XXII. Poland

Ewa Bagińska

The selection of cases which have had the greatest impact on Polish tort law in the last 25 years was based on two criteria: their influence on legislative reforms and their weight on the development of tort law in the modern society. Thus, this article presents two cases decided by the Constitutional Tribunal, the first one regarding public authorities' liability (1), and the second concerning the prescription of tort claims (2), as well as three Supreme Court cases relating to: wrongful birth (3), vicarious liability for self-employed physicians (4), and the compensation to closest family members for their non-pecuniary loss in cases of permanent injury suffered by a surviving victim (5). All the cases were reported in the Yearbooks series.

1. Judgment of the Constitutional Tribunal of 4 December 2001[1]

In the seminal judgment of 4 December 2001, the Constitutional Tribunal (*Trybunał Konstytucyjny*, TK) held that art 77 of the Constitution, by creating a subjective right to claim damages from public authorities, gave individuals a means of protection of their personal rights and freedoms. The Tribunal's interpretation of the said constitutional rule opened a new phase in the development of the liability of public authorities for unlawful conduct. Not only was it followed in subsequent case law, but also determined the shape of the new Civil Code rules.

The Polish Constitution of 1997 provides in art 77 (1): 'Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law'. Article 77 (2) states that statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging an infringement of freedoms or rights. The Constitutional Tribunal heard jointly two cases brought by individuals.[2] In the first one,

[1] *E Bagińska*, Poland, in: H Koziol/BC Steininger (eds), European Tort Law 2001 (2002) 378, nos 13–23.

[2] According to art 79 (1) Constitution, 'In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity

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the tax office denied the plaintiffs the reimbursement of the execution fee that had been claimed and paid without a legal ground. The office kept the money for over five years. The plaintiffs sued for damages, but their claim was dismissed on the grounds that they failed to prove the public servant's 'qualified fault', pursuant to (former) art 418 Civil Code (*kodeks cywilny*, KC). In the second case, a policeman was made redundant in 1974 for concluding a Roman Catholic marriage. After the political change in 1989, his unemployment period was taken account of for social and retirement benefit purposes according to the Act of 1989 on Rehiring Workers Dismissed on the Grounds of their Political Views, Religious Beliefs, and Activity in Independent Trade Unions.[3] In 1993, he brought a claim for damages for non-pecuniary loss and lost income, but was finally denied compensation by the Supreme Court on the ground that he had failed to prove damage and the fault of the functionary.[4]

The Tribunal first acknowledged that the primary function of art 77 (1) is to guarantee an effective protection of individual rights and freedoms. Since the article has normative contents and thus itself establishes the conditions for liability of public authorities, art 77 (1) is directly enforceable. The Tribunal, having noted divergent legal opinions as to the direct enforceability of art 77 (1) and to the constitutionality of (former) arts 417–420 KC, took the middle ground. On the question of the direct effect, the Tribunal held that even though the Constitutional norms are in principle directly applicable (art 8 (2) Constitution), common courts cannot refuse to apply a statutory norm (here: the Civil Code) and adjudicate cases based on the Constitution unless the norm has been pronounced unconstitutional by the TK. The courts should rather use their right to ask the Tribunal for an interpretation of the norm in question (arts 188 and 193 of the Constitution).

The Tribunal emphasised that the change to the scope of liability marks a conceptual change. The liability is now strict and dependent only on the unlawful exercise of public authority, and independent of anyone's fault. Statutory provisions cannot limit a constitutionally guaranteed right to claim damages. The TK referred to the autonomous constitutional interpretation of concepts referred to in the Constitution. Thereby, by virtue of art 10 of the Constitution, an organ of public authority is an

to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution'.

[3] Dziennik Ustaw (Journal of Laws, Dz U) no 32, 172.

[4] See *Bagińska* (fn 1) no 13.

organ of the legislative (the *Sejm* and Senate), executive (the President and the Council of Ministers) and judicial (courts and tribunals) powers. The executive branch covers not only the Cabinet, but also the head of provinces (*voivodes*), and local administration organs. By virtue of arts 16 and 163 of the Constitution, public authority is also exercised by local self-government organs. An organ of public authority is not an organ of a legal entity (or even of the State) in the sense of civil law, where it usually relates to a natural person (an agent) endowed with a set of rights defined in the organisational charter and manifesting the will of the organisation. The term 'public authority' is thus wider, and covers all organisations or institutions, whether public or private, that exercise the powers and prerogatives transferred to them by an organ of the State or local self-government. The TK explained further that the liability based on art 77 of the Constitution rests on the institution (structure), not its agents (functionaries), and relates to the exercise of public authority, ie the prerogatives and official powers. Thus, the definition of an organ of public authority is based on a functional criterion.

The Tribunal further explained that 'exercise of public authority' refers to all kinds of activities which usually, but not always, entail the ability to affect the rights, liberties or interests of individuals (referred to as *imperium* or *actes de pouvoir*). It also includes the judiciary, whose liability has so far been rejected by the Supreme Court.[5] Although the formal link between a direct tortfeasor and an organ of public authority is not decisive, the establishment of such a relationship facilitates the proof of the fact that the damage arose from the exercise of public authority. The TK underlined that the new principle of strict State liability only covers *actes de pouvoir*.

Moreover, the obligation to repair damage regulated in art 77 (1) arises only when the act causing the damage was unlawful (illegal). This includes any illegal action or omission, including physical acts, administrative acts (decisions, orders and decrees), as well as normative acts. Liability for omissions arises when the organ of public authority had a duty to act and the damage would not have occurred had it fulfilled its duty. However, only acts violating the norms of the Constitution may be considered unlawful within the meaning of art 77 (1).

Illegality of a public authority's conduct is to be regarded as a sufficient premise for the establishment of liability. For the question of illegal-

[5] Sąd Najwyższy (Polish Supreme Court, SN) 27.1.1999, II CKN 201/98, 7-8 OSNC, Orzecznictwo Sądu Najwyższego Izba Cywilna (Decisions of the Supreme Court, Civil Chamber, OSNC) 1999, item 135.

ity, it may be important to examine to what extent the acting authority was free to act when it caused the damage, especially regarding legislative or policy-making administrative acts, where authorities usually have wide margins of discretion.

Against this background, the Tribunal carried out an analysis of the Civil Code rules and concluded that the interpretation of art 417 § 1 KC considerably restricted the liability of the State.[6] The Tribunal stated that when the new Constitution entered into force in 1997, the 30-year-old interpretation of the rule lost its validity and legal justification insofar as it required proof of the negligent act or omission of the functionary. Hence, the Tribunal held that the judicial construction of art 417 § 1 KC infringed art 77 (1) of the Constitution.[7] As to art 418 KC, the Tribunal held that it was unconstitutional.

The long-awaited ruling of the Tribunal was groundbreaking. In a historical context, it should be recalled that strict liability of public authorities was first introduced in the Polish Constitution of 1921, but after World War II, under the new political regime, the scope of State liability was narrowed down. The Constitution of 1997 reintroduced the modern standard of liability of public authorities into civil law. The statutory provisions should have been adjusted to the new Constitution within two years after it entered into force. However, the proposed amendments to the KC had not yet been enacted. This caused confusion in the practice and theory of law. Only some court judgments regarded art 77 of the Constitution as a self-executing rule and the sole ground for a claim for damages.

Although art 418 KC was rightly abolished, in fact the former art 417 § 1 KC was not held unconstitutional, which would have been much simpler. Despite this, the TK judgment was of great importance for the development and enactment of the new rules in the Civil Code in 2004.[8] The new rules contained in art 417 § 1 KC currently provide for a general rule of liability for damage resulting from an unlawful exercise of public authority. New arts 417^1 and 417^2 KC were inserted into the Code, and arts 419, 420, 420^1 and 420^2 KC repealed. The revision of 2004 also repealed the relevant provisions of the Code of Administrative Procedure

[6] Art 417 § 1 KC provided: 'The State Treasury is liable for damage caused by a state functionary in the performance of the entrusted scope of activity.'

[7] The Tribunal also held that art 417 KC is not contrary to art 64 of the Constitution, which provides for the protection of the right of ownership and other property rights.

[8] Law on the Revision of the Civil Code of 17 June 2004, Dz U 2004, no 162, item 1692.

and, thus, the legislator ensured that almost all cases of governmental liability are embraced by the rules contained in the Civil Code.[9]

It should be observed that legal scholarship did not agree with the TK on some points. Notably, the narrow interpretation of illegality was regarded as incompatible with the understanding of unlawfulness in civil law, which means conduct contrary to law and to established customs and moral norms (referred to in the Code as principles of equity, or of community life). The TK judgment did not, however, prevent the legislature or the courts from attributing the traditional civil law meaning of unlawfulness with respect to the liability of public authorities. This issue was nevertheless the subject of abundant case law.

One of the most significant ramifications of the judgment is the acceptance of liability for legislative wrongs and for judicial wrongs. Contrary to the previous position of the courts, the TK rightly held that the Constitution did not exclude the possibility that the legislature could be held liable for damages. This marked a milestone in the protection of individuals against unlawful acts of organs exercising legislative powers in Poland, following the trend in other European countries, and in the European Union.

2. Constitutional Tribunal Judgment of 1 September 2006 (SK 14/05)[10]

The TK judgment abolished the prescription rule in the Civil Code (art 442) for tort claims. The case involved an injured soldier who had been exposed to radiation when he served in the army in the 1980s, but the harm occurred later. His claims were rejected by the State and eventually he questioned the constitutionality of art 442 KC.

The TK observed that the question is essentially whether the grammatical interpretation of art 442 § 1 sent 2 KC, ie the interpretation approved by the Supreme Court in the judgment of 17 February 2006, is constitutional. The Tribunal stated that even though the Constitution does not regulate the limitation of claims, the prescription rules may have an impact on the protection of subjective rights, including constitutional subjective rights. Consequently, the TK reviewed art 442 § 1 KC from two perspectives. First, against the background of State liability for the

[9] *E Bagińska*, The Liability of Public Authorities in Poland, in: K Oliphant (ed), The Liability of Public Authorities in Comparative Perspective (2016) 355 ff.

[10] OTK 8/2007, item 97, OTK, A-2006, no 8, item 97; *E Bagińska*, Poland, in: H Koziol/BC Steininger (eds), European Tort Law 2006 (2008) 373, nos 83–90.

exercise of public authority (art 77 (1) of the Constitution) and, secondly, through the lens of the relation of the general structure of the prescription of tort claims in the Civil Code to the prescription of such claims against the State.

The Tribunal stressed that the liability of public authorities guarantees that the risk and losses arising from public administration will not be shifted onto individuals. The conditions for the establishment of this liability must be so formulated as to provide an injured person with a genuine possibility of receiving compensation. The scope of the liability may not be freely determined by statutory law. Moreover, less legislative discretion is permitted because of the greater risk of losses arising from military service and due to the stronger public interests pursued by military activity. The regulation of the prescription of claims provided for in art 442 KC cannot be accepted in the case of liability of public authorities, because it leads to an illusory protection of the subjective right to redress guaranteed by art 77 (1) of the Constitution.

The Tribunal ruled that the rules on the prescription of claims cannot treat diverse categories of defendants differently, as this would be contrary to the requirements of justice and equal treatment. The only allowed distinction can be made between damage to persons and damage to property, with better protection granted to the former, in line with art 30 of the Constitution, which guarantees the protection of life and dignity. However, the rules on redressing personal injury should apply equally to all categories of defendants. The constitutional standard is infringed when a pecuniary right becomes fictitious due to the rules on the prescription of claims.

The Tribunal opined that art 442 is flawed because it fixes the 'wrong' point in time as the beginning of the period of limitation. The correct rule is art 120 KC. Thus, a claim for damages cannot arise until damage occurs. In consequence, the Tribunal held that the rule in art 442 § 1 sent 2 KC violated arts 2 and 77 (1) of the Constitution because it deprived an injured party of a right to claim compensation of personal injury that occurred after the lapse of the ten-year limitation period. The Tribunal declared that the situation where some claims may be limited in time before the victim is even aware of the damage was unconstitutional.

The presented judgment should be read as a reaction by the Tribunal to the position taken by the Supreme Court in the Resolution of the Full Civil Chamber of 17 February 2006, III CZP 84/05,[11] according to which

[11] III CZP 84/05, OSN 7–8/2006, item 114; *Bagińska* (fn 10) nos 75–82.

the maximum ten-year period must always commence from the day of the tort (*a tempore facti*), and not from the day of the awareness of the damage. This interpretation applied equally to future losses and to losses that the victim was unaware of. The Supreme Court held that when interpreting art 442 § 1 KC, no reference should be made to the notion of 'accrual of claims'.

This judgment should first be put in the historical context. Until 2007, tort claims were limited to three years from the time the victim learned of the damage and the person responsible, but in any case, to ten years from the time when the tort occurred. The key practical problem was long-tail damage. The case law was largely inconsistent. The problem did not lie in the extending of the period of limitations but in identifying the proper moment of its commencement. The doctrine agreed that the prescription of pecuniary claims should rather be coupled with the moment when the claim arose and, hence, could be settled. While the Tribunal offered a new interpretation of art 442 § 1 KC, it became obvious that the prescription rules violated constitutional values. The situation called for an urgent intervention of the legislator.

Consequently, the rules on the prescription of tort claims were amended in 2007.[12] Pursuant to a new art 442^1 § 1 KC, a claim for redress of damage caused by a tort is barred after a period of three years from the date on which the injured person learned of the damage and about the person obliged to redress it. However, this period cannot extend beyond ten years from the date on which the event causing the damage occurred. Another new rule stipulates that a personal injury claim cannot expire before the lapse of three years from the day on which the injured person learned about the injury and about the person obliged to redress it (art 442^1 § 3 KC). Hence, the absolute periods of ten or twenty years are 'suspended' in personal injury cases. Nevertheless, the periods running *a tempore facti* may remain more convenient for the injured party regarding evidentiary burdens. Finally, the claims of minors for redress of personal injury may not expire earlier than two years from the day when they reached maturity. Under the new regime on prescription, the 'suspension' of the period of prescription in personal injury cases does not prevent a declaratory judgment being given that the defendant is liable for any future damage originating from the same event (tort).

[12] Act of 16 February 2007 on the amendment of the Civil Code, Dz U 2007, item 538; see *E Bagińska*, Prescription in tort law: Poland, in: I Gilead/B Askeland (eds), Prescription in Tort Law. Analytical and Comparative Perspectives (2020) 522 ff.

3. Supreme Court Judgment of 13 October 2005, IV CK 161/05[13]

In the seminal case referred to as the *Lomzynska* case (from the name of a city: Łomża,) the Supreme Court for the first time approved a claim for compensation for wrongful birth. The plaintiffs were the parents of a child born with a serious genetic illness. After the plaintiff had become pregnant, she was refused a eugenic abortion, to which she was entitled by the law of 7 January 1993 on family planning, protection of a human foetus and the conditions for admissibility of an abortion (hereafter 'the Law on Family Planning').[14] The plaintiffs' daughter was born with the same serious dystrophy that her older sibling suffers from. Although the doctors knew about the sibling's condition, they did not adequately inform the plaintiff of the risks associated with her pregnancy (the risk that the genetic condition would occur in the second child was 25%–50%). The patient presented medical documentation relating to the first child's dystrophy. The conduct of the physicians was negligent. They failed to refer the plaintiffs to another hospital for an abortion or specialised prenatal diagnosis. The plaintiffs sought assistance from other hospitals, and the genetic defect of the child was discovered only in the 26th week of pregnancy, that is when an abortion could no longer be performed. Suing the public hospital, the doctor and the director of the hospital jointly and severally, the plaintiffs claimed compensation for non-pecuniary loss arising from the violation of the mother's personal interests and of her patient's rights, as well as damages for pecuniary losses. The plaintiffs did not raise any claims on behalf of their child.

The regional court held that the public hospital was liable for the negligence of its physicians, the violation of the plaintiffs' right to plan a family and their right to information and to a referral to a specialist in genetics. The court awarded the mother PLN 60,000 (€ 15,400) in non-pecuniary damages, in addition to the damages for the lost income and medical expenses linked to the mental breakdown she suffered after the child's birth. Both plaintiffs were awarded a monthly annuity to cover the additional costs of the treatment and maintenance of the handicapped child (ie the difference in expenses in comparison to the cost of maintenance of an average healthy child).

The court of appeals held that personal injury rules do not embrace any parental claims for the maintenance of a child born with certain de-

[13] IV CK 161/05, OSP 6/2006, item 71. See *Bagińska* (fn 10) nos 49–61.

[14] Dz U no 17, item 78, with later amendments.

fects and dismissed the claims of the parents (ie for wrongful birth), but, *obiter dicta*, stated that it would have allowed the claims of a child (ie for wrongful life), if those had been raised. Also, in this case, the plaintiffs' statutory right to this procedure was not enforceable since the condition of the foetus was diagnosed after the point in time when an abortion would still have been legally possible. Hence, there is no causal link between the damage and the hospital's conduct.

The Supreme Court expressly referred to wrongful birth actions. Regarding the ground for a legal abortion, the Supreme Court held that a genetic defect need not be established with certainty or solely through prenatal examinations. It is sufficient that there is a high probability that such a defect will be present, which may be evidenced due to other medical preconditions. The Court held that the physicians had negligently violated the plaintiffs' right to plan a family and the right to abortion provided for in art 4a sec 1.2 of the Law on Family Planning and hence the parents were entitled to claim compensation for the non-pecuniary loss stemming from the breach of the right of parents to plan a family. Also, they could seek pecuniary losses such as the increased cost of the maintenance of the handicapped child.

The Court openly rejected any wrongful life claim, stating that the birth of a child per se does not constitute damage to its parents. However, it is their loss to have to bear the additional costs of raising a handicapped child, which they neither planned nor agreed to bear and which they would not have had to bear had their right to plan a family not been breached. The child has no claim for pecuniary loss since there is no right to not be born.

On remand, the Court of Appeals in Białystok[15] awarded PLN 60,000 (€ 15,000) to the mother and half of this sum to the father as compensation for the infringement of their right to plan a family and for burdening them with the obligation to raise a second handicapped child. It ruled that where prenatal examinations or any other medical findings indicate a significant probability of grave and irreversible impairment of the foetus, the parents have a right to make an informed decision about whether they want to burden themselves and their family with the consequences of the birth of a disabled child. In such a case, they have a right to decide to terminate the pregnancy. If a negligent breach of that right leads to the birth of a disabled child against their will, the parents can claim pecuniary compensation for the violation of their personal rights (art 448 KC).

[15] Judgment of 4.7.2008, I ACa 278/08, Prawo i Medycyna 2/2009, cmt by *M Nesterowicz* 126.

This was a landmark decision, which relied on comparative law and followed the solutions taken by foreign courts. However, the decision was not widely approved of in the Polish doctrine, partly due to the ethical background of some scholars and partly due to some doubts as regards the details of the decision. Most importantly, it was debatable whether the pecuniary damages should have been limited to the increased costs of child maintenance instead of the full costs thereof. Nevertheless, the Supreme Court confirmed this line of interpretation in the subsequent judgment of 6 May 2010 (II CSK 580/09),[16] in which it rightly corrected the legal basis of parents' claims for pecuniary losses to be the general clause of liability (art 415 KC). Since then, the case law has been consistent.

What is important from a dogmatic point of view is that the presented ruling confirmed that the Polish judicature treats the mother's and father's harm as consisting in the violation of personal rights or as an infringement of the sphere of reproductive autonomy. The protection of personal rights has thus become the main theoretical concept underlying the remedying of infringements that constitute damage in wrongful birth actions. Wrongful conception claims have also been accepted in the Polish jurisprudence on that ground.[17]

4. Supreme Court Judgment of 26 January 2011, IV CSK 308/10[18]

The case concerns the question of the basis of liability for damage caused by physicians who work in a medical institution pursuant to a contract for the performance of services (so-called self-employed physicians). The defendants in this medical malpractice suit are the attending physician and the hospital, operated by the local authority. The two-year-old patient was hospitalised with pneumonia. The child was a victim of flagrant malpractice which led to her paraplegia and irreversible brain damage. The attending doctor was found guilty by a criminal court (whose conviction was binding on the civil court). The defendant hospital, however, objected to its joint and several liability. The physician and the hospital had a contract to perform medical services (not a contract of

[16] OSP 2/2011, item 13, cmt by *M Nesterowicz*.

[17] See *E Bagińska*, The development of liability for 'reproductive torts' in Polish law, in: H Koziol/U Magnus (eds), Essays in Honour of Jaap Spier (2016) 8 ff.

[18] OSP 11/2011, item 112 cmt by *M Nesterowicz*, OSP 11/2011, 789; see *E Bagińska*, Poland, in: K Oliphant/BC Steininger (eds), European Tort Law 2011 (2012) 489, nos 37–49.

employment), in which the parties agreed that the physician, as an independent contractor, would be solely liable for damage caused to patients in connection with her services performed in the hospital. On the facts, it was established that the physician worked under the supervision of the manager of the hospital as well as of the chief physician of the paediatric ward. Hence, from an organisational perspective, she was dependent on the hospital and was obliged to follow professional advice and instructions of the chief physician. The lower courts found the hospital liable pursuant to art 430 KC (vicarious liability) and held both defendants jointly and severally liable. The trial court awarded compensation for pecuniary and non-pecuniary losses. Before the Supreme Court, the hospital questioned its liability, and the physician questioned the assessment of damages as well as the non-application of the ad hoc reduction clause.

The Supreme Court, upholding the Court of Appeal's decision, stated that the contract between the defendants could not prevent the application of the proper legal basis to claims brought by third persons based on tort law. If damage resulted from acts or omissions by a physician or other medical staff, the health care institution in question may be held vicariously liable for a 'subordinate' (auxiliary, servant) in accordance with art 430 KC.[19] This liability is based on risk, but all the conditions of liability must be met: the fault of a physician (or other personnel), the conduct in the course of the performance of an entrusted task, subordination and acting on account of the principal. According to the prevailing opinion and case law, the subordination (understood as working under someone's leadership with a duty to follow the principal's instructions) is interpreted broadly, and includes both the organisational dependence and the duty to follow all orders and instructions, whether general or specific. The master-servant relationship covers both those performing simple tasks and those who are largely independent. Since professional qualifications and skills have become more advanced in the last few years, the instructions given by managers have become less detailed and the control more general. Physicians may be deemed auxiliaries for the purpose of art 430 KC if they are subject to the organisational management of a health care institution where they perform health care services for the institution. This should be determined in the light of all circumstances of a given case. On the facts, the defendant physician could be regarded as an auxiliary.

[19] Article 430 KC reads: 'A person who on his own account entrusts the performance of an act to a person who at the performance of the act is under his control and has a duty to abide by his instructions is liable for any damage caused by that person's fault in the course of performance.'

The Court stated that the source and nature of damage remain the same regardless of whether a physician works as an employee or as an individual practitioner (self-employed). Although the defendants are tortfeasors liable on two different liability grounds, their liability is joint and several pursuant to art 441 KC. Moreover, the principles of fairness do not support an ad hoc reduction of damages in this case (art 440 KC).

The case concerns the interesting issue of the basis of liability for damage caused by physicians who work in a public medical institution as self-employed physicians. First of all, the judgment confirmed that the legal bases of liability for physicians and other medical personnel after the reform of the State liability rules in 2004 are 'common' torts, thus, physicians employed by public hospitals trigger liability that is based on the same grounds as the liability of private hospitals for their employees. However, as the number of hospital-based doctors who do not hold the status of an employee has risen dramatically in recent years in Poland, the courts were faced with the problem of apportioning the liability between the physician and the medical entity. The Court made it clear that a medical institution cannot exempt itself easily from vicarious liability and the protection of patients, who are usually unaware of the internal legal relationships between the medical institution and its personnel, cannot be diminished. Until this judgment, the dominant view accepted a contrary solution. Physicians who had contracted to perform health care services as self-employed entrepreneurs (individual practitioners) were regarded as independent contractors. Hence, their liability was joint and several with the hospital's liability. The analysed judgment confirmed that the hospital's liability is vicarious, however, the self-employed medical personnel cannot avail themselves of the immunities granted to employees by labour law, hence they can be sued directly and the recourse by the paying tortfeasor (hospital) is full.

5. Supreme Court Judgment of 27 March 2018, III CZP 60/17[20]

The significance of the judgment lies in the extension of the pecuniary protection of the family bonds between the closest persons and the victim of a tort. The presented judgment is one of three resolutions issued on the

[20] OSNC 2018/9, item 83; see *E Bagińska*, Poland, in: E Karner/BC Steininger (eds), European Tort Law 2018 (2019) 474, nos 2–23.

same day and regarding the same material issue, sharing essentially the same motives.[21]

On the facts, the plaintiffs' child was born with severe brain damage due to oxygen deficiency, because its mother was forced to have a natural birth. The plaintiffs, who were immigrants, claimed compensation on behalf of their child as well as for their own non-pecuniary losses due to the violation of family bonds. The Court of Appeal in Warsaw awarded, amongst others, compensation for non-pecuniary losses to the child and its parents. The Supreme Court referred the case to the panel of seven judges. The preliminary question in this case was whether the rules on the pecuniary protection of personality rights can be applied as a legal basis for non-pecuniary compensation to the relatives of a seriously injured victim who survived the tort.

The first argument of the Supreme Court referred to the open catalogue of personal rights in art 23 KC. The Court stated that wrongful death could cause a violation of a personal right. The essence of such a right is a close emotional family bond, or a bond between close relatives. Established court practice includes this right in the sphere of the protection of tort law. The differences in naming the said right are illusory and should be ignored. Moreover, the right to close family bonds in fact transforms an indirect victim into a direct victim who can assert their own rights and claim compensation for their moral damage.

If such a personal right was accepted to enhance the protection of indirect victims in wrongful death cases where the death occurred before 3 August 2008 (ie the date of the entry into force of art 446 § 4 KC regulating bereavement claims), then the present inquiry is whether it can also be accepted in a situation where a tort caused grave injuries to the surviving victim. The Court answered this question in the affirmative.

The Court dismissed the interpretation of art 446 § 4 KC as an exceptional rule. In consequence, art 446 § 4 KC simply limits the subjective scope of the entitlement to claim bereavement damages. Hence, any close persons who can prove a strong emotional (family-like) bond, its violation, fault and the moral harm stemming therefrom can claim compensation on the ground of art 24 in conjunction with art 448 KC.[22] The

[21] SN 27 March 2018, III CZP 69/17, OSNC 11/2018, item 104; SN 27 March 2018, III CZP 36/17, OSNC 11/2018, item 103.

[22] Article 448 provides: 'In the case of an infringement of personal interests, the court may, independently of other measures necessary to remove the results of the infringement, award the injured person an appropriate sum as compensation for non-pecuniary harm or may, at his request, award an appropriate sum to a social cause chosen by him.'

fact that indirect victims were vested with a right to seek bereavement damages does not mean that they had previously been prevented from seeking compensation pursuant to the rules on the protection of personal interests in other situations, especially in cases of particularly grave brain injury. The evolution of case law reflects the change in the moral views and the values that society attaches to certain rights and interests. There is no ethical ground to differentiate between the breach of family ties due to the victim's death and due to a serious irreversible injury, especially when a victim is comatose or is in a persistent vegetative state. The violation of a family bond can be established in exceptional cases, based on objective assessment criteria.

However, the entitlement of the relatives should not be unlimited. Firstly, a family bond must be a particularly strong emotional and mental relationship, which is real and persistent. Secondly, exceptional circumstances must exist in which it is impossible for the relatives to create and maintain personal contact typical for a given type of relationship due to the severe and significant impairment of vital functions. The violation of a family bond in such situations can be regarded as creating grave and indefinite moral harm. Additionally, the Court referred to art 10:301(1) Principles of European Tort Law (PETL) and art 2 § 202 sec 1 Draft Common Frame of Reference (DCFR).

There were two dissenting opinions to the presented judgment, which questioned both the recognition of a personal right of an emotional family bond and the possibility of applying art 448 KC to claims of indirect victims. According to one opinion, there is no such legal ground in the present law and, according to the other, the discussed claims could be based on art 446 § 4 construed *per analogiam*.

The impact of the three Supreme Court judgments of 27 March 2018 on the development of the law of damages, embracing the protection of traffic victims and medical malpractice victims, is unprecedented. They should be seen in a wider normative context. Over several years, the Supreme Court has extended the protection of the civil law to other personal rights, which it recognised. A personal right is recognised not only in the constitutional context but also in light of the development of legal, ethical and moral societal views. The judgment also indirectly attested that the 2008 revision of the Civil Code, which granted a claim for bereavement damages to the closest persons (art 446 § 4 KC)[23], was formulated too narrowly. Although that legislative change improved the

[23] Act of 30 May 2008 amending the Civil Code Dz U 2008, item 731, which entered into force on 3 August 2008.

protection of family members in cases of wrongful death, it immediately opened another question of compensating surviving victims who suffered grave irreversible injuries.

This context notwithstanding, it should be observed that the judgment contradicted the traditionally recognised principle of Polish civil law, pursuant to which compensation in money for non-pecuniary loss can be awarded in cases provided by the law. Albeit in recent years, the number of such provisions has grown: Polish law has always followed the rule that indirect victims are protected by way of exception. Thus, the doctrinal controversy which arose around the Supreme Court's concept of the family bonds as a personality right has not vanished completely. In a few court decisions, family bonds were not qualified as a personal interest and subsequently compensation for moral harm caused by the violation of a personal interest was denied.

Most importantly, however, the judgment led to a successful legislative action in 2021.[24] A new art 446^2 KC has permitted compensation for moral damage suffered by the next of kin when a direct victim has suffered serious and permanent injuries.[25] The purpose of the amendment was to remove the disparity regarding the possibility of awarding damages for moral harm caused to indirect victims. Article 446^2 KC applies to events which occurred prior to the date of entry into force of the amending act, which is an exception to the *lex retro non agit* principle. On the positive side, the changes have brought Polish law in line with art 10:301 (1) PETL.

[24] Act of 24 June 2021 amending the Civil Code, Dz U 2020, item 1740.

[25] Article 446^2 KC reads: 'In the event of a serious and permanent personal injury or disorder of health resulting in the inability to establish or continue a family relationship, the court may award the injured party's immediate family members an appropriate sum by way of financial compensation for the non-material harm suffered.'