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A MEDICAL DOCTOR AS A LEGAL EXPERT DURING THE COVID-19 PANDEMIC

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ABSTRACT

Background: In Poland, the total number of SARS-CoV-2 infections since March 4, 2020 is 2,880,596, with 2,652,372 recoveries and 75,135 deaths. It may be assumed that such an unexpected event, apart from the health-related and economic consequences, will in the near future result in a wave of demands from those who have suffered as a result of COVID-19.

Aim of the study: The aim of this study is to assess the current legal status in the context of opinions issued by medical doctors with regard to COVID-19, with a particular emphasis on responsibility towards the employee and the employer.

Material and methods: A review was conducted using the database of legal acts (SIP LEX; accessed on 01.06.2021) based on the following words: labor code, civil procedures code, decisions of the Supreme Court, claims, employee health, health protection, COVID-19, and labor law.

Results: By searching the SIP LEX database and comparing the results with the legal standards of international law, the role and importance of the doctor as an expert on COVID-19 was established. The presented findings are based on judgments of the Supreme Court, the regulations of the Minister of Justice, announcements of the Marshal of the Sejm of the Republic of Poland, and the provisions of the Act on the Profession. It is certain that doctors will face another important task connected with COVID-19. It must be assumed that, in the near future, they will be forced to issue opinions on numerous and complicated cases regarding employer responsibility for damages incurred by employees due to COVID-19.

Conclusions: Medical experts will use knowledge and experience acquired during the struggle with the disease to evaluate whether it was highly probable that an employee illness was the result of an infection with the pathogen in the workplace, and then, furthermore, to specify the after-effects of this illness.

KEYWORDS: COVID-19, SARS-CoV-2, pandemic, infectious, occupational diseases

Background

Initial news of severe pulmonary inflammation caused by an unknown factor among vendors and suppliers at the Huanan marketplace in Wuhan dates back to December 31, 2019. On that day, the Representative Office of the World Health Organization (WHO) in China was notified. Next generation sequencing determined that the infection was caused by a new type of coronavirus that exhibits similarities to the severe acute respiratory syndrome virus (SARS-CoV-1). This novel coronavirus was called SARS-CoV-2

and, on February 11, 2020, the WHO termed the disease caused by this virus COVID-19. One month later, a worldwide pandemic was declared [1-3]. Previously known coronaviruses have also been associated with recent epidemics. Between 2002–04 a SARS epidemic was declared [4], and, in 2012 in the Middle East and in 2015 in South Korea, an epidemic was caused by the Middle East Respiratory Syndrome (MERS) [5].

The pandemic caused by the SARS-CoV-2 (COVID-19) virus has been characterized by a dynamic and unpredictable course, significantly influencing everyday life and national economics. In Poland, the total number of infections since March 4, 2020 has been 2,880,596, out of which 2,652,372 individuals recovered (92.1%) and 75,135 died (7.9%) [6]. Worldwide, 186,033,321 infections have been confirmed, with 170,214,024 recoveries (91.5%) and 4,020,869 deaths (8.5%) [7]. It may be assumed that such an unexpected event, apart from the direct health-related and economic consequences, will in the not-too-distant future cause a wave of demands from those who have suffered from the illness. The most significant demands will most likely be directed at employers, who are responsible for workplace conditions. Indeed, these actions are currently occurring in the United States and Great Britain, where they are seen as a very serious threat to the stable functioning of the economy. The current number of COVID-19-related lawsuits against employers in the USA due to alleged labor violations is 2879, with most (691) concerning the healthcare system [8]. In these lawsuits, the employee is responsible for providing evidence that they were infected with the SARS-CoV-2 virus in connection with employment and that there exists a particular risk of infection resulting from working conditions, which exceeds the risk for the general public. Therefore, the responsibility is conditioned by the need to formally prove two premises. The first must show that the disease in question was a result of the employment (the type and way of performing duties), while the second must prove that the disease in question was the result of, or was caused by, particular conditions at work, and is not "a common illness of everyday life" to which the general public is also susceptible. In order for these lawsuits to be settled, the medical knowledge of doctors is required. Therefore, important evidence to establish the premises of employer responsibility is obtained from opinions prepared by medical experts.

Aim of the study

The aim of this study is to assess the current legal status in the context of COVID-19-related opinions issued by doctors, with a particular emphasis on the responsibilities of employees and employers.

Material and methods

The SIP LEX is a complete, unified database that contains legal acts, including standardized versions of legal acts contained in the Journal of Laws and the Polish Monitor, and collections of judgments from Polish and European courts. Using the SIP LEX database, a review of legal acts and judgments was conducted (accessed on: 01.06.2021) based on the following words: labor code, civil procedures code, decisions of the Supreme Court, claims, employee health, health protection, COVID-19, and labor law. For this review, the dictionary function was used, which allows for a search for legal acts using words of interest. The review covered legal acts and the judgments of courts from 1996 to the present day. Pending and non-assessed acts available in the database were excluded from the analysis. In total, 13 legal acts and judgments were analyzed.

Results

By searching the legal acts and comparing them with the legal standards of international law, the role and importance of the doctor as an expert on COVID-19 was established. The presented findings are based on judgments of the Supreme Court, regulations of the Minister of Justice, announcements from the Marshal of the Sejm of the Republic of Poland, the provisions of the Act on the Professions of Doctor and Dentist, and specialist literature on the subject.

Most of the aforementioned lawsuits have centered on accusations that employees were infected with SARS-CoV-2 due to negligence in the workplace, which was the fault of the employer. In such cases, the employees generally accuse the employers of not following health agency guidelines aimed at preventing of the spread of the virus in the workplace, including appropriate disinfection procedures, mask wearing, and the implementation of protocols for social distancing [9].

Therefore, employee lawsuits have aimed for compensation due to damages incurred as the result of a long-lasting illness, loss of work, and, in certain cases, employee death. Apart from the typical cases regarding compensation for health impairments, the demands that employees have made also concern:

- the illegal termination of a contract or discrimination as far as dismissal from work, vacations, shortened working hours, remote work, and paid sick leave;
- mistreatment or employee harassment due to illness or suspicion of illness;
- unlawful disclosure of the identity of an infected employee or private medical information [10].

The increasing number of employee lawsuits has prompted employers to seek effective measures to secure their own interests. One of the proposals concerns the introduction of an act on civil immunity against actions connected with COVID-19. However, the key to effectively using this instrument is to show that the employer has undertaken reasonable measures and displayed goodwill in order to comply with all government regulations and guidelines in force. This means that the possibility of holding the employer at fault for their actions, or lack thereof, will exclude the possibility using the proposed immunity. Another possibility to secure employer interests is a statement of the release of possible claims connected with COVID-19 for the employee. However, such releases must be clear, unambiguous, and written in a language that is easy to understand. It must be emphasized that this action does not mean that the employer is released from responsibility for deliberate actions or omissions (intentional fault), or recklessness and gross negligence (unintentional fault) [11].

Taking into account the tendencies observed in the USA and Great Britain, attempts should be made to characterize the lawsuits putting particular emphasis on the role of doctors as medical experts in settling such cases. Therefore, in applying this knowledge to the predicted claims directed towards employers based on the provisions of the Civil Code [12], we must emphasize the similarities of the basis of tort liability (due to tortious acts) of the previously described regulations, as well as those which function in the Polish legal framework. It must also be added that, in taking legal action for the compensation of damages to the person which were caused by an infectious disease, the claimant must prove all premises of liability of damages of the defendant, meaning:

- the responsibility of the employer for the unlawful act (on basis of guilt – e.g., art. 415 of the Civil Code, or risk – art. 435 of the Civil Code), meaning the unlawful behavior (act, or omission) of the employer;
- incurred damage (personal injury), most often in the form of health impairment or death;
- a common cause relationship between the unlawful act of the employer and the damage to the employee [13].

It must be underlined that tort responsibility for working in conditions that risk infection or effects on an infection have been entrenched in the judicial decisions of the Polish Supreme Court for many years. This means – in the opinion of the authors – that the views of the Supreme Court expressed in rulings from April 19, 2013 (regarding hepatitis) [14] and from April 22, 2015 (regarding Lyme disease) [15] may be applied in the evaluation of employee "COVID claims" with the use of the provisions of the Civil Code applied on the basis of art. 300 of the Labor Code [16].

Therefore, it must be stated that employer responsibility based on guilt (art. 415 of the Civil Code) for the effects of an infection is conditioned by the proof of an employee during the case that, under specific actual circumstances, work had been inappropriately organized, which, as a consequence, led to the infection, or that real threats, which existed during the performance of employee duties, were not recognized by the employer, therefore the employee did not know of them, or that threats actually recognized were not eliminated by the employer and resulted in the risk of health impairments for the employee. Defined as such, COVID-19 as an infectious disease may be seen as a "work-related disease," meaning a disease that was not included in the catalog of occupational diseases, but which may be caused by working conditions [17].

In relation to the first of the mentioned premises of tort responsibility of the employer, it must be remembered that provisions of art. 24, art. 66 section 1, and art. 68 of the Constitution of the Republic of Poland [18], contain guarantees of protection of employment, including those that guarantee everyone the right to safe and hygienic working conditions, as well as health protection. The realization of these constitutional guarantees as far as employment protection and labor law is among art. 94, items 4 and 10 of the Labor Code, which levies upon the employer the obligation to ensure safe and hygienic working conditions. It is the employer who is tasked with ensuring safe and hygienic working conditions, as described in art. 207 § 2 of the Labor Code. In art. 226, item 2 and art. 227 of the Labor Code, these obligations are specified, requiring the employer to provide the employee with information regarding occupational hazards and means of prevention, especially with the aim of preventing occupational and work-related diseases. It must be emphasized that even in the title of the Act from March 2, 2020 on specific solutions related to the prevention, counteraction, and eradication of COVID-19 and other infectious diseases, and crisis situations caused by them (hereinafter referred to as the COVID Act) [19], by using the term "prevention" (meaning resistance to some action caused by another action) the lawmakers have included a hint as to the role fulfilled by the employer. In the text of art.2, section 2 of the COVID Act, it was assumed that in every instance the Act mentions "prevention of COVID-19," it is understood as all actions connected with the eradication of the infection, prevention of its spread, as well as combating its effects, including its socio-economic effects. As per the provisions of the Act, the principal form of COVID-19 prevention in the workplace is remote working (art. 3 of the COVID Act) [20]. On the other hand, the resolution

of the Council of Ministers regarding the establishment of limits, orders, and prohibitions, includes detailed and variable in time regulations regarding the principles of hygiene, covering the mouth and nose, as well as social distancing in the workplace [21]. However, it must be taken into account the fact that court rulings have moved the boundaries of the obligations specified by the above provisions ensuring the employee of safe and hygienic working conditions. The Supreme Court in a ruling from May 11, 2005 [22] showed that a healthcare facility as an employer is obliged to use all available organizational and technical means to protect the health of its employees (medical staff) against infectious diseases, highlighting the fact that the employer's responsibility is based on guilt. Due to this fact – in the circumstances of a given case –it may be assumed that it is the employer who is tasked with taking the employees' temperature before allowing them to work, or with organizing testing in the company offices and requiring employees to take a test for the presence of coronavirus antibodies or an antigen test. It must be noted that antigen tests guarantee high effectiveness and the possibility to obtain results in a few minutes. Thus, an employee with a positive test may immediately be isolated from healthy staff members. Referencing the obligations described in the text to the realities of tort responsibility, it must be concluded that violating them in any way may lead to the employer being held responsible for the health impairments or death of an employee.

It is more difficult for the employee to establish the premise of causation between a COVID-19 infection and the illegal behavior of an employer. In this case, it is possible to use previous court rulings regarding the responsibility for injuries or death caused by medical malpractice. The Supreme Court has numerous times underlined the fact that, in cases on the compensation for medical malpractice, due to the properties of the biological processes in question, it is extremely difficult, sometimes impossible, for the patient to establish the premises of responsibility of the healthcare facility. That is why, in reference to these kinds of cases, the judiciary has introduced particular legal constructions, which greatly alleviate the evidence stipulations required of the claimant. The Supreme Court has agreed to allow a high probability of occurrence as evidence of the existence of causation between damages to a person and the activity of people acting on behalf of an entity providing healthcare services [21]. In its ruling, the Supreme Court underlined the fact that it would be unreasonable to require that the patient provide strict proof as to the exact moment and method of infection. The basis of establishing a high probability of employee infection in the workplace is an inference based on the analysis of the facts (including proof of employer negligence), which does not include signs of arbitrariness, significant gaps, or contradictions.

During the trial, the issue of defining the infection mechanism and possible high probability of infection of employees in the workplace (meaning the method and time of infection), as well as effects of the infection, requires specific knowledge that is available solely to doctors in the appropriate fields (e.g., infectious diseases and workplace medicine).

The procedures regarding the performance of the profession of a doctor are regulated in the Act from December 5, 1996 on the medical and dental profession [22]. In general, this profession may be performed in Poland solely by a person possessing the right to perform said profession, which is granted by the District Medical Council and for whom the required qualifications (specified in art. 5 and ff. of the Act) have been confirmed.

The lawmakers have agreed that the basic duty of a doctor is to provide "healthcare services" (art. 2 section 1 of the Act on the medical and dental profession) [23]. At the same time, this term was not defined in the act, being limited to providing a sample list of activities that constitute these services [24]. The legal definition of a permissible form of performing a profession is an inherent feature of professions of public trust and regulated professions [25]. The catalog of activities treated as the provision of healthcare services includes, among others, the issuance of an opinion by a doctor, which is directly connected with the doctor appearing in court as a court-appointed medical expert. Enabling doctors to issue court opinions is possible based on specific provisions, in this case, the provisions of the Code of Civil Procedures (art. 278) [25].

An opinion expressed in such a scope is – performed with the use of the available knowledge and acquired experience – judgment about the medical event being evaluated and its connection with previously agreed-upon facts. Most often in such a context, the doctor examines and determines the connection of a specific activity or omission (e.g., working with risk of COVID-19) with death, bodily impairment, or illness.

As far as the provisions of civil procedures are concerned [26], the doctor in presenting evidence based on an opinion may appear in court in one of three roles:

- as a court-appointed expert;
- as an *ad hoc* expert;
- as a person preparing an opinion on behalf of a scientific or scientific research institute.

The right to perform the function of a court-appointed expert is acquired by the doctor upon fulfilling the conditions and exhausting the procedure specified in the provisions of the resolution of the Minister of Justice from January 24, 2005 on court-

appointed experts [27]. Upon appointment, the president of the regional court enters the medical expert onto the list of court-appointed medical experts, in accordance with the field that the doctor represents. While the provisions in force have been widely criticized, the benefits that result from having a list of court-appointed experts cannot be overlooked. Based on the entries onto the list, courts, organizations conducting preparatory proceedings (criminal), and both parties involved in a trial can obtain information regarding persons (proven experts in their fields) who are court-appointed experts.

As indicated, any other doctor (who is not a court-appointed expert) may be nominated by a judicial body for the position of a court-appointed expert (*ad hoc* expert*)* if, according to the judicial body, he/she possesses sufficient special knowledge and professional experience to issue a specific opinion. In such a situation, the judicial body – based on information that it possesses – issues a decision, by which it appoints a doctor, indicated by name, as an expert in the field in which the doctor has the appropriate knowledge (specialization) and professional experience. It is admissible, and practiced by both parties of the court dispute, to suggest specific persons who may, due to their specialized knowledge, be *ad hoc* experts.

Finally, a doctor may give an opinion on behalf of a scientific or scientific research institute. Generally, the function of such an institute is fulfilled by a university clinical hospital. In its rulings regarding evidence, the Supreme Court has underlined the particular procedural function of the evidence of an opinion of a scientific or scientific research institute, which is another form of evidence of an expert opinion. This evidence allows for the use of the intellectual potential and technical capabilities of such institutes, which have at their disposal high-level research means and issue opinions as a team after conducting joint research. Allowing evidence from such an opinion will therefore be purposeful and justifiable in a situation where the medical problem being evaluated by the court, due to its complexity, requires the explanation of specialists with a high level of theoretical preparation, when it is necessary to use the latest research results, or when it is impossible in any other way to address contradictions which have arisen in the available opinions. Such an opinion is to be made collectively and expresses the stance of the institute (clinic), and not individual persons who represent the institution. It means that the opinion should indicate the doctors who issued it, pointing out their posts and the fields in which they specialize. These doctors sign the opinion, while the annotation of the head of the clinic means that he/she saw the opinion, but it is not treated as an opinion that was issued with his/her involvement.

Of course, there are no obstacles for a doctor who is a court-appointed expert to prepare a private opinion commissioned by one of the parties involved in a trial. However, such an opinion does not constitute evidence from an opinion and may not be used as such. A party may present it during a trial only to support their own arguments presented to support their demands during the trial, or to show the need to use specialized knowledge with the use of the opinion of a medical expert.

As per art. 278 of the Civil Procedures Code, the court consults an expert in cases requiring specialized knowledge. Specialized knowledge means circumstances that go beyond the scope of the general knowledge of an educated person with appropriate life experience. In other words, specialized knowledge is knowledge that goes beyond average practical abilities [28].

Due to the above, it must be concluded that each court does not possess the specialized knowledge to allow for an individual evaluation of the mechanism of a SARS-CoV-2 infection or the effects of COVID-19. However, the court does possess a certain amount of convictions regarding the functioning of the human organism. These include the conviction about the integrality of the human organism, whose various systems, organs, and functions impact one another, as well as the conviction of the existence of synergy (the increased impact of several causes together on a retroactive effect) in relation to the general health of a person [29].

Taking into account the above, very general principles, the court – in order to explain the circumstances, for the evaluation of which medical knowledge is needed – uses the opinions of medical experts in the appropriate fields. Moreover, if the settlement of a case requires specialized knowledge, evidence from the opinion of a medical expert is a must [30].

Limitations of the study

It must be remembered that allowing evidence from the opinion of an expert, by issuing the appropriate decision, should take place at the moment when the case file includes factual evidence allowing the expert to issue an opinion, since the thorough analysis of the case and the evidence gathered up to that point (necessary medical documentation) is a condition required for the clear stating of doubts and the precise formulation of questions directed towards the expert in the evidence thesis. At the same time, the court may force the parties (especially if represented by attorneys or legal advisers) to present in the procedural writ detailed questions, which may be the basis of constructing the evidence thesis. Taking advantage of this opportunity minimalizes the

possibility of the accusation that the expert was not asked the appropriate questions, which has an influence on the evaluation of the opinion that he/she has prepared.

Conclusions

It must be explicitly underlined that doctors within the scope of their profession are entitled to prepare medical opinions. The increasing number of lawsuits where specialized knowledge is required has resulted in an increased need for medical opinions. Therefore, it is important for doctors to possess a thorough knowledge of their duties and rights, and the principles of preparing such opinions. In addition, it is certain that doctors are currently facing another important task connected with the effects of the COVID-19 pandemic. It must be assumed that, in the near future, doctors will be forced to issue opinions on numerous and complicated cases regarding employer responsibility for damages incurred by employees due to COVID-19. In order to issue such opinions, medical experts will use knowledge and experience acquired during the struggle with the disease to evaluate whether it was highly probable that the employee illness was the result of an infection with the pathogen in the workplace, and then, furthermore, to specify the after-effects of this illness (degree of discomfort connected with treatment, damage to the health, or the relation of employee death with such an illness). The knowledge that doctors possess is necessary for the court to make appropriate and just decisions.

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