

Legal aspects of surgery

Dr Zbigniew Włodarczyk, Prof., Ph. D.

Lecture "Introduction to surgery"

III year Faculty of Medicine

Duplicating, reproducing, sharing or distributing in whole or in part, using for purposes other than the didactic at Collegium Medicum in Bydgosz, UMK in Toruń, is forbidden without written consent of the lecture's author.

„Ignorantia iuris nocet”

Legal acts regulating the doctor's actions

- Penal Code Act of 6th June 1997 Journal of Laws of 1997, no. 88, item 553
- Penal Code Act of 23rd April 1964
- Act on the professions of doctor and dentist of 5th December 1996, Journal of Laws of 2008, no. 136 item 857
- Act on patient's rights and Patient's Rights Ombudsman of 6th November 2011, Journal of Laws of 2009, no. 52 item 417
- Act on health care institutions of 30th August 1991 Journal of Laws of 2007, no. 14 item 89
- Code of Medical Ethics of 2nd January 2004

The doctor is subject to the following liabilities

- Criminal
- Civil
- Professional

Consent as the supreme principle of medical activities

Consent - the patient's verbal or written declaration of will, expressing consent for the execution of a health service

The obligation to obtain consent for all health, diagnostic, therapeutic and rehabilitation services.
Art. 192 of the Penal Code *"who performs a medical operation without the patient's consent, is subject to a fine, restriction of liberty or imprisonment for up to 2 years"*

Conditions of a valid consent

- Expressed prior to the service
- Expressed positively (*expressis verbis*)
- Expressed after obtaining comprehensive and available information
- Expressed in an appropriate form
- Expressed by an authorized entity

Types of consent

- **Autonomous** patient mature and not incapacitated
- **Parallel** minor 16-18 years old + statutory representative
incapacitated person + curator
- **Replacement** statutory representative of a minor < 16 years old
court of guardianship

Unconscious patient

- Informed declaration of will expressed prior to loss of consciousness - binding
- No statement - decision of the treating doctor
- emergency mode
- proceedings in the patient's best interest
- consultation with a second doctor
- entry in the medical records

Minor patient < 16 years of age

- Consent of the statutory representative (-es) (and not the actual guardian)
- Lack of consent from one of the parents?
- Urgent indications ?
- Consent for examination and/or vaccination?

Autopsy

Obligatory execution

- Death < 12 hours from admission to the hospital
- Cause of death cannot be unambiguously determined
- Forensic-medical indications
- Epidemiological indications to perform a necropsy
 to discard a necropsy

Optional execution

- Lack of dissent of the deceased, expressed within his lifetime by a legal representative or immediate family

Abandonment

- Dissent of the deceased, expressed within his lifetime by a legal representative or immediate family

Managing a patient under the influence of alcohol or drugs

- Is the patient able to knowingly give consent or voice dissent
- Is the operation life or health saving
- Is it possible to obtain consent of the Court of Guardianship
- Consent of the legal guardian
- Blood collection from a vehicle driver

Patient's dissent against medical procedures

- *"Law does not require the patient to undergo a medical intervention and the doctor to overcome the patient's resistance, either through conducting an activity not agreed to or through appearing in court, for it to make such a dissent invalid"*
- "The patient's dissent is expressed in case of loss of consciousness is binding for the doctor, if it's been made in a clear and unambiguous manner" judgement of the Supreme Court of 27th October 2005

Exceptions (compulsory proceedings)

- Infectious diseases
- Treatment on the basis of the Act on Mental Health Care
- Inmates
- Treating addictions
- Blood draw from drivers

The dissent effectiveness depends on

- The possibility to make an informed decision regarding the treatment and the consequences of abandoning treatment
- Obtaining complete information on the consequences of abandoning treatment
- Ultimate decision of the Court of Guardianship
- Person expressing dissent
 - legal guardian to the treated minor
 - immediate family to the unconscious person
 - declaration of the family
 - presenting a written statement from the patient

Providing health services without the patient's consent

Extension of the surgical field

Art. 35 of the Medical Profession Act *"if in the course of a surgery, there are circumstances, which, when not taken into account, would put the patient in danger of losing his life or a severe health disorder, and there is no possibility to immediately obtain the patient's consent or of his legal representative, the doctor has the right to change the scope of the procedure, in a way allowing to take these circumstances into account"*

Exceptions

dissent against extension of the procedure

Doctor's disclosure obligation

Art. 31 par. 1 of the Medical Profession Act *"a doctor is obliged to provide the patient with lucid information about his health, diagnosis, proposed and possible diagnostic methods, foreseeable medical consequences of their administration or abandonment, treatment results and prognosis"*

Draw backs of the doctor's information

- Incompleteness
- Falsity
- Selectivity
- Incomprehensibility
- Form (verbal vs written)

Humanitarian lie

Art. 31 par. 4 of the Medical Profession Act *"In exceptional circumstances, if the prognosis is unfavourable for the patient, a doctor may limit the information about the health status and the prognosis, should the patient's well-being, according to the doctor, enforce it. In such cases the doctor informs the patient's legal representative or a person authorised by the patient. However, at the patient's request, the doctor is obliged to provide him with the requested information"*.

Physician–patient privilege

Art. 40 of the Medical Profession Act *"the doctor is obliged to keep confidential the information regarding the patient, obtained in association with the performed profession"*
"the Duty does not cease with the end of treatment or even the patient's death"

Exceptions

- patient's custodian
- if secrecy is likely to pose a threat to life or health of the patient or other persons (e.g. HIV carriers) - exposed to infection
- the patient does not follow doctor's instructions - immediate family members
- the patient cannot drive mechanical vehicles - district starost
- the patient or legal representative agreed to disclosure of data - in the scope of the consent and after presenting possible impact of disclosure
- if it is necessary for clinical instruction - possibility of the patient's dissent

Malpractice

"Doctor's action or negligence in the scope of diagnosis and therapy, non-compliant with the field of medicine available for the doctor"

"breach of conduct rules binding the doctor, developed on the basis of medical science and practice"

Therapeutic error: administering unnecessary or improper treatment method, implementation or conduction of treatment discordant with current medical knowledge

Diagnostic error: improper diagnosis, omission or improper execution of available diagnostic tests or drawing obviously wrong conclusions on their basis

positive error - disease diagnosed in a healthy person

negative error - no diagnosis in an ill person

mixed error - incorrect diagnosis

Technical error - improper conduct of the procedure

Organizational error - invalid work organization

Necessary constituents of malpractice

Proceeding inconsistent with the current state of knowledge

Damage

Cause-effect relation

Professional liability of the doctor

Act on Medical Chambers of 2nd December 2009

The Proceedings of the Screener for Professional Liability

- Enquiry activities
- Investigation proceedings
- Proceedings in the medical court
- Enforcement proceedings

Possible penalties

- Warnings
- Reprimands
- Financial
- Ban on performing management positions
- Restriction of the scope of procedures conducted as a doctor
- Suspension of the right to practice as a doctor for 1 to 5 years
- Revocation the right to practice as a doctor

Civil liability of the doctor

Contractual – failure or improper performance of an obligation involving incorrect execution of the agreement between the doctor and the patient

Tort – damage as a result of an unintentional act in the course of treatment activities (gross negligence or recklessness)

Type of employment

- employment contract - recourse
- medical cooperative - tort
- private practice - tort and contract

Thank you for your attention