ON THE POSSIBILITY OF ABUSE OR VIOLATION OF PATIENT RIGHTS IN CONNECTION WITH THE USE OF TELECONSULTATIONS – LEGAL ASPECTS AND *DE LEGE FERENDA* DEMANDS

O możliwości nadużycia lub naruszenia praw pacjenta w związku z korzystaniem z teleporad – aspekty prawne i postulaty *de lege ferenda*

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Abstract

Introduction: Telemedicine can increase the patient's safety and comfort, as well as facilitate access to medical services and improve their quality. On the other hand, the use of tools offered by telemedicine may, if used incorrectly, give rise to a number of threats. Teleconsultations are generally a very convenient tool, thanks to which a patient can obtain a medical consultation in a convenient place, remotely, without the need to come to the doctor's office, nevertheless despite many facilitations, the provision of medical services in the form of telemedicine can also situations related to violation of patients' rights by a doctor or abuse of these rights by the patient himself. This study aims to identify the most important manifestations of this type of threats (limited to abuses by the patient and violations by the doctor) related to the provision of medical in the form of teleconsultation and areas where these risks may occur. **Material and methods:** The work uses the dogmatic-legal method. The work contains a number of references to procedural regulations and practice in the researched area. **Results:** Health protection requires the legislator to create mechanisms adequate to the changes caused by scientific progress, and at the same time ensuring patient safety. In this dimension, teleconsultation should be treated as a tool primarily supporting "classic" treatment. **Conclusion:** It is necessary to undertake legislative work aimed at a more detailed implementation of telemedicine in the health care system. In the current legal status, the lack of detailed procedures for providing medical teleconsultation poses numerous risks to the patient and may be the cause of numerous errors in the process of their proper diagnosis. It seems reasonable to postulate *de lege ferenda*, specifying in detail the areas that may be covered by telemedical services.

Streszczenie

Wstęp: Telemedycyna może zwiększać bezpieczeństwo pacjenta i ułatwiać dostęp do świadczeń zdrowotnych oraz poprawiać ich jakość. Z drugiej strony korzystanie z narzędzi, jakie daje, może – przy niewłaściwym ich zastosowaniu – rodzić szereg zagrożeń, choćby w obszarze ochrony prywatności czy zachowania odpowiednich standardów jakości świadczonych e-konsultacji. Jakkolwiek bowiem teleporady to generalnie bardzo wygodne narzędzie, dzięki któremu pacjent w dogodnym dla siebie miejscu, na odległość, bez potrzeby przychodzenia do gabinetu lekarskiego, może uzyskać konsultację medyczną, jednak (niestety) mimo wielu ułatwień, świadczenie usług medycznych w formie telemedycyny może też sprzyjać sytuacjom związanym z naruszaniem praw pacjentów przez lekarza lub nadużyciem tych praw przez samego pacjenta. Niniejsze opracowanie ma na celu zidentyfikowanie najważniejszych przejawów tego rodzaju zagrożeń (ograniczonych do nadużyć ze strony pacjenta i naruszeń ze strony lekarza) związanych ze świadczeniem usług medycznych w formie teleporady oraz obszarów, w których do tych zagrożeń może dochodzić. Zawarto w nim także postulaty, jak należy zorganizować proces udzielania tego typu porad oraz jak informować pacjenta o zasadach ich udzielania. **Materiał i metody:** W pracy wykorzystano metodę dogmatyczno-prawną. Polegała ona na wnikliwej analizie obowiązującej literatury oraz aktów prawnych. W pracy odnaleźć można szereg odniesień do przepisów proceduralnych oraz praktyki w badanym zakresie. **Wyniki:** Ochrona zdrowia wymaga od ustawodawcy stworzenia mechanizmów adekwatnych do zmian, jakie wywołuje postęp naukowy, a jednocześnie zapewniających bezpieczeństwo pacjentom. W tym wymiarze teleporadę należy traktować jako narzędzie mające przede wszystkim charakter wspomagający „klasyczne" leczenie. **Wnioski:** Konieczne jest podjęcie prac legislacyjnych mających na celu bardziej szczegółową implementację telemedycyny do systemu ochrony zdrowia. W aktualnym stanie prawnym brak szczegółowych procedur dotyczących udzielania teleporad medycznych stwarza liczne zagrożenia dla pacjenta i może być przyczyną wielu błędów w procesie ich właściwej diagnostyki. Zasadnym wydaje się postulat *de lege ferenda*, uszczegółowienia dziedzin, które mogą być objęte świadczeniem telemedycznym.

Keywords: patient, break the law, teleconsultation, abuse of law, patient's right

Słowa kluczowe: pacjent, naruszenie prawa, teleporada, nadużycie prawa, prawo pacjenta

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Introduction

Progress observed in medical knowledge, as well as intensive technological development, widespread access to mobile devices and new communication channels, ensure unique opportunities for the development of new methods of healthcare provision. The impact of technology on medical services will be deepened and intensified. Undoubtedly, such social phenomena also favour the development of telemedicine.

It was mandatory for primary health care (PHC) facilities to provide teleconsultations since 1 January 2020 onwards. However, the declaration of a state of the epidemic and the need to ensure a mechanism to provide healthcare services safe for the patient and medical staff led to the large-scale implementation of this form of medical advice in PHC in March 2020. Thus, teleconsultations in PHC became one of the measures to prevent the spread of SARS-CoV-2 by:

- limiting the contact between patients waiting for appointments at PHC facilities;
- isolating people who could infect others with the virus;
- allaying fears if the patient's situation turns out to be harmless;
- reducing waiting times for face-to-face appointments with doctors [1].

According to the legal definition, provided for in § 2(3) of the Regulation of the Minister of Health of 12 August 2020 on the organisational standard for teleconsultation within the PHC [2], a teleconsultation is a medical service provided remotely using ICT systems or communication systems. It is, therefore, the remote consultation of a patient and a medical professional, constituting a medical service provided via ICT and communication systems, in particular by means of audio, video, telephone or other online solutions.

There is no doubt that telemedicine can increase patient safety and comfort, as well as facilitate access to and improve the quality of medical services. The main advantages of teleconsultation include, for example, shorter waiting times for medical consultations – with little effort and without the patient having to leave home.

On the other hand, the use of the tools provided by telemedicine may, when used incorrectly, give rise to a number of risks, for example with regard to the protection of privacy and compliance with appropriate quality standards for e-consultations. Although teleconsultation constitutes, generally, a very convenient tool, whereby a patient can get a medical consultation at his or her convenience, remotely, without having to visit a doctor's surgery, despite its many advantages, the provision of medical services in the form of teleconsultation may also lead to situations when patients' rights are violated by the doctor or by the patients themselves – often to a greater extent than in case consultation is conducted face-to-face.

This calls for reflection on the issue of both potential violations of patients' rights involving provided teleconsultations, as well as on possible manifestations of abuse of subjective rights by the patient in this area [3]. Within the scope of the analysis of the above-mentioned issues, the legal dogmatic method was used as the basic research method, which assumes the study of the applicable normative material and is appropriate for the analysis of legal regulations and case law. In addition, theoretical legal methods and, to a small extent, the method of system analysis were also used in the conducted analysis.

Organisational standard for teleconsultation

Modern health care systems define standards for the provision of medical service services understood as patterns of behaviour of health care providers, determined by the current level of medical knowledge.

It can be assumed that a standard is a set of rules of conduct and good practice, the observance of which is to ensure that telemedicine services are provided in a manner consistent with the current state of knowledge, due diligence, legal regulations and respect for patient rights and interests.

In the light of the jurisprudence of the Constitutional Tribunal, Article 68(2) of the Constitution of the Republic of Poland of 2 April 1997 at the same time imposes on public authorities, in particular the legislator, the obligation to determine the principles of exercising the entitlement to health protection, and this involves the necessity to determine both conditions and scope for medical services provision [4].

In order to ensure the quality of medical services provided in the form of teleconsultation, the Minister of Health issued a regulation on 12 August 2020 on the organisational standard of teleconsultation within the PHC, supplemented by the Guidelines of the national family medicine consultant on teleconsultation in the PHC provided during an epidemic caused by the SARS-CoV-2 virus. The provisions contained therein address, among other things, the question of a doctor providing the teleconsultation to decide whether it is sufficient to address the patient's health problem or whether it proves necessary to inform the patient that he or she should have the medical service provided directly, and whether the teleconsultation should be carried out under conditions that guarantee confidentiality. The Regulation also gov-

erns the disclosure of information on the patient's health status, so that the flow of electronic records is protected against unauthorised use, disclosure or access.

A detailed discussion of all the issues related to the standards for the provision of teleconsultations is beyond the scope of this paper, but the most important issues in this area will nevertheless be mentioned below.

The concept of patient rights, their abuse and violation

The terms 'patient's right' and 'patient's rights' denote sets of functionally related entitlements of a person the medical services are provided to, recognised by the legal order and protecting primarily moral rights. They are closely related to fundamental human moral rights, such as dignity, life, physical and mental integrity, health and freedom. At the same time, the patient's rights constitute an essential element of the content of the legal relationship between the patient and healthcare providers. The catalogue of patients' rights is broad [5].

As regards the issue of rights' abuse, it is widely addressed in the literature on the subject [6]. Being the starting point of many discussions, it has also given rise to an analysis in the field of teleconsultation-related issues.

The teleconsultation tool has made it possible to ensure continuity of care for the patients and, at the same time, patients have also gained new rights in this respect. However, having a specific right does not mean that it can be used completely freely. First and foremost, it cannot be used for purposes incompatible with its content, but there is more to it. As stipulated in Article 5 of the Civil Code [7], a person may not make use of their own right in a way that would be contrary to the social and economic purpose of the said right or to the principles of community life. Exercise a subjective right in a manner contrary to these criteria is unlawful and therefore is not covered by jurisdictional protection.

It is a well-established view in the judicature that Article 5 of the Civil Code – which contains a general clause referring to the principles of community life – regulates the issue of abuse of a right in the subjective sense [8]. The solution adopted in Article 5 of the Civil Code is a manifestation of the so-called internal concept of subjective right abuse. It assumes that exercising a right involves making use of it which is not contrary to the principles of community life and the social and economic purpose of the right *per se*. Thereby, this means that exercising a given right must fall within a set of socially approved forms of exercising a subjective right. On the other hand, all other (i.e. disapproved, reprehensible) manifestations of exercising a subjective right cannot be considered as its exercising and, consequently, do not enjoy the protection inherent in subjective rights [9]. Thus, abusing a right involves an action only apparently compliant with the content of the entitlements vested in a given person [10].

The assessment of what is perceived as an abuse of rights must relate to specific cases and must therefore be decided on a case-by-case basis. In this respect, it is also necessary to refer to extra-legal rules. When assessing the behaviour of an entitled person, not only the principles of community life, but also the legal norms applicable to a given situation should be taken into account. Consequently, abusing a right may be perceived as crossing certain boundaries from the ethical, socio-economic sphere, which often cannot be precisely specified in law.

Of course, it should also be borne in mind that the regulation of Article 5 of the Civil Code does not constitute an independent basis for the right acquisition, nor can it be regarded as a general way of eliminating certain axiologically negatively assessed behaviour from civil law transactions [11]. It is a well-established view that by means of the construction of the prohibition of a subjective right abuse it is not possible to justify the establishment of a subjective right against the other party [12].

At the same time, it is accepted in the civil law science that the scope of application of Article 5 of the Civil Code is very broad and covers all categories of civil law relations from all branches of civil law [13]. Indeed, it does not follow from the interpretation of Article 5 of the Civil Code that its application is excluded in any particular type of civil cases. In its judgement of 3 October 2000, I CKN 287/00, the Supreme Court stated that the content of Article 5 of the Civil Code enables to assess the compatibility of exercising any subjective right with the principles of community life [14].

In this context, it seems that the application of the model adopted in Article 5 of the Civil Code for assessing the behaviour of an entitled person in medical law relations is not excluded. Thus, the patient's behaviour may also be assessed through the prism of Article 5 of the Civil Code and whether, in specific relations with the doctor, it constitutes an adequate reaction, i.e. which is not inconsistent with the principles of community life.

On the other hand, we can speak of a violation of the patient's rights in every case in which a doctor violates the right to an appropriate standard of medical care, including in the case of teleconsultation, and this regardless of whether such behaviour of the doctor caused a possible negative effect for the patient in a given situation, even in the form of his or her health condition deterioration.

In this context, it should be made clear that, pursuant to Article 2 of the Law of 6 November 2008 on patient's rights and patient's ombudsman [15] in conjunction with Article 2(2) of the Law of 15 April 2011 on medical activity [16], a doctor – as a medical practitioner and therefore a person authorised under separate regulations to provide medical service services – is under a statutory obligation to respect patients' rights. The duty to respect patients' rights is also imposed on the doctor by the Medical Code of Ethics, adopted by the resolution of the Extraordinary Second National Congress of Physicians of 14 December 1991 on the Medical Code of Ethics.

It should therefore be emphasised that, in general, when providing medical services in the form of telemedicine, the principles of services provision and the scope of the doctor's duties remain unchanged in relation to the provision of medical services in the form of personal contact with the patient. This means that also when providing telemedical services, the doctor should bear in mind the

basic duties, including, in particular, acting in accordance with current medical knowledge, available methods and means of preventing, diagnosing and treating diseases, as well as in accordance with the principles of professional ethics and with due diligence.

This is expressly stipulated in Article 4 of the Law of 5 December 1996 on the professions of a physician and a dentist [17], according to which the physician is obliged to practice his/her profession in accordance with current medical knowledge, available methods and means of preventing, diagnosing and treating diseases, in accordance with the principles of professional ethics and with due diligence

There is therefore no doubt that also when providing teleconsultations , the doctor shall act with due diligence and in accordance with the current state of medical knowledge. At the same time, numerous statements of the judicature regarding the scope of diligence required of a professional doctor also assert that the high diligence expected of doctors must not translate into ascribing to them duties that are practically impossible to perform. Indeed, there is an inherent increased risk of harm associated with certain types of medical activities, which often cannot be excluded or avoided, even with maximum diligence.

Regardless of the legal basis for the medical services provision and the nature of the doctor–patient relationship, the doctor's duty towards the patient remains a duty of diligence and not of result.

It is also worth emphasising that the doctor's duty to act in accordance with current medical knowledge corresponds to the patient's entitlement to receive medical services of relevant quality.

Manifestations of potential violations of patients' rights and possible abuses of the law by patients in relation to provided teleconsultation

Risks associated with the choice of location for teleconsultation provision

The starting point for the analysis of possible risks related to teleconsultation provision involves the patient's basic rights, such as, **inter alia**, the right to information on health condition, the content of which, in accordance with Article 9 of the Law on patient's rights and Article 31 of the Law on the professions of a physician and a dentist, includes the right to information on health condition, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable consequences of the application of the aforementioned methods or their abandonment, results of treatment, as well as the prognosis [18]. Furthermore, according to Article 20(1) of the Law on patient's rights, the patient has the right to have his/her intimacy and dignity respected, in particular during the provision of medical services. The patient has the right to have a next-of-kin present when the medical service is provided. It is up to the patient to decide on the presence of a next-of-kin, having freedom to exercise this right but not obliged to do so. The patient's rights to have his/her intimacy and dignity respected constitute the general basis for good interpersonal relations and guarantee the fulfilment of other patient's rights [19].

Therefore, from the perspective of the science of law and the related possible risks, it must be stated that the protection of privacy is necessary for the preservation of a proper doctor–patient relationship, which serves to protect health in individual cases, and is also important for the protection of public health. The need to protect the doctor–patient relationship is based on the recognition of trust as a pre-requisite for effective treatment. This trust determines the willingness of the patient to share complete and truthful information at the time of the interview accompanying medical service provision. At the same time, it must be borne in mind that such information can often be of a very intimate nature [13]. Nowadays, the doctor should be aware of the danger inherent in practising the profession of a 'situation of dependence' formed between him/her and the patient. The provisions of the Medical Code of Ethics, stating in Article 14 (in a way preventing possible abuse in this respect) that 'A doctor may not use his/her influence on a patient for any purpose other than a therapeutic one', are important in this respect.

Undoubtedly, solely from the point of view of respecting the referred to rights of the patient (but not only), the choice of the place where the medical service is provided as a teleconsultation should be ascribed significant importance. This applies both to the location of the doctor providing the teleconsultation and to the location of the patient receiving this type of consultation. In both situations, the patient's rights may be violated or abused by the patient.

In this regard, it should be emphasised that current legislation does not specify either the place where the patient is to stay during teleconsultation or the place where the person providing medical services by means of teleconsultation is to provide the said services. It should also be noted that neither the provisions of the Law on medical activity, allowing the provision of medical services via ICT systems or communication systems, nor the rules set out, for example, by the National Health Fund with regard to the provision of teleconsultation, nor, finally, the guidelines of the Minister of Health concerning the organisational standard of teleconsultation, impose the manner of organisation of this type of medical service in the discussed aspect. By virtue of the very nature of the teleconsultation, it is only obvious that the doctor providing this type of consultation should be in a different place from the patient.

The above dictates that the place where the doctor should stay when providing the teleconsultation will be determined each time by arrangements made between the doctor and the clinic through which such teleconsultation is to be provided.

In general, therefore, there are no legal obstacles to the provision of teleconsultations by a doctor outside a clinic, as long as the doctor providing the teleconsultation has access to a database containing all the information necessary for the provision of medical services, while ensuring conditions favourable to respecting the patient's

rights to privacy, as well as intimacy and dignity [13]. If such requirements are not ensured, there is a risk that information given during the teleconsultation or data from the medical records will be disclosed to outsiders. If these conditions are not met, there is also a risk that the conversation with the patient will not be free and unfettered.

Undoubtedly, the patient, too, if he or she wishes to have his or her rights to privacy and dignity be ensured during the teleconsultation in a place where he or she will be able to have his or her medical consultation with the doctor in conditions ensuring full confidentiality of the information provided.

In view of the above, it is appropriate that the person providing the medical service in the form of a teleconsultation stays in a doctor's surgery or in another place where it can be guaranteed that the information provided during the teleconsultation or the medical records will not reach outsiders, while at the same time the conditions are provided for a free, unhindered and undisturbed conversation with the patient. On the other hand, during the teleconsultation the patient should stay in a place where he or she can have a medical consultation respecting his or her right to privacy and dignity, in a free conversation with the doctor, undisturbed by external factors. Indeed, it goes without saying that, in any case, teleconsultation must be provided under conditions of confidentiality, and the solutions used to transmit electronic documents in graphic and textual form should ensure their integrity and protection against destruction, loss, modification, unauthorised disclosure or unauthorised access.

It should also be emphasised that, although it is obvious that the doctor has no influence on whether the patient benefiting from the teleconsultation actually stays in conditions ensuring conversation confidentiality, it seems advisable to formulate a request to doctors that during the teleconsultation they pay particular attention to whether the environment in which the patient is staying is conducive to taking care of the abovementioned rights of the patient, precisely because of the potential threats to his or her rights in this respect.

However, it is also important to realise that it is, undoubtedly, a difficult task for the doctor to carry out the above task in the current legal state. Currently, the doctor does not really have any legal tools at his disposal that would allow him to control where the patient stays during the teleconsultation. It also seems difficult, and sometimes even impossible, for the doctor to verify that the patient is not in the company of other persons, often outsiders, during the conversation (e.g. by telephone), and this even despite the patient's having been first clearly instructed about such an obligation. After all, the patient may disregard such information (despite being instructed to do so), while the doctor providing the teleconsultation does not have any legal instruments allowing verification of where the patient actually is during the e-consultation [20].

Risks associated with the qualification of patients for teleconsultation

The current rules for the qualification of patients for teleconsultation also seem to provide ample scope for potential violations of patients' rights and their abuse by patients themselves. From media reports alone, it is possible to learn about situations in which doctors even 'force' their patients – against their explicit will – to carry out visits in the form of teleconsultation, thus refusing direct contact in the doctor'surgery and, a *contrario*, require to carry out a direct consultation with the patient in a situation in which a visit in the form of teleconsultation would be sufficient in a given case. On the other hand, the problem of a kind of 'phishing' by patients – by means of teleconsultations – for e-prescriptions and e-referrals has also been widely discussed recently.

The above, of course, forces a reflection on whether teleconsultation should be regarded as a necessity or just a possibility [20], and whether teleconsultation is de facto a doctor's or patient's choice.

The legal solutions currently in force with regard to teleconsultations do not explicitly specify who is explicitly responsible for the qualification of the patient for teleconsultation. For on the one hand, in the light of § 3 of the aforementioned Regulation of the Minister of Health of 12 August 2020 on the organisational standard of teleconsultation within the PHC, the legislator granted the patient the right to choose the most convenient form of contact with the doctor. Indeed, he or she may not agree to the teleconsultation. On the other hand, both Article 42(1) of the Law on the professions of a physician and a dentist and Article 3(1) of the Law on medical activity generally grant the right to choose the way in which medical services are provided to physicians.

Thus, both the Law on the profession of a physician and a dentist and the Law on medical activity, on the one hand, generally grant doctors the right to choose the way in which they provide medical services, while on the other hand, they do not state any restrictions as to the use of the teleconsultation system, which may also become a source of risks to patients' rights. At the same time, in § 3(1a) of the aforementioned Regulation of the Minister of Health of 12 August 2020 on the organisational standard of teleconsultation within the PHC, the legislator introduced legal restrictions as to the principles of using teleconsultation. This provision namely stipulates that the doctor is obliged to provide the service in the form of a direct contact with the patient (and thus also to refuse to provide the medical service in the form of e-consultation, i.e. remotely) in five cases. This applies when:

- in general, the patient or the patient's legal guardian has not consented to the provision of the service in the form of teleconsultation (with the exception of situations relating in particular to the certificate issue);
- the patient is a child under 6 years of age (except in the case of follow-up consultation in the course of treatment, established as a result of the patient's personal examination, the provision of which is possible without a physical examination);
- the patient is suspected of having cancer;
- the patient's condition deteriorated or the symptoms in a patient who has a chronic illness have changed;
- it is the first visit to a doctor who was stated in the so-called declaration of choice.

Against the background of the afore-quoted provisions, there is no doubt that the legal solutions concerning teleconsultation do not specify the standards for their provision and do not directly state (which, as it seems, should be required of a rational legislator) who is explicitly responsible for the patient's qualification for teleconsultation, which, in a further step, may give rise to the formulation of further potential risks to patients' rights against this background.

In this context, the question therefore arises as to how far a doctor should retain professional autonomy when deciding whether a teleconsultation or in-person consultation is appropriate in a given case. All the more so as it is argued in the literature that any kind of recommendations or guidelines of scientific societies, even those covered by the provisions of implementing acts, cannot be treated as absolutely binding in a specific case [21].

Analysing the above-mentioned problem, one should be in favour of the recognition that it should be the physician's duty to assess in the first place, of course taking into account the entire factual circumstances of a given case (in particular, the analysis of the available medical data, including the patient's medical records), whether it is possible to provide teleconsultation in a given situation and whether the telemedical service is an appropriate (optimal) solution for a given medical case and in accordance with the current medical knowledge, understood as the knowledge of the best treatment methods and the best therapeutic and technical means available at the time [22]. There is no doubt that – by virtue of professionalism and medical knowledge – a doctor is in a better position to assess which course of action should be chosen in the case of medical services provided to a particular patient. Thus, it is the doctor who should, in the first instance, decide whether it is possible and reasonable in a given case to provide a medical service remotely (by means of ICT systems) or whether the patient's situation requires a face-to-face medical consultation in a doctor's surgery.

In order to avoid possible violations of the patient's rights, the doctor's decision on the choice of the appropriate form of medical consultation should be taken with due diligence and the state of the art, as required, for example, by the Medical Code of Ethics. This means that the choice of a doctor in this respect should take into account the specific personal situation of the patient in each case and, in order to exercise due diligence, adapt the manner of providing these services to the individual patient.

Current medical knowledge is the knowledge of medical procedures that have been recognised on the basis of the results of properly conducted scientific studies, as the optimal solutions from the point of view of the balance of benefits and risks in relation to their use in a given clinical indication. It is objective in nature, meaning that it does not depend on the subjective beliefs of the medical professional or the patient [23].

At the same time, Widłak also aptly points out that although the up-to-dateness of medical knowledge has an objectivised nature, 'with the extremely dynamic development of modern medicine, it has long been impossible to expect a single person to have full up-to-date medical knowledge in the entire field of medicine, and more and more often even within individual, especially broader medical specialisations', and moreover, 'a doctors may find themselves in a situation in which they face subjective limitations for the application of up-to-date medical knowledge in the form of e.g. no appropriate medical equipment or access to the latest drugs or treatments even despite their knowledge and skills in applying them' [24]. Furthermore, the literature aptly emphasises that the order to be guided by the indications of current medical knowledge 'does not imply a requirement of medical omniscience' [25].

Undoubtedly, in view of the doctor's professionalism, the assessment of which treatment scheme should be chosen for the provision of services to a particular patient should be left to the doctor's discretion, taking into account the circumstances of the particular case. Thus, it is the doctor who should, in the first instance, decide whether it is possible and justifiable in a given case to provide a medical service by means of ICT systems.

There is no doubt that it is not an easy matter for a doctor to decide whether in a specific clinical situation of a patient the very implementation of an innovative diagnostic/treatment method or a traditional one would be more appropriate. Therefore, the doctor should choose the most appropriate method from among the existing several ones, taking into account, first of all, medical contraindications to the use of a specific therapeutic method and the possible comorbidities. As the Supreme Court stated in its unpublished judgement of 5 February 1957, IK 1011/530: 'Treatment cannot be limited by the prevailing methods and ways, either because of the individual nature of the cases, or because of the development of medical treatment' [26]. The doctor's experience in the use of a particular treatment method is also not without significance [27].

Undoubtedly, when providing medical services – including when deciding on the appropriate form of medical consultation – a physician should each time take into account the specific personal situation of the patient and, in order to exercise due diligence, adapt the manner of providing these services to the individual patient.

It is also aptly indicated in the guidelines of the Supreme Medical Council incorporated in Resolution No. 89/20/P-VIII of the Presidium of the Supreme Medical Council of 24 July 2020 on the adoption of guidelines for the provision of telemedical services that the patient–doctor relationship should be based on effective communication and mutual trust. The medical care process can be carried out using various organisational and technical solutions that enable effective patient management and ensure continuity of treatment. Telemedicine is for medicine, not instead of medicine. It is meant to enhance, to complement traditional service provision options, not replace them. Personal contact should be the most important and optimal way of the patient–doctor relationship. This is because it not only minimises the risk of violations of the patient's rights, but also possible abuses of rights by patients themselves.

In this context, further doubts also arise as to how far the patient's autonomy should extend when deciding on

the type of medical service he or she wishes to use, i.e. a medical consultation during a personal visit to a doctor's surgery or a remote consultation.

Undoubtedly, due to no professional medical knowledge on part of patients, they are not in a position to objectively assess whether and what type of medical service they need. Therefore, in order for the patient to be able to make an informed decision regarding consent or refusal of consent to the method of diagnosis or treatment chosen by the doctor, medical information should serve the purpose. As rightly emphasised by legal scholars, 'an essential element for the legal validity of consent is that the patient and other persons deciding to subject him or her to medical services are informed in advance' [28]. This is because only if they have adequate knowledge of their situation, potential treatment alternatives and the consequences of a possible outcome, can they give so-called 'informed consent'. In other words, the doctor's duty to provide medical information enables the idea of patient autonomy to be realised. This position has also been consistently adopted by case law, which emphasises that: 'One of the manifestations of an individual's autonomy and freedom of choice is the right to decide for oneself, including the choice of treatment method [29]. Undoubtedly, patients' rights can be abused in this area, too.

Risks associated with the choice of communication system in the provision of a teleconsultation

Another extremely important aspect of the analysis of the present study is the issue of the choice of communication medium to have the service provided in the form of teleconsultation, because even here there certain violations of patients' rights or abuse of the law by patients themselves may occur. Unfortunately, the Regulation of the Minister of Health on the organisational standard of teleconsultation does not clarify this issue or specify this very important element of the organisation of teleconsultation, which is the communication system. This makes it possible to consider that it is in fact permissible to use any kind of telephone calls or video call applications or even electronic communicators to provide a service in the form of a teleconsultation, i.e. any solution that takes into account the development of digital techniques, and to this extent this may constitute another sphere of risk to patients' rights. Based on the guidelines of the Supreme Medical Council in the aforementioned Resolution of 24 July 2020, it is possible to conclude that teleconsultations can be provided using ordinary telephones and telephone lines, and online consultations (video, chat, email) can be carried out using secure internet connections within secure telemedical platforms, applications or communication systems. However, as is aptly emphasised, these must 'meet the conditions not only for a secure connection, but also for secure identity verification, etc., in accordance with the general applicable standards for communication systems.

The assessment of whether a communication application or system meets the requirements for a secure connection is particularly relevant in the case of free, publicly available instant messaging services, which may not guarantee adequate standards of security and confidentiality. For the above reasons, it seems advisable to postulate that before using a communicator, a doctor should verify that the equipment used to provide teleconsultation ensures security and confidentiality standards.

It is also important to bear in mind that the use of messengers that are not optimised for the provision of medical services (e.g. Messenger) may generate a risk of breaching the security of the provided teleconsultation. The doctor should also not use open e-mail or contact the patient using a private email account or a private telephone number as part of the teleconsultation. If the doctor is using a device that can be accessed by a third party, he/she should ensure that he/she uses his/her own account on the system before commencing the teleconsultation. The use of a shared account (or a third-party account) generates the risk of violating medical confidentiality and the confidentiality of the conversation with the patient.

It seems that, taking into account the need for due diligence on the part of the doctor, the most optimal solution should be the use of videoconsultation, which ensures simultaneous audio and video transmission. Such a solution allows not only an ongoing analysis of the patient's behaviour, but also an assessment of his/her verbal relationship and facial expressions during the provided consultation. It also makes it possible to better prevent patients from abusing their rights in this respect (since it is more difficult for a patient in such a situation to hide his/her actual physical health condition from the doctor). On the other hand, it also makes it possible to protect the patient to a greater extent against a possible infringement of his/her rights (e.g. to receive information on his/her health condition or to privacy) on part of the doctor (since the patient in such a situation is also able to observe the doctor, his/her reactions, his/her preparation, as well as the environment where the doctor stays) [20].

Patient identification related risks

The issue of verification of the patient's and doctor's identity constitutes another important element in the provision of medical service, as it affects the assurance of confidentiality of teleconsultation, safety of the service, possibility of making an entry in the medical records and retaining the patient's right to privacy. Adequate verification of the patient's identity also affects the possible confirmation of the patient's entitlement to publicly funded medical services.

There is no doubt that there may be potential violations of patient's rights and possible abuses relating to patient's and doctor's identification in this area when providing teleconsultations. It is clear that in the case of providing medical services in the form of teleconsultation, there is a greater risk of 'identity theft' (impersonation) than in the case of an in-person consultation in a doctor's surgery. Consequently, it cannot be excluded that a teleconsultation may be provided by a person who is not actually a doctor (or by a different doctor than the patient is expecting), in particular if it is only given by telephone or on-line – via the Internet. On the other hand, the possibility cannot be ruled out that the doctor will provide teleconsultation to the wrong person (according to the documentation).

The Polish legislator does not seem to recognise the importance of the issue in question concerning verification of the identity of the patient and the doctor during a teleconsultation. Since there are no statutory solutions in this respect. Only the mentioned guidelines of the Supreme Medical Council provide that the doctor should assess on his/her own whether the person the connection was established with is definitely the patient the teleconsultation was to be provided for. However, it is no longer specified how such verification on the part of the doctor should be processed. There are also no arrangements in place to allow the patient to verify that the teleconsultation provider is, in fact, a doctor.

In practice, in the current state of the law, the question of identification is generally resolved by healthcare facilities depending on the form of teleconsultation provided: via an on-line portal or by telephone. Undoubtedly, however, it seems reasonable to conclude that this mechanism is not sufficient and the adoption by the legislator of tools aimed at minimising the risk of so-called 'identity theft' in this area is required. Additionally, this will undoubtedly be a difficult task.

Risks in terms of personal data protection

When analysing the possible violations of patient's rights, attention should also be paid to data protection issues. Since in the course of a teleconsultation conversation, a very large amount of personal data, including sensitive medical data, is being processed. The above raises the question of the possible eligibility of recording such conversations. It seems that the possible recording of conversations in this case should be carried out on a specific legal basis and, which is particularly important, it should have a defined purpose within the framework of the applicable legislation on personal data (GDPR).

In accordance with Article 5(1)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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/EC, i.e. the General Data Protection Regulation, Official Journal of the EU L. 2016, No. 119 p. 1, as amended, personal data must be processed lawfully, fairly and in a transparent manner for the data subject. Furthermore, pursuant to Article 5(1)(f) of Regulation 2016/679, personal data must be processed in a manner ensuring appropriate security of personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, by means of appropriate technical or organisational measures.

In practice, there is a viewpoint that the legal basis for data processing is the patient's consent. While the said viewpoint may be accepted with regard to the patient's use of the telephone in the context of activities related, for example, to making appointments with doctors, scheduling appointments, etc., already at the stage of the provision of the medical service itself in the form of teleconsultation, conditioning its provision on the patient's consent may both raise doubts with regard to the freedom of consent and, which seems even more important, constitute a source of recognition of an attempt to restrict access to the service. It is also difficult to identify the proper purpose of recording the teleconsultation.

Summary

Healthcare is a sensitive area which requires the legislator to create mechanisms appropriately addressing the changes brought about by scientific progress, while at the same time ensuring patient's safety.

There is no doubt that the development of telemedicine cannot replace the primary form of service provision, which is personal contact between the doctor and the patient. In this respect, teleconsultation should be seen as a tool that primarily supports 'classical' treatment.

However, it is really necessary to undertake legislative work aimed at a more detailed implementation of telemedicine into the health care system. This is because the current legal state lacks detailed procedures (guidelines) for providing medical teleconsultations, which pose numerous risks for the patient and may be the cause of numerous errors in the process of their proper diagnostics. This is evidenced, for example, by the information contained in a report dated as of December 2022, prepared by the Ombudsman for Patients' Rights and concerning his investigations of individual cases in 2019–2021 [30]. The document concludes (rather worryingly, one has to admit) that the scale of reported and simultaneously ascertained cases of violations of patients' rights has been on an upward trend since 2017. The data from the Report also show that in the period under review, as many as 93% of the cases involved a finding of a violation of patients' rights in the investigations completed by the Ombudsman within the framework of the PHC. The report also shows that within the framework of remote services provision (teleconsultation) in the analysed period, the detected irregularities concerned mainly: no telephone contact with the facility, no information about the standard of the teleconsultation, impossibility to use the teleconsultation, as well as no due diligence during the teleconsultation.

Given the above, it should be borne in mind that, with technological developments, patients are exposed to a greater risk of lack of professionalism and, consequently, patients' trust may be abused. Therefore, a *de lege ferenda* demand to clarify, as soon as possible, the areas that can be covered by telemedical services, as well as the conditions for qualifying patients for such diagnostics and the manner in which it is carried out, seems undoubtedly justified.

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