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Dentists' errors as seen on the example of Polish medical disciplinary boards

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Abstract: *This Article outlines the dentist's obligations in relation to diagnosis and treatment, the performance of which by the dentist should be grounded in with the principle of due diligence. This is derived not only from the provisions of the law but also from deontological norms. However, decisions of Polish medical disciplinary boards ('sąd lekarski', literally: 'medical court') bring to light certain irregularities, found in 10-25 % of all cases.*

Keywords: *dentist, medical disciplinary board, due diligence, penalties.*

I. Introduction

In Poland professional (disciplinary)responsibility of physiciansis a separate type of liability at law that must be distinguished from civil, criminal or administrative responsibility. It is accepted in legal literature that this type of liability relates to the profession exercised (Czarnecki, 2013) and especially to professions involving public trust (besides lawyers, these include lawyers, judges, etc.). In such professions irreproachable ethical conduct and high professional skill are indispensable (judgment of the Constitutional Court, 2007). For this reason liability grounds in medical professional responsibility include not only violations of the legal provisions governing the medical profession, including dentists, but also violations of ethical norms and values — the Code of Medical Ethics — CME (CME, 2004).

The professional liability of physicians is governed by the Act on Medical Chambers (Chambers Act, 2009).Subsidiarily, though, in matters not regulated in the Act, provisions of the Code of Criminal Procedure and of the Criminal Code must be applied *mutatis mutandis*. Article 53 of the Act on Medical Chambers introduces the definition of 'professional misconduct' (*przewinienie zawodowe*), which indicates that we are dealing with culpability (Giętkowski, 2013). Guilt, just as it is in criminal law, is a necessary element of professional misconduct by doctors. Guilt is inseparably linked to punishment. The fundamental principle of Polish criminal law, *nulla poena sine lege*, meaning that any punishment must be provided for in an Act of Parliament that is in force, is reflected also in the provision of Article 83(1) of the Act on Medical Chambers, which provides the list of available disciplinary penalties for doctors. These are: admonition; reprimand; fine; prohibition from exercising management roles in health-care established for a term of one to five years; restriction of the scope of activities performed as a physician for a term of six months to two years; suspension of the right to practise for a term of one to five years; revocation of the right to practise. In the jurisprudence of the Constitutional Court the proximity of criminal and disciplinary liability is seen in how both are in the nature of repression, which, however, does not make them identical (judgment of the CC, 2002), but it often allows them to be regarded jointly as repression law (CC judgment, 1998).

II. Purpose of this work

The purpose of this work is to discuss select issues in the work of a dentist on the example of the decisions of regional medical disciplinary boards. The analysis deals with dentists whom the disciplinary prosecutor (the 'Ombudsman') charged with failure of due diligence in the diagnostic-and-therapeutic process, *viz.* a violation of Article 8 CME in conjunction with Article 4 of the Act on the Professions of Physician and Dentist (Profession Act, 1996).The aforementioned failures of due diligence are the most frequent basis for punishment before Polish medical disciplinary boards. The selected cases refer to relatively complicated procedures in the area of endodontic, prosthetic and implantological treatment. The errors result mainly from failure to conduct full and thorough diagnostics, failure in the planning out of prosthetic works, and use of improper materials. Meaningful information for and conversation with the patient was also lacking. Frequently, even appropriate contact with the patient as a human being. Hence, it is necessary to highlight this type of misconduct in dentists' training and to develop their capability of maintaining conversation and good rapport with the patient, not only during academic training but throughout the entire professional life of a dentist.

To this end, the decisions of medical disciplinary boards concerning professional misconduct by dentists presented in this publication were selected in such a way as to emphasize the choice of the penalty imposed. These include: admonition, reprimand, fine, suspension of licence up to 5 years and even permanent revocation. It is important to make dentists aware that the nature of the penalty imposed by the disciplinary board is not only that of repression but also of deterrence and first and foremost of moral discomfort.

III. Material and methods

To highlight the risk involved in the dentist's profession select decisions of regional medical disciplinary boards (OSLs) were analysed for violations of legal provisions and of the Code of Medical Ethics. The author analysed the jurisprudence on the basis of case files from the OSLs in Łódź (2016), Poznań (2015 and 2016), and Warsaw (2016, 2017 and 2018. The study of the files from 2016 provides a cross-section of cases from different locations in a comparable period of time. In principle, those were closed cases and final decisions. Cases from the OSL in Warsaw were analysed for three consecutive years: 2016, 2017, and 2018. Only in the last year were some of the decisions not yet final and unappealable. Nonetheless, the above material allows some trends to be traced, which cover the span of three consecutive years at a medical disciplinary board whose jurisdiction includes the largest medical chamber in Poland.

The analysis accounted for the most frequent charges brought against dentists before medical disciplinary boards, *viz.* lack of due diligence in diagnostics and treatment. The diligence part concerned two questions. Firstly, how often physicians are charged with lack of due diligence, and secondly, how many of those cases refer to dentists.

In the analysed cases for 2016 in the OSL in Warsaw, out of 55 cases studies, in 39 (71%) the charge of lack of due diligence was pressed, which includes dentists in 9 cases. During the same year, out of 33 cases before the Łódź OSL, doctors faced the charge in 23 cases (69.7%), and among them dentists in 6. In 2016 in the Poznań OSL, which heard only 9 cases, the charge appeared in 2 cases (22%), none in the area of dentistry.

The year before, the Poznań OSL heard 29 cases, out of which 12 (41.4%) referred to the charge under Article 8 MCE in conjunction with Article 4 of the Act on the Professions of Physician and Dentist, including dentists in 3 cases. In 2017 the OSL in Warsaw heard 52 cases, and among those 34 (65.4%) involved failure of due diligence in the diagnostic-therapeutic process, with dentists facing the charge in 12 cases. In 2018, on the other hand, the Warsaw OSL heard all of 40 cases, including 65% involving lack of due diligence, out of which 10 involving dentists.

IV. Procedure before a Polish medical disciplinary board

From the procedural perspective proceedings enforcing the professional responsibility of physicians are conducted by the disciplinary prosecutor — Professional Responsibility Ombudsman (ROZ) — and thereafter by the medical disciplinary board ('medical court'). The ombudsman and the board members ('judges') are physicians and dentists with 10 years' professional experience. They were elected by the delegates of the regional conference of physicians for a four-year term. In principle, the proceedings are initiated by a patient

complaint to the ROZ. Initially, the Ombudsman carries out fact-checking activities followed by an investigation. The Ombudsman has three options in the proceedings. The first is to issue an order refusing to institute the proceedings or dismissing the proceedings if already instituted, where no evidence has been found in relation to the physician or dentist's alleged professional misconduct. Either order can be challenged with a complaint to the medical disciplinary board hearing those cases, as the 2nd instance. Secondly, if the Ombudsman finds that there exists evidence of the physician or dentist's professional misconduct, the result will be a request for punishment brought before the medical disciplinary board. In accordance with the rules of procedure, the 1st instance is the regional medical disciplinary board (OSL), and the 2nd, appellate, instance is the Supreme Medical Disciplinary Board (NSL). Since 2010 it has also been possible to take advantage of an extraordinary appeal against the NSL's decision, *viz.* an appeal-in-cassation to the Supreme Court, which is staffed by professional justices.

V. Penalties

The nature of the penalty imposed by the medical disciplinary board is not limited to repression, although the latter is an element bringing physicians' professional responsibility closer to criminal liability. In criminal law three purposes of punishment are distinguished — justice, general deterrence and specific deterrence (Indecki, Liszewska, 2002). In physicians' professional responsibility only a just penalty can have deterring impact not only on the perpetrator, which is specific deterrence, but also on other physicians. That is where we speak of the general-deterrence purpose of disciplinary punishment, which is to deter professional misconduct by potential perpetrators. The list of disciplinary penalties available for physicians and dentists puts them in the order from the mildest to the most severe. In consequence, the medical disciplinary board should in each case heard first and foremost consider the merit of the imposition of the mildest sanction, and a more severe penalty only thereafter, if the milder penalty occurred to be insufficient. Sometimes, penalties imposed by medical disciplinary boards can entail greater severity than would otherwise occur from their objective parameters. This primarily involves the additional consequences to the physician in the form of negative reputation in professional circles. Such consequences can be regarded as an honour penalty (Skuczyński, 2017). Literature cites examples from the statutory frameworks of other countries: Germany, France or Belgium, where the lowest penalties, *viz.* admonition or reproach, are regarded as penalties of moral impact (Zielińska, 2001). Additionally, the board may order its decision to be published in the *Gazeta Lekarska* (Medical Gazette). This refers to such penalties as suspension or revocation of the right to practise. Publication of the decision is in effect a special form of condemnation of the perpetrator's conduct. It is an important matter for decisions to be published in those cases which can meet with condemnation from the environment in which the event occurred (Bojarski, 2012). Similarly to judges in courts of law, board members ('medical judges') have a certain margin of appreciation when imposing the penalty. Sentencing guidelines can increase or decrease the severity of the penalty. In one of its rulings, the Supreme Court (SC judgment, 2014) emphasized that the NSL should consider the imposition of the disciplinary penalty in such a way as for the penalty to be both commensurate with the degree of culpability and any aggravating or mitigating circumstances found but also constitute a realistic discomfort for the defendant, giving effect to the requirements of specific impact and to the functions of the penalty provided for in relation to general deterrence.

VI. Discussion of the decisions

1. Admonition

The ROZ charged a dentist with failure to observe due diligence in diagnostics and therapy in endodontic treatment, which resulted in long-term pain and the need for repeat treatment. The board found that the patient received endodontic treatment in connection with tooth 14 ailments from 16 April to 18 May 2015. On 4 November 2016, however, due to persistent pain, she reported to a different dentist, who ordered a radiological examination. As a result, it was established that the root canals of tooth 14 had not been completely filled, and so the patient was referred for repeat endodontic treatment. Beyond any doubt the treatment she received was in violation of the basic principles of the diagnostic and therapeutic procedure in endodontics. This was confirmed by the expert appointed to the case, who found that the defendant doctor failed to order the radiological diagnostics necessary for the correct classification and diagnosis and, furthermore, upon completion of the treatment failed to confirm the correctness of the filling of the canal system by radiological examination. The

expert also noted that the dentist failed to conduct the medical files correctly, missing certain records of importance to endodontic treatment, including measurement of the working length of the canals, or the patient's consent for the treatment. While discussing this case, it must be emphasized that the patient's consent is the principal element conferring axiological and legal legitimacy on a physician's activities.The institution of consent for the performance of a medical procedure constitutes one of the grounds of legality of therapeutic activities (SC order, 2005). At the main hearing the defendant dentist confessed and apologized to the victim.Ruling on the case, the board found the doctor guilty of the professional misconduct charged, and imposed the penalty of admonition. The board took into advisement the fact the nature of the penalty in professional-responsibility proceedings is primarily that of a deterrent and of an educational measure. Additionally, the dentist showed contrition and apologized to the patient. The penalty of admonition imposed is therefore adequate to the professional misconduct committed and accounts for the fact that the defendant's lack of prior record (Warsaw OSL decision 2018).

2. Reprimand

The OSL in Łódź evaluated the victim's prosthetic treatment not preceded by proper radiological diagnostics. Additional emphasis must be put on the prior endodontic treatment of tooth 13. In the charges brought against the dentist, the ROZ emphasized that the inclusion of that tooth in prosthetic restoration required absolute radiological diagnosis in order to assess hypothetical periapical changes. The expert found that the crowns performed for the victim were too wide and loose at the bridge, leading to food impaction and gum inflammation at the bridge, with the results including pain and gum bleeding. Due to existing and the risk of further complications (*e.g.* decay, pulp inflammation, periodontitis), the crowns had to be removed. In the OSL's view there had been no indications for connecting the bridge pillars with a single filling. Individual crowns should have been made for the patient, facilitating hygiene and improving the periodontium's condition. While discussing this case it should be added that Article 6 CME does provide the physician with some leeway in the choice of the course of action. As literature rightly points out, however, this: 'discretion in professional decisions taken by the physician is not a value in itself but is subordinate to the general principle of care to the patient's welfare,' (Urbaniak, Cofta, 2015). In its decision the board emphasized that the incorrect execution of the prosthetic restoration was linked to the lack of radiological diagnostics preceding the treatment. The OSL found the dentist guilty of professional misconduct, imposing the penalty of reprimand (Łódź OSL decision, 2016).

3. Suspension and revocation of the right to practise

The victim's prosthetic treatment started in May 2000 and ended in October 2009. It was intended to include mounting a bridge on implants. The victim had had five Branemark implants installed the year before at a different dentist's. The defendant installed the abutments for the victim over the course of three weeks, and two bridges with porcelain crown on them. In 2000 December one of the abutments decemented itself, while the remaining one held correctly, causing pain in the victim. The defendant dentist attempted to drive the abutment in and when that failed decided to wait for the abutment to dislodge on its own. Later, there were several more instances of either one or the other bridge decementing itself, as well as a broken abutment within the internal width of the canal. The dentist removed connector residue from the canal, leaving the victim in enormous pain. Thus, he suggested and installed one-piece implants to supplement the permanent teeth. Soon, one of the implants dislodged on its own and two were fractured. Thus, in lieu of the removed implants the dentist implanted bio-oss material for which the patient had to make an additional payment. The ROZ charged the doctor with incorrect prosthetic and implantological treatment resulting in the loss of the majority of the implants in the jaw, long-term pain and the need for bio-oss implantation, in violation of Article 8 of the CME and Article 4 on the Act on the Professions of Physician and Dentist. Having examined the complainant and analysed the panoramic X-rays and the prosthetic structure from section 23–25, the expert found the cause of implant fracture and subsequent loss to have been the defendant's use of materials close to crown-root inlays and their cementation to openings inside implants instead of prefabricated Branemark connectors. The above determinations enabled the board to find, with all firmness, that a physician of such education and experience as the defendant ought to have displayed greater diligence and responsibility. He should have been familiar with safe and successful procedures for implantological treatment. It must also be noted that the board proceedings were held in the absence of the defendant, who had been duly notified of the dates of the hearings. Moreover,

desirous to provide the dentist with a chance to respond to the charges, the OSL set the dates twice, with the defendant ignoring both of the citations. In the board's view the dentist's guilt was beyond the smallest doubt, and the harm occasioned by the conduct was significant due to the threat posed to the patient's health. With that in mind, the OSL decided to impose the maximum extent of the penalty of suspension of the right to practise — 5 years. The ruling became final and unappealable on 9 December 2013. Here, it must be noted that the severity of the penalty was the result of the defendant's attitude and the knowledge of the defendant's prior record (*e.g.* in 2015 — reprimand, in 2005 — suspension for 1 year, and in 2010 — reprimand). In the OSL's view, the severity of the penalty ought to account for the type and extent of the negative consequences of the professional misconduct, as well as the perpetrator's conduct before and after committing it (Poznań OSL decision, 2013).

However, on 30 April 2016 a new complaint reached the ROZ in Warsaw against the dentist previously penalized with 5 years' suspension from practice in 2013. The Ombudsman pressed charges on two points. The first one was that in the period from September 2012 to May 2014 the doctor incorrectly performed the victim's treatment consisting in placing implants in the jaw, on which permanent prosthetic restoration was based, leading to inflammations in the area around implants 12 and 14, and in consequence the need to remove the implants. The ROZ's second charge was that from 9 December 2013 onward the dentist had practised while suspended. The defendant dentist did not appear when summoned by the ROZ or later by the board. It occurs from the evidence that he knowingly violated the binding decision of the OSL in Poznań suspending him for 5 years from practice. In the light of the above, in the hearing on 2 February 2017, the ROZ requested permanent revocation of the defendant dentist's licence. The OSL in Warsaw found the dentist guilty of the charges. The board noted that the defendant flagrantly violated the legal order and wholly ignored the ideals and principles of medical self-government. As aggregate sentencing is unknown to medical disciplinary proceedings, the board imposed a separate penalty for each offence. For the irregularities in the implantological and prosthetic treatment the board imposed the penalty of reprimand, and for practising while under the penalty of suspension — the most severe penalty of revocation of the right to practise (Warsaw OSL decision, 2017). The convicted dentist appealed to the NSL. On appeal, the NSL ruling in the 2nd instance upheld the decision (NSL decision, 2017). Due to the above, the dentist's lawyer took advantage of the cassation path before the Supreme Court, alleging that the 2nd-instance medical disciplinary board failed to conduct adequate review. The Supreme Court reversed and remanded, finding the penalty imposed to be manifestly incommensurate with the conduct. For the other offence — issuing a prescription after 9 December 2013 despite the already imposed suspension from practice — the doctor received the most severe penalty, *i.e.* revocation of the right to practise. The justices of the Supreme Court found that the dentist's conduct was not harmful to the image of the corporation (*i.e.* the professional community) as a whole (SC judgment, 2018). While discussing this judgment, it should be noted that the Chief Professional Responsibility Ombudsman (NROZ) expressed a different opinion during the hearing before the SC. In the Ombudsman's view, the repeated nature of the defendant's conduct, which clearly testified to persistence in engaging in reprehensible conduct, ought not to be ignored. The physician's profession is one of public trust.The professional self-government, as a professional community, is put in charge of control functions (*e.g.* over compliance with quality standards, ethical rules or the principles shaping doctor-patient relationships) involving legal responsibility attached to the exercise of the relevant profession (Skrzypczak, 2015).

VII. Conclusion

The increase in the numbers of medical litigation is not unique to Poland. More and more cases, especially requiring the evaluation of not only the professional but also the ethical conduct of a dentist, reach medical disciplinary boards. In 2016 in three large OSLs in Warsaw, Łódź and Poznań, with almost 100 cases inbound against all physicians, including dentists 15. A comparison of the last three years (2016, 2017 and 2018) at the OSL in Warsaw clearly shows that the number of all cases is decreasing slightly, also in reference to dentists. In the last three years 147 cases were brought against all physicians, including dentists 31. The number of physicians and dentists in Poland who are responsible in the medical courts is the result of the lack of analysis of these judgments in the course of education. The above decisions are unpublished and, to a lesser extent, it is possible to discuss the current and practical issues.

In Poland, besides the statutory framework regulating physicians' professional responsibility, provisions of criminal law are applied mutatis mutandis (*i.e.* in unregulated matters). One should, however, note certain basic differences between criminal and disciplinary law. Firstly, as the cited OSL and NSL decisions show, there is no exhaustive, closed list of conduct outlawed for physicians. The criterion used in professional responsibility is more evaluative and hence the elements of professional misconduct are not sharply delineated (Czarnecki, 2013). Disciplinary violations are not and cannot be statutorily defined, just as it is impossible to describe principles of medical practise, especially as regards the ethical grounds (Wróbel, Zoll, 2010). Secondly, while the Act on Medical Chambers does contain a catalogue of penalties, it is not clearly defined what penalty should be imposed for what type of conduct. Hence, the medical disciplinary board should, with due diligence, examine both the circumstances relating to the physician's person and professional situation and circumstances strictly relating to the alleged conduct (SC judgment, 2015).

It is essential to carefully and individually analyse all matters of justifications and the amount of disciplinary penalties for doctors. However, along with this flexibility in the process of administering penalties, taking into account the entire subject and subject of matter, the factual circumstances are increasing the risk of arbitrariness and uncertainty and no uniformity of the disciplinary cases. This diversity in the case law is clearly visible to dentists who work with the patient individually. It manifests itself in the approach of the dentist to the patient. The examples presented in the study show that dentists by their specialization are deprived of a wider view of the human (non-therapeutic treatment was associated with long-term pain, the inability to maintain hygiene, the emergence of inflammation and loss of dentition).For this reason, decisions of medical disciplinary boards should be used in physicians' training both at medical schools and in post-diploma education (specialization).

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