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The Admissibility of ‘Private Opinions’ in Civil Medical Litigation Based on the Patient’s Right to Medical Documentation

Abstract: A private opinion is a statement referring to the expertise not obtained from an expert appointed by the court. Consequently, in medical proceedings this opinion is not as important as expert evidence within the meaning of Article 278 § 1 of the Polish civil procedure. Nevertheless, the role of a private opinion in civil medical litigation is constantly increasing. This is primarily due to the crisis of the institution of an expert witness. The author focuses on the issue whether a private expert has the right to access information gathered in medical records. In the case of consent given by the patient himself as the holder of the right to access medical documentation, this issue does not raise any doubts. The situation is problematic when a medical entity acting as an opponent of the patient intends to use medical documentation to draft a private opinion. The medicinal entity may process sensitive data contained in medical records for purposes strictly defined by law. In view of this dilemma, the author presents the thesis that both the patient and the medical entity have the right to use this evidence if it is based on medical documentation. Her view is based on the content of Art. 27 par. 2 point 5 of the Data Protection Act, which allows to process data necessary to enforce the rights before a court as well as data referring to the principle of equal treatment in civil proceedings.

Keywords: private opinion, expert evidence, access to medical records, patient’s consent, investigation and defence of rights before the court

1. Introduction

The term “medical litigation” means judicial proceedings to investigate compensatory claims made by patients due to the occurrence of harm during treatment¹. Apart from classic cases where charges concern the commission of

¹ The term “the medical process” is used less frequently than the term “doctor’s process”. Both terms are not concepts of legal but legal language (see e.g. M. Rogowski, Trudności związane

culpable medical error², there are cases where the source of civil liability is infection³, or culpable violation of patient's rights⁴. The addressee of patient's claims in such cases is most often a medical entity, more seldom the doctor himself or herself.

All such proceedings are characterized by the complex factual state and the ensuing need to obtain an expert opinion. The claimant (a patient or potentially his or her family claiming liability⁵) must prove the incident (situation) and guilt as well as the chain of cause and effect between this incident and the harm (wrong) based on expertise. As a rule, the court obtains such expertise from judicially appointed expert witnesses, duly called "assistants of a procedural body"⁶.

Pursuant to the provisions of the Act of 17 November 1964 – the Code of Civil Procedure⁷, such proof is not basic evidence⁸. However, in case law practice, its importance is considerable while in medical litigation it often decides about adjudication or dismissal of the claim⁹. Nevertheless, before such evidence is admitted by the court, the party initiating a dispute must prepare for the trial. Pursuant to Art. 6 of the Act of 23 April 1964 – the Civil Code¹⁰, a burden of proof (in this case

z przeprowadzeniem dowodu w procesach lekarskich, (in:) J. Haberko, R.D. Kocylowski, B. Pawelczyk (ed), *Lege artis. Problemy prawa medycznego*, Poznań 2008, p. 86 i and following.; B. Janiszewska, Aktualne zagadnienia procesów lekarskich (przegląd orzecznictwa), "Prawo i Medycyna" 2004, No. 1, p. 39 and following).

2 See more on the notion of a medical error: K. Bączyk-Rozwadowska, Błąd lekarski w świetle doktryny i orzecznictwa sądowego, "Prawo i Medycyna" 2008, No. 3, p. 26 and following.

3 Cases relating to nosocomial infections compared to others are characterized by special features due to the use of factual presumptions, mainly in the area of proof of guilt and causation. See: B. Janiszewska, Dowodzenie w procesach lekarskich (domniemanie faktyczne i dowód prima facie) "Prawo i Medycyna" 2004, No. 2, p. 104 and following.

4 Matters relating to the violation of patient rights are more and more common in court. The most famous were the violation of the patient's right to information about the possibility of a prenatal examination, see eg.: the judgment of the Supreme Court of 13 October 2005 CK 161/05, OSP 2006, No. 6, item 71, with commentary of M. Nesterowicz; the Judgment of the Supreme Court of 12 June 2008, III CSK 16/08, OSNIC 2009, No. 3, item 48 [wyrok SN z dnia 12 czerwca 2008 r., III CSK 16/08, OSNIC 2009, nr 3, poz. 48].

5 The patient's relatives may raise their own claims for damages based on art. 446 of the Civil Code in the event of the patient's death.

6 See: the judgment of the Supreme Administrative Court of 20 August 1998 II SA 992/98. The literature also meets the terms "the assistant referee", "the scientific judge" or "the judge of facts", see: K. Piasecki, System dowodów i postępowanie dowodowe w sprawach cywilnych, Warszawa 2010, p. 196.

7 Consolidated text Journal of Laws 2016, item 1822 as amended [tekst jedn. z 2016 r. poz. 1822 ze zm.], in short kpc.

8 Formally, on the basis of the provisions of civil procedure, this evidence is assessed by the court under the same conditions as other evidence in the case. See: A. Klich, Dowód z opinii biegłego w postępowaniu cywilnym. Biegły lekarz, Warszawa 2016, p. 16 and following.

9 More on the role and meaning of the expert opinion see: A. Klich, Dowód, *op. cit.*, p. 71.

10 Consolidated text Journal of Laws 2017, item 459, as amended [Tekst jedn. z 2017 r. poz. 459 ze zm.], in short k.c.

the circumstances conditioning compensatory liability) shall rest on the person who draws legal effects from that fact¹¹. On the other hand, Art. 232 of CCP stipulates that the parties shall be obliged to present evidence to confirm facts they draw legal effects from as well as present all facts and evidence without delay to assure efficient and prompt course of the proceedings (compare Art. 6 § 2 of CCP). Hence, the need to rely on the expert opinion, which will help the claimant prove the prerequisites of compensatory liability, may arise already during preparations for a trial. We deal here with a private opinion of an expert because it is drafted upon the party's and not the procedural body's request.

As pointed out in the literature, a private opinion plays a significant role as it allows to assess a probable success of the claim, facilitates estimation of potential profits and losses generated by the proceedings, and thus often decides whether a court struggle will be launched at all¹². Furthermore, it may persuade the parties to conclude settlement (pre-court or out-of-court), due to which it may considerably shorten hearing of evidence and close the examination more quickly¹³. It is worth noticing here that a private opinion may be helpful not only for the claimant; the respondent more and more often relies on this type of evidence too, particularly if an unfavourable opinion drafted by the expert appointed by the court has been presented during the proceedings. The request to draft a private opinion may then constitute counter evidence and facilitate a substantive argument with the procedural opponent. Importantly enough, a private opinion is a tool considerably increasing a chance of finding out the truth, in particular in complex and ambiguous cases, that is in medical cases too¹⁴.

11 It should be noted that the deviation from this rule is transferring the burden of proof from the patient to the doctor / medical entity to comply with the statutory obligation to provide the patient or his representative with accessible information, prior to consenting to the surgery, the Judgment of Supreme Court of 17 December 2004, II CK 303/04, OSP 2005, No. 11, issue. [Wyrok SN w wyroku z dnia 17 grudnia 2004 r., II CK 303/04, OSP 2005, nr 11, poz. 131] with the commentary of M. Świdarska.

12 See: K. Knoppek, Prywatna opinia biegłego *de lege lata* i *de lege ferenda*, (in:) K. Flaga-Gieruszyńska, G. Jędrejek (ed.), *Aequitas segitur legem*. Księga Jubileuszowa z okazji 75-lecia urodzin profesora Andrzeja Zielińskiego, Warszawa 2014, p. 225 and following; J. Misztal-Konecka, Znaczenie tzw. opinii prywatnej dla postępowania cywilnego, "Monitor Prawniczy" 2013, No. 2, p. 63 and following; A. Klich, Dowód, *op. cit.*, pp. 77-93; J. Budzowska, Opinia prywatna w sprawie o tzw. błąd medyczny, "Monitor Prawniczy" 2012, No. 5, p. 279 and following; D. Jagiełło, Dowód z opinii prywatnej w świetle procedury cywilnej oraz karnej, "Themis Polska Nova" 2015, No. 2 (9), pp. 153-157.

13 Compare J. Misztal-Konecka, Znaczenie, *op. cit.*, p. 66.

14 After P. Girdwoyń, T. Tomaszewski, Opinie biegłych w sprawach medycznych na tle zasady kontradiktoryjności, (in:) *Prawo wobec problemów społecznych*. Księga Jubileuszowa Profesor Eleonory Zielińskiej, Warszawa 2016, p. 627. It is true that the authors consider the problem in the context of criminal procedure provisions, but it seems that this view can be referred to the provisions of civil procedure that which admits the principle of the contradictory dispute

Describing positive aspects of using a private opinion in civil proceedings, we cannot forget about a certain risk related to it¹⁵. Above all, it is pointed out that due to the operation of numerous insurance companies that are profit-oriented, a private expert is quite likely to issue an untrue (false) opinion. Money impacts an opinion-making process here; in some cases, a certain role may also be played by the expert's beliefs or attitudes, emotional involvement in the case, or even mechanical reproduction of the content of available information and documents by the expert¹⁶. Both lawyers and doctors are well aware of the phenomenon of information selection and conveying only such information which favours the person conveying it. What is more, as far as medical litigation is concerned, a private expert could not have access to all medical records the court will dispose of during a trial¹⁷.

Due to the above, an interesting question arises here whether a private expert has the right to access information gathered in medical records. If the patient himself gives consent as a holder of the right to access medical records, this issue does not evoke major doubts. The expert is thus authorized to access patient's medical records. The situation is different when a medical entity as the patient's procedural opponent intends to use medical records at their disposal in order to draft a private opinion. A medical entity may process sensitive data contained in medical records for the purposes strictly specified by the law.

Taking the above into account, the issue of using experts' private opinions in medical civil litigation should be further analyzed. First of all, the legal nature of a private opinion compared to expert evidence in the meaning of Art. 278 et seq. of CCP will be explained. Next, the issue of using such evidence by both parties of a judicial dispute in the context of the patient's right to access medical records should be described.

2. The legal nature of private opinions in the light of opinions held by the doctrine of civil proceedings and court case law

According to the prevailing opinion of scholars, a private opinion is each statement invoking expertise not obtained from the expert appointed by the court¹⁸. In other words, it is a result of work carried out by an expert who drafts his or her

much stronger than the criminal procedure, but also it expresses the principle of striving for material truth.

15 See e.g.: A. Klich z punktu widzenia procesu cywilnego, A. Klich, *Dowód*, *op. cit.*, p. 91 and following.

16 Compare. A. Szymańska, Wykorzystanie prywatnej ekspertyzy w postępowaniu karnym, "Studenckie Zeszyty Naukowe" 2014, No. 25, p. 93.

17 J. Budzowska, *Opinia prywatna*, *op. cit.*, pp. 279-280.

18 See: J. Misztal-Konecka, *Znaczenie*, *op. cit.*, p. 64; K. Woźniewski, *Tzw. prywatne opinie biegłych*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2005, No. 3, p. 92 and following.

opinion upon request of the parties and not a procedural body; that is why it is known as extra-procedural, out of court or expert opinion¹⁹.

The literature has been discussing the issue of the legal nature of a private opinion for a long time now since, in particular, in the light of the provisions of the Procedural Act, it may not be treated as expert evidence in the meaning of Art. 278 of CCP²⁰. It should be underlined that expert evidence may occur in civil litigation solely upon the court's request when it is necessary to rely on expertise and, in principle, if an appropriate procedural motion has been submitted²¹. Hence, the prerequisites justifying drafting a court opinion and private opinion are different.

The position of an expert witness appointed by the court in civil litigation is exceptional²². A purpose of civil procedure provisions is to provide an expert witness with impartiality. This aim is achieved, among others, by the institution of expert witness's exclusion. Until an expert witness completes his actions, the party may request his exclusion for the same reasons as in the case of the judge exclusion²³. Pursuant to Art. 281 sent. 2 of CCP, when the party submits a motion to exclude

19 Identical definitions regarding the private opinions are created on the basis of criminal proceedings; see: Z Kwiatkowski, *Dopuszczalność wykorzystania "opinii prywatnej" w procesie karnym*, (in:) A. Przyborowska-Klimczak, A. Taracha (ed.) *Iudicium et scientia. Księga Jubileuszowa Profesora Romualda Kmiecika*, Warszawa 2001, p. 570; A. Podemska, *Opinia biegłego w nowym modelu postępowania karnego*, "Zeszyty Naukowe Towarzystwa Doktorantów UJ. Nauki Społeczne" 2014, No. 8, p. 39 and following.

20 See: szerzej J. Misztal-Konecka, *Znaczenie, op. cit.*, pp. 63-65.

21 The court accepts the evidence from an expert opinion after hearing the parties' requests on this subject (art. 293 § 1 of the Civil Procedure Code). It may admit evidence from an expert's opinion ex officio under art. 232 p. 2 kpc. when the proof is the only way to counteract the danger of obviously incorrect resolution of the case, undermining the function of civil proceedings: [the Judgment of Supreme Court of 15 January 2010, I CSK 199/09, Lex No. 570114, see also the judgment of the Supreme Court of 7 March 2013 II CSK 422/12, Lex No. where the court pointed out that the evidence from the expert's opinion due to the component in the form of special messages is evidence of such a kind that it cannot be replaced by any other evidential act, such as hearing a witness. The court allows violation of art. 232 second sentence of the kpc., since it ex officio does not provide evidence from an expert opinion, necessary for a proper assessment of the legitimacy of the action brought.

22 See: A. Klich, *Dowód, op. cit.*, p. 103 and following.

23 See: art. 48 and 49 kpc. The task of the trial body is to check whether there are circumstances excluding the expert from participation in the case. For this reason, the provisions of the kpc. which provide for prior to the appointment of an expert hearing the parties. The expert himself should also inform the court about the reason for his exclusion, e.g. when he has previously made a private opinion. See: J. Misztal-Konecka, *op. cit.*, pp. 67-68. One should agree with the author's argument that issuing a private opinion should be a reason to exclude from the opinion (similarly the Judgment of the Appeal Court in Wrocław of 16 April 2012, II AKA 67/12, OSAW 2013, No. 3, issue 294. The reason for the excluding is problematic if the patient had previously treated the patient. In the Judgment of 8 June 2010 (II UK 399/09) the Supreme Court decided that it does not constitute the circumstances that could raise doubts as to the impartiality of the expert. Critically against this judgment A. Klich, *Dowód, op. cit.*, p. 85.

an expert witness after he started his actions, the party shall be obliged to prove that the reason for the exclusion occurred later, or that the party was not aware of it before. Impartiality is further guaranteed by the oath taken by an expert. It reads as follows: *“Being aware of the meaning of my words and legal liability, I solemnly pledge that I will fulfil the duties of an expert witness I have been entrusted with reliably and impartially”*²⁴. The oath is taken unless the parties (Art. 283 § 1 of CCP) or the court (Art. 515 of CCP) decide otherwise. The oath is taken by an expert witness appointed in a concrete case (*ad hoc* expert witness) while a permanent expert witness takes an oath after being appointed and entered into the register of expert witnesses. In the decision admitting expert evidence, the court determines an expert witness in person (possibly determines several expert witnesses), the scope of data subject to the opinion, and defines a substantive scope of the opinion, usually presenting certain theses that must be confirmed and assessed through the expertise²⁵.

A private opinion is devoid of the above-mentioned formal guarantees and, thus, it may not be equal to an expert opinion. It is worth pointing out that according to the opinion embedded in case law, grounding a judgment on an out-of-court statement of an expert witness infringes procedural law justifying a possibility of submitting an effective challenge²⁶. Hence, expert evidence should not be replaced by a private opinion even if it has been drafted by a person registered as an expert witness²⁷. Furthermore, the subject literature underlines that an expert witness plays an auxiliary role in the court and is entitled to use a title of an expert witness solely when drafting an opinion upon request of entities envisaged by the law (i.e. the court); any

24 It should be noted that in the content of promise there is no obligation to speak the truth (as in the promise relating to a witness in art. 268 of the k.c.p.), however, it is pointed out that the court can draw the attention to the expert, especially that before submitting a promise, an expert should be warned about criminal liability for submitting a false opinion (art. 233 § 4 k.k.).

25 In the judgment of 11 July 1969 (I CR 140/69, OSNP 1970, No. 5, issue. 85); the Supreme Court has stated that the task of the expert is not, however, to determine the facts of the case, but to expose and explain before the court the circumstances from the point of view of the special messages held by him, taking into account the material collected and made available to the expert.

26 See: the Judgment of 29 September 1956 III CR 121/56, OSN 1958, no1, issue 16. This view is still valid under the current provisions of civil procedure but a reservation should be made in accordance with art. 162 kpc. and the plea of appeal should be linked to art. 233 kpc. See: The judgment of 8 June of 2001, I PKN 458/00, OSNP 2003, no 11, issue. 112 where: “The expert’s out-of-court expertise prepared at the request of the party is not subject to court review as evidence from an expert opinion (art. 278 kpc.)”.

27 As Supreme Court in the cited judgment of 29 September 1956: “It cannot be treated as evidence in the proceedings by an expert opinion, even if it was a permanent court expert, drawn up in writing at the direction of the party and submitted to court files” See: the judgment of Supreme Court of 12 April 2002, I CKN 92/00, OSG 2003, no 11, issue 112: “Recognition of an expert opinion, even if it was an expert witness, being a private document, violates art. 233 kpc.”

activity pursued by an expert witness beyond the scope of his powers may even result in deleting him from the registry of expert witnesses²⁸.

Nevertheless, the above opinions do not efface the importance of private opinions. The Supreme Court ruled in the judgment of 8 June 2001²⁹ that an out-of-court expert opinion may be treated as a part of the party's reasoning. It occurs when the party explicitly requests to treat the expert opinion as a part of their own factual and legal reasoning. However, if the party submits an out-of-court expert opinion with a clear intention to treat it as evidence in the case, there are grounds to attribute it the status of private document evidence³⁰.

Pursuant to Art. 245 of CCP, a private document proves that a person who signed it made statements contained therein. The content of the expert's statement contained in a private document is not subject to the presumption of truth, which means that a person having a legal interest in it may confirm/prove that the content of such statement is not true³¹. This way the parties get involved in a substantive dispute about the claims and theses included in the opinion (comp. Art. 253 of CCP³²). It should be emphasized that in the Polish civil trial, the collection of trial evidence, i.e. factual statements and evidence to verify them, burdens the parties thereto (the principle of adversarial litigation). Adversarial proceedings are characterized by litigation burden categories, in particular a burden of statement and burden of proof. Despite the fact that we are far from the model of proceedings where "the party's expert" is a typical element of adversarial litigation, it can be said that treating a private opinion as a private document is a step increasing an adversarial nature of litigation. Nevertheless, the problem is that a private expert may not be heard as an expert witness because he or she is not an expert witness.

In the judgment of 8 November 1976³³, the Supreme Court decided that a person who, due to his or her expertise, has observations unavailable to others (e.g. a doctor treating a patient), should generally be heard as a witness while another person, who has not previously encountered facts vital for the case's resolution, should be entrusted

28 See. A. Klich, Dowód, *op. cit.*, p. 81, 217. As it seems, this is not a matter of prohibiting the preparation of private opinions by experts entered on the list, but not to use the title "forensic expert" in the event of preparing such opinions, so as not to mislead the parties to the proceedings as to their importance (rank) opinion issued in this way.

29 I PKN 468/00, OSNP 2003, No. 8, issue 197. Lex No. 50484.

30 Similarly: the judgment of Supreme Court of 15 January 2010, I CSK 199/09, Lex No. 570114; the judgment of 8 June 2010., I PKN 468/00, Lex No. 50484; the Judgment of Supreme Court of 25 February 2015, IV CSK 312/14, Legalis.

31 See: the judgment of Supreme Court of 2 July 2009, V CSK 4/09, Lex No. 527176 [wyrok SN z dnia 2 lipca 2009 r., V CSK 4/09, Lex nr 527176].

32 See: the judgment of Supreme Court of 2 February 2011, II CSK 323/10, Lex No. 738542. For the private opinion presented by the party in the course of the process, art. 253 kpc."

33 [I CR 374/76, OSN 1977, No. 10, issue 187.

with the function of an expert witness³⁴. Thus, assuming that a private expert may be heard as a witness, differences between expert witness evidence and witness evidence should be emphasized. A basic difference is that witnesses convey information about the facts and state of affairs while expert witnesses express their judgment of the facts, i.e. opinions. Facts may only exceptionally be the subject of expert witness evidence³⁵. For the above reasons, requesting admissibility of witness evidence, i.e. private expert, we must prove that our expert will present before the court factual information observed just thanks to his or her professional experience and will not merely express his or her opinion (which is already contained in the case files). Hence, there is a risk that the court will not accept our request and the arguments could only be raised in pleadings. Nevertheless, the judiciary expressed an accurate opinion that a private expert opinion may be a prerequisite of the necessity to admit another expert witness evidence or supplementary opinion by the court³⁶. Furthermore, if an expert witness appointed by the court questions the out-of-court opinion, the court must critically consider arguments contained in both opinions³⁷.

In the judgment of 2 February 2011³⁸, the Supreme Court acknowledged that the parties more and more often present private opinions in a trial. They are an element of trial evidence and as such they should be made available to the opposite party. In the judgment of 30 June 2004³⁹, the Supreme Court decided that private document evidence is independent evidence whose force is assessed by the court according to the principle of free evaluation of evidence expressed in Art. 233 § 1 of CCP, i.e. at the court's discretion based on the comprehensive examination of evidence collected in the case. For this reason, the same as in case of other evidence, it is assessed whether a private opinion should be recognized. In effect thereof, the court may evaluate if private document evidence may be accepted or refused with regard to its credibility.

In the case heard by the Court of Appeal in Szczecin⁴⁰, the courts refused to recognize credibility of private medical expert opinions because they had been drafted by doctors of completely different specialization with regard to the object of

34 Polskie prawo procesowe nie przewiduje instytucji "świadków-biegłych" znanej prawu niemieckiemu i austriackiemu, see: K. Gajda-Roszczyńska, (in:) Ł. Błaszczak, K. Markiewicz (eds.), *Dowody i postępowanie dowodowe w sprawach cywilnych. Komentarz praktyczny z orzecznictwem*, Warszawa 2015, pp. 646-647.

35 *Ibidem*, p. 646, see also: A. Klich, *Lekarz jako osobowe źródło dowodowe w postępowaniu cywilnym (część I – lekarz jako świadek)*, "Prawo i Medycyna" 2013, No. 3-4, p. 120-136.

36 See the Judgment of Supreme Court of 21 August 2008, IV CSK 168/2008 [wyrok SN z dnia 21 sierpnia 2008 r. IV CSK 168/2008].

37 See the Judgment of Supreme Court of 8 November 1988 II CR 312/88, Legalis [Wyrok SN z dnia 8 listopada 1988 r., II CR 312/88, Legalis].

38 II CSK 323/10, Lex No. 738542 [II CSK 323/10, Lex No. 738542].

39 IV CK 474/03, OSNC 2005, no 6, issue 113 [IV CK 474/03, OSNC 2005, nr 6, poz. 113]; the Judgment of Supreme Court of 10 October 2012 2012, I UK 210/12, Lex No. 128472.

40 The Judgment of Appeal Court in Szczecin of 4 December 2012, I ACa 119/12, Lex No. 1246842.

expertise, which in itself deprived it of any value to the evaluation of circumstances essential for the resolution of the case. What is more, the authors of this opinion did not dispose of full documentation gathered during the trial. Due to the above, the Court of Appeal decided that these opinions did not contribute much to the case because their content did not univocally allow to evaluate the claimant's health condition because of incomplete medical documentation disposed by their author.

On the other hand, in the case heard by the Court of Appeal in Katowice⁴¹, the first instance court (Regional Court) admitted private expert evidence presented by the defendant. Hence, the challenge raised by the opposite party of breaching Art. 278 § 1 of CCP by the court proved to be accurate. Nevertheless, according to the Court of Appeal, this breach did not impact the manner of the case's resolution because the private opinion corresponded to the findings made by the court expert witnesses.

3. Admissibility of using private opinions in the light of the patient's right to medical records

Pursuant to Art. 24 par. 1 of the Act of 6 November 2008 on the Patient's Right and Patient Ombudsman⁴², the entity providing medical services shall be obliged to keep, preserve and provide access to medical records in a manner specified in this Act and the Act of 28 April 2011 on the System of Information in Healthcare⁴³, and protect data contained therein. The right to access medical records is a part of widely understood patient's information autonomy. For this reason, the legislator first enlists a patient himself as an authorized entity, to be followed by his statutory representative as well as individuals authorized by them (see Art. 26 par. 1 of APR). It does not mean, however, that other entities do not have the right to access medical records without the patient's consent⁴⁴. Pursuant to Art. 26 par. 3 of APR, these are, among others, entities providing health services if such records are necessary to assure continuity of health services, public authorities bodies, NFZ (National Health Fund), medical professions self-government bodies, and national and provincial consultants within the scope necessary to fulfil their tasks, in particular monitoring and supervising; entities mentioned in Art. 119 par. 1 and 2 of the Act of 15 April 2011 on Therapeutic

41 I ACa 676/12, Lex No. 1236712.

42 Consolidated text Journal of Laws 2016, item 186 as amended [Tekst jedn. Dz.U. z 2016 r. poz. 186 ze zm.], in shoirt u.p.p.

43 Consolidated text Journal of Laws 2015, item 636 as amended [Tekst jedn. Dz.U. z 2015 r. poz. 636 ze zm.].

44 The problem of who is the administrator of information gathered in the documentation has been solved by the legislator in a specific way. Because the medical documentation is not only for the treatment of the patient, but is subject to public law regulation, i.e. control and supervision, therefore the entity administering the documentation is its dispatcher.

Activity⁴⁵ within the scope necessary to carry out control upon the request of a competent Health Minister, etc. In every above mentioned case of providing access to medical records the legislator specified the reason for processing information contained in the records; the only exception thereto are insurance companies that have access to medical records based on the insured patient's consent (comp. Art. 26 par. 3 point 7 of APR⁴⁶). This manner of regulation results from the need to protect sensitive data that the data contained in medical records undeniable are. Pursuant to Art. 27 par. 1 of the Act of 29 August 1997 on Personal Data Protection⁴⁷, processing sensitive data is forbidden while exceptions thereto specified in par. 2 of Art. 27 should be strictly interpreted.

The above quoted case of access to medical records given to other entities providing services is specified more precisely in the Act on the Patient's Rights in the purpose of assuring continuity of provided services. The medical law literature points out that this solution corresponds to other provisions of medical law that envisage analogical exemption from medical secret (comp., for instance, Art. 14 par. 2 point 4 of APR), and it aims at the protection of the patient's interest⁴⁸. To assure proper performance of therapeutic activities, the entity providing such services should dispose of specific medical information. Due to the protection of patient's privacy, the interpretation of this provision should be rigorous, which means that a medical professional requesting access to medical records should justify circumstances indicating the need and scope of expected data⁴⁹. For this reason, claiming that the above quoted norm cannot be treated as an excuse (justification) to provide access to medical records to a specialist doctor who drafts a private opinion for the needs of one of the parties to civil litigation should not arise any doubts.

The problem of processing medical records by their administrator is perceived in the practice of law application. In his study addressed at entities performing therapeutic activity, A. Sieńko points out that in case of a claim submitted by the patient, a therapeutic entity is obliged to inform the insurer providing insurance

45 Consolidated text Journal of Laws 2016, item 1638 as amended [Tekst jedn. Dz.U. z 2016, poz. 1638 ze zm.].

46 Nevertheless, the legislator in the act of 11 September 2015 on insurance and reinsurance activity Journal of Laws 2015, item 1844 as amended [Ustawa z dnia 11 września 2015 r. o działalności ubezpieczeniowej i reasekuracyjnej (Dz.U. z 2015 r., poz. 1844 ze zm.)] predicted stricter conditions related to the use of the insured's medical records by the insured

47 Consolidated text Journal of Laws 2015, item 2135 as amended [Tekst jedn. Dz.U. z 2015, poz. 2135 ze zm.], in short u.o.d.o.

48 See: R. Kubiak, *Tajemnica medyczna*, Warszawa 2016, p. 224; U. Drozdowska, (in:) *Taż* (ed.), *Dokumentacja medyczna*, Warszawa 2012, p. 67.

49 The issue of protecting the patient's privacy in dealing with many healthcare representatives will be of fundamental importance when the obligation to maintain electronic medical records and the obligation to send unit medical data to specific platforms created within the medical information system becomes effective.

protection for the period when the service covered by the claim was provided⁵⁰. Launching the so-called liquidation proceedings, the Insurance Company evaluates the patient's claim through their own medical consultant; therefore, the Company requests the entity performing therapeutic activity (insured against civil liability) to provide explanations. Hence, already at this point, it is essential, or even necessary to provide the insurer with the access to the patient's medical records⁵¹. Yet, the entity providing services may not do so without the patient's consent. Even though at this point patients usually give consent to make their medical records available (probably expecting the therapeutic entity's civil liability insurer to pay them requested allowance without launching civil litigation), already during the proceedings, they frequently refuse to give their consent believing that the insurer or private medical consultant act on behalf of the defendant (i.e. litigation adversary).

For the above reasons, the grounds for making medical records available (without the patient's consent) are sought in the content of previously quoted Art. 27 par. 2, which in point 5 envisages a possibility of processing data if they are necessary to claim one's rights before the court. According to P. Barta and P. Litwiński, this prerequisite legitimizes processing sensitive data within the scope of activities related to claiming all rights (private and public) which are implemented by courts, parties and their attorneys regardless of the type and course of proceedings⁵².

The Court of Appeal in Krakow expressed an opinion on the admissibility of application of the above mentioned regulation in civil litigation in the judgment of 3 September 2015⁵³. The circumstances of the case were as follows. Due to the pending trial for compensation and damages for medical error, the defendant (a therapeutic entity) requested the issue of a private opinion on the actions undertaken by medical personnel during the claimant's stay in hospital related to her pregnancy and child delivery. Therefore, the hospital made the claimant's medical records available for the purpose of consultation. It is worth adding that the expert witness appointed by the court issued an unfavourable opinion for the defendant while the court dismissed the defendant's request to admit a supplementary opinion of another expert witness evidence to explain vital circumstances of the case. The claimant launched another trial against the defendant claiming apology and compensation on her own and her child's behalf for the infringement of personal interests. When she found out that her and her son's medical records were made available to the doctor drafting an opinion upon the request of the hospital (the defendant), she said she was offended. She felt

50 A. Sieńko, *Błędy medyczne, odpowiedzialność lekarza i placówki medycznej. Jak uniknąć kosztownych pułapek*, Warszawa 2013, p. 70.

51 *Ibidem*.

52 P. Barta, P. Litwiński, *Ustawa o ochronie danych osobowych. Komentarz*, Warszawa 2015, p. 315.

53 I ACa 679/15. Lex No. 1927548.

discomfort knowing that intimate information about her and her newborn child's health conditions was "leaked".

Although the courts hearing this case adopted distinct reasoning, the claimants' claims were found unreasonable in both judgments⁵⁴. The Regional Court as the first instance court dismissed the claim under Art. 27 par. 2 point 5 of APDP. The Court decided that the above quoted provision should refer to all litigants; it involves both claiming, prosecuting and defending rights. For this reason, the therapeutic entity was authorized to process data contained in medical records. The Court underlined that the defendant was burdened with the obligation to prove that their action was not unlawful and this duty was fulfilled in compliance with the content of Art. 24 of the Civil Code. The scope of data handed over to the specialist was justified by the opinion to be issued; thus, it was adequate to the purpose thereof. It is difficult to require to remove data concerning the claimants' health condition from the records if the object of the opinion was regularity and accuracy of actions undertaken by medical personnel corresponding to the condition of the claimant before and during the child delivery. These circumstances were vital for the resolution of the case between the parties for damages and determination of liability for the future. Moreover, the defendant undertook steps to assure anonymity of records to be given out⁵⁵.

The Court of Appeal ruled distinctly; the Court assumed that making medical records available to another doctor for consultation infringes the claimants' personal goods. The Court argued that the provisions of medical law prevail over the provisions of APDP as they guarantee farther-reaching protection. The Court decided that the argument raised by the therapeutic entity about fulfilling its own right to defence was not relevant because a private opinion does not have an attribute of evidence, being merely development of the claims and challenges of the party in the pending trial. Therefore, the Court decided there was no exclusion of unlawfulness because medical records may only be made available under the judicial decision admitting expert evidence, and medical records may be made available solely for this purpose. The party may submit such evidence while medical records may not be freely processed.

Referring to the reasoning contained in the above presented judgments, two issues are worth paying attention to. The first one is connected with the relation between the provisions of APDP and the so-called sector Acts, i.e. here the Act on

54 The district court The SO dismissed the claims due to the indication of the legal basis for action by the healthcare entity, and Appeal Court refused to adjudicate because the infringement of the claimant's personal rights was not commonly associated with breaking the medical secret in a way that harmed her personal rights. See. justification of the cited judgment.

55 As Appeal Court explainedp these activities were not complete, in many places data anonymization did not take place. This issue does not matter, however, from the point of view of the interpretation of the quoted provisions.

the Patient's Rights, while the second one regards directly a private opinion treated as evidence in medical proceedings.

The first issue is a source of many doctrinal doubts⁵⁶ because Art. 5 of APDP which sets forth mutual relations between APDP and the provisions of the so-called Sector Acts is not a typical conflicting norm⁵⁷. Under this provision, if the provisions of separate Acts that refer to data processing envisage farther-reaching protection than it ensues from this Act, the provisions of those Acts shall apply. For this reason, APDP is of a subsidiary nature while its regulations should be taken into account to assure the so-called minimum protection⁵⁸.

It is worth noticing that it is assumed that special Acts referring to data processing will supplement or develop obligations within the scope of assuring data security. However, special Acts often either omit or regulate separately specific issues due to their specificity, which makes it difficult to evaluate whether given regulation lowers or increases this protection standard. Referring to the presented issue, it should be indicated that the provision of Art. 26 par. 3 of APR envisaging access to medical records by various legal entities is of a structuring nature⁵⁹. Entities enlisted in the provision are generally authorized to process medical data based on separate legal acts. Requesting access to medical records, they must indicate legal grounds which usually justify the fulfilment of the so called essential public interest⁶⁰. Because a therapeutic entity administers personal data and makes it available itself, the above-mentioned regulation could not embrace the discussed case as the legislator regulated the purposes of data processing by their administrator separately, both in the Act on the Patient's Rights (comp. Art. 23-24 of APR) and the Act on Personal Data Protection (comp. Art. 27 par. 2 point 7 of APDP). That is why the Administrative Court's reasoning based on the application of the rule *lex specialis derogat legi generali*

56 J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych*, Komentarz, Kraków 2004, p. 364; U. Drozdowska, (in:) *Dokumentacja medyczna...*, *op. cit.*, pp. 32-33; J. Byrski, *Wybrane tajemnice zawodowe a prawna ochrona danych osobowych*, (in:) G. Sibiga, X. Konarski (ed.), *Ochrona danych osobowych. Aktualne problemy i nowe wyzwania*, Warszawa 2007, p. 191 and following.

57 Compare: P. Barta, P. Litwiński, *Ustawa...*, *op. cit.*, pp. 62-63.

58 See: U. Drozdowska (in:) *Dokumentacja medyczna...*, *op. cit.*, pp. 32-33.

59 D. Karkowska, *Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta*. Komentarz, Warszawa 2012, p. 372.

60 The so-called premise important public interest is expressed, among others in art. 8 par. 2 of European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 Consolidated text Journal of Laws 1993, item 61 as amended (Dz.U. z 1993 r., Nr 61, poz. 284) ratified by Poland. Against the background of this provision, the ECHR's jurisprudence sets out the limits of the right to the protection of medical data in the situation in national law in situations such as: the need to ensure public safety, economic prosperity of the country, order protection and prevention of crimes, protection of health and morality, protection of the rights and freedoms of persons. See also the art. 31 par. 3 of the Constitution of the Republic of Poland, concerning restrictions on rights and freedoms.

is inaccurate. The special norm does not describe the situation of making medical records available to protect the rights of the entity processing the records.

It is worth invoking here arguments presented in the situation of conflict between the protection of the patient's secret and doctor's interest. It is pointed out that the above conflict occurs if a doctor claims due remuneration from the patient, or defends himself against charges jeopardizing his professional reputation⁶¹. In such cases, exclusion of the doctor's right to defence cannot be accepted as it would be the abuse of the law committed by the party requiring respect for the secret⁶². It seems that this argument may be referred to the discussed conflict between the protection of data contained in medical records and the need to use these data to defend a therapeutic entity. Deprivation of a possibility of using medical records in defence against liability for damages should be recognized as the abuse of law. In such a situation, a therapeutic entity should not be charged with unlawful conduct.

It is worth adding that this problem has been discerned by the EU legislator who, in Art. 9 par. 2 point f) of the Regulation of the EU Parliament and of the Council of 27 April 2016 (2016/679) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC⁶³, decided that processing sensitive data is admissible if it is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity.

Moving on to the argument of the Court of Appeal saying that a private opinion does not have a value of evidence because the party is entitled to submit a motion to admit expert evidence, it should be acknowledged that it contradicts case law presented in point two. The evidence value of a private opinion should be sought in the fact it may become a private document while the court should take into account arguments presented therein and confront them with the reasoning presented by the expert witness. The attitude of the Court of Appeal in Krakow leads to the infringement of the principle of "equality of arms" in civil litigation since the patient may use a private opinion while the therapeutic entity may not. In the context of the procedural principle assuring equality of procedural measures for each litigant⁶⁴,

61 M. Safjan, *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998, p. 147.

62 *Ibidem*.

63 Dz.U. UE L. 119/1. <http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELex:32016R0679> (so-called general regulation on data protection). The regulation introduces uniform legal regulations regarding the protection of personal data at EU level. This regulation will apply directly in the EU countries (without the need for implementation) from 25 May 2018.

64 See: A. Góra-Błaszczkowska, *Zasada równości stron w procesie cywilnym*, Warszawa 2008, p. 90 and following.

we may notice the need to regulate issues related to the application of a private opinion in the Procedural Act⁶⁵.

Additionally, it is worth pointing out that administrative courts do not hold such a rigorous opinion as civil courts with regard to the use of documentation for the purpose of pending proceedings⁶⁶. The Supreme Administrative Court decided in the judgment of 25 August 2011⁶⁷ that the content of medical records is the ground for establishing an essential circumstance of the case (in this case it was the establishment of a vocational disease), and the party's position on a lack of possibility of finding out its content (by the administrative body) cannot be approved of. This would entail issuing a decision which would not be subject to any control since the only evidence it would be based on could be a verdict of a competent court or tribunal that could not be verified and compared with the source evidence it was grounded upon. It is similar to the case resolved by the Provincial Administrative Court in Warsaw in the judgment of 5 August 2005⁶⁸. The entity who had access to the victim's medical records in preparatory proceedings was the defendant's attorney, who also handed it over to the doctor issuing a private opinion. In this situation, the PAC accepted a possibility of application of Art. 27 par. 2 point 5 of APDP and decided that the right had not been infringed.

4. Conclusion

A private opinion in medical proceedings does not bear the same importance as expert evidence in the meaning of Art. 278 § 1 of CCP. Such expert opinions are usually refuted by the opposite party who raise objections as to their credibility and objectivism, and most of all, the fact they must be paid for. Nevertheless, their role in civil litigation is continually increasing. It is caused, above all, by the crisis of the institution of expert witnesses. Courts wait for the expert witness opinions from several months to several years⁶⁹. What is more, there are shortages of expert witnesses in many specializations while some of them, due to numerous professional

65 The solution is to introduce an expert-side institution, which is part of the adversarial principle of the dispute, or the institution of a witness – expert. Also it is possible try to create additional legal mechanisms to control the reliability of the private opinions presented. However, there is no room for a wider presentation of these proposals. See: A. Klich, Dowód, *op. cit.*, p. 89-93.

66 See: the judgment of Regional Administrative Court in Warsaw of 5 August 2005 II SA/Wa 564/05 Legalis; the judgment of Regional Administrative Court in Rzeszów of 22 February 2011, II SA/Rz 981/10, Legalis; the Judgment of Regional Court in Wrocław of 28 February 2013, IV SA/Wr 695/12, Legalis; the Judgment of Regional Administrative Court in Warsaw of 18 December 2013, II SA/Wa 1449/13, Lex No. 1542378. The decisive factor for this ruling line is the principle of internal transparency of the proceedings.

67 II OSK 991/11. Legalis. See also: R. Kubiak, Tajemnica medyczna..., *op. cit.*, pp. 228-229.

68 II SA/Wa 564/05, Legalis.

69 See: J. Budzowska, Opinia prywatna..., *op. cit.*, p. 279.

responsibilities, refuse to draft an opinion for the court's use. The opinions of science and research institutions are not an alternative because they set very long time limits to drafting them too⁷⁰. Existing legal solutions allow to use private expert opinions for the sake of the justice system only partially because they may not compete with expert evidence.

The interpretation of the provisions of substantive law within the scope of personal data protection should not lead to the creation of additional barriers hampering the use of such evidence in civil litigation as it entails the so-called legal exclusion. According to K. Flaga-Gieruszyńska, the essence of such exclusion is full or considerable deprivation of a possibility of exercising rights and freedoms as well as competence by specific individuals or entire groups of individuals they are entitled to⁷¹. We got used to the fact that such exclusion refers to the patient who is a weaker party (by the definition) in the professional relations, particularly in the relation between the patient and organized medical institution. However, reality could be different; there are therapeutic entities in a very bad financial situation that may face problems with not only paying allowances but also paying costs of long litigation. Civil liability insurance does not solve this problem because insurers usually do not want to pay allowance before the court's judgment. Hence, under the principle of equal arms, each party should be equipped with a possibility of reliable presentation of their position, including submission of evidence motions and presentation of evidence in the circumstances that do not place them in a worse situation than their procedural opponent⁷².

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71 K. Flaga-Gieruszyńska, The problem of legal exclusion on the example of access to justice in civil cases, (in:) M. Sitek, G. Damacco, A. Ukleja, M. Wójcicka (ed.), Europe and Founding Fathers. Investment in common future, Olsztyn 2013, p. 125.

72 A. Góra-Błaszczkowska, Zasada równości stron..., *op. cit.*, p. 90.

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