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The notion of grievous bodily harm and the legal obligation to notify law enforcement authorities

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Abstract

The obligation of physicians and other health professionals under Art. 240 § 1 of the Criminal Code instructs them to notify the law enforcement authority responsible for prosecuting crimes (in particular the Police or public prosecutor's office) when prohibited acts are committed, attempted, or prepared. The list of such acts is enumerative, indicating the numbers of the relevant articles and paragraphs. On 13th July 2017 Art. 156 of the Criminal Code extended the list, adding grievous bodily harm as a prohibited act. Accordingly, this act introduced the legal obligation of denunciation, which outweighs medical privacy in such situations. As it can be difficult for a clinician to identify which injuries meet the criteria of grievous bodily harm, the authors of the paper have described in detail all of its forms with specific examples, since failure to comply with that obligation is punishable by up to three years of deprivation of liberty.

Key words: grievous bodily harm, denunciate, medical privacy.

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MEDICAL PRIVACY AND THE OBLIGATION TO DENUNCIATE

Healthcare professionals, especially physicians, are bound by medical privacy regulations. In some cases, however, the information they possess can be crucial for the judiciary and indirectly save lives or health of those at risk; therefore, they can be obligated to disclose the medical secret by conveying certain information to the law enforcement agencies or the judiciary, which is called an obligation to denunciate, i.e. to report when a prohibited act has been committed. This obligation is universal and rests upon everyone, yet it is of particular importance in the case of physicians. Firstly, due to the profile of their activities, physicians can detect the committing of a prohibited act. This mainly concerns the offences against life or health that may be disclosed by the physician providing the victim with medical assistance. Such situations are predominantly encountered by physicians performing their professional responsibilities in hospital emergency departments. Secondly, as mentioned earlier, the disclosure of data may be associated with a breach of medical privacy. This, in turn, can lead to multifaceted liability of physicians (civil, criminal and professional); therefore, they have to comply exactly with the conditions for the legality of disclosure and provide the authorities appointed to prosecute the offences only with information on prohibited activities covered by the statutory obligation of denunciation. Noteworthy, the doctrine distinguishes two types of the above-mentioned obligation: legal and social. The former is secured by sanctions; in other words, failure to do so has criminal consequences. This duty is considered to be superior to the privacy of medical information. Therefore, the physician must provide information to the Police or the Public Prosecutor's Office taking no heed of discretion, i.e. even if the patient has not authorised or has expressly forbidden him to do so. Otherwise, the physician may be criminally liable for non-notification. Social duty, on the other hand, has a purely civic, moral dimension. Failure to fulfil it does not give rise to sanctions and therefore is inferior to the privacy of medical information. However, in order to fulfil that duty, the physician has to justify the disclosure of confidential data by additional circumstances and rely on one of the exceptions to the breach of privacy, which are covered by Article 40 (2) and (3) of the Medical Practitioners and Dentists Act of 5 December 1996 [1, 2]. It follows from the foregoing that the legal obligation to denunciate

is more important. Its basic precept was created by Article 240 § 1 of the Criminal Code, which orders the notification the law enforcement authority responsible for prosecuting crimes (i.e. the Police or Public Prosecutor's Office) of the committed prohibited act, its punishable preparation or attempt. It should be stressed, however, that the list of the acts in question is enumerative and the respective numbers of articles and paragraphs are provided. Only such offences are therefore subject to denunciation. This list was extended by the amendment of the Criminal Code formulated on 13 July 2017 (the amendment introduced by the Act of 23 March 2017 amending the Act – Criminal Code, the Act on juvenile proceedings and the Act – Code of Criminal Procedures, Journal of Laws, item 773). As a result, Article 156 of the Criminal Code was added to that catalogue, in which grievous bodily harm is penalised, thereby falling within the legal obligation of denunciation. Considering the above, several observations are noteworthy. Firstly, both an intentional and unintentional act should be reported (which is of importance when medical malpractice is found to cause such harm). Secondly, the act is subject to denunciation regardless of who the victims are (minors as well as adults). Thirdly, the obligation is limited to a particular offence and does not cover other actions causing grievous bodily harm. This issue is clearly visible in the case of a beating leading to such consequences. This offence has been penalised in Art. 158 § 2 of the Criminal Code yet has not been listed in the catalogue of offences referred to in Art. 240 § 1 of the Criminal Code. Therefore, beating is not subject to legal denunciation. From the doctor's point of view, this can be difficult to assess. It should be explained how a beating with the discussed effect differs from grievous bodily harm referred to in Art. 156 of the Criminal Code. The concept of beating was explained by the Supreme Court, which stated that "beating is an active assault of two or more persons on one person or a group of persons on other persons, the characteristic of which is the predominance of assaulters" [3]. In simple terms, it can be assumed that in the event of grievous bodily harm, penalised in Art. 156 of the Criminal Code, there is a two-person configuration in which one person is attacked by another. Beating, on the other hand, assumes the involvement of at least 3 people and an advantage of one of the parties. For instance, emergency physicians may find it difficult to determine whether the patient's injury has been caused by one person (and therefore the act can be qualified under Article 156 of the Criminal Code) or many persons (which would indicate beating). In this example, it is easy to see the inconsistency of this regulation. The findings in this regard are important, since if a physician wrongly qualifies a particular act and notifies of grievous bodily harm resulting from the act not subject to legal denunciation (i.e. beating), he will unlawfully reveal medical privacy information. This can lead to civil and professional liability (criminal liability is questionable). The physician should therefore carefully assess the situation so as not to make a mistake (this issue will be discussed in detail below). It is therefore essential to characterise the offence of grievous bodily harm, typified in Article 156 of the Criminal Code. The characteristics of this offence should be investigated closer. If the physician assesses that this has been the case, as has already been mentioned, he is obliged to report. This is not a trivial duty, as the failure to do so is punishable by up to three years in prison. Therefore, the exegesis of Article 156 § 1 of the Criminal Code will be presented later in the article, considering the forensic opinions and the legal doctrine. Other acts that may result in grievous bodily harm will not be considered since they are not covered by the legal obligation to notify and their analysis would go beyond the scope of the present paper (e.g. causing a traffic accident – Article 177 § 2 of the Criminal Code, bringing about a general danger – Article 163 § 3 and 4 of the Criminal Code).

TYPES OF BODILY HARM

The Polish Criminal Code adopts a **three-stage classification of health damage** according to transient and permanent effects of the injury suffered [4–6].

Minor, medium and grievous bodily harm are distinguished; it should be emphasised that these concepts must be understood according to the understanding of the legal language and not the medical language. In other words, each of the above types of damage should be understood as resulting from the relevant provision of the Criminal Code and not what might appear to be based on the knowledge and experience of clinicians. In some cases, this can give rise to doubts, since legal and medical understandings are often quite distant from each other; moreover, the legal comprehension itself (i.e. interpreting legal norms, thus being only a certain superstructure to the language of those norms) is not always explicit.

The term **trauma** should be understood as the action of a harmful agent (mechanical, electrical, thermal, chemical, biological and others), resulting in a bodily injury, disturbance in functioning of a bodily organ or a health disorder. The effects listed above often coexist. Noteworthy, the words "trauma" and "bodily injury" are often used interchangeably, both in the common and medical language.

Disturbance in functioning of a bodily organ or a health disorder means to induce such changes (in the organ, system or entire body) that interfere with normal activities to a very real and not only slight extend. Disturbance or disorder can result from damage caused by a given injury, or be direct consequences of the injury (functional changes without noticeable anatomical changes). In practice, a distinction between a disturbance in functioning of a bodily organ and health disorder is irrelevant.

The terms of **minor and medium bodily harm** do not appear literally in the Criminal Code, but it is assumed that they are a group of conditions described in Article 157 of the Criminal Code, which states: "§ 1. Whoever causes a disturbance in functioning of a bodily organ or a health disorder other than the one referred in art. 156 § 1, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. § 2. Whoever causes a disturbance in functioning of a bodily organ or a health disorder lasting for no more than 7 days, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. § 3. If the perpetrator of an act referred to in § 1 or 2 acts unintentionally, he is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. § 4. If the disturbance in functioning of a bodily organ or the health disorder has not lasted for more than 7 days, the crimes provided for in § 2 and 3 are privately prosecuted, unless the harmed party is an immediate family member sharing the same residence. § 5. If the harmed party is an immediate family member, the crime provided for in § 3 is prosecuted upon the harmed party's motion." According to this Article, minor and medium bodily harm will be any condition where there was a disturbance in functioning of a bodily organ or a health disorder, without any grievous bodily harm. The delimiting factor of minor and medium harm is the duration of a disturbance in functioning of a bodily organ or a health disorder. No other circumstances can be taken into account in this respect. In particular, the duration of injury healing, pain, hospital stay or incapacity for work are insignificant.

Examples of injuries leading to **minor bodily harm** are epidermal abrasions, bruises, wounds that heal properly; examples of injuries leading to **medium bodily harm** include contusion of large joints that prevent proper functioning of the limb for more than a week, rupture of the tympanic membrane, single-sided deafness, loss of one testicle, loss of a functional healthy tooth or wounds in the areas with physiologically high mobility, complicated healing (e.g. suppurative).

Grievous bodily harm is a group of conditions described in Article 156 of the Criminal Code, which states: "§ 1. Whoever inflicts a grievous bodily harm in the form of: 1) deprivation of sight, hearing, speech or the ability to procreate, 2) another severe disability, a severe, incurable illness or a protracted illness, a life-threatening illness, a permanent mental illness, a permanent total or substantial incapacity to work in a profession or a permanent, substantive disfigurement or deformation of a body, is subject to the penalty of deprivation of liberty for no less than 3 years. § 2. If the perpetrator acts unintentionally, he is subject to the penalty of deprivation of liberty for up to 3 years. § 3. If the consequence of the act referred to in § 1 is the death of a human, the perpetrator is subject to the penalty of deprivation of liberty for no less than 5 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life." According to the construction of this Article, there are many forms of grievous bodily harm: four listed casuistically in § 1 point 1 and seven defined in a more general way in § 1 point 2. The above forms may occur separately, e.g. a given event can result only in a life-threatening illness, or together, e.g. the effects of an event can simultaneously deprive a person of sight and cause a complete permanent inability to work in their profession. An example of grievous bodily harm is the condition in which the victim develops at least one of the forms listed in Article 156 of the Criminal Code. The characteristic feature of all (except two) forms of grievous bodily harm is permanency and irreversibility of their consequences. It should be emphasised that to accept the classification of one of the seven forms listed in § 1 point 2, their adverse consequences have to be comparable to those mentioned casuistically in § 1 point 1.

Deprivation of sight is a loss of vision to both eyes. This applies to cases when the visual acuity of both eyes is zero as well as when a person has only a preserved perception of light without being able to distinguish shapes or distances, and when the visual acuity after applying corrective lenses is less than 0.02 of normal vision. Deprivation of sight may be the result of damage to the eyeballs, optic nerves or centres in the brain responsible for processing images (e.g. as a result of brain contusion).

Deprivation of hearing is a complete bilateral deafness, hindering hearing and understanding of speech. Loss of hearing ability is usually associated with damage to the bones of the skull base (damage to the middle and inner ear) or brain centres responsible for processing auditory sensations.

Deprivation of speech is a complete loss of the ability to speak, or such a loss of ability, which causes speech to be incomprehensible to the envi-

ronment. This type of damage can occur when there is an injury to the larynx, nasopharynx, tongue, or speech centres in the brain.

Deprivation of the ability to procreate is considered differently in the case of a man and a woman. In women, it means inability to have sexual intercourses, inability to fertilise, e.g. due to the loss of the uterus, fallopian tubes or ovaries, and changes that prevent carrying pregnancy to term. If the injuries prevent spontaneous vaginal delivery, they do not constitute a loss of the ability to procreate (Caesarean section can be performed). Moreover, women are assessed differently depending on their age. If these injuries occur in a woman naturally no longer able to reproduce (climacteric/menopause), they are not eligible as deprivation of the ability to reproduce (you cannot lose something you do not have). In men, deprivation of the ability to procreate is associated with inability to have sexual intercourses and inability to fertilise, e.g. due to loss or damage to the testicles.

Another severe disability is complete abolition or extreme impairment of organ or system functions, which significantly reduces the overall efficiency of a given individual. An example of this type of damage will be the loss of the hand, thumb, foot, stiffness of a large joint, but also such organic damage to the nervous system, which significantly reduces the overall efficiency. In the case of the loss of one paired organ, the situation is inexplicit and depends on how the body functions after the loss. If the second organ assumes the function of the lost one and there is no significant reduction in overall performance, another severe disability cannot be demonstrated. This will be the case, for instance, of a loss of one testicle or one-sided deafness, which is not the condition that would significantly impair the functioning of a given individual. However, the loss or damage to one eye undoubtedly causes such a significant disturbance, as it reduces the field of vision and abolishes stereoscopic vision. Likewise, the loss of one lung will result in another severe disability.

A severe, incurable illness is simultaneously severe and incurable. Severity is understood as being bedridden or an equivalent condition, while incurability is the situation in which recovery is not possible based on current medical knowledge and experience. An example of such an illness is damage to both kidneys requiring dialysis.

A severe, protracted illness is simultaneously severe and long-lasting. Severity is understood as being bedridden or an equivalent condition, while long-term duration is the case in which the disease is found improvable, yet the severe bodily injury or health disorder lasts more than 6 months, e.g. some cases of spinal or pelvic fractures. This is one of the two forms of serious damage, where there is no permanence and irreversibility of the consequences but only the long-term duration.

A permanent mental illness as a form of codex grievous bodily harm has hitherto been defined as a permanent and irreversible mental disorder resulting from, for instance, organic damage to the nervous system. However, in the light of the current International Classification of Diseases (ICD-11) [7], in which the concept of "a mental disease" has already been abandoned (as was previously done in the DSM-5 classification [8]), this form of severe damage is already an anachronism; in such situations, the occurrence of its another form, i.e. another severe disability, should be considered.

A permanent total or substantial incapacity to work in a profession is the deprivation of an individual of the ability to pursue the profession covered by their qualifications and not of any gainful employment. It has to be permanent and total or substantial. In this case, the effects of the injury depend strictly on the profession pursued, e.g. unilateral deafness will not be as severe for a salesman as it is for a professional driver or motorman. One-sided deafness affecting professional drivers or motormen means the end of work in their profession [9] yet will not have any greater impact on the work of salesmen.

A permanent, substantive disfigurement or deformation of a body is a form of grievous bodily harm referring to aesthetic characteristics. Disfigurement of a body consists in causing the external changes on a body, which are contrary to the widely accepted body aesthetics. Deformation of a body, on the other hand, refers to the changes in the anatomical shape of a body. Both disfigurement and deformation of a body must be permanent and substantive. In such cases, complaints associated with a particular disfigurement or deformation should always be considered. Listing the types of grievous bodily harm, the legislator considered them equivalent. In case of doubts whether the disfigurement in question is grievous bodily harm or otherwise, it is necessary to refer to the other forms of grievous bodily harm, in particular those mentioned in the Casuistic Article 156 § 1 of the Criminal Code, and to consider whether the suffering related to them is comparable. For instance, a 3-centimetre scar on the cheek, which can be a life drama for an individual, objectively is not the same ailment as the loss of vision or hand dysfunction.

A life-threatening illness is the second and last form of grievous bodily harm in which no permanent or irreversible effects are found. Instead, there must be a real threat to life, i.e. it must be the near-death condition, in which death can be expected at any

moment. For instance, a real life-threatening illness will be massive haemorrhage with secondary shock, chest injuries with tension pneumothorax, intracranial injuries with secondary cerebral oedema, heart wounds with pericardial tamponade, abdominal wounds with secondary peritonitis, etc. In such conditions, the body undoubtedly balances between life and death, and even appropriate medical interventions often do not allow the patient to be saved. Obviously, this balancing between life and death has to result from the objective condition of the patient, and not only from the exact diagnosis established.

DISCUSSION

If a physician or other health professional reveals committed or attempted grievous bodily harm (or another prohibited act, as indicated in Article 240 § 1 of the Criminal Code), they are obliged to report it to law enforcement authorities responsible for prosecuting crimes. However, this obligation arises only if the information on the offence is "reliable". The Criminal Code does not define this concept. In the literature, it is suggested that a mixed objective-subjective criterion should be used to assess that reliability. The objective criterion occurs when the evidence shows the possibility of committing a prohibited act, i.e. when, based on the assessment of an average person, it can be assumed that the act took place. On the other hand, the subjective condition occurs when the denouncer has the inner conviction that the prohibited act has been committed and that there is evidence supporting that fact [10]. Therefore, there is objective evidence of a prohibited act and the content of information produces the conviction that the act has actually been committed [11]. However, the physician is not obliged to verify this kind of information thoroughly and may provide false information [12], which will ultimately be verified by law enforcement authorities. In such cases, physicians will not be liable for the offence of false report, which is penalised in Article 238 of the Criminal Code (that act requires intent, i.e. awareness that the information provided is false and the offender knows that the act has not actually been committed). Moreover, the physician will not be found responsible if he is convinced that the information is not reliable and will refrain from notification, and the circumstances have given him grounds for such an assessment (e.g. the physician is unable to determine whether the injuries suffered by the patient resulted from the action of third parties or from an unfortunate accident) [13].

Here, it is worth considering the situation when the physician has notified the Police or the Public Prosecutor's Office, revealing medical privacy information, and it turns out that they had no grounds to do so (e.g. they wrongly assessed that grievous bodily harm was inflicted, while in fact it was only a non-denounceable medium bodily harm). It will not then be liable for the breach of disclosure of professional secrecy information (including medical privacy information), which is penalised in Article 266 § 1 of the Criminal Code. The offender must therefore be aware that they unlawfully disclose confidential data. In the case analysed, the physician was convinced that his actions were legal. However, civil liability is not excluded, mainly under Article 4 point 1 of the Law of 6 November 2008 on Patients' Rights and Patients' Rights Ombudsman [14]. According to that provision, the patient may seek monetary compensation for a culpable breach of the patient's right, including medical privacy. This regulation does not require an intentional action, as unintentional fault, which may be manifested by negligence, is sufficient. This negligence is a failure to exercise professional diligence. In such cases, the assessment is based on the so-called model of a good doctor, who was in such a situation. Consideration is given to how a professional, who retains their professional duties and uses professional knowledge, would behave under such circumstances. Any deviation in minus from such a pattern may be considered negligence and consequently lead to civil liability. In the situation analysed, the physician could be held liable if he has taken the decision to notify too hastily, without checking the circumstances, without a preliminary verification of his suspicions and assessments (e.g. by consulting another medical professional as to the extent of damage). *A contrario,* liability will not arise if the physician proves professional diligence, i.e. using their medical knowledge and a thorough assessment of the circumstances, the physician will find a reasonable basis to believe that the prohibited act described in Article 156 of the Criminal Code has been committed.

Moreover, it is also possible to be held liable for professional misconduct within the meaning of Article 53 of the Act of 2 December 2009 on medical chambers [15]. That provision states that "members of the chambers of physicians shall be professionally liable for violations of the principles of medical ethics and regulations related to practicing the medical profession". When adjudicating on such cases, the criminal law solutions are applied. Above all, the physician must be proved guilty, considering the individual possibilities for the offender to avoid committing an act, i.e. whether he could avoid law violation. If it is apparent from the circumstances that, in a particular situational system, the physician could not avoid a mistake in assessing the patient's condition, their possible error in that regard is not culpable and therefore they shall not be held liable.

The excusable circumstances can be, for instance, the emergency of the situation, excessive workload, the need to attend to many patients, etc. However, it is for the Ombudsman and then the medical court to analyse all the above conditions.

If the physician has reliable information about inflicted grievous bodily harm, they should report it "promptly" to law enforcement authorities responsible for prosecuting crimes. The term "promptly" is quite often used in the legal language. From a semantic point of view, this term means "without delay, immediately, forthwith, instantly, in the shortest possible time" [16]. The denouncer should therefore carry out their obligation as soon as they have obtained credible information about the commission of the act. The notification can be delayed only if justified by a significant obstacle, e.g. the doctor, after examining the patient and establishing that grievous bodily harm has been caused, is first obliged to provide medical assistance. Once medical assistance has been provided, the physician can inform the law enforcement authorities of their observations as to the commission of an act.

Article 240 § 1 of the Criminal Code does not indicate the extent of the information to be provided. The literature explains that it is sufficient to provide only such facts that justify the conviction of the act committed. Therefore, the physician does not have to inform about the offender and other circumstances of committing the offence (in most cases, the physician does not have such knowledge) [17]. This issue is similarly addressed to by court jurisdiction. The Supreme Court has instructed that "the obligation of the denouncer must be regarded as a duty to inform about a specific event which law enforcement authorities do not yet know about, i.e. as an order to notify of the «fact» itself, which should «trigger the prosecution» or possibly prevent it from taking place. The obligations of a denouncer cannot be equated with the obligations of a witness. The latter should testify all that is known to him without concealing anything" [18].

The physician is only exempted from the obligation in question if he has sufficient grounds to believe that the law enforcement authorities have already been informed about the offence. For instance, the Police were at the scene of the incident, and even brought the patient himself, or the physician notices that another person from the medical staff has already notified the respective authorities. In this case, it is unnecessary to multiply the notices. On the other hand, the physician is not exempted from the obligation in question when the information has been conveyed to entities other than those called for the prosecution of criminal offences. The obligation will therefore not be fulfilled if the physician has informed their superior, e.g. the head of the department, hoping that they will notify the Police. It is also not sufficient to notify the guardianship court, the caregiver, the patient's probation officer, the social welfare authority, etc. The provisions do not specify the form of notification. Therefore, it may be done in written form or orally.

CONCLUSIONS

Given the relatively severe sanctions for non-compliance with the obligation discussed, physicians should carefully assess whether they are facing grievous bodily harm caused by a criminal offence, regardless of the type of incident that caused it. If such information is reliable, they should denunciate without respecting medical privacy, although the erroneous assessment may nevertheless result in a non-criminal responsibility for disclosure of medical privacy information.

It should be noted, however, that the issue of assessing the criminal consequences of injuries rests on forensic specialists, and not clinicians. Therefore, apart from the obvious cases, it is completely beyond the reach of clinicians to determine whether a criminal offence under Article 156 of the Criminal Code has been committed or otherwise [19]. The introduction of the obligation to denunciate in the case of Article 156 of the Criminal Code should therefore be considered difficult to implement in practice (see above) and insufficiently thought out [20].

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