of the analysis in the above-mentioned article was the Provincial Commissions for Adjudication of Medical Events in the context of ADR methods. The basic and most important issue discussed in the above-mentioned study was to consider whether the institution of the Provincial Commission for the Settlement of Medical Events provides methods for alternative dispute resolution. As it has been presented, in today's realities, the advantages of *Alternative Dispute Resolution* cannot be overestimated. Especially, these methods seem to be effective and helpful in disputes in the field of medical law. It is even harder to understand why the legislator did not decide to implement ADR methods. Despite the fact that the authors of the draft law amending PrPacju indicated that the proceedings before the Provincial Commission for Adjudication of Medical Events is a conciliatory-mediation procedure, you cannot agree with them. Voivodship Commissions can not be perceived as a mediating authority,

[23] Art. 67e, paragraph 3 PrPacjU provides: The provincial committee consists of 16 members, including: 1) 8 members with at least higher education and a master's degree or equivalent in the field of medical sciences who have been in the medical profession for a period of at least 5 years or hold a doctorate in medical sciences, 2) 8 members with at least higher education and a master's degree in legal sciences who have been employed for a period of at least 5 years in positions related to the application or creation of law or hold a PhD degree in legal sciences - who have knowledge of patient rights and enjoy full public rights.

because it issues a firm resolution not supported by the search for a joint solution to the dispute with the parties. I stand in the position that the Provincial Commissions for Adjudication of Medical Events are assumed to be the most structurally similar to arbitration. This is due to the fact that the legislator wanted the Committees to act professionally, quickly, confidentially and the decision was issued by impartial experts. In addition, they were to be voluntary. Indeed, there are normative grounds in the Act to take such a position, but as it was shown in earlier parts of the article, this is only an apparent impression. Analyzing exactly every element constituting the essence of ADR methods (arbitration) one should come to the conclusion that the Provincial Commissions for Adjudication of Medical Events are *quasi-judicial* bodies appointed to resolve cases of so-called medical events.

When finalizing the considerations, one must criticize the subject of the discussed institution. It does not introduce any added value that may affect faster or more effective resolution of disputes over medical errors. It is an institution that is difficult to enter into any legal framework. It is impossible to qualify it for a specific legal matter, which affects many ambiguities and interpretational difficulties. In my opinion, the legislator should lean on revising the law and leading to the state in which the Provincial Commissions for Adjudication of Medical Events will fulfill their tasks to the full extent.

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The Code of Civil Procedure Act of 17 November 1964 (Journal of Laws of 2016, item 1822, as amended)

Streszczenie

Autor w artykule skupia się na omówieniu elementów nawiązujących do typów ADR występujących w instytucji Wojewódzkich Komisji do spraw Orzekania o Zdarzeniach Medycznych. Dąży do zanalizowania cech konstrukcyjnych negocjacji, mediacji oraz arbitrażu oraz poszukiwaniu ich w działaniu omawianego organie. Rozważając te alternatywne metody rozwiązywania sporów dochodzi do wniosku, że ustawodawca nie implementował do Wojewódzkich Komisji do spraw Orzekania o Zdarzeniach Medycznych metod ADR co należy ocenić krytycznie.

SŁOWA KLUCZOWE: prawo medyczne, wojewódzkie komisje do spraw orzekania o zdarzeniach medycznych, alternatywne metody rozwiązywania sporów

Summary

The author in the article focuses on discussing elements referring to the ADR types appearing in the institution of the Provincial Commission for Adjudication of Medical Events. It seeks to analyze the constructional features of negotiations, mediation and arbitration, and to seek them in the operation of the body under discussion. Considering these alternative methods of dispute resolution, he comes to the conclusion that

the legislator did not implement the ADR methods to the Provincial Commission for Adjudication of Medical Events, which should be critically assessed.

KEY WORDS: medical law, provincial commissions for adjudicating on medical events, Alternative Dispute Resolution

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