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Medical confidentiality in gynaecological matters and the criminal trial

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SUMMARY

This article discusses the issue of medical secrecy, including its subjective, subjective and temporal scope. It also presents the procedure for exempting a physician from the obligation of medical confidentiality pursuant to Article 180 § 2 of the Code of Criminal Procedure, as well as the most common problems that occur with its use. An attempt was made to indicate solutions which may solve complications, most frequently occurring in the practice of the procedure under Article 180 § 2 of the Code of Criminal Procedure. The paper points out that the most common problem occurring in the practice of exempting a doctor from the obligation of medical confidentiality is the issue of mutual relationship between the provisions of corporate acts and art. 180 § 2 of the Code of Criminal Procedure. It should be noted that the provisions of corporate acts take precedence over art. 180 § 2 of the Code of Criminal Procedure. Therefore, the dismissal of a physician under Article 40, paragraph 1, point 4 of the Act on the professions of a physician and a dentist, excludes the obligation of his dismissal under the procedure of Article 180 § 2 of the Code of Criminal Procedure. Another problematic issue is whether a physician may independently exempt himself or herself from the obligation of medical confidentiality. The analysis of the above issue leads to the conclusion that a doctor cannot make decisions on his or her own on the exemption from the obligation of medical confidentiality with complete omission of the procedure indicated in Article 180 § 2 of the Code of Criminal Procedure. In a situation where a doctor voluntarily gives testimony, the content of which is covered by medical secrecy, he or she will be liable for disciplinary liability for failure to comply with the obligation to keep it.
Key words: medical confidentiality; exemption from medical confidentiality; relative prohibition of evidence; criminal proceedings

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1. LEGAL REGULATIONS

The origin of the medical mystery, one of the medical imponderables, dates back to ancient times, when the Greek Hippocratic doctor, regarded as one of the precursors of modern medicine, with the nickname „father of medicine", first formulated in the Corpus Hippocraticum[1] the duty to preserve it. The most important part of the Corpus Hippocraticum collection, from the point of view of medical confidentiality, is the «Medical oath», which expresses the purpose of medical confidentiality, that is to say, the obligation to keep the data on the patient's health secret even after his death[2].

Initially, the obligation to maintain medical confidentiality was only a moral obligation, not sanctioned by law. Nowadays, the obligation of medical secrecy has been regulated by common law, including the Act of 5 December 1996 on the professions of doctor and dentist[3], which, in Article 40, obliges a doctor to keep secret information related to a patient and obtained in connection with the profession. Another important legal regulation which regulates the issue of medical confidentiality is the Act of 6 November 2008 on Patient's Rights and Patient Ombudsman, and more specifically Article 13[4], according to which a patient has the right to keep secret by medical professionals, including those providing medical services, information related to him/her and obtained in connection with the exercise of the medical pro-

[1] The oldest work of writing, whose subject matter is focused on the medical science of ancient Greece. Traditionally Hippocrates of Kos is considered its author, but in fact Corpus Hippocraticum is a collection of treatises by many anonymous authors belonging to various medical schools.

[2] Notice No 1/04/Iv of the President of the Supreme Medical Council of 2 January 2004 on the announcement of the consolidated text of the resolution on the Code of Medical Ethics.

[3] Act of 05.12.1996, on the professions of doctor and dentist, (OJ 2019.537).

[4] Act of 6 November 2008 on Patient Rights and Patient Ombudsman, (Journal of Laws 2019.1127).

fession. Also the Code of Medical Ethics[5], which is a document establishing universal, ethical rules of conduct for doctors and dentists in Poland, also defining the priorities they should follow in their professional work and take into account in their relations with patients, other doctors and the rest of society, establishes, in Articles 23-29, the obligation to maintain medical confidentiality[6]. Due to the fact that medical data should be classified as particularly sensitive, the obligation to protect them is also expressed in the Constitution of the Republic of Poland, which in Article 47 grants every citizen the right to protect his privacy[7] On the grounds of criminal proceedings, the protective function of the obligation to observe medical secrecy is performed by the prohibition of evidence formulated in Article 180 § 1 of Kodeks Postępowania Cywilnego (the Code of Criminal Procedure), which makes it possible to carry out evidence from the testimony of a person obliged to observe medical secrecy only in the case of cumulative fulfilment of the conditions indicated therein. Pursuant to Article 180 § 2 of the Code of Criminal Procedure. persons obliged to keep medical secrecy may be questioned as to the facts covered by the secrecy only if it is necessary for the benefit of the justice system and the circumstance cannot be established on the basis of other evidence.

2. SUBJECTIVE AND SUBJECTIVE SCOPE OF THE SECRECY

As previously indicated, medical confidentiality, according to Article 40 of the Act on the Professions of Physician and Dentist is a medical doctor's obligation to keep confidential all information which is directly related to the patient and which was obtained in connection with the profession. Therefore, facts established by the doctor himself, as well as facts communicated to him by another doctor and facts disclosed by the patient and third parties at his request[8], constitute the scope of the confidentiality. The subject matter of medical confidentiality, on the other hand, consists of all information relating to the patient which the doctor has obtained in the course of his professional activity. An analogous regulation of the scope of medical confidentiality is contained in the Code of Medical Ethics, which in Article 23 indicates that the confidentiality covers information about the patient and his environment obtained by the doctor in connection with his professional activities.

The first prerequisite for the obligation of medical confidentiality is a direct relationship between the information itself, which is available to the doctor and the patient. Medical information disclosed, for example, by third parties, even against the patient's own will, will also be kept confidential[9]. The fact that a physician who obtains data on a patient against his or her will is unlawful is irrelevant to the obligation to keep the aforementioned data confidential[10]. The second prerequisite for the obligation of medical secrecy is that the doctor has acquired information in connection with his or her practice. This means that medical secrecy will cover not only information obtained by the doctor in connection with the provision of a specific health service, but all information which the doctor acquires in connection with the exercise of his profession, including information about the patient obtained from third parties, including medical records, as well as data concerning the patient's private sphere of life which the patient would not want to disclose even to his closest relatives[11]. In this re-

[5] Notice No 1/04/IV of the President of the Supreme Medical Council of 2 January 2004 on the announcement of the consolidated text of the resolution on the Code of Medical Ethics.

[6] Constitutional Tribunal by virtue of the decision of 7 October 1992 in case of U. 1/92, although it did not recognize the Code of Medical Ethics as an act of normative nature, i.e. an act constituting legal norms within the meaning of Article 1(2) of the Act on the Constitutional Tribunal, nevertheless, the author of this article agrees with the separate opinions to the above mentioned provision, expressed by the Tribunal's judges in the persons of Czesław Bakalarski, Kazimierz Działocha and Remigiusz Orzechowski, who unanimously indicated that the Code of Medical Ethics belongs to the legal system.

[7] Constitution of the Republic of Poland of 02.04.1997, (Journal of Laws 1997.78.483).

[8] Judgment of the Provincial Administrative Court in Cracow of 15 December 2017, file no.: II SA/Kr 1206/17, LEX no. 2431147.

[9] E. Zielińska (ed.), E. Barcikowska-Szydło, M. Kapko, et al.: Act on the professions of doctor and dentist. Komentarz, Dom Wydawniczy ABC, Warsaw 2008, access in the legal information system LEX, A. Zoll, Professional secret of a doctor, (in:) Tajemnica lekarska. Materials from the meeting of the Committee on Medical Ethics on November 15, 1993, Cracow 1994; p. 6-7.

[10] A. Huk, Tajemnica zawodowa lekarowa w polskim procesu karnego (Professional secret of a physician in a Polish criminal trial), Dom Wydawniczy ABC, Warsaw 2006; p. 34-35.

[11] L. Ogiegło, Act on practising the profession of a doctor and a dentist. Commentary, C.H. Beck Publishing House Warsaw 2010; p.450 ff.

spect, it should be noted that information which is only indirectly related to the patient will not be covered by medical confidentiality, e.g. the doctor's knowledge of the commonly known symptoms of a particular disease entity which the patient suffers from and which are present in the patient. The obligation to observe medical confidentiality also applies to medical personnel who participate directly or indirectly in the treatment process (nurses, paramedics, instrumentaries).

In conclusion, medical confidentiality consists of all information obtained by the doctor during the treatment process, including the diagnosed disease unit (diagnosis), the results of the tests carried out, the pharmacotherapy applied, the history of the disease and previous therapeutic management, methods and progress of treatment, previous or coexisting diseases, hospitalizations, including the surgical techniques used, recommended prevention and rehabilitation. It also extends to any material related to the diagnosis or treatment, such as certificates, notes, records[12].

3. TEMPORAL SCOPE OF CONFIDENTIALITY

Medical confidentiality is not limited in time. In accordance with the content of Article 40(3) of the Act on the profession of a doctor and a dentist, a doctor, except for statutory cases excluding the obligation to keep a doctor's secret, is bound by it also after the patient's death, unless a close person within the meaning of Article 3(1)(2) of the Act of 6 November 2008 on Patient's Rights and the Patient's Rights Ombudsman consents to the disclosure of the secret. A close person giving consent to disclosure of a secret may specify the scope of its disclosure, as referred to in paragraph 2a of the Act on the professions of a doctor and a dentist. Also the Code of Medical Ethics in Art. 23 indicates that the death of a patient does not release him/her from the obligation to observe medical confidentiality. The lack of time limit of medical confidentiality causes numerous controversies in the doctrine. Namely, some authors[13] treat the obligation to keep the medical secret after the patient's death only as an expression of respect for his rights, which in the author's opinion is contrary to the literal wording of both the Act on the Professions of Physician and Dentist as well as the and the contents of the Code of Medical Ethics. Others[14], on the other hand, argue that the scope of medical confidentiality is not only limited to information about the patient's state of health before death and the cause of death, but also concerns information which the doctor obtained as a result of the autopsy. Consequently, the doctor is also obliged to maintain medical confidentiality even after the patient's death.

4. EXEMPTION FROM THE OBLIGATION OF MEDICAL SECRECY UNDER APPLICABLE LAWS

The legislator, despite the original establishment of the World Medical Association[15], according to which medical secrecy should be absolute, allows for the possibility of abolishing the obligation to keep it under the conditions specified in the Act[16]. Since the patient's autonomy in the scope of expressing the decision on undertaking the therapy, its course and completion, as well as the method of data processing in the scope of medical services provided is a key issue for the Polish system of protection of patient's rights, it is the patient first of all, and not the doctor, as the main disposer of information concerning the state of his or her health, who has the right to release the doctor from the obligation to keep medical secrets[17]. The above mentioned statement, in order to produce certain legal effects, must be expressed in a clear and unambiguous manner by a person who has full legal capacity. Furthermore, the patient who agrees to the release of the doctor from the obligation of medical secrecy must be duly informed of the adverse effects of

[12] Judgment of the Provincial Administrative Court in Kraków of 15 December 2017, file no.: II SA/Kr 1206/17, LEX no. 2431147.

[13] I. Bernatek - Zaguła, Patient - consumer or charges?, PPiA 2004; No. 60: p. 135.

[14] B. Christmas, Patient's right to information about his health, Doctor's Guide 1999; No 5: p.19.

[15] J. Sawicki, Tajemnica zawodowa lekarza i dziennikarza, Państwowe Wydawnictwo Naukowe, Warsaw 1960; p. 25-26.

[16] M. Cieślak, Zagadnienia dowodowe w procesie karnego (Issues of evidence in a criminal trial), Wydawnictwo Prawnicze, Warsaw 1955; p. 264 ff.

[17] Art. 40 of the Act of 5 December 1996, section 2 point 4 of the Act of 5 December 1996, on the profession of a doctor and a dentist, (Journal of Laws 2019.537).

its disclosure[18]. The patient can revoke his consent at any time, which means that the doctor loses the right to disclose the secret[19].

Other reasons, which according to the content of Article. 40 item 2 of the Act on the Profession of a Physician and the Profession of a Dentist, exempt a physician from the obligation of secrecy, are 1) the provisions of other acts, 2) a request for a medical examination to be performed by bodies and institutions authorised under separate acts; then the doctor is obliged to inform only these authorities and institutions about the patient's state of health, 3) maintaining secrecy may pose a threat to the life or health of the patient or other persons, 4) the above mentioned consent given by the patient or his statutory representative, 5) there is a need to provide necessary information about the patient to the court physician, 6) there is a need to provide necessary information about the patient related to the provision of health services to another doctor or authorized persons participating in the provision of these services. The catalogue of indicated bases is of a closed nature. In turn, Article 25 of the Code of Medical Ethics indicates that the exemption from the obligation of medical confidentiality may take place in the following cases: 1) if the patient consents to it, 2) if keeping the secret significantly endangers the health or life of the patient or other persons, and 3) if the provisions of law require it.

A common problem that occurs in the practice of litigation is whether a doctor who has not obtained the patient's consent to disclose the secret is entitled to disclose information covered by medical confidentiality if the information covered by the confidentiality was voluntarily made public by the patient. For example, a pregnant patient who was diagnosed with a high probability of severe and irreversible impairment of the fetus was refused a timely referral to a prenatal genetic test that would confirm or exclude the above diagnosis. Moreover, the patient was not provided with reliable information concerning the tests she should perform as well as medical facilities where their performance is possible. What is more, after the doctors became certain about the actual severe and irreversible impairment of the fetus, and thus despite the fulfilment of the statutory requirements, indicated in Article 4a(1)(2) of the Act of 1 March 1993 on Family Planning for the Protection of the Human Fetus and Conditions of Admissibility of Termination of Pregnancy[20], the patient was refused the termination of pregnancy. Due to the fact that according to the standards of the World Health Organization, abortion is allowed only until the fetus is able to live independently outside the mother's body, i.e. until the 23rd week of pregnancy, the patient was not able to carry out the procedure within the legally allowed time. As a result of the above, the patient was forced to give birth to a handicapped child, which on the grounds of the case in question should be qualified as preventing the patient from exercising her rights under the Act on Family Planning, Protection of the Human Fetus and the conditions of admissibility of termination of pregnancy. As a result of illegal (in the patient's opinion) actions of doctors, the patient gave an interview in the mass media, in which she described the course of pregnancy, medical procedures applied to her, fetal disease as well as the doctors' actions during the whole therapeutic process, which ended in birth a handicapped child. The journalist who interviewed the patient then contacted the doctor who was leading the patient's pregnancy, in order to respond to the doctor's position. The doctor, presenting his position on the case, published information related to the patient's treatment, the course of her pregnancy, the child's father and the patient's and her husband's relationship with the handicapped child. This information was published in a press article, which was created as a result of an interview with the pregnant woman. In the situation described above, as a result of the patient disclosing information covered by the secrecy in the mass media, the knowledge about her health was made public and thus became generally available. It is therefore puzzling whether, in the presented facts, it is possible to speak at all about the existence of any secret that the doctor is bound by, and even more so whether it is possible to continue to speak about the obligation to keep it. The Supreme Court answered the above mentioned exhaustive answer[21],

[18] D. Rydlichowska, Medical Mystery in Criminal Proceedings, Law and Prosecutor's Office 2015; p. 41.

[19] A. Huk, Tajemnica zawodowa lekarza w polskim procesu karnego (Professional secret of a doctor in Polish criminal proceedings), Dom Wydawniczy ABC, Warsaw 2006; p. 92.

[20] Act of 01.03.1993, on Family Planning for the Protection of the Human Fetus and Conditions of Admissibility of Termination of Pregnancy, (Journal of Laws 1993.17.78).

[21] Judgment of the Supreme Court of 12 June 2008, Ref: III CSK 16/08, OSNC 2009/3/48.

pointing out that sharing sensitive data covered by medical secrecy by the patient does not release the doctor from the obligation to keep it, due to the fact that the patient did not de facto release the doctor from the obligation to keep it confidential. The Supreme Court pointed out that the statutory obligation to keep medical secrecy is imposed directly on the doctor, therefore the patient should personally release the doctor from the obligation to keep information related to her treatment secret. The mere disclosure of data covered by medical secrecy by the patient to the public does not automatically release the doctor from the statutory obligation to keep it secret; considering antagonistic optics to be correct would undermine the sense of medical secrecy in general. It cannot be presumed that the patient he released the doctor from the obligation of medical confidentiality, as this consent should be expressed unequivocally, in writing or orally[22]. The above claim is justified also on the grounds of criminal proceedings in which the participants in the proceedings are the medical facility and the patient. In the course of the trial or preparatory proceedings (most often in the case of medical errors), information covered by medical confidentiality is disclosed to a wider entity than the doctor-patient, as a result of including medical records in the evidence or hearing the parties to the proceedings. Nevertheless, despite some kind of sharing of medical data with the participants of proceedings, a physician who has information covered by medical confidentiality about a patient being a party is not automatically released from the obligation to keep it. Also in such a situation, a physician shall be released from the obligation of medical secrecy either under the procedure indicated in Article 180 § 2 of the Code of Criminal Procedure or under the procedure indicated in Article 40(1)(4) of the Act on the Professions of Physician and Dentist.

As indicated earlier, under the criminal-procedural procedure, the procedure of exemption from medical secrecy is regulated by the prohibition of evidence formulated in Article 180 § 2 of the Code of Criminal Procedure. The above mentioned provision constitutes an exception to the principle of freedom of proof, binding in the Polish criminal trial, according to which it is permissible to carry out all acts of evidence, except for those which are expressly forbidden. On the grounds of criminal procedure, prohibitions of evidence are legal norms that prevent or limit the taking of evidence under certain conditions getting[23] The purpose of introducing into criminal proceedings the relative prohibition of evidence formulated in Article 180(2) of the Code of Criminal Procedure, in the area of medical confidentiality, is to protect the legal assets, which is expressed, on the one hand, in the protection of the patient's right to privacy and, on the other hand, to guarantee the protection of the welfare of the justice system, i.e. to implement the principle of material truth, the aim of which is to base all decisions on truthful findings of fact, by which is meant proven findings.

According to the aforementioned provision, persons obliged to observe medical confidentiality may be questioned as to the facts covered by that confidentiality only if it is necessary for the benefit of justice and the circumstance cannot be established on the basis of other evidence. In the preparatory proceedings, the court decides on the questioning or permission to be heard, at a hearing without the participation of the parties, within a period not exceeding 7 days from the date of service of the prosecutor's motion. The court's decision may be appealed against.

As it results from the content of Article 180, par. 2 of the Code of Criminal Procedure, the basic premise for releasing a doctor from the obligation of medical confidentiality is the good of the justice system, which is expressed in undertaking all activities aimed at detecting and bringing to justice the perpetrator of the offence, which constitute a cardinal objective of criminal proceedings. The second condition is that it is impossible to establish a given fact/circumstances covered by the secrecy on the basis of other evidence. Only the cumulative fulfilment of the above mentioned prerequisites constitutes the basis for releasing a doctor from the obligation of secrecy in criminal proceedings. Both the notions of „necessity", „good of the justice system" and „impossibility to establish circumstances on the basis of another

The «evidence» does not have a legal definition, which means that both case-law and

[22] M. Boratyńska, Autonomy of the patient and the limits of authorization of a close and trusted person, Law and Medicine 2014; No. 1: p. 65.

[23] M. Cieślak, Zagadnienia dowodowe w procesie karnego (Issues of evidence in a criminal trial), Wydawnictwo Prawnicze, Warsaw 1955; p. 264 et seq.; S. Waltoś, Proces crny. Zarys systemu, Lexis Nexis, Warsaw 2005; p. 353.

doctrine attempt to define it. The Supreme Court indicated that indispensability means „the impossibility of making determinations by other means of evidence, while at the same time exhausting existing sources of evidence in a given case”[24]. The good of justice, in turn, is understood as „the need to establish the objective truth”[25]. It should be pointed out that the concepts referred to above are to be classified as general clauses, which, because of their vagueness, allows considerable leeway for interpretation by the court, which issues an order for exemption from medical confidentiality. In the opinion of the Regional Court in Warsaw, the formulation of the impossibility of establishing circumstances on the basis of other evidence means „(...) the actual non-existence of such a source of evidence which could provide information on a given subject”[26]. The complexity of carnomedical cases, in which a patient acts as a witness, wronged party or less frequently as a suspect, is expressed in the fact that often it is impossible for law enforcement authorities to reach the material truth without reconstructing the actual course of the event under criminal proceedings, about which a doctor, obliged to keep medical confidentiality, usually has comprehensive knowledge[27].

It is also reasonable to subject the testimony of doctors acting as witnesses to a prohibition of evidence, due to the special circumstance in which a doctor comes into possession of information covered by medical secrecy, i.e. saving lives and human health. Often patients entrust doctors with the knowledge of facts they do not want to share with third parties. The guarantee of confidentiality of the above mentioned information is undoubtedly a basis for mutual trust and an essential prerequisite for the proper exercise of the medical profession. Particularly noteworthy is the medical knowledge that the gynaecologist acquires, which is particularly sensitive data, since it is related to the sphere of human sexuality. The European Court of Human Rights[28] indicated that „The protection of personal data, including medical data, is essential for the exercise of a person's right to respect for private and family life as guaranteed by Article 8 of the Convention”. In view of the above, it should be noted that the function of the prohibition of evidence indicated in Article 180 § 2 of the Code of Criminal Procedure is to protect the patient and not the doctor who provides sensitive data to the doctor[29].

5. THE ISSUE OF PHYSICIAN'S EXEMPTION FROM THE OBLIGATION OF MAINTAINING MEDICAL CONFIDENTIALITY IN CRIMINAL PROCEEDINGS

The fact that judicial authorities in practice use the institution's exemption from medical confidentiality, in accordance with the procedure indicated in Article 180 § 2 of the Code of Criminal Procedure, often causes numerous problems in obtaining evidence. Often the exemption of a doctor from the obligation of medical secrecy is necessary in order to issue a decision based only on truthful factual findings, which are understood as proven findings. Some of these findings are discussed below.

The first of the problems that occur in practice is the stage of criminal proceedings at which the procedural authorities are entitled to request that the doctor be released from medical confidentiality. The solution proposed by A. Jaskuła and K should be accepted. Płończyk[30], according to which the application to the court for releasing the physician from the obligation of medical secrecy should be preceded each time by obtaining the patient's position on consent to release the physician from the obligation of medical secrecy. In the opinion of the author of the present argument, the court should also ask such a question in the case in which the patient released the doctor from the obligation of medical secrecy prior to the commencement of criminal proceedings, due to the fact that the court authority is not able to re-

[24] Resolution of the Supreme Court of 19 January 1995, ref. I KZP 15/94, OSNKW 1995, no. 1-2, item 1, Supreme Court's decision of 15 December 2004, issued in the case ref. no.: III KK 278/04.

[25] Order of the Supreme Court of 15 December 2004, case file no.: III KKK 278/04

[26] Order of the Regional Court in Warsaw of 25 August 2017, in the case file no.: X Kz 977/17, LEX no. 2447824, Order of the SA in Katowice of 12 October 2011, file no. II AKz 664/11, LEX no. 1102940.

[27] D. Wąsik, Doctor's secret in criminal trial, Prok.i Pr. 2018; 1:125-137.

[28] Judgment of the European Court of Human Rights of 30 October 2012, ref: 57375/08, LEX No 1223096.

[29] Order of the Court of Appeal in Wrocław of 4 November 2010, ref: II AKz 588/10, LEX no. 621274.

[30] A. Jaskuła, Katarzyna Płończyk, Medical confidentiality waiver in preparatory proceedings, Prok.i Pr. 2017;3: p. 90 ff.

liably verify whether the patient was informed in detail about potential negative consequences, including legal consequences of disclosure of sensitive data. Only in the case of the lack of consent of the patient or his or her legal representative to the disclosure of the secret, after having informed the patient about the negative consequences of its disclosure, should the trial authority consider the conflict of legal assets, i.e. the good of the patient and the administration of justice, and make a decision on submitting a request to release the doctor from the obligation of medical confidentiality pursuant to Article 180 § 2 of the Code of Criminal Procedure. Although the lack of the above mentioned position of the patient does not exclude the possibility of using the application under Article 180 § 2 of the Code of Criminal Procedure, nevertheless, the above solution is justified due to the procedural economy and implementation of the principle of speed of proceedings. The above practice is also justified due to the fact, that the procedural body (court or prosecutor) is able to provide to the patient of factual and reliable information about potential negative consequences of disclosing information covered by medical confidentiality, with particular emphasis on negative legal consequences, which for obvious reasons a doctor is not able to do. If a doctor refuses to testify on the grounds of medical secrecy, the procedure indicated in Article 180 § 2 of the Code of Civil Procedure shall also apply.

Submitting an application for exemption from medical secrecy pursuant to Article 180 § 2 of the Code of Criminal Procedure will also be justified in a situation where the patient revokes his or her prior consent, which will result in the doctor losing the right to further disclosure of information covered by the secrecy. The procedural activities carried out in the course of the case, including the doctor's testimony based on the patient's prior consent to be released from the obligation of medical secrecy, will constitute evidence of full value if the court verifies it positively based on the principle of free evaluation of evidence.

The Supreme Court[31] expressed a controversial view, according to which carrying out the evidence from the doctor's testimony in a situation where the patient did not consent to the disclosure of the secrecy will not always involve the necessity to carry out the procedure of releasing him from the obligation of medical confidentiality. In the above mentioned decision, the Court indicated that „the provision of art. 180 § 2 of the Code of Civil Procedure applies only if the doctor obliged to keep professional secrecy refuses to testify as to the circumstances to which this obligation extends. On the other hand, if he does not refuse to testify on these circumstances, the court may also hear him on this subject, without initiating the proceedings referred to in Article 180(2) of the Code of Criminal Procedure'. The above view should be criticised, because its acceptance would mean that it is the doctor and not the patient who has the secret, while the doctor is its depositary. Moreover, granting the right to a doctor to decide on his or her own on the exemption from the obligation to keep medical confidentiality, without the procedure indicated in Article 180(2) of the Code of Civil Procedure. could lead to loss of trust in the medical profession.

Numerous controversies have arisen in the doctrine related to whether it is still necessary to carry out the procedure of physician's exemption from the obligation to observe medical confidentiality at the preparatory stage, pursuant to Article 40(1)(4) of the Act on the professions of doctor and dentist (patient's exemption), pursuant to Article 180 § 2 of the Code of Criminal Procedure. The author of this study agrees with the thesis formulated by A. Jaskuła and K. Płończyk[32], according to which, on the grounds of criminal proceedings, it is sufficient to release from the obligation of secrecy under Article 40, paragraph 1, point 4 of the Act on the professions of doctor and dentist, due to the fact that Article 180 § 1 of the Code of Criminal Procedure. constitutes a lex specialis in relation to the regulations which impose on the representatives of the professions concerned the obligation to keep the information obtained during their performance secret[33]. As it has already been indicated earlier, the aim of introducing into the crimi-

[31] Decision of the Supreme Court of 11 February 2013, ref. SNO 58/12, Lex no. 1297724, So the Court of Appeal in Katowice, in the decision of 21 December 2016, ref. II AKz 688/16, LEX no. 2309507.

[32] A. Jaskuła, K. Płończyk, Medical confidentiality waiver in the preparatory proceedings, Prok.i Pr. 2017;3: p. 93.

[33] Tak też M. Rusinek, Tajemnica zawodowa i jej ochrona w polskim procesu karnego (Professional secret and its protection in the Polish criminal trial), Oficyna, Warsaw 2007; p. 118, B. Kurzępa, Zakazy dowodzenia w procesie karnego (Procurator 2002); no. 2: p. 72-73; B. Kunicka - Michalska, Ochrona tajemnicy zawodowej w polskim prawie karnego (Protection of professional secrecy in Polish criminal law), Wydawnictwo Prawnicze, Warsaw 1972; p. 191.

nal procedure the relative prohibition of evidence formulated in Article 180(2) of the Code of Criminal Procedure in the area of medical confidentiality is the protection of legal assets, which is expressed, on the one hand, in the protection of the patient's right to privacy and, on the other hand, in the protection of the good.

The Commission is to be responsible for the implementation of the principle of substantive truth, i.e. the implementation of the principle of material truth, the aim of which is to base all decisions on truthful findings of fact, by which is meant proven findings. In any event, in the event of conflicts between the aforementioned legal assets, a balance must be struck between which of them should be given priority. However, if it is the patient himself who relieves the doctor of the obligation of medical confidentiality, there is no conflict between the patient's legal interests and the administration of justice, so there is no need to determine whether the doctor's questioning is actually necessary for the sake of justice. The adoption of antagonistic optics would lead to situations in which a doctor disclosing data covered by medical secrecy, with the patient's consent, and therefore in a manner consistent with the law, would be exposed not only to criminal liability but also to liability for damages. It is worth noting that the exception from the principle of the obligation to observe medical secrecy, according to which the above mentioned legal act does not apply when the acts so provide, is formulated in Article 40(2)(1) of the Act on the professions of a doctor and a dentist, but it does not exclude the application of the exception indicated in Article 40(2)(4) (patient's consent), which is provided for in the above mentioned Act.

The blank exemption of a doctor from the obligation of medical confidentiality should also be avoided[34]. Law enforcement authorities may not treat the procedure indicated in Article 180 § 1 of the Code of Criminal Procedure as a universal way of obtaining certain evidence, as well as each time assume that a doctor will refuse to testify due to the obligation to keep medical confidentiality. Conclusion

The prosecutor in the subject matter of dismissal should not only meet the formal requirements specified in Article 119 of the Code of Criminal Procedure, but also contain information on the subject of the patient concerned, specify the period of hospitalisation, and the circumstances, which cannot be proved with the available evidence, as well as the substantive justification of the need to make them available. The scope of exemption from medical confidentiality must be each time strictly defined in a court decision, so as to prevent law enforcement authorities from freely supplementing the evidence.

6. SUMMARY

The duty of medical confidentiality is undoubtedly one of the imponderables of the medical profession. However, the obligation to maintain medical secrecy is not absolute, since both legal regulations and corporate acts set the legal framework within which it is possible to legally process medical data[35].

The solution adopted in the Polish criminal-procedural law, which makes it possible to abolish the obligation to keep medical secrecy while meeting a narrow set of conditions indicated in the Act, is a compromise between the relative prohibition of evidence prohibiting the taking of evidence from testimonies of witnesses covered by medical secrecy, in this case medical secrecy, and the non-recognition of any limitations on the obligation to keep it. The use, by procedural authorities, of the institution indicated in Article 180 § 2 of the Code of Criminal Procedure. The use of the institution indicated in Article 180 § 2 of the Code of Criminal Procedurenshould be made with a great deal of caution, as it is not allowed to exempt a doctor from the obligation of secrecy on a blank sheet. The application in

The object of a physician's exemption from the obligation of confidentiality should be submitted only if there is a real need, justified by the circumstances of the case, to disclose information covered by professional secrecy which cannot be derived from other evidence. It should also be remembered that each time the law enforcement authorities want to use the procedure of releasing a physician from the obligation of confidentiality should be preceded by an attempt to question him/her. A prosecutor wishing to use the institution mentioned above should also have comprehensive knowledge about the material evidence gathered in the case

[34] Order of the Court of Appeal in Katowice of 6 August 2019, File No.: II AKz 685/19, LEX No. 2751451

[35] Yes also: Judgment of the Voivodeship Administrative Court in Warsaw of 11 April 2006, ref. no.: II SA/Wa 183/06, LEX no. 220919.

and have specific questions, the task of which is necessary in order to supplement factual findings. What is important is the abolition of the obligation to observe medical confidentiality, pursuant to Article 180 § 2 of the Code of Criminal Procedure. does not determine the obligation to interview a doctor. If the authority, in the course of the proceedings, obtains evidence on the basis of which it is possible to make factual findings covered by medical secrecy, it should refrain from questioning the doctor because the condition „it is impossible to determine the circumstances on the basis of other evidence" is not met.

The Code of Criminal Procedure does not impose an obligation on procedural authorities to instruct witnesses, in this case doctors, about the obligation to keep medical secrecy; nevertheless, in the opinion of the author of the paper, in order to avoid negative consequences of unintentional disclosure of information covered by medical secrecy by a doctor, it would be good procedural practice to determine the existence of the above obligation each time, before proceeding to interview the witness (doctor). Therefore, the questioning of the patient should be preceded by an inquiry about consent to release the doctor from the obligation of secrecy. If, on the other hand, the patient does not give such consent and the doctor refuses to give testimony due to the obligation to keep medical confidentiality, the prosecutor should start the procedure of releasing the doctor from the obligation to keep medical confidentiality, pursuant to Article 180 § 2 of the Code of Criminal Procedure.

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