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Exclusion of a Physician's Liability for Performing a Medical Procedure Without the Patient's Consent[1]

Abstract: The paper is an English translation of the article "Uchylenie odpowiedzialności lekarza za wykonanie zabiegu leczniczego bez zgody pacjenta" published originally in *Palestra*, no. 11–12 from 2002. The text is published as a part of a section of the Adam Mickiewicz University devoted to the achievements of the Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.
Keywords: medical law, physician's liability, performing a medical procedure without the patient's consent

The considerations set out in this article are intended to clarify the following issues:

- the scope of the lawful performance of medical procedures without the patient's consent;
- the liability of a physician confronted with a conflict of duties: the duty to save human life on the one hand the duty to obtain the patient's consent on the other;

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– the impact on a physician's liability for a fundamental error inherent in the new offence introduced into the Criminal Code of 6 June 1997 (Article 192 § 1 of the Criminal Code provides for criminal liability for performing a medical procedure without the patient's consent);
– the legal foundations of the thesis (advanced, inter alia, in textbooks and commentaries) that narrows the scope of defence arguments in cases involving physicians who perform medical procedures without the patients' consent. On the basis of this thesis, the argument premised on a physician acting in a state of necessity is excluded. thesis requires more justification.

It must also be stipulated at the outset that these considerations concern only those situations in which the performance of a medical procedure without the patient's consent would constitute the sole basis of liability, and not those in which other causes determine the physician's liability (eg. so-called professional malpractice, a revealed lack of competence, and the like).

I

In contemporary 'medical law', as well as in other branches of law (not only domestic law), patient consent is regarded as the fundamental basis for a physician's actions. In this respect, the regulation contained in Article 32 of the Act on the Medical Profession of 5 December 1996[2] is unequivocal. It provides that a physician may conduct an examination or provide other health services "after the patient has expressed consent." When the patient is a minor (and thus has not attained the age of 18) or is incapable of expressing informed consent, the consent of the patient's statutory representative is required; where the patient has no statutory representative or where communication with such representative is impossible——the consent of the guardianship court is required.

2 Journal of Laws of 1997, no. 28, item 152.

The cited provision does not introduce any conditions as to the form of the required consent. Article 34(1) of the Act on the Medical Profession, however, imposes a requirement of written patient consent for the performance of a surgical procedure or for the application of a method of treatment or diagnosis involving an increased risk to the patient.

Closely connected with these provisions is Article 15 of the Code of Medical Ethics, which provides that diagnostic, therapeutic and preventive procedures requires the patient's consent.

Also noteworthy in this context is the statement of one of the eminent representatives of medical science.[3] He explained—"for the purpose of avoiding any kind of ambiguity, erroneous interpretations and insinuations"—that, in his view and in the view of the entire surgical community, a fully conscious patient must express consent to the proposed treatment, including operative treatment. For surgeons, he observed, this is a wholly indisputable matter … He further stated that he could not understand why the view is being disseminated that surgeons take a different position … No physicians—and surgeons least of all—not only do not question the individual's right to self-determination, but in fact stand guard over that right.

The performance of medical procedures without the consent required by statute is qualified as an infringement of human freedom. That freedom enjoys fundamental protection under the Constitution of the Republic of Poland of 2 April 1997. This protection is not, however, unlimited. Restrictions may be established by statute where they are necessary, inter alia, for the protection of health or the freedoms and rights of other persons (cf. Article 31 of the Constitution).

3 Tadeusz Tołłoczko, "Problem zgody pacjenta jako dylemat aksjologiczny—refleksje klinicysty," *Prawo i Medycyna*, no. 1 (1999): 90.

II

The already-cited Article 32 of the Act on the Medical Profession expressly provides that a physician may provide health services "after the patient has expressed consent," albeit "subject to the exceptions provided for in the Act."

There are numerous legal provisions under which medical procedures undertaken without the patient's consent are lawful. Several examples may be noted.

Article 118 of the Executive Penal Code of 6 June 1997[4] provides for a situation in which 'the life of a convicted person is in serious danger' (as certified by the opinion of a medical commission). A necessary medical procedure (including surgical intervention) may be performed "even despite the convicted person's objection." In the event of such objection, the decision to perform the procedure is taken by the penitentiary court. However, "in an urgent case, where there is a direct risk of the convicted person's death, the necessity of the procedure is decided by the physician" (§§ 1–3).

The placement of perpetrators of prohibited acts in appropriate institutions in which therapeutic or rehabilitative measures are applied is also provided for in the Criminal Code.[5] The examination of a patient without his or her consent, as well as the possibility of admitting a person suffering from mental illness to a psychiatric hospital without that person's consent, is also provided for by the so-called Mental Health Act.[6] Compulsory treatment may likewise be undertaken in relation to persons dependent on narcotics[7] and, in exceptional situations, also in relation to persons abusing alcohol (where this causes the breakdown of family life, the demoralisation of minors, evasion of work, or systematic disturbance of social order).[8]

4 Journal of Laws of 1997, no. 90, item 557.

5 Cf. Chapter X of the Criminal Code.

6 Act of 19 August 1994 on the Protection of Mental Health (Journal of Laws of 1994, no. 111, item 535).

7 Act of 24 April 1997 on Counteracting Drug Addiction (Journal of Laws of 1997, no. 75, item 468.)

8 Cf. Article 24 of the Act of 27 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism (Journal of Laws of 1982, no. 35, item 230).

Numerous orders concerning the mandatory submission—by not only ill persons but also persons suspected of disease or infection—to examinations, compulsory treatment, compulsory hospitalisation, isolation, quarantine or epidemiological supervision are provided for in the comprehensive Act of 6 September 2001 on Infectious Diseases and Infections.[9] It thus envisages lawful actions by physicians and other persons, notwithstanding that they entail far-reaching restrictions of individual freedom.

Mandatory hospitalisation, isolation or quarantine does not lose its character as lawful action even "in the absence of consent." In such circumstances, however, it is obligatory to inform the person who withholds consent "of his or her right to appeal to a court for the immediate determination of the legality of the deprivation of liberty," to enable such an appeal, and to record this in the medical documentation (Article 30).

III

The questions most frequently raised concerning the legality of medical procedures undertaken without the patient's consent arise in connection with situations in which the physician is faced with a conflict of duties, only one of which can be fulfilled. On the one hand, the physician is under an obligation to save the life of a person directly threatened with its loss; on the other, he is subject to the duty to obtain that person's consent, which he does not receive.

Each of these duties is grounded in the protection of a legally protected interest: on the one hand, human life; on the other, human freedom, within the scope of which lies the right to make autonomous decisions and to choose one's course of action. There can, however, be no doubt that, in the hierarchy of interests protected by law, human life has a superior value. This entails "an important consequence for the application of law: it prompts the adoption of an interpretative directive according to which all possible doubts as to the pro-

9 Journal of Laws of 2001, no. 126, item 1384.

tection of human life should be resolved in favour of that protection (*in dubio pro vita humana*). The particular rank of human life is reflected in the recognition of the 'right to life' as a fundamental legal principle by international legal instruments (Article 6(1) of the International Covenant on Civil and Political Rights, Article 3 of the Universal Declaration of Human Rights of 1948, as well as by the constitutions of certain states)."[10] It should be added that the Constitution of the Republic of Poland of 2 April 1997 likewise belongs to that group, Article 38 of which contains a guarantee of legal protection of life.

The absolute character of the duty to save human life is confirmed both by the provisions of the Act on the Medical Profession and by the provisions of the Criminal Code. Article 30 of the Act on the Medical Profession provides that a physician is under a duty to provide medical assistance in every case "where delay in its provision could result in danger of loss of life, serious bodily injury or serious impairment of health, and in other cases not admitting of delay."

The absolute character of this duty is further indicated by Articles 38 and 39 of the Act on the Medical Profession. Article 38 defines those situations in which 'a physician may decline to undertake or may discontinue treatment of a patient', expressly excluding the situations "referred to in Article 30." Article 39 in turn provides that a physician may refrain from providing health services that are incompatible with his conscience "subject to Article 30." The physician is thus under a duty to provide medical assistance in every such case, while "where possible" consulting his decision with another physician.

The fulfilment by a physician of the duty to provide medical assistance in the situation described in Article 30 of the Act on the Medical Profession therefore constitutes lawful conduct even where he acts without the consent of the persons to whom such assistance is rendered. Moreover, the Act on the Medical Profession legalises the provision of health services without the patient's consent not only on account of the danger of loss of life or serious bodily injury. Such

10 Marian Cieślak in *System prawa karnego, vol. 4, O przestępstwach w szczególności, part 2, ed. Igor Andrejew et al. (Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, 1985)*, 291–92.

services are also permissible where the patient requires immediate medical assistance and, by reason of his state of health or age, is unable to express consent, and it is not possible to communicate with his statutory representative or de facto guardian. In such a case the physician should make a note of the circumstances of the matter in the patient's medical records (Article 33(1)–(3)).

It also deserves emphasis that the legal bases discussed above, which under the specified conditions legalise medical procedures performed without the patient's consent, are in conformity with European standards. The so-called European Convention on Bioethics of 4 April 1997[11] provides for situations in which "a physician may be confronted with a conflict of obligations', namely a conflict between the duty to treat and the duty to obtain the consent of the patient or of his statutory representative. Article 8 of that Convention 'authorises the physician to act immediately," limiting such action, however, to "interventions which are medically necessary and do not admit of delay."

A physician who fails to fulfil the duty to provide medical assistance in the situation described in Article 30 of the Act on the Medical Profession (where delay in its provision could result in loss of life or serious bodily injury) cannot escape professional liability by pointing to the fact that the patient did not give consent to such assistance.

The detailed rules of professional liability of a physician who has failed to comply with the duty laid down in Article 30 of the Act on the Medical Profession are regulated by the Act of 17 May 1989 on Medical Chambers[12] and by the Regulation of the Minister of Health and Social Welfare of 26 September 1990 on Proceedings in Matters of Physicians' Professional Liability.[13]

In respect of a physician who incurs professional liability, the following sanctions may be imposed: (1) admonition; (2) reprimand; (3) suspension of

11 *Convention on Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine in: Tadeusz Jasudowicz, Europejskie standardy bioetyczne: Wybór materiałów (TNOiK "Dom Organizatora", 1998).*

12 Journal of Laws of 1989, no. 30, item 158.

13 Journal of Laws of 1990, no. 64, item 406.

the right to practise the medical profession for a period from six months to three years; (4) deprivation of the right to practise the profession.

A physician who has failed to perform the duty to provide immediate medical assistance to a person threatened with loss of life or serious bodily injury, for example permanent disability, is burdened not only with professional liability. In such a case his liability is 'two-track' in nature: it encompasses both professional and criminal liability.[14] Its basis is found above all in Article 162 of the Criminal Code, which provides:

> § 1. Whoever fails to render assistance to a person in a situation of direct danger of loss of life or of serious detriment to health, being able to render such assistance without exposing himself or another person to the danger of loss of life or serious detriment to health, shall be liable to imprisonment for up to three years.
> § 2. No offence is committed by a person who fails to render assistance where doing so would require that person to undergo a medical procedure, or in circumstances in which immediate assistance from an institution or a person designated for that purpose is available.

It is also worth noting that, in several respects, the Act on the Medical Profession regulates a physician's responsibility for failing to provide immediate medical assistance to a person at risk in a more stringent manner, namely:

– The criminal liability provided for in Article 162 § 1 of the Criminal Code concerns situations in which the person in need of assistance is already in a position involving a direct danger of loss of life or serious detriment to health. By contrast, Article 30 of the Act on the Medical Profession imposes an obligation to provide medical assistance where

14 For a broader discussion, see: Krystyna Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu: Rozdział XIX Kodeksu karnego; Komentarz* (C.H. Beck, 2000), 402.

the danger may be caused only by delay in the provision of such assistance. Accordingly, situations may arise in which a physician who does not incur criminal liability under the Criminal Code will nevertheless incur professional liability.

- Article 30 of the Act on the Medical Profession also refers to 'other cases not admitting of delay', which entail the physician's obligation to provide medical assistance. In such cases, the physician may be subject only to professional liability.
- Under Article 162 § 2 of the Criminal Code, a person does not commit an offence by failing to render assistance in circumstances "in which immediate assistance from an institution is available," for example at the scene of a road traffic accident in which a person faces a direct danger of loss of life, where a physician happens to be present but there is also an ambulance service on site with a full team and equipment. Article 30 of the Act on the Medical Profession does not release the physician from the duty to provide immediate medical assistance on the ground that "immediate institutional assistance is available."
- Both the physician's professional liability and criminal liability may be associated with the imposition of a prohibition on holding a specified position or practising a specified profession. Where such a prohibition is imposed in addition to a penalty for the offence of failure to render assistance under Article 162 § 1 of the Criminal Code, it may be imposed for a period from one to ten years (Articles 41 § 1 and 43 § 1 of the Criminal Code). By contrast, under Article 42 § 1(4) of the cited Act on Medical Chambers, a physician who incurs professional liability may be deprived of the right to practise the profession indefinitely. The possibility of removing, after a specified number of years, entries concerning sanctions from the register of disciplined physicians (kept by the Supreme Medical Council) does not apply to deprivation of the right to practise the profession (Article 55(3)).

IV

The conflict of duties confronting the physician assumes particular significance where the physician is obliged to save the life of a person directly threatened with its loss, and consent to the intervention is given not by the patient personally but by the patient's statutory representative or de facto guardian.

Such situations arise, for example, where a child is directly threatened with loss of life and the physician considers transfusion of blood products to be necessary, but the child's parents—Jehovah's Witnesses—not only fail to give consent but lodge a "categorical objection."

It would be a peculiar paradox, and contrary to what appears self-evident, if a physician were to incur liability in each of two situations: first, where he yields to the parents' will, complies with their objection and the child dies (or survives only because another physician has fulfilled the duty, performed the necessary procedure and saved the child); and second, where he disregards their objection and performs the necessary procedure, thereby preserving the child's life.

The physician will incur liability only in the first situation, in which, by reason of the parents' objection, he fails to discharge his duty to provide the necessary medical assistance to a child directly threatened with loss of life or serious bodily injury. In the second situation, he will not incur liability, even though he acted not only without the parents' consent but in defiance of their categorical objection. For his conduct to be deemed lawful, however, several conditions expressly specified in the Act on the Medical Profession must be satisfied.

Where the statutory representative of a minor patient does not consent to the physician performing a surgical procedure necessary "to remove the danger of the patient losing life or suffering serious bodily injury or serious impairment of health," the physician may perform the procedure after obtaining the consent of the guardianship court (Article 34(6) of the Act).

Obtaining the consent of the guardianship court, however, requires time. As a rule, that time is unavailable in situations in which immediate action is re-

quired because the child is directly threatened with loss of life. In such circumstances, the Act on the Medical Profession legalises action by the physician undertaken not only without the consent of the child's statutory representative but also without the consent of the guardianship court. The physician may proceed in this way "where delay caused by the proceedings to obtain consent would expose the patient to the danger of loss of life, serious bodily injury or serious impairment of health" (Article 34(7)).

In the situation described, where the physician acts without the consent of the statutory representative and without the consent of the guardianship court, the Act on the Medical Profession imposes the following three obligations:

1) the physician must, "if possible," obtain the opinion of a second physician, "where possible" of the same specialty;
2) the physician must promptly notify the statutory representative, the de facto guardian or the guardianship court of the actions performed;
3) the physician must make an appropriate entry concerning the circumstances of the case in the patient's medical records (Article 34(7)–(8)).

These regulations merit particular attention because they concern recurrent and 'persistently present' issues of medical practice, which give rise to questions and requests for legal opinions. They also have a dimension extending beyond Poland. The literature, for example, cites theses formulated by US courts in cases in which parents who were Jehovah's Witnesses refused consent to a necessary operation for their child. In one such case it was stated that 'the right to religious freedom does not include the freedom to expose a child to death'; in another, that "parents who do not wish to undergo treatment may become martyrs, but they do not have such a right in relation to their children."[15]

If a physician, performing his duty in conditions of direct threat and the necessity of saving a child's life, has saved that child or prevented serious bodily injury

15 Mirosław Nesterowicz, *Prawo medyczne: Prawa pacjenta i obowiązki lekarza, odpowiedzialność cywilna lekarza, odpowiedzialność cywilna zakładu opieki zdrowotnej, odpowiedzialność Kasy Chorych, odpowiedzialność gwarancyjna i ubezpieczeniowa, akty prawne*, 4th ed. (Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora", 2000), 88.

against the will of the parents, it would be profoundly immoral and contrary to the principles of social coexistence for the parents of the saved child to prosecute him, and in particular to seek financial compensation for the alleged harm.

The literature has analysed a case in which a patient, a Jehovah's Witness, sought "compensation for non-pecuniary harm harm suffered as a result of a blood transfusion performed against her will during a surgical operation." The case was heard by successive courts in Paris. All dismissed the claim, as did the Administrative Court of Appeal in Paris. On 9 June 1998, the full bench of that court held that a physician cannot be said to have acted culpably where, in an emergency and in the absence of alternative methods of treatment, he performs life-saving medical acts contrary to the patient's previously expressed will. The court regarded the protection of human life as an interest of higher value than the individual will of the patient.[16]

Were an analogous case to be considered in Poland, it would fall within Article 35 of the Act on the Medical Profession, which provides as follows:

> 1. Where, in the course of performing a surgical procedure or applying a therapeutic or diagnostic method, circumstances arise such that failure to take them into account would expose the patient to the danger of loss of life, serious bodily injury or serious impairment of health, and it is not possible to obtain promptly the consent of the patient or the patient's statutory representative, the physician is entitled, without obtaining such consent, to alter the scope of the procedure or the method of treatment or diagnosis in a manner that enables those circumstances to be taken into account.

In such a case, the physician is also subject to the three obligations already mentioned: (1) "if possible," to obtain the opinion of a second physician, where possible of the same specialty; (2) to make an appropriate entry in the medical records concerning the changes made; (3) to inform the patient, the statutory representative or the de facto guardian thereof (§ 2).

16 Nesterowicz, *Prawo medyczne*, 91.

Providing consent to a medical procedure, or refusing consent to such a procedure, falls within the scope of human freedom protected by law. Particular attention should, however, also be paid to the thesis long since introduced into textbooks and commentaries that the object of legal protection is "only such freedom as does not constitute an abuse of that freedom."[17] The possibility of such abuses must be taken into account above all in those situations in which one person faces a direct danger of loss of life and another refuses consent to life-saving intervention.

It must also be emphasised unequivocally: an individual has the right to his or her worldview, to choose and prefer certain views and to reject others, for this falls within the scope of legally protected freedom. That legal protection does not, however, extend to acts or omissions which, though grounded in the individual's worldview and value system, infringe "the freedoms and rights of other persons" (as the Constitution phrases it), are contrary to the principles of social coexistence, constitute an abuse of parental or guardianship authority, or—worst of all—fulfil the statutory elements of criminal offences.

In any event, these problems cannot be confined solely to matters associated with the worldview of Jehovah's Witnesses. They are significantly broader in scope. They include, for example, known situations involving children requiring immediate medical interventions where consent is withheld by parents living with them in sects or by their de facto guardians. In 2002 a conviction was handed down against one of the parents of a child who had been subjected to a diet that led to extreme emaciation. Without necessary, immediate medical intervention the child would have died. Other motivations underlie the concealment, in remote villages, of children who are intellectually disabled or physically impaired and require immediate medical interventions to which their parents do not consent. There are also known situations in which close relatives, burdened

17 Cf. e.g. Witold Świda in Igor Andrejew et al., *Kodeks karny z komentarzem* (Wydawnictwo Prawnicze, 1973), 490.

by onerous care of elderly persons, refused consent to necessary, immediate life-saving medical interventions for those elderly individuals.

V

It would be highly desirable for physicians to inform statutory representatives of patients, or their de facto guardians, that by refusing consent to life-saving interventions they are abusing parental or guardianship authority and, moreover, that their conduct may fulfil the statutory elements of criminal offences. Article 31 of the Act on the Medical Profession, which regulates the scope of information and makes its disclosure to other persons dependent "only on the patient's consent," does not provide for such warnings.

For intentional deprivation of life, criminal liability is borne not only by one who, by act or omission, brings about death because he desired it, but also by one who, foreseeing that death, reconciled himself to it.

A refusal of consent to necessary, immediate life-saving intervention may also fulfil the statutory elements of exposing another person to the danger of loss of life (Article 160 of the Criminal Code). A more severe sanction (imprisonment from three months to five years) applies to a person upon whom a duty of care towards the endangered person rests. Such a person will not, however, be subject to punishment if he voluntarily removes the threatened danger, for example by giving consent to the necessary, immediate medical assistance.

There is likewise no doubt that a person exposes another to a direct danger of loss of life or serious detriment to health not only where he moves that person "from a safe state into a state of danger," but also where he moves a person "from one dangerous state into a more dangerous state"; in other words, where he aggravates an existing danger and determines its escalation[18]—for example

18 Cf. e.g.: Judgment of the Supreme Court of 3 October 1973, IV KR 256/73, Supreme Court Bulletin No. 2/1974, item 26; Judgment of the Supreme Court of 21 March 1979, IV KR 62/78, OSNPG No. 2/1979, item 21. See also: Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu*, 389.

by delaying consent to a necessary life-saving intervention or refusing it altogether, thereby deepening an already existing danger.

It should also be recalled that criminal liability for failure to render necessary, immediate assistance to a person threatened with loss of life is borne not only by the person who does not provide such assistance despite being able to do so, but also by the person who incites such failure. This liability may therefore attach to, for example, the statutory representative or de facto guardian of a person requiring an immediate, life-saving medical intervention who induces, urges or indeed demands that the physician not provide such assistance (cf. Article 162 § 1 of the Criminal Code in conjunction with Article 18 § 2 of the Criminal Code).

VI

The Criminal Code of 6 June 1997 introduced a new offence in the form of that provided for in Article 192. The provision reads as follows:

> § 1. Whoever performs a medical procedure without the patient's consent shall be liable to a fine, a penalty of restriction of liberty, or imprisonment for up to two years.
> § 2. Prosecution shall take place upon the application of the injured party.

In introducing this new offence into the Criminal Code, a fundamental error was committed, to the detriment of those who perform medical procedures without patients' consent. As has already been indicated, there are numerous situations in which the performance of a medical procedure without the patient's consent is lawful. This, however, was not taken into account in the cited provision. The performance of *any* medical procedure without the patient's consent is threatened with punishment, which is plainly unacceptable.

This error has been noticed, and the forthcoming amendment is intended to modify Article 192 § 1 of the Criminal Code. This is reflected both in the

so-called ‘Presidential draft’ (submitted to the Sejm in December 2001) and in the ‘Parliamentary draft’ of January 2002. Under the first, the penalty set out in the provision is to apply to the performance of a medical procedure without consent “required by statute”; under the second, to performance without consent “contrary to the conditions laid down by statute.”

Representatives of the medical sciences rightly draw attention to the numerous doubts that arise in practice when physicians seek a clear answer to the question whether a patient consents to, or refuses consent to, an operation – for example one that constitutes the only chance of saving the patient’s life. A patient may, within a very short time, consent, withdraw consent, consent again, and so on “in a circle.” A patient may express consent to one physician while refusing it to another.

The Act on the Medical Profession identifies situations in which consent is given by the patient’s statutory representative or de facto guardian. The latter is defined as “a person who, without a statutory duty, exercises constant care over a patient who, owing to age, state of health or mental condition, requires such care” (Article 31(8)). A patient may, however, have both a statutory representative and a de facto guardian. How should a physician proceed where the statutory representative consents to an operation while the de facto guardian categorically objects? The same difficulty may arise in relation to a patient who has attained the age of 16. As a minor, such a patient has a statutory representative who provides consent (in writing) to a surgical procedure. Under Article 34(4), “if the patient has attained 16 years of age, his written consent is also required.” How should a physician proceed where the statutory representative of a sixteen-year-old consents to a surgical procedure that constitutes the only chance of saving the patient’s life, while the patient himself categorically objects?

The Act on the Medical Profession employs the concept of a patient ‘incapable of providing informed written consent’ and the concept of a patient “incapable of providing informed consent,” as well as situations in which “communication with the patient is impossible” (Article 34(3) and (6)). A surgical

procedure requires written consent. How should a physician proceed where a patient gives conscious consent to a necessary operation but is unable to write or cannot write? Is it sufficient for the content of that consent to be dictated to another person?

In medical practice doubts have also arisen as to the criteria on which a physician should rely in classifying a patient as "capable" or "incapable" of expressing informed consent, especially in situations requiring immediate action, where the patient is under the influence of alcohol and is incoherent, is stupefied by narcotics, or expresses consent "on condition" that cannot be met without delay. May consent to a procedure also be presumed consent?

The Act on the Medical Profession also provides for situations in which communication between the physician and the patient or the patient's statutory representative is impossible, as well as those in which the patient—even if legally incapacitated, mentally ill or intellectually disabled—yet possessing sufficient understanding, objects to medical acts (cf. Articles 32–35). On what criteria is the physician to base these assessments where he must save human life without delay and lacks sufficient time even for that?

The Act on the Medical Profession also introduces the crucial requirement that the patient express consent consciously. This is not possible where a person exists "with such changes in the brain as wholly and irreversibly exclude any manifestations of mental life."[19]

Both in the theory of criminal law and in medicine, fundamental importance has long been attached to distinguishing acts of will that are the product of a properly functioning cerebral cortex from reactions closely connected with the functions of subcortical brain centres. This concerns many problems, including the foundations of intent, resolutions and premeditated actions,[20]

19 Cf. e.g.: B. Popielski, "Etyczne i prawne zagadnienia medycyny współczesnej," *Studia Prawnicze*, 282; B. Popielski, "Śmierć człowieka w świetle medycyny i prawa," *Problemy Kryminalistyki*, no. 88(1970).

20 Cf.: Krystyna Daszkiewicz, *Przestępstwo z premedytacją* (Wydawnictwo Prawnicze, 1968), 60 ff.; Krystyna Daszkiewicz, *Przestępstwa z afektu w polskim prawie karnym* (Wydawnictwo Prawnicze, 1982), 19 ff.

the conduct of perpetrators under the influence of affect, reactions to sudden stimuli—for example in situations of defence against a criminal attack—and others.

This issue has rightly been recalled in connection with the strong emotion of fear in a patient who consents to a medical procedure or refuses such consent.[21] Profound fear is hardly an exceptional reaction in cases involving a person directly threatened with loss of life, experiencing severe pain and expecting further suffering, including suffering connected with medical interventions.

The broad range of (merely illustrative) doubts connected with the assessment of patient consent or its absence demonstrates how important, with respect to the offence under Article 192 § 1 of the Criminal Code, is not only the general principle that "irremovable doubts are to be resolved in favour of the accused." It also underscores the relevance of institutions contained in the General Part of the Criminal Code, such as the exclusion of criminal liability for a person who "remains in error as to a circumstance constituting an element of a prohibited act" (Article 28 § 1). A statutory element of the offence in Article 192 § 1 is "the patient's consent" to the procedure. A physician's lawful performance of a medical procedure without consent is also conditioned on compliance with formal requirements, such as recording the circumstances of the case in the medical documentation. An allegation that the physician did so in an overly laconic manner should not determine that the procedure was unlawful. If, however, such an allegation were to constitute a basis for treating the act as an offence (especially given the current erroneous version of the provision), then Article 1 of the Criminal Code should in any event be applied, according to which "an act prohibited by law whose social harmfulness is negligible does not constitute an offence" (§ 2), including in relation to minor formal shortcomings.

21 Tolłoczko, "Problem zgody pacjenta jako dylemat aksjologiczny," 92.

VII

The thesis that acting in a state of necessity – an institution both important and traditional within the General Part of the Criminal Code – is excluded in cases involving medical procedures performed without the patient's consent must likewise be regarded as lacking any legal basis. This institution is provided for in Article 26 of the Criminal Code, which states:

> § 1. No offence is committed by a person who acts in order to avert an immediate danger threatening any legally protected interest, where the danger cannot otherwise be avoided, and the interest sacrificed is of lesser value than the interest saved.

The provision thus has fundamental significance, as it enables verification of pivotal circumstances in concrete cases involving physicians, where the question arises whether, and on what basis, they performed medical procedures without the patient's consent. These circumstances include the immediacy of the danger threatening the patient, action undertaken solely to avert that danger, the absence of any other course of conduct ("the danger cannot otherwise be avoided"), the maintenance of proportionality between the interests sacrificed and saved, and the conflict of duties resting upon the physician of which only one can be fulfilled (Article 26 § 5).

The following arguments speak against the thesis that acting in a state of necessity is excluded in the cases under consideration:

1) This thesis is repeated and introduced into commentaries, textbooks and other studies following the conception of J. Sawicki, who formulated it on the basis of provisions of a different, no longer binding Act on the Medical Profession and of a different Criminal Code. He also cautiously reserved that: "Whether, and to what extent, a 'patient' afflicted by a severe, serious illness directly threatening death is still in a state enabling him consciously to express an effective objection or to refuse consent

belongs to the sphere of assessment of factual, not legal, circumstances … against the background of a concrete case."[22] Such an assessment of "factual circumstances" in the context of a 'concrete case' is precisely what the provisions on acting in a state of necessity are designed to serve. Following J. Sawicki, A. Zoll introduced the thesis into a textbook and commentary already based on different provisions, and others cite it thereafter. Thus, for example: "If the legislature makes the legality of a medical procedure conditional upon the patient's consent, then one cannot, by invoking a state of necessity, undertake procedures for which the patient has not expressed consent in order to save, for example, his life"[23] … "the absence of the patient's consent excludes the legality of medical acts. The possibility of a physician relying on a state of necessity is excluded where the patient has not expressed consent to a procedure that is indispensable owing to a direct threat to life or health … in this case the law accords primacy to the protection of freedom."[24]

2) The principle *lex specialis derogat legi generali*[25] is said to support the exclusion of acting in a state of necessity in these cases. For several reasons, however, that institution cannot be eliminated on such a basis. The exclusion of so fundamental a provision of the General Part of the Criminal Code must be stated expressly. In the presence of any doubts, the 'general' provision remains in force. And in the present context doubts abound. It should also be added that the provisions of the Act on the Medical Profession concern professional liability, whereas both Article 162 (failure to render assistance) and Article 192 (performance

22 Jerzy Sawicki, *Przymus leczenia, eksperyment, udzielanie pomocy i przeszczep w świetle prawa* (Państwowy Zakład Wydawnictw Lekarskich, 1966), 26 ff. and 84–87.

23 Andrzej Zoll in *Kodeks karny: Część ogólna; Komentarz do art. 1–116 kodeksu karnego, ed. Kazimierz Buchała and Andrzej Zoll (Zakamycze,* 1998), 234.

24 Agnieszka Liszewska, "*Problem zgody pacjenta jako dylemat aksjologiczny," Prawo i Medycyna, no. 1(1999):* 86.

25 Andrzej Zoll, citing Jerzy Sawicki, *Odpowiedzialność karna lekarza za niepowodzenie w leczeniu (*Wydawnictwo Prawnicze, 1988), 19.

of a medical procedure without consent) concern criminal liability. Article 26 of the Criminal Code, addressing acting in a state of necessity, likewise concerns the exclusion of criminal liability.

3) Article 15 of the Code of Medical Ethics has also been treated as a basis for excluding acting in a state of necessity. Yet it has little in common with Article 26 of the Criminal Code.[26] It provides that: "Diagnostic, therapeutic and preventive conduct requires the patient's consent. If the patient is incapable of expressing informed consent, it should be expressed by the statutory representative or the person who constantly cares for the patient. The initiation of diagnostic, therapeutic and preventive conduct without that consent may be permissible only in exceptionally special cases of threat to the life or health of the patient or of other persons. Where consent to the proposed conduct is not given, the physician should continue, as far as possible, to provide the patient with medical care."
4) It is further suggested that exclusion of acting in a state of necessity is justified by the conflict, in these cases, between the interest saved and the interest sacrificed belonging to the same person. Yet Article 26 § 1 contains no such limitation. It concerns *any* legally protected interests. Nor does every situation involving medical procedures entail the saving and sacrifice of interests of the same person, since saving a patient's life may depend on a decision of the patient's statutory representative or de facto guardian as to whether consent is to be given.
5) It would also be difficult to accept as a basis for excluding the application of the defence of necessity the peculiar 'argument' that Article 26 of the Criminal Code "constitutes a temptation to justify the legality of a procedure performed without the patient's consent."[27] This contention has already been rightly criticised.[28]

26 Cf. Andrzej Zoll in the collective work: *Kodeks karny: Część szczególna; Komentarz do art. 117–277 Kodeksu karnego (Zakamycze,* 1999), 474.
27 Zoll, ed., *Kodeks karny: Część szczególna*, 474.
28 Tołłoczko, "Problem zgody pacjenta jako dylemat aksjologiczny," 91.

'Temptations' leading to an unjustified invocation of insanity or diminished responsibility by perpetrators of economic offences are far more common; yet this plainly cannot justify the elimination of Article 31 of the Criminal Code, which provides for such situations.

It must therefore be concluded that there are no legal grounds for excluding, in the cases under consideration, reliance on actions undertaken in a state of necessity.

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