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## Poland : Developments in Personal Injury Law in Poland: Shaping the Compensatory Function of Tort Law

Ewa Bagińska

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**DEVELOPMENTS IN PERSONAL INJURY LAW IN POLAND:  
SHAPING THE COMPENSATORY FUNCTION OF TORT  
LAW**

Ewa Bagińska\*

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This report from the Polish jurisdiction will focus on the legally and socially most significant developments in civil liability law, more specifically in the field of personal injury law, which took place after the political-economic change in 1990.

Polish personal injury law embraces rules that are contained in the part of the civil code (*kodeks cywilny*,<sup>1</sup> hereinafter k.c.) governing torts as well as in some other special legislation. Contrary to referring to the subject matter of the rules as “personal injury law,” as American lawyers do, Polish lawyers refer to these on “reparation or compensation of damage to person.” Compensation is possible only when the claim is sought in the tort regime. However, under the principle of concurrence of liabilities, if the breach can be qualified as a tort, the victim who suffered damage arising from a breach of contract may choose the tort regime in order to seek compensation for personal injuries.

After a short introduction to the historical underpinnings of Polish civil law and a brief description of Polish tort rules and remedies, this article presents the topic of damages in cases of personal injury law in light of its development by courts after 1990. Some of the most important legislative changes, spurred by the demand of legal practitioners, are then presented. Both substantive law and procedural law changes will be discussed.

#### I. THE HISTORICAL DEVELOPMENT OF POLISH PRIVATE LAW AND THE INFLUENCE OF THE FRENCH LEGAL TRADITION

Polish private law is a “hybrid civil legal system”—a system in which there were developed uniform solutions superseding the first classical European civil codes, like the French civil code (Code Napoléon), the Austrian civil code (ABGB) of 1711 and the

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1. Act of 23 April 1964, *Kodeks Cywilny* [Civil Code], Dziennik Ustaw [Dz.U.] 1964, no. 16, item 93 as later amended.

German civil code (BGB) of 1896.<sup>2</sup> Until 1795 Polish civil law was mainly customary and under very limited influence of Roman law, which was considered as limiting the privileges of nobility.<sup>3</sup> After three partitions of the Republic of Poland by the Russian, Prussian and Austrian Empires (1772, 1793 and 1795, respectively), the Polish state ceased existing for 123 years. During the time of partition, the whole of the Polish territory was under the influence of five legal systems: the ABGB, the Code Napoléon, the Prussian civil code (later replaced by the BGB), the Collection of Laws of the Russian Empire (volume X) of 1835, and Hungarian law (in the small southern parts of Poland—Spiš and Orava). All of the above were official sources of law in the territory of Poland.<sup>4</sup> The Duchy of Warsaw, created in 1807 by Napoléon, formally adopted his *code civil* as its general civil law in 1808. The code also continued to be binding law in the semi-independent Congress of Poland (1815-1832).<sup>5</sup> Cultural and political ties with France were to a great extent influenced by the continental exploits and legend of Napoléon. The reception of the Code Napoléon *in toto* serves as a great example of the reception of a foreign legal system. Polish doctrinal views were strongly influenced both by the general ideas of the Code Napoléon and by

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2. See Wojciech Dajczak, *The Polish way to a unified law of contract – local curiosity or contribution to the European debate today?* in DEUTSCHLAND UND POLEN IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 13-24 (Chr. v. Bar & A. Wudarski eds., Sellier European Law Pubs 2012).

3. See Wojciech Dajczak, *Historical development of private law in Poland* in HANDBOOK OF POLISH LAW 42-43 (W. Dajczak, A. J. Szwarc & P. Wiliński eds., Szkolne PWN 2011).

4. See EWA BAGIŃSKA & MAGDALENA TULIBACKA, POLAND in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW, nos. 3-4 (I. Boone ed., Kluwer Law Int'l 2014).

5. Established in 1807, the Duchy of Warsaw was subordinated to France. Napoleon ordered the application there of the liberal constitution and the French civil code of 1804; whereas the Congress (Kingdom of) Poland created at the Congress in Vienna (1815) was under the Russian regime, its civil law remained French civil law until 1964, with the modification of mortgage law in 1818 (replacing title XVIII of the Code Napoléon), as well as personal and matrimonial law that were replaced in 1925 with the Civil Code of the Congress of Poland. For more detail, see Dajczak, *Historical development of private law in Poland*, *supra* note 3, at 43-44.

the French judiciary. French commentaries and case law were translated into Polish, which facilitated the proliferation of French law in Poland. The Code Napoléon is regarded as an element inseparable from the Polish system of civil law.<sup>6</sup>

As the three codes (Code Napoléon, ABGB and BGB) commonly derived from the Roman law tradition, Polish private law eventually became a civilian country as well. The Roman tradition is the main reason why the Polish law of obligations followed both the ideas of the French Code Napoléon and the Germanic legal culture.<sup>7</sup>

When Poland regained its independence in 1918, substantial legal reforms were undertaken immediately. The Polish Codification Commission first codified the law of obligations in the code of obligations of 1933 (*kodeks zobowiazan*, hereinafter k.z.), borrowing many elements of the regulation from the then-most modern Swiss code of obligations of 1911, as well as from the French-Italian draft civil code of 1927.<sup>8</sup> The codification also embraced commercial law (the code of commercial companies of 1934), private international law, the law on bills of exchange and cheques, the law on unfair competition, and the copyright law.

In 1964, the code of obligations (*kodeks zobowiazan*, k.z.) was replaced by the civil code (*kodeks cywilny*, k.c.).<sup>9</sup> As far as the sources of obligations are concerned, the civil code of 1964 followed more closely the structure of the BGB, although it generally continued the substance of the code of obligations. The Polish law of torts, found primarily in the code of obligations, did not go through many changes under of the socialist regime. After

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6. See Katarzyna Sójka-Zielinska, *La réception du Code Napoléon en Pologne* in RAPPORTS POLONAI PRÉSENTÉS AU HUITIÈME CONGRÈS INTERNATIONAL DE DROIT COMPARÉ 210-16, 220 (Ossolineum 1970).

7. See Ewa Bagińska & Eugeniusz Kowalewski, *The influence of Italian law on Polish private law* in 2014 ANNUARIO DI DIRITTO COMPARATO ET DI STUDI LEGISLATIVI 437, 448.

8. Including, in particular, the French-Italian draft civil code of 1927; see Bagińska & Kowalewski, *id.* at 446-48, and the Polish literature cited therein.

9. Act of 23 April 1964, *supra* note 1.

the change of the political-economic regime in 1990, the main improvements include the introduction of strict product liability, reform of the liability of public authorities, and modifications of the rules governing recovery for non-pecuniary loss in non-personal injury cases.<sup>10</sup> Some solutions contained in the code of obligations were brought back to the Polish private law after 1990.

## II. GENERAL FEATURES OF POLISH TORT LAW

Polish tort law represents the “general clause model,” not the German “protected interests model.” The general clause of article 415 k.c. establishes tortious liability based upon proven fault. It is supplemented by a number of separate provisions located in the civil code and in other pieces of legislation that regulate tortious liability in specified situations. While some of them are also based on fault, others are examples of strict liability, absolute liability, or liability based on equity.<sup>11</sup>

Fault was at first the dominant basis of liability but this has evolved in the direction of the other civil law systems—towards the approval of the principle of risk as an equally important and autonomous ground for liability.<sup>12</sup> This notwithstanding, there must be a specific rule providing for strict liability cause of action, or otherwise the general clause for liability (i.e., fault liability) will govern the case. The principle of equity (fairness), on the other hand, is definitely supplemental. It is available only in the realm of tort liability, in three cases: public authority liability for legal conduct that caused personal injury (art. 417[2] k.c.), liability for animals (art. 431 § 2 k.c.), and personal liability of minors or incompetent persons (art. 428 k.c.). In all those situations, the courts tend to relax the burden with respect to proving adequate

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10. Through several amendments to the civil code of 1964 (in 1990, 1996, and 2003).

11. See generally BAGIŃSKA & TULIBACKA, *supra* note 4.

12. See Adam Szpunar, *Uwagi o funkcjach odpowiedzialności odszkodowawczej* [Remarks about the Function of Liability], 58:1 PAŃSTWO I PRAWO 17-26 (2003).

causation, in addition to the fact that they impose the obligation to redress harm (which is usually personal injury) on the defendant who neither committed any fault nor is strictly liable.

In contrast to French law, contractual and tortious liability are clearly separated. These two liability regimes are regarded as independent and distinct from one another in many respects, and yet they remain subject to some common rules and principles applicable to the law of obligations in general. These common rules are contained in Book III of the civil code (“Obligations”), but placed in two different titles: Title III (“General Rules on Contractual Obligations”), and Title VI (“Illicit Acts/Torts” (*czyny niedozwolone*)). Title I, which regulates general matters within the area of obligations, applies to both. It contains provisions concerning:

- the determination of the extent of liability and compensation;
- adequate causation (art. 361 §1 k.c.);
- the principle of full compensation (art. 361 §2 k.c.);
- contributory negligence (art. 362 k.c.); and
- methods of repairing damage (art. 363 k.c.).

In common with other European jurisdictions, the main factual elements of tortious and contractual liability for damages in Polish law are the same. First, there must be an event triggering damage, second, there must be damage, and third, causation should exist between the event and the damage. With regard to the procedural issues, one should note that there is no jury in the Polish system. The court evaluates the evidence and rules on the issues of facts and on questions of law.

In Polish law there is no legal definition of damage. The concept of damage is closer to that of the French and Swiss traditions, rather than the German approach. In the legal literature and case law, damage is considered to be every wrong upon an interest protected by law, be it property or personality interests,

suffered by a person against her will.<sup>13</sup> Both legal writers and courts generally refer to both pecuniary and non-pecuniary loss when discussing the notion of “damage” in the civil code (as in, “liability for damage”).

The notion of personal injury has not been given a detailed definition. Nevertheless, the civil code provides a short description in article 444 which includes “bodily injury or damage to health.” Thus, it is clear that any physical injuries are covered, as are any circumstances where a person’s internal organs are not functioning properly even though no apparent injury occurred. The latter types of damage to health include mental conditions and even mental trauma (which can be temporary).<sup>14</sup>

It is commonly accepted that in Polish law there are three types of compensable damage: damage to person, damage to property, and damage to the environment.<sup>15</sup> In this context it is not settled whether the notion of personal injury (damage to person) includes the violation of personal interests, which are of course embraced by the wide definition of damage. Modern doctrine seems to incline towards accepting this wider definition of personal injury. Nevertheless, in this article I will employ the traditional, strict definition of personal injury (i.e., embracing bodily harm and mental harm), hence leaving aside problems relating to compensation for the violation of personal interests (such as in defamation, slander, invasion of privacy, etc.)

Causation, as the third requirement of liability, is based on the theory of adequate causation. Article 361 § 1 k.c. stipulates that

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13. See ADAM SZPUNAR, *USTALENIE ODSZKODOWANIA W PRAWIE CYWILNYM* [DETERMINATION OF CIVIL LAW COMPENSATION] 36 (Prawnicze 1975); ADAM SZPUNAR, *ODSZKODOWANIE ZA SZKODĘ MAJĄTKOWĄ* [COMPENSATION FOR PROPERTY DAMAGE] 22-24 (Branta 1998). The last element of the definition is disputable in doctrine. The case law supports the dominant view, recently in the Supreme Court (*Sad Najwyższy*, hereinafter SN) judgment of 25 January 2007, V CSK 423/06 (unpublished).

14. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 169, no. 329.

15. With respect to damage to the environment, account should be taken of arts. 322–28 of the Environmental Protection Law, Act of 27 April 2001, Dz.U. 2001, no. 62, item 627, with amendments.

“the person obliged to pay compensation is liable only for the normal effects of the act or omission from which the damage resulted . . . .” This is known as the principle of “adequate causation.” It plays two roles in the Polish civil law: the role of establishing the premise of liability (causal link between the damage and the harmful event) and the role of limiting damages. The courts use objective criteria flowing from life experience and science for the establishment of adequate causation.

With regard to the burden of proof, article 6 k.c. imposes the burden of proving causation on the injured person.<sup>16</sup> There is no codified rule regarding the standard of proof. The courts have traditionally required “a probability bordering on certainty,” which means the judge must be convinced beyond reasonable doubt. Over the past decades the standard has shifted from “probability bordering on certainty” to “a sufficient degree of probability,” with the approval of legal scholarship.<sup>17</sup> The shift has allowed the courts to award compensation in more complex scenarios involving personal injuries. Nowadays, courts typically state that the plaintiff has proved causation with a “sufficient (sufficiently high) degree of probability.”<sup>18</sup> There are only subtle differences between the names given to the degree of probability.<sup>19</sup> The question of what is a “sufficient degree” or a “significant degree” of probability depends on the individual case.<sup>20</sup>

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16. “The burden of proof relating to a fact rests on the person who attributes legal consequences to that fact.”

17. See Ewa Bagińska, *Causal Uncertainty and Proportional Liability in Poland* in *PROPORTIONAL LIABILITY: ANALYTICAL AND COMPARATIVE PERSPECTIVES* 253, 256 (I. Gilead, M.D. Green & B.A. Koch eds., De Gruyter 2013).

18. SN judgment of 17 June 1969, II CR 165/69, *Orzecznictwo Sądów Polskich* (Decisions of the Polish Courts, OSP or formerly OSPiKA) OSPiKA 7-8/1969, item 155.

19. See MACIEJ KALIŃSKI, *SZKODA NA MIENIU I JEJ NAPRAWIENIE* [DAMAGE TO PROPERTY AND ITS REDRESS] 400 (C.H. Beck 2008).

20. See SN judgment of 24 May 2005, V CK 654/04 (unpublished).

The principle of full compensation governs damages, although it is subject to many exceptions (both statutory and contractual).<sup>21</sup> Compensation ought to be equivalent to and not higher than the damage established. The scope of liability is determined by the following rules: articles 361–363 and, with respect to personal injury, articles 444–449 k.c. From a general principle of full compensation it follows that all kinds of damage must be redressed. Material (pecuniary) loss is to be repaired in every case. According to article 361 § 2 k.c.,<sup>22</sup> the scope of pecuniary damage comprises *damnum emergens* and *lucrum cessans*. The so-called consequential loss is redressed as long as the test of adequate causation is met.<sup>23</sup>

Further, Poland belongs to the group of legal systems where non-pecuniary loss is compensable only when it is permitted by the law.<sup>24</sup> As a rule, non-pecuniary loss may not be compensated in the contractual regime unless the violation of a contract constitutes concurrently a tort (concurrence of liabilities), in which case the tort regime applies *in toto* to the claim for non-pecuniary loss damages.<sup>25</sup>

Hence, the claim can be raised in personal injury cases *sensu largo*:

- a) bodily harm or health disorder, article 445 § 1 k.c;

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21. See Ewa Bagińska, *Droit polonais* in LA RÉPARATION INTÉGRALE EN EUROPE: ÉTUDES COMPARATIVES DES DROITS NATIONAUX 360-378 (F. Leduc & P. Pierre eds., Larcier 2012).

22. Article 361 § 2 k.c. reads: “Within the limits specified above, in the absence of any legal or contractual provision to the contrary, damages shall include the losses suffered by the injured person and the profits which he could have gained had he not sustained the damage.”

23. See Ewa Bagińska & Mirosław Nesterowicz, *Poland* in 2 DIGEST OF EUROPEAN TORT LAW: ESSENTIAL CASES ON DAMAGE 53-54 (B. Winiger, H. Koziol, B.A. Koch & R. Zimmermann eds., De Gruyter 2011).

24. See W.V. Horton Rogers, *Comparative Report of a Project Carried Out By the European Centre for Tort and Insurance Law* in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 246 (W.V.H. Rogers ed., Springer 2001).

25. See Ewa Bagińska & Mirosław Nesterowicz, *Country Reports. Poland* in DAMAGES FOR NON-PECUNIARY LOSS IN A COMPARATIVE PERSPECTIVE 181-82, no. 38 (W.V.H. Rogers ed., Springer 2001).

- b) deprivation of liberty, article 445 § 2 k.c.;
- c) sexual assault or misconduct, article 445 § 2 k.c.; and
- d) infringement upon personal rights (interests), article 448 k.c.

Pursuant to article 448 k.c., to which other rules of the civil code or outside the code refer, in the case of infringement of personal interests the court may award an injured person an adequate sum as compensation for non-pecuniary loss or, if she so demands, award an appropriate sum for a designated social purpose, irrespective of other means necessary to eliminate the effects of the damage caused.

Special laws provide for other cases of compensation for non-pecuniary loss, in particular in the sphere of medical liability (e.g., cases of infringement of patient rights, compensation for a blood donor), intellectual property law, and criminal law (unjust conviction, arrest or detention), as well as in the worker's compensation system.<sup>26</sup>

Moreover, compensation can be awarded to persons in close relationships with the victim in case of death (art. 446 § 3 k.c.), which is the equivalent of bereavement damages available in common law systems.

Finally, punitive damages are not accepted by Polish law. Courts have held that damages are not intended to amount to a penalty, and damages awarded in civil proceedings may not, in any case, exceed the actual damage.

In general, Polish tort law does not provide for liability caps. Any limitation with respect to personal injury claims does not arise from national legislation, but originates in binding international conventions,<sup>27</sup> or EU directives, such as the 374/85 Product Liability Directive (which imposes a €500 threshold for property damage).

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26. See Bagińska & Nesterowicz, *id.* at 174.

27. Most importantly, in the Warsaw-Montreal system governing the liability of air-carriers and the respective EU laws (e.g., Regulation no. 889/2002) apply, with similar conventions governing transportation by other means.

With regard to procedural issues, one should recall that there is no jury in the Polish system. The court evaluates the evidence and decides both the issues of facts and the questions of law.

### III. CATEGORIES OF DAMAGES IN PERSONAL INJURY CASES

In Polish law the categories of damages in cases of personal injury are regulated in much more detail than the in general categories of damage to property (real loss and lost profits, art. 361 § 2 k.c.). A list of claims that can be drawn from articles 444–446 k.c., is presented below. It should be noted here that sums awarded as expenses and costs of treatment, annuity, as well as non-pecuniary loss damages must be listed separately in the judgment. In particular, damages for pecuniary loss and non-pecuniary loss must always be awarded as separate elements, with independent justification in the motives.

Where the damage already occurred and its extent is relatively clear, but it is impossible to determine its exact scope or assess its money value, the court can in these conditions use discretion and award a sum it considers adequate taking into account all the circumstances, using article 322 of the Code of Civil Procedure. This margin of discretion cannot be used to adjudicate non-pecuniary loss damages (detailed below).

#### *A. Claims of the Directly Injured*

##### *1. Pecuniary Losses*

A general rule provides that in the case of bodily injury or a disturbance of health, the redress of damage covers all resulting costs (art. 444 § 1 k.c.). This includes all necessary and suitable expenses causally linked to the injury and paid out directly by the victim, as well as by other persons (for instance, the victim's family, if the victim is a minor), if they are all included in the victim's claim. Judicial decisions and scholarly writings construed the notion of 'all costs' broadly. Accordingly, it includes hospital

treatment, doctors, nurses and other medical practitioners' visits, travel and accommodation related to treatment, expenses relating to rehabilitation, purchasing medicines, implants, other medical devices, and any other equipment necessary for treatment or the daily living needs of the victim (such as a pair of glasses, a hearing aid, a wheelchair, or a special needs vehicle required by the victim for attending treatment and carrying out business activities).<sup>28</sup> It also extends to differences in income suffered by a person unable to work for a period of time.<sup>29</sup>

The person obliged to redress the damage shall pay the sums required for the costs of medical treatment in advance.

Second, the Polish system has established a distinguished model of reparation of damage in the form of annuity. Pursuant to article 444 § 2 k.c., if a victim completely or partially loses her ability to work or if her needs have increased or her future prospects have been diminished, she may demand an appropriate annuity from the person obliged to redress the damage. Any of the three grounds for an annuity, whether existing alone or concurrently with others, constitutes a sufficient ground for the claim. However, according to case law, an annuity based on the loss of earning capacity or on the loss of future prospects (e.g., inability to carry out a profession or obtain specialization), may not be awarded to a minor who can claim an annuity on the ground that his/her needs have increased (this includes, for instance, permanent expenses for treatment or care and assistance by third persons). On the other hand, an annuity for the loss of ability to work should reflect the shortfall in income, taking into account what the injured person would be expecting to earn if the injury did not occur; it can also be awarded to a person who is not employed but runs a household (usually a stay-at-home mother).

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28. SN judgment of 14 May 1997, II UKN 113/97, OSP 1998, no. 6, item 121.

29. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 169, no. 331.

When awarding an annuity to the victim of a personal injury a court usually makes an overall assessment of different elements of pecuniary damage, including loss of earnings and loss of earning capacity. Polish courts have emphasized that in the case of a diminution of working capacity, the damage cannot be purely theoretical. Some pecuniary consequences of the loss must be proven. Accordingly, this damage should be understood as the difference between what the victim could have received from her work if the damaging event had not occurred and what she will actually receive after this occurrence. The income of a victim after a damaging event is not to be compared to the pre-accident earnings or the lack of them, but to those she would have earned if there had been no accident. It is sufficient that the victim proves a high probability of receiving this income.<sup>30</sup>

An annuity must be “appropriate”; the court enjoys a margin of discretion in the assessment of its extent. If, at the moment of adjudication, the damage cannot be accurately assessed, the plaintiff may be awarded a temporary annuity.

By way of exception, pursuant to article 447 k.c., a court may for important reasons and upon the victim’s request award a lump sum instead of an annuity or a part thereof. In particular, this applies to a case where the injured person became disabled and the award of a lump sum would help her to engage in another profession. The victim carries the burden of establishing the existence of “important reasons.” The assessment of a lump sum is based on the annuity to which the plaintiff would be entitled. The payment of a lump sum must equate with the obligation to pay an annuity (hence, as long as the victim is entitled to an annuity he may request a lump sum).

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30. SN judgment of 30 January 2004, I CK 131/03, OSNC 2/2005, at 40; Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2005, at 460-63, nos. 16-26 (H. Koziol & B.C. Steininger eds., Springer 2006) [hereinafter *Poland* (2005)].

## 2. *Victim's Claim for Non-Pecuniary Loss (Pain and Suffering)*

The direct victim has a pecuniary claim for non-pecuniary loss stemming from bodily injury, i.e., for pain and suffering and moral damage (art. 445 §1 k.c.). The same legal basis applies when no injury occurred to the person concerned and the only type of detriment is moral suffering and trauma.

Anyone may demand redress for non-pecuniary loss. This extends to a foetus' claim for prenatal damages (art. 446[1] k.c.). The latter claim can be made against a third person or against the mother.<sup>31</sup>

In Polish law an award of compensation for non-pecuniary loss is discretionary (left to the court) and an assessment is made in light of the circumstances of the case. This does not mean that the court is free to award or not award damages. It can deny an award only when some objective criteria are met; in particular, when: i) the damage was inappreciable and the tortfeasor cannot be held negligent, ii) the injured person largely contributed to the damage, or iii) bodily injury ensued from the injured person's blameworthy, criminal conduct. The denial of damages for non-pecuniary loss would not release a tortfeasor from liability for compensation of pecuniary loss.

The courts use objective standards to determine the amount of compensation. Courts should consider all circumstances of a particular case in assessing compensation,<sup>32</sup> in particular: the degree of physical and mental suffering and how long it lasted, how permanent the injuries are, what the future prospects are concerning life expectancy and quality of life (for instance regarding social life, travel or work), and the age of the victim. Courts have also emphasized that a high degree of the tortfeasor's fault should result in an increased sum of damages. Moral suffering may well be amplified by the tortfeasor's insensible

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31. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 174, nos. 343-44.

32. See Bagińska & Nesterowicz, *supra* note 25, at 176 et seq.

behaviour after the tortious event in failing to undertake an action mitigating the damage.<sup>33</sup>

The extent of the damages cannot be attributed to the current material status of the victim.<sup>34</sup>

Damages for non-pecuniary loss first play a compensatory role as they purport to make good for the moral harm. Relating the amount of the award to an average salary may be helpful, but this cannot be done mechanically. The aim of the damages is to compensate non-pecuniary harm, which is very difficult to measure. Courts have recently rejected the criterion developed in the nineteen-sixties and -seventies, according to which the size of the award should reflect “the current living conditions of an average member of society.” The present jurisprudence and doctrine underline that this factor is only supplementary and may not lead to the frustration of the compensatory function of damages for moral harm.<sup>35</sup>

#### *B. Claims upon the Victim's Death*

Damage remedies for the close persons (family members) in the case of the victim's death (the so called victims *par ricochet*) are governed by article 446 k.c. and include five kinds of claims.

First, the costs of treatment and the funeral are to be refunded to the person who has incurred them (art. 446 § 1 k.c.). This claim does not belong to the estate of the deceased, but is an autonomous claim by the person who actually incurred the expenses, unless the costs were paid by the decedent herself.

Second, those in respect of whom the deceased had a statutory duty of maintenance have the right to an annuity from the person liable. This type of annuity is referred to as a “mandatory annuity,”

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33. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 160, 174, nos. 309, 344.

34. SN judgment of 17 September 2010, II CSK 94/10, OSNC 4/2011, item 44.

35. SN judgment of 30 January 2004, I CK 131/03, OSN 2/2005, at 40; SN judgment of 10 March 2006, IV CSK 80/05, OSP 1/2007, at 11.

because if all the conditions for tortious liability specified in the provision applicable in the case are met, the court must make an award. Duties of maintenance are regulated by the Family and Care Code of 1964,<sup>36</sup> and include descendants, and, in some cases, siblings, other relatives, and divorced or separated spouses.<sup>37</sup> With regard to actual spouses the position was clarified by the Supreme Court's decision of 20 December 1990.<sup>38</sup> The obligation to satisfy the financial needs of the family rests upon every married person (Art. 27 of the Family and Care Code). This, of course, extends to situations where one of the spouses does not work and runs the household, rearing the children. However, prior to the Supreme Court decision mentioned above, it was generally accepted that tortfeasors who caused death were not liable to pay an annuity to the surviving spouse where the latter was working, or at least was capable of working, and there were no dependent children. Maintaining the latter's lifestyle was not seen as an adequate basis for an obligation to compensate. In the 1990 decision the Court held that spouses can be awarded annuity until they are in a financial position to sustain themselves and their family.

Third, an annuity may also be claimed by persons who were in a close relationship with the deceased and whom he voluntarily maintained on a regular, long-term basis (art. 446 §2 k.c.). This type of annuity is referred to as a "voluntary/facultative annuity." The court can award a voluntary annuity as long as the principles of community life so require (considering the financial position of both parties, the relationship between the deceased and the beneficiary, and the context in which the voluntary support was taking place, especially its purposes). This provision is particularly relevant in case of cohabitants.<sup>39</sup>

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36. Act of 25 February 1964, Dz.U. 1964, no. 9, item 59, with amendments.

37. Kodeks rodzinny i opiekuńczy [Family and Care Code], 25 February 1964, arts. 128-34 & 60.

38. SN judgment of 20 December 1990, II PR 61/90, Praca i Zab. Spół. 1991, nos. 5-6, p. 64.

39. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 172-73, nos. 338-41.

For all those who are entitled to payments, the annuity is assessed by taking into account the needs of the claimant and the earnings and financial means of the deceased. The nature of claims for an annuity is compensatory; they are not a type of maintenance claim. The persons are entitled to enforce those claims *sui generis*, thus the cause of action is independent of the rights of the directly injured and of the pecuniary and non-pecuniary loss compensation that she has received before her death. If the directly injured person, while still alive, relinquishes or settles the claims, these acts will have no legal effect after her death.

Fourth, the code also allows immediate family members of the deceased to claim compensation for a considerable deterioration of their living standards (art. 446 §3 k.c.). The compensation extends to the damage which is not grounds for an annuity. These are types of pecuniary damage in a broad sense, often difficult to assess exactly, as well as non-pecuniary damage, both leading to substantial deterioration of an immediate family member's financial position. For example, the loss of maternal care and support constitutes a worsening in the child's situation, and merits the indemnity on the basis of article 446 §3 k.c.<sup>40</sup> Such losses include not only changes in the actual economic position, but also losses of the realistically foreseeable prospects for improvement of the living conditions: for instance death of a son whose financial help in the near future could be counted on by his parents,<sup>41</sup> or death of a person thanks to whom the claimant planned to improve his living conditions.<sup>42</sup> Although, in general, mere grief is not to be compensated, a severe mental trauma (for instance, in case of the spouse's or the long-time partner's death), or feeling of solitude (for instance, the loss of a mother by a minor) may increase the degree of the decline in one's quality of life and therefore should merit an award.

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40. SN judgment of 6 February 1968, OSNC 1969, item 14.

41. SN judgment of 13 May 1969, OSPiKA 1969, item 122.

42. SN judgment of 8 July 1974, OSPiKA 1975, item 204.

Finally, the ability to obtain compensation of non-pecuniary damage caused by the death of a close relative (bereavement damages) is a new addition to the civil code. It was introduced by the Act of 30 May 2008 (amending the civil code), and in force since August 3, 2008,<sup>43</sup> although throughout the 1970s, 1980s and 1990s, courts utilized the ability to award compensation of pecuniary damage mentioned above to include some purely non-pecuniary losses as well. Close relatives are entitled to bereavement damages if the victim of a tort died on or after August 3, 2008.

If the directly injured has survived, there is no explicit claim for non-pecuniary loss of the close persons under Polish law. They may demand damages only upon proof of their own personal injury (a physical injury or a health disorder, such as depression or other similar medically recognized conditions). It is sufficient to prove that the causative factor simply exacerbated an existing health disorder or increased physical suffering. With regard to psychiatric injury, Polish law does not set any special threshold for a qualifying claim.

#### IV. THE MAIN TRENDS IN COURT PRACTICE (2000–2014)

##### *A. The Cost of Future Treatment and the Assessment of Annuities*

The actual amounts awarded to injured victims with regard to pecuniary losses reflect the true cost of medical care, treatment and rehabilitation in Poland. A large part of such costs is borne by the state-funded health care system (with the exception of pharmaceuticals, which are as a rule co-paid by the insured).<sup>44</sup> The public health care system is open to all citizens and is mandatory; it is the so-called universal health insurance system based on

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43. Act of 30 May 2008, Dz.U. 2008, no. 116, item 731.

44. For a detailed analysis of the health care system in Poland, see MIROSLAW NESTEROWICZ, EWA BAGIŃSKA & ANDRÉ DEN EXTER, INTERNATIONAL ENCYCLOPAEDIA OF LAWS: MEDICAL LAW, 20-26, nos. 27-46 (Herman Nys ed., Kluwer Law Int'l 2013).

premiums paid by all employees and entrepreneurs. Other persons (for example, foreign students) can get access to the system as well by paying the premium. The specific feature of Polish health care, however, is the relative importance and popularity of private medical care that exists alongside the state-funded system. Patients often use private healthcare, particularly in urgent situations. As long as the private alternative can realistically, based on sound medical prognosis, improve the patient's chances of recovery from a serious medical condition, the patient is not obliged to use the public system.<sup>45</sup> Moreover, the more serious the condition, the more likely it is that a medical service unavailable in Poland will be sought abroad, whether in another EU Member State or outside the EU. Consequently, the tortfeasor may be obliged to reimburse much higher costs.

This approach was confirmed in a judgment of the Supreme Court of 13 December 2007 (I CSK 384/07).<sup>46</sup> In this case the plaintiff suffered from brachial birth palsy. His disability was at that time 60%, but he had a positive medical prognosis. He was operated on twice in the US, which was paid for by the State, and consulted with specialists in Leeds and Paris at his parents' cost. In the lawsuit he demanded *inter alia* \$55,000 to cover the cost of a third operation in Houston, TX. The hospital and its insurer questioned the obligation to pay the treatment cost in advance, referring the plaintiff to the Ministry for Health and Public Resources. After six years of trial the Regional Court awarded PLN 237,000 (\$78,000) for pecuniary damage and PLN 200,000 (\$66,000) for non-pecuniary loss (as demanded). On appeal, however, the damages for pain and suffering were reduced to PLN 120,000 (\$40,000) and the claim for future medical expenses was dismissed because the plaintiff did not prove that they would not

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45. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 171, no. 335.

46. OSP 2/2009, item 2046; Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2009 at 497-98, no. 66 (H. Koziol & B.C. Steininger eds., De Gruyter 2010) [hereinafter *Poland* (2009)].

be refunded *ex post* by the State. The Supreme Court reversed the verdict and remanded the case. It regarded the damages for non-pecuniary loss as too low to fulfill the purpose of adequate compensation. As to the medical expenses, the Court held that under article 444 § 1 k.c. the plaintiff must only prove that he has a valid claim for all necessary costs arising from a tort. The burden of proof that the costs of the operation in the U.S. were to be covered *ex post* from public resources was on the defendant. The Court emphasized that a victim of a tort had no obligation to use the public health care system in order to restore his/her health condition to its previous state. After all, the public health care system may be used only by the insured (through the compulsory universal health insurance), and the conclusion reached by the Court of Appeals would put the insured victim of a tort at a disadvantage in comparison with the uninsured victim. This decision is correct and confirms the long-established case law. In the former regime, a claim for advance payment of treatment costs was rarely raised because of the generous public health care system. Presently, with scarce public resources, many specialized procedures are available only by request and granted by the National Health Fund or the Ministry for Health on a case-by-case basis.

It should be explained further that future loss (when at the time of adjudication not all the harmful effects of the tort have materialized) and future costs that are highly likely to occur can be sought as part of an annuity. If, at some point in the future, circumstances change (for instance, the victim's health deteriorates significantly), either of the parties may request modification of the annuity (art. 907 § 2 k.c.).<sup>47</sup> The plaintiff may also ask for a determination of liability for future losses.<sup>48</sup>

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47. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 171, no. 334.

48. SN judgment of 24 March 2009, III CZP 02/09, OSNC 12/2009, item 138; Bagińska, *Poland* (2009), *supra* note 46, at 486-88, nos. 34-41.

In the judgment of 17 June 2009 (IV CSK 37/09),<sup>49</sup> the Supreme Court ruled that negligent omissions of the health care providers can lead to damages that take the form of lost or reduced chances for healing or improvement of the health condition. The standard of proof in such cases should be a sufficient degree of probability. In this, case a minor lost his chance to reduce the disability, for which no-one was to blame. He was diagnosed with cerebral palsy and epilepsy in December 1999. The early signs of the disease, reported by the mother shortly after his birth in 1998, were either ignored or misdiagnosed by the attending doctors. If cerebral palsy had been diagnosed at an early stage, the effectiveness of rehabilitation could have been 20% better. Adequate causation between the negligent delay in discovering of the cause of the disability and the lost chance of improvement through rehabilitation was established; nevertheless, the lower courts did not find grounds for awarding an annuity. The Supreme Court held that the minor plaintiff was entitled to both compensation for non-pecuniary loss and an annuity based on the increase of needs as a result of a tort. Cerebral palsy is a life-long disease, and any improvement in the child's condition that can be made is reached principally through proper and constant rehabilitation. The late diagnosis may lead to increased expenses, as delayed rehabilitation is less effective and more difficult. This case can be seen as a loss of chance case. Polish courts approach cases of this kind from the perspective of damage rather than causation. If the damage is personal injury, the standard of proof is lowered to a sufficient degree of probability. The Polish courts have awarded damages for a lost chance of healing or a lost chance of improvement of the patient's condition either under the category of a pecuniary damage (in the form of an annuity) or as

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49. OSP 9/2010, item 93; Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2010 at 464-66, nos. 45-51 (H. Koziol & B.C. Steininger eds., De Gruyter 2011) [hereinafter *Poland* (2010)].

compensation for non-pecuniary loss.<sup>50</sup> From the perspective of a minor with a life-long, incurable disease, whose harm takes a form of losing or reducing the chances for health improvement, an annuity guarantees better protection for the future. The amount of an annuity is subject to revision by a court in case of a change in circumstances.<sup>51</sup>

Another interesting case that marks a victim-friendly approach is represented by the judgment of the Court of Appeals in Poznan judgment of 15 December 2009 (I ACa 848/09).<sup>52</sup> In this decision the court applied article 447 k.c. and awarded lump-sum compensation instead of an annuity to an older woman who was hit by a truck while negligently crossing the street. The injuries suffered as a result of the accident eventually led to a 50% permanent disability. The lower court established that the plaintiff contributed to her damage by 90%, but the Court of Appeal assessed the contribution to be 75%. The demand for non-pecuniary loss was justified under the circumstances, but the award was ultimately reduced to PLN 30,800 (\$10,200) due to the contributory negligence. Moreover, instead of an annuity, the plaintiff demanded PLN 125,000 (\$41,600) as a lump sum. That claim was dismissed as unsubstantiated by a lower court, but the Court of Appeals, after having found that the plaintiff met her burden of proof, considered the prerequisites of article 447 k.c. Pursuant to that provision, for important reasons the court may, at the request of the injured person, award him lump-sum compensation instead of an annuity or a part thereof. However, none of the typically accepted “important reasons” were present in

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50. See, e.g., SN judgment of 1 September 1978, CR 510/77, OSNC 11/1978, item 210.

51. Based on art. 907 k.c., the person responsible, or the victim, may ask the court to adjust the amount or duration of the annuity or to discontinue it completely in the case of changed circumstances.

52. See Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2011 at 514-15, no. 79 (K. Oliphant & B.C. Steininger eds., De Gruyter 2012) [hereinafter *Poland* (2011)].

this case.<sup>53</sup> Nevertheless, the Court regarded the difficult financial situation of the plaintiff as an important reason. According to the facts, the seventy-two-year-old victim was retired, but a part of her very low pension was taken away by the court executor to pay for her debts, and the rest was fully consumed by monthly expenditures. The annuity, if awarded, would amount to PLN 75 per month (as reduced by 75% due to contributory fault), which obviously would not cover her increased needs. Conversely, a lump sum would allow her to pay her debts and raise the actual net income from her pension, which in turn would allow her to cover the current and future increased expenses due to the tort. The payment of a lump sum must be equivalent to the obligation to pay an annuity and cover both present and future damage. However, the law does not state what period of time should be taken into account in the calculation of the award. The Court thus referred to the average life expectancy in Poland, which is 80 years for women, and calculated that the annuity for eight years equaled PLN 7,200 (\$2,400). The reasoning of the Court is compelling and should be approved of as it fulfills the aims of damages and takes into account the individual situation of the victim.

A final issue, although of lesser importance, concerns the consideration of illicit profits. In the case of 20 January 2004,<sup>54</sup> the defendant questioned the inclusion of the “grey zone” income of the deceased into the computation of an annuity. The income was not revealed in a personal income declaration, nor was it taxed. The Supreme Court held that, although the phenomenon of the “grey zone” in the labour market should meet with disapproval, the computation of an annuity in wrongful death cases is not dependent on the taxed income, but on the earning capacity of the deceased and on his financial standing, including, but not limited

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53. Article 447 k.c. shall especially apply in a case where the injured person has become disabled, and the award of a lump-sum payment would facilitate his exercise of a new occupation.

54. II CK 360/02, Lex no. 173557.

to, his actual income. However, on similar facts, the Court of Appeals in Białystok in a judgment of 18 September 2002<sup>55</sup> ruled to the contrary. It held that regular illicit earnings received by the deceased victim within “the grey zone” might not lead to an increase in the sum of damages. The court stated that failure to pay personal income tax is a fiscal criminal offence. Such an income also contradicts the principles of community life (principles of equity and justice).

*B. The Scope and Function of Compensation of Non-Pecuniary Loss Awarded to Direct Victims*

*1. Medical Malpractice Cases*

One should clarify here that in medical cases there are two independent bases for awarding non-pecuniary loss damages: (i) medical malpractice which inflicts pain and suffering (art. 445 k.c.), and (ii) the infringement of a patient’s right (art. 4 of the Patients’ Rights Act, in conjunction with art. 448 k.c.).<sup>56</sup> There has been some litigation recently regarding the relationship between these two bases of a claim. It has been held that article 445 k.c. aims at compensation for pain and suffering due to personal injury and that article 4 of the Patients’ Rights Act protects dignity, privacy and the autonomy of a patient, regardless of the diligence and effectiveness of medical intervention.<sup>57</sup> Hence, the two claims can be cumulated.<sup>58</sup> Below we focus on the pure malpractice cases.

In present practice, the level of compensation in personal injury cases is increasingly high. The following cases are illustrative examples of this trend.

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55. I ACa 399/02, OSAB 2003, at 7.

56. Law on Patients’ Rights and the Patients’ Ombudsman, Act of 6 November 2008, Dz.U. 2009, no. 52, item 417 and no. 76, item 641.

57. SN judgment of 29 May 2007, V CSK 76/07, OSN 7-8/2008, item 91; Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2008 at 511-13, nos. 53-60 (H. Koziol & B.C. Steininger eds., Springer 2009) [hereinafter *Poland* (2008)].

58. See Ewa Bagińska, *Remedying patients for moral harm arising from an infringement of patients’ rights*, 15 COMP. L. REV. (NICOLAUS COPERNICUS UNIV.) 45 (2013).

In 2001, in a case where the plaintiff's leg was amputated because the doctors failed to diagnose artery damage incurred in a motorcycle accident, the Regional Court in Krakow awarded PLN 50,000 (\$16,600) for non-pecuniary loss.<sup>59</sup> In 2006, the wrongful removal of a kidney resulted in the award of PLN 150,000 (\$50,000) by the Supreme Court.<sup>60</sup> The same amount was adjudicated in 2007 to a 50-year-old victim of negligence in a standard procedure for the removal of kidney stones which resulted in the victim's 45% permanent disability and a total loss of working capacity.<sup>61</sup> In the decision of 13 June 2007 (VI ACa 1246/06)<sup>62</sup> the Court of Appeals in Warsaw established the hospital's liability for the lack of informed consent to cardiac surgery, during which the patient suffered a stroke. The patient became disabled due to the neurological damage. No medical error was established. The plaintiff claimed PLN 250,000 (\$83,000), the Regional Court awarded PLN 50,000 (\$16,600) as damages for moral harm, but the sum was doubled on appeal (final award: \$33,000).

A striking example of the change in the trend concerns hospital infections. In the late 1990s, compensation for infection with Hepatitis B amounted to PLN 5,000 (\$1,600) for adult patients and as much as PLN 8,000 (\$2,600) for minors; PLN 20,000 to 50,000 (\$6,600 to \$16,600) was awarded for Hepatitis C infections.<sup>63</sup> In the last decade these amounts were doubled or even tripled; in

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59. Published in RZECZPOSPOLITA, 3 April 2001. The amount was converted into dollars based on the average rate \$1 = 3 PLN.

60. SN judgment of 10 March 2006, IV CSK 80/05, OSP 1/2007, item 11; Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2007 at 453-55, nos. 13-17 (H. Koziol & B.C. Steininger eds., Springer 2008) [hereinafter *Poland* (2007)].

61. Court of Appeals (*Sąd Apelacyjny*, hereinafter SA) in Krakow judgment of 12 October 2007, I ACa 920/07, (2010) *Prawo i Medycyna* (PiM) 1, 151, cmt by M. Nesterowicz.

62. SA in Warsaw judgment of 13 June 2007, VI ACa 1246/06, OSA 12/2009, item 64.

63. See Kinga Bączyk-Rozwadowska, *Medical Malpractice and Compensation in Poland*, 86 CHI.-KENT L. REV. 1217, 1251 (2011).

2010 the average compensation for a non-pecuniary loss resulting from hepatitis C amounted to PLN 375,000 (\$125,000).<sup>64</sup>

In contrast, cases of birth-related injuries can presently trigger successful non-pecuniary claims as high as PLN 500,000-1,000,000 (\$166,000-\$333,000), which may be compared with ten years previously, when amounts between PLN 50,000 and 90,000 (\$16,600 to \$30,000) were considered adequate.<sup>65</sup> It is well-established case law that the younger the age of the victim, the greater the moral harm. Apart from birth-related injuries, we can refer to a case where a young girl who, after several months of inadequate treatment, suffered necrosis of parts of her skin and permanent scarring (50% disability), was awarded (at the age of eleven) \$83,300 for non-pecuniary loss.<sup>66</sup>

Finally, in a rare case a comatose victim of malpractice at birth who had no contact with the outside world and did not feel pain was awarded \$166,000 in 2008.<sup>67</sup> Thus, it is relatively unimportant whether the victim is, because of her mental state, unable to realize the full impact of what happened, or whether the victim has particularly acute sensitivity and thus suffered a much more intense mental trauma.

In a groundbreaking decision of March 24, 2011,<sup>68</sup> the Supreme Court dealt with the issue of succession of a child's claim for non-pecuniary loss by its parents. On the facts, a medical malpractice at childbirth (in particular, the failure to perform a Caesarean section) led to enormous injuries to the child who, while

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64. *Id.* at 1251.

65. See Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2001 at 391-92, nos. 42-45 (H. Koziol & B.C. Steininger eds., Springer 2002) [hereinafter *Poland* (2001)].

66. SA in Poznan judgment of 23 November 2006, I ACa 561/06, PiM 2/2008, 140, cmt by M. Nesterowicz.

67. See SA in Rzeszow judgment of 12 October 2006, I ACa 377/06; Bagińska, *Poland* (2009), *supra* note 46, at 493-94, nos. 57-59.

68. I CSK 389/10, OSNC-ZD 1/2012, item 22; Ewa Bagińska & Katarzyna Krupa-Lipińska, *Poland* in EUROPEAN TORT LAW 2012 at 537-39, nos. 51-57 (K. Oliphant & B.C. Steininger eds., De Gruyter 2013) [hereinafter *Poland* (2012)].

never conscious, was kept alive by doctors for 14 months before dying. Before the child's death, the parents sued the hospital for compensation on the child's behalf, and then continued the trial as successors of the child's right of action (art. 445 § 3 k.c.<sup>69</sup>). The patent fault of the doctors was established and the court of first instance awarded a record sum of PLN 1 million (\$333,000) as damages for non-pecuniary loss (arts. 446[1] and 445 k.c.), having ruled that the child's harm was unspeakably grave. On appeal the award was reduced by 80% due to the fact that the money was to be paid to the parents seeking compensation *de iure hereditatis*; hence it should not enrich them. Moreover, the court held that the child had died so early in its life that it could not be argued that it had suffered moral harm, as its psyche had not been shaped; accordingly the child was only able to experience physical pain and suffering. That decision was attacked in cassation to the Supreme Court, who did not agree with the reduction of the award by the court of appeal. The Court recalled that, pursuant to article 446[1] k.c., after its birth a child can claim compensation for any prenatal damage it suffered, including damage stemming from medical malpractice directed at the child's mother before its birth. The compensation calculated by the lower court rightly took into consideration all the horrendous conditions of the child's painful life and in this respect the court met the criteria of compensating non-pecuniary loss. Although objectively very high, the award correctly took into account the primary compensatory function of the claim. The principle that compensation must be adequate (i.e., proportionate) to the harm suffered does not give permission to recklessly disregard human life, as had happened in this case. The Court also held that whether or not a newborn is able to suffer moral damage or physical pain and suffering is irrelevant and cannot be a reason to reduce the compensation. The fact that the

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69. "A claim for compensation for non-pecuniary harm shall pass to the heirs of the deceased only if this was agreed in writing or the action was commenced when the deceased was still alive."

child died during the trial and the parents stepped into the proceedings as successors to the child's right of action is not grounds to lower the compensation for the child's harm. The Supreme Court deviated from early cases<sup>70</sup> which endorsed the view that a court, when calculating damages for moral harm, should take into account the fact that the damages awarded were to be paid to the successors of a victim who died during the trial. In the commented decision the Court ruled that the claim passes to the heirs by way of exception provided for in article 445 § 3 k.c., since in principle all claims for personal injuries become extinct upon the death of the injured person. The claim for compensation of moral harm does not change due to the fact that the victim dies before the award has been issued. The extent of reparation may not be determined by such an unforeseeable and uncertain event as death before or after the award. The parents also have their own (*sui generis*) claims for bereavement damages as indirect victims (art. 446 § 4 k.c.) and this compensation claim is different to that which the victim is entitled to pursue. The case calls for the legislative intervention and introduction of a clear-cut rule concerning the award of damages for non-pecuniary loss in wrongful death cases. Presently, it is uncertain whether the parents can collect twice: once as heirs and once as indirect victims.<sup>71</sup> One should also emphasize the hopefully preventive effect toward avoidable medical errors by the highest ever award in such a case in Poland. Despite their compensatory function, the damages aim at the deterrence of reprehensible conduct, and in this case the doctor's malpractice amounted to gross negligence.

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70. See, e.g., SN judgment of 12 April 1972, II CR 57/72, OSNCP 10/1972, item 183.

71. See Mirosław Nesterowicz, *Comment*, 7-8 *Przegląd Sądowy* 200 et seq. (2012).

## 2. Traffic Liability Cases

Traffic accidents make up the majority of personal injury cases in Poland.<sup>72</sup> According to statistics, Poland unfortunately led the EU countries in 2011 with the death rate of 109 killed in car accidents per one million inhabitants, while in 2012 it was 93 per one million inhabitants. Over 40,000 victims per year suffer personal injuries, 21% of these being pedestrians). There are approximately 25.5 million registered vehicles in Poland; the motorization index is 470 cars per 1000 inhabitants.

With regard to more serious injuries, we should mention the case where a 51-year-old man who suffered serious injuries in a car accident and was declared 77% disabled, with a complete, irreversible loss of working capacity and the loss of sexual functions, was awarded \$66,000 by the Court of Appeals; the verdict was, however, reversed by the Supreme Court in 2008. In another case, the victim of a traffic accident, who became quadriplegic and regained consciousness only after several months of hospitalization, filed a claim for PLN 400,000 (\$133,000) for non-pecuniary damage. After his death his successors (a wife and two children) continued the lawsuit and the Court of Appeals in Lublin awarded them the demanded sum in equal shares; the decision was affirmed by the Supreme Court in 2008.<sup>73</sup>

Additional problems have been caused by the introduction of bereavement damages in 2008, as will be seen below.

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72. See the analysis in Polska Izba Ubezpieczeń [Polish Chamber of Insurance], Rynek ubezpieczeń komunikacyjnych w Polsce [Automobile Insurance Market in Poland] (2011-2013), available at [http://piu.org.pl/public/upload/ibrowser/analizy%20i%20raporty/raport\\_komunikacyjny\\_2011\\_2013.pdf](http://piu.org.pl/public/upload/ibrowser/analizy%20i%20raporty/raport_komunikacyjny_2011_2013.pdf).

73. SN judgment of 27 November 2008, IV CSK 306/08, OSP 11/2009, item 121; Bagińska, *Poland* (2009), *supra* note 46, at 497, no. 65.

### *3. Individual versus Uniform Approach to Compensatory Claims*

As it was mentioned earlier, when assessing a claim for pain and suffering, Polish courts apply general and abstract criteria to the individual situation of a given plaintiff in the assessment of a claim for pain and suffering (such as the victim's age and personal situation, the degree and duration of physical and mental suffering, the long-term effects of the tortious conduct and similar circumstances). The main principle is that each case of bodily injury and mental harm requires an individual approach, with regard to the facts of the case. Due to the specific criteria for the evaluation of non-pecuniary loss, an award of damages may successfully be attacked in cassation to the Supreme Court only when it flagrantly violates these criteria. Such a situation took place in a case decided by the Supreme Court on April 20, 2006 (IV CSK 99/05).<sup>74</sup> The plaintiff (a 53-year-old woman) was diagnosed with hepatitis C infection and subsequent liver cirrhosis. She was declared 70% disabled, suffered from great pain and nervous shock; the probability of developing liver cancer was 5%. The Court of Appeals awarded PLN 100,000 (\$33,000) as damages for pain and suffering (the plaintiff claimed the equivalent of \$60,000). The Supreme Court allowed cassation and held that, although the lower courts had used proper general criteria of assessment, they had failed to apply them correctly to the facts of the case. The Court raised the compensation to PLN 150,000 (\$50,000) in order to more adequately redress the plaintiff for the suffering, the anxiety, the actual moral harm and for the negative future prognosis. The Court determined that only the higher sum would perform the compensatory function properly.

More importantly, the Supreme Court ruled that the amount of awards adjudicated in other cases should not be taken into account as a factor to reduce compensation in a given case. An interesting

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74. OSP 4/2009, item 40.

issue arises in a not-so-rare situation (considering the movement of persons within the European Union) where the victim is a foreign citizen. According to the Supreme Court the standard of living in the country where the victim lives should be taken into consideration in the evaluation of damages. The case decided on February 14, 2008 (II CSK 536/07),<sup>75</sup> involved a German citizen who was injured in a car accident in Poland. He claimed PLN 185,000 (\$60,000) for serious injuries (multiple fractures, several operations, altogether four years of medical treatment and 75% disability), arguing that an award of non-pecuniary damages should reflect the living standard in Germany (the country of his habitual residence). The Regional Court awarded PLN 82,000 and the Court of Appeals raised this to PLN 120,000 (\$40,000), because compensation of non-pecuniary loss should have a real economic value in order to fulfill its compensatory function. However, the Court determined that the standard of living in Germany, which “is not dramatically different than in Poland,” is not a proper criterion of assessment of these damages. On review, the Supreme Court emphasized that damages for non-pecuniary loss should first of all relate to the injury and take into account all the relevant circumstances, in particular the gravity of pain, duration of the disease and permanent effects of the damaging act. Therefore, the plaintiff was entitled to PLN 150,000 (\$50,000). Second, taking into account the current living conditions in the victim’s home country for determining the size of the award is generally acceptable, but the application of this criterion may not lead to the frustration of the compensatory function of damages for moral harm. It may only be treated as a supplementary criterion to reduce the non-pecuniary damages. The Supreme Court concluded that even after considering the standard of living in Germany, the sum of PLN 150,000 was still adequate within the meaning of article 445 k.c.

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75. OSP 5/2010, item 47; Bagińska, *Poland* (2010), *supra* note 49, at 475-76, no. 76.

In another case of November 26, 2009, (III CSK 62/09),<sup>76</sup> the Supreme Court held that the amount of awards adjudicated in other cases can help to evaluate whether the award in a given case was not unreasonably high. Therefore, they may be used as a guideline, provided however, that each case of moral harm is given an individual assessment, with regard to the facts of the case. This is, of course, a quite Solomonic solution. On the facts, the Supreme Court raised the non-pecuniary damages for a nineteen-year-old victim of a car accident to PLN 550,000 (\$180,000), (the victim demanded PLN 1,000,000 for extremely severe brain injuries causing permanent physical and mental damage, and 100% disability.<sup>77</sup>

### *C. Non-Pecuniary Loss in Wrongful Death Cases*

The close persons (victims *par ricochet*) are entitled to compensation of the moral damage arising from the victim's death (art. 446 § 4 of k.c.). The bereavement claim was introduced by the revision of the Civil Code on May 30, 2008.<sup>78</sup> Since then a major theme in personal injury jurisprudence has been the problem of compensating moral harm of family members of the deceased when the death happened before August 3, 2008. It should be noted that the legislature did not introduce any special intertemporal provisions in the revision of 2008, hence the regular rules of intertemporal law apply (in particular, the *tempus regit actum* rule).

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76. OSNC ZD C/2010, item 80.

77. A similar sum of damages was granted to a widow for the deterioration of her life due to the death of her husband in a car accident on the basis of article 446 §3 k.c. See SN judgment of 14 March 2007, I CSK 465/06, OSP 11/2008, item 123. On remand the Court of Appeals awarded PLN 500,000 with interest, which made a total of PLN 1 million. The average awards in similar cases hover around PLN 200,000 (\$66,000).

78. Act of 30 May 2008, Dz.U. 2008, no. 116, item 731.

In the case of January 14, 2010 (IV CSK 307/09)<sup>79</sup> the Supreme Court allowed bereavement damages to be pursued on the basis of the violation of the personal right to family ties (art. 24 in conjunction with art. 448 k.c.). Such a construction of articles 24 and 448 k.c. has caused a vast flow of claims arising from events that happened prior to August 3, 2008, in particular in the light of the Court's recent liberal approach to accumulation of claims for compensation of non-pecuniary loss on the basis of article 448 k.c.<sup>80</sup> The scenario almost exclusively involves death arising from a traffic accident. The idea of making use of the provisions regulating the protection of personal rights in order to create a ground for awarding compensation for the moral damage arising from the victim's death was first applied shortly before 2008 in a few judgments of the courts of appeal.<sup>81</sup> In fact, this trend in case law contributed to the legislative change in 2008. The protection of personal rights as a legal ground for such claims was, however, called into question by scholars. Since the revision of the civil code in 2008, the common opinion is that indirectly injured persons have finally been vested with a right to seek redress of moral harm arising from the death of a family member.

Nevertheless, since 2010 the Supreme Court has repeatedly held that a "special family tie between the living persons" may be violated by wrongfully causing death to one of the family members.<sup>82</sup> The catalogue of the interests included in article 23

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79. OSNC-ZD C/2010, item 91; Bagińska, *Poland* (2010), *supra* note 49, at 467-70, nos. 52-59.

80. SN judgment of 9 September 2008, III CZP 31/08, OSNC 3/2009, item 36, reported in Bagińska, *Poland* (2009), *supra* note 46, at 488-90, nos. 42-50.

81. SA in Gdańsk judgment of 23 September 2005, I ACa 554/05, 9-10 PALESTRA 308 (2006); SA in Gdańsk judgment of 14 December 2007, I ACa 1137/07 (unpublished).

82. *See* SN judgment of 21 October 2010, III CZP 76/10, OSP 9/2011, item 96; SN judgment of 10 November 2010, II CSK 248/10, OSNC-ZD B/2011, item 44; SN judgment of 3 June 2011, III CSK 279/10; Bagińska, *Poland* (2011), *supra* note 52, at 493-97, nos. 13-26; similarly, also in SN judgment of 13 July 2011, III CZP 32/11 (unpublished); SN judgment of 15 March 2012, I CSK 314/11 (unpublished); SN judgment of 7 November 2012,

k.c. is open-ended and the Supreme Court found no reason to exclude emotional family ties from the sphere of legal protection.

It is hard to contest the Court's argument referring to unequal treatment of claimants. Without question, those victims who were "unlucky enough" to lose their next-of-kin before August 3, 2008 are "discriminated" against by the system. They form a substantial group of actual and future claimants. Why are they to be treated differently with respect to entitlement to bereavement claims than those who lost their relative after August 3, 2008? From the constitutional perspective, such a situation is unacceptable. On the other hand, the *tempus regit actum* rule was not modified by the legislature and it has to be applied. This policy decision is now attenuated by the refreshed construction of the provision of article 448 k.c. in the shape it has existed in since 1996.<sup>83</sup> According to the Court, the fact that indirect victims were finally vested with a right to claim bereavement damages in 2008 does not mean that they had been prevented from seeking compensation pursuant to the rules on the protection of personal interests before that date. In the Court's view, the legislative change only confirmed the admissibility of compensatory claims based on the protection of personality rights.

That entirely new interpretation was created and maintained in the context of the indemnity paid under third party liability motor insurance,<sup>84</sup> as the scope of guarantee liability of an insurer is identical (albeit capped) to the scope of civil liability of the insured towards any victim. In all cases where the Supreme Court equated the civil liability for wrongful death with the violation of a personality right (i.e., a special emotional family tie), the

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III CZP 67/12, OSN IC 4/2013, item 45; SN judgment of 20 December 2012, III CZP 93/12, OSN IC 7-8/2013, item 84.

83. See Bagińska, *Poland* (2010), *supra* note 49, at 468-69, nos. 56-58.

84. See article 38 of the Law on Compulsory Insurance, Insurance Guarantee Fund and Polish Motor insurers' Bureau, Act of 22 May 2003, Dz.U. 2003, no. 124, item 1152, with amendments.

defendant, sued directly by the next-of-kin, was a third party traffic liability insurer, whose liability has a cap of €5 million (until June 10, 2012, the cap was €2.5 million). Nevertheless, in no single case can one find any overt policy argument indicating that the insurers' deep pockets had a great impact on the ruling. A similar decision against a "normal" defendant (e.g., against a doctor for medical malpractice which resulted in death, or a recourse claim of the insurer towards a drunken driver) has not yet been reported.<sup>85</sup> It ought to be noted that this case law, despite meaningful criticism in legal writings, is well established.

From a practical angle, pursuing "old" cases, where the claims have not yet expired, has become a huge problem for the insurance sector. Most of the cases from before August 2008 were adjusted and paid out to the claimants—next-of-kins. Hence, now insurers face the necessity of safeguarding millions of Polish zlotys to cover the claims grounded in the theory of an infringement of a new personality interest. The average award ranks between PLN 100,000 and 120,000 (\$33,000–40,000), but not infrequently the sums reach the ceiling of \$120,000. This higher level of compensation reflects the sums paid by the Polish government to the members of families of the victims of a governmental plane crash in Smolensk (Russia) in 2010, in which 98 persons were killed. The sum of PLN 300,000 (\$100,000) is also a maximal cap in the new system of seeking compensation for losses due to medical incidents in the event of a patient's death (discussed below).

Finally, a victim-oriented approach also concerns the scope of entitlement to bereavement damages. In a landmark decision of March 9, 2012 (I CSK 282/11),<sup>86</sup> the Supreme Court has extended the understanding of the "next-of-kins" who may claim non-

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85. See Ewa Bagińska & Izabela Adrych-Brzezińska, *Poland* in EUROPEAN TORT LAW 2013 at 510-13, nos. 88, 90-92 (E. Karner & B.C. Steininger eds., De Gruyter 2014) [hereinafter *Poland* (2013)].

86. OSP 11/2012, item 106; Bagińska & Krupa-Lipińska, *Poland* (2012), *supra* note 68, at 539-42, nos. 59-71.

pecuniary compensation on the basis of article 446 § 4 k.c. The Supreme Court ruled that a baby who is stillborn may be declared a descendant according to the said provision. In this case, a baby was stillborn due to the injuries that its mother suffered in a car accident. At the time of the accident, the mother was in her 34th week of pregnancy and the fetus was a viable baby that could have lived outside the womb. Due to the loss of the baby, its parents suffered bereavement; the mother was traumatized, not able to work, and taking psychotropic medication. She claimed PLN 150,000 (\$50,000) and the father PLN 100,000 (\$33,000) as bereavement damages. The Supreme Court awarded compensation holding that an unborn baby might be considered as next-of-kin under a factual test. Hence, it should be established in each case whether strong, positive and deep emotional bonds existed between the plaintiffs and the deceased—that is, whether it was an expected and wanted baby. It was the first time that the Supreme Court awarded non-pecuniary damages for parents as secondary victims who have had a stillborn baby. In 1966 the Supreme Court considered an opposite situation: whether a baby might claim for bereavement damages as a secondary victim if it was in its mother's womb at the time of the death of its father. The court then answered in the affirmative.<sup>87</sup> The decision of March 2012 has been criticized in legal academic writings.<sup>88</sup> According to Mirosław Nesterowicz, the final result (the award of bereavement damages) is correct and just, but the legal reasoning of the Court is wrong: the parents' claims should have been classified as those of primary victims (on the basis of art. 445 § 1 k.c.), as they had

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87. SN judgment of 4 April 1966, II PR 139/66, OSPIKA 12/1966, item 279. The case was based on article 166 of the Code of Obligations (1933), which was equivalent to article 446 § 4 k.c.

88. See Mirosław Nesterowicz, *Dziedziczenie roszczenia o zadośćuczynienie za krzywdę wyrządzoną dziecku w łonie matki. Glosa do wyroku SN z 24 marca 2011 r. (I CSK 389/10)* [*Inheritance claims for compensation for the harm done to the child in the womb. Commentary on the judgment of the Supreme Court of 24 March 2011. (I CSK 389/10)*], 7 PRZEGLĄD SĄDOWY 197 (2012); see also cmt by Bączyk-Rozwadowska, OSP 11/2012, item 106.

suffered moral damage (physical and mental pain) due to the death of their unborn baby, and not as those of secondary victims (on the basis of art. 446 § 4 k.c.). To justify its decision, the Supreme Court pointed to the distinction between the terms “injured” and “deceased” used in article 446 k.c. Some commentators approve of this as the correct approach, coherent with the *ratio legis* of the Code provision, which implies that a deceased person does not need to have legal capacity.<sup>89</sup> Others argue that the term “deceased” used in the article is a logical consequence of the regulatory scheme in articles 444-446 k.c.: articles 444–445 k.c. concern claims of a primary victim, while article 446 k.c. concerns claims of an indirectly injured person, resulting from the death of the primary victim.<sup>90</sup> To be classified as “deceased”, however, the baby needs to live at least for a moment.

#### V. THE REFORM OF THE RULES ON CLAIMS PRESCRIPTION IN PERSONAL INJURY CASES<sup>91</sup>

Until recently tort claims were limited to three years from the date that the victim learned of the damage and the person responsible, but in any case to ten years since the tort occurred (art. 442 §1 k.c.). The key practical problem was compensating personal injuries stemming from events that took place more than ten years before the occurrence of the damage. Lower courts had tackled this problem differently, following the grammatical construction of article 442 §1 k.c., although the case law was largely inconsistent. In the Resolution of the Full Civil Chamber of

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89. See cmt by Bączyk-Rozwadowska, *supra* note 88, at 749.

90. See Nesterowicz, *supra* note 88, at 108.

91. In Polish law prescription of claims does not result in the termination of a right. The right (claim) survives the lapse of time, but the debtor, when sued, may raise a defence of limitation of action and the court will thus dismiss the claim (i.e., the claim is time-barred). Should the debtor not raise the defence, the court will enforce the claim, as it has no competence to apply the statute of limitations *ex officio*.

February 17, 2006,<sup>92</sup> the Supreme Court held that the maximum ten-year period must always be counted 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. When construing article 442 §1 k.c., no reference should be made to the notion of “accrual of claims.” This judgment preceded the ruling of the Constitutional Tribunal (*Trybunał Konstytucyjny* or TK). The Constitutional Tribunal, in the judgment of 1 September 2006 (SK 14/05), declared that the situation where some claims may be limited in time before the victim is even aware of the damage was unconstitutional.<sup>93</sup> The Tribunal thus repealed article 442 §1 sentence 2 k.c. because of its unconstitutionality.<sup>94</sup>

Consequently, the rules on prescription of tort claims placed in the Title on Torts were modified in 2007 by the Act of 16 February 2007 on the Revision of the Civil Code.<sup>95</sup> Pursuant to the new article 442[1] §1 k.c., a claim for redress of damage caused by a tort shall be 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 damage occurred. This means that the three-year period stops running after ten years from the day of the tort. The ten-year period must always be counted from the day of the tort (*a tempore facti*), and not from the day of the awareness of the damage (*a tempore scientiae*).

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92. III CZP 84/05, OSN 7–8/2006, item 114; Ewa Bagińska, *Poland* in EUROPEAN TORT LAW 2006 at 389-90, nos. 75-82 (H. Koziol & B.C. Steininger eds., Springer 2008) [hereinafter *Poland* (2006)].

93. TK judgment of 1 September 2006, 14/05, OTK, A- 2006, no. 8, item 97; Bagińska, *Poland* (2006), *supra* note 92, at 389-92, nos. 83-90.

94. Article 442 k.c. originated in the 1933 Code of Obligations, and despite strong criticism has not been changed with the exception of shortening of the prescription period from twenty to ten years in 1950.

95. Dz.U. 2007, no. 80, item 538; *see* Bagińska, *Poland* (2007), *supra* note 60, at 451-52, nos. 1-5. The revision did not modify the interpretation of Article 449[8] k.c.—the special rule on prescription in the product liability regime which must be construed in conformity with Product Liability Directive 85/374/EEC.

Pursuant to article 442[1] §2 k.c., if damage resulted from a crime or misdemeanour, compensation claims are barred after a period of twenty years from the date when the crime or misdemeanour was committed, regardless of when the person who suffered the damage learned about it and about the person obliged to redress it.

A 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 k.c.). This means that regardless of the lapse of the time *a tempore facti*, whether ten or twenty years, the claim arising from personal injury will not be time-barred for three years since *tempore scientiae*. 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 with regard to 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.<sup>96</sup>

Under the new regime on prescription, the ‘suspension’ of the period of prescription in personal injury cases (art. 442[1] §3 k.c.) does not preclude obtaining a declaratory judgment that the defendant is liable for any future damage originating from the same event (tort). The Supreme Court, in the ruling of February 24, 2009,<sup>97</sup> held that the amendment of the Civil Code had not caused a substantial difference in this respect as compared to the former regime.<sup>98</sup> Damage caused by injury to persons is dynamic and the consequences of tortious conduct may appear long after the event. The rule stated above performs two functions. First of all, it enables the injured person to claim compensation for distant

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96. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 127-29, nos. 228-30.

97. III CZP 2/09, OSNC 12/2009, item 168; Bagińska, *Poland* (2009), *supra* note 46, at 486-88, nos. 34-41.

98. This was well-established case law under the former regime; see SN judgment of 17 April 1970, III PZP 34/69 OSNCP 12/1970, item 217.

consequences of a tort. The second aim is to facilitate the burden of proving all conditions of liability for those consequences. Therefore, an injured person has, in principle, legal standing to ask for a declaratory judgment if she pursues her interest simultaneously with a claim for actual damages.

## VI. RECENT DEVELOPMENTS IN THE MANAGEMENT OF PERSONAL INJURY CASES

### *A. Group Actions Law*

In 2010 the legislature introduced class (group) actions into Polish law.<sup>99</sup> A class action may only be brought with respect to claims for consumer protection, claims based on product liability and claims based on tort law (except for claims for protection of personal interests).<sup>100</sup> A class action is allowed where single-type claims are asserted by at least ten persons and are based on the same facts or on the same legal bases, provided that material circumstances that substantiate the claim are common for all the claims. There is no maximum limit of claimants. However, with regard to claims for payment of money, all the group's members have to agree on the unified amount per person being claimed. Diversified amounts are still possible, provided that they are settled within subgroups of at least two persons. This requirement entails a detraction from the idea of full compensation and is rather uncommon among other class action models. Some class members will need to modify their claims and adjust them to the amounts claimed by other class members. In practice, this means decreasing the claim amount to the level of the lowest in the class or sub-

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99. Law on Pursuing Claims in Group Proceedings, Act of 17 December 2009, Dz.U. 2010, no. 7, item 44; in force since July 18, 2010.

100. The distinction of product liability claims from tort claims is artificial. A product liability claim is a tort claim under Polish law. Perhaps it is due to the fact that torts are regulated in Chapter VI and the product liability regime in Chapter VI prim of Book Three of the Civil Code. Chapter VI prim implemented the EU Directive 374/85/EC (it was technically more convenient to create an additional chapter in the code).

group, because courts will not award compensation above the actual damage.<sup>101</sup>

If claims are pecuniary, the plaintiffs may request that instead of demands for payment, the court establish the liability of the defendant (art. 2). It is an opt-in procedure. The claimants must be defined (not anonymous) and they have to make a declaration of willingness to participate in the class action before the court. The regime of a class action does not exclude the right to pursue individual claims under the general rules of civil procedure.

Clearly, the aim of the new mechanism is to simplify and facilitate actions by large numbers of people seeking compensation. In spite of this attempt at approaching damages more “globally”, the Act does not detract from the main premise of compensatory rules: each class member is to be awarded damages individually. The first Polish class action suit was filed in a case of over 400 patients who were infected with the hepatitis C virus through the administration of a medication (the class is seeking approximately PLN 75 million = \$25 million in damages) and is still ongoing.

*B. Alternative Route for Seeking Compensation for Personal Injury Arising from Hospital Medical Incidents*<sup>102</sup>

For the past 20 years Polish legal writers have strongly supported the introduction of an alternative compensatory scheme to deal with the large number of claims arising from health care services. Both the Swedish No-Fault Patient Insurance system of 1975 (as amended in 1997) and the French model were suggested as best suited to Polish juridical, economic and social conditions.<sup>103</sup> Such a special scheme would enhance, in particular,

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101. See BAGIŃSKA & TULIBACKA, *supra* note 4, at 147-49, no. 276.

102. See generally Ewa Bagińska, *The New Extra-Judicial Compensation System for Victims of Medical Malpractice and Accidents in Poland*, 3 JOURNAL OF EUROPEAN TORT LAW (JETL) 101 (2012).

103. See KINGA BĄCZYK-ROZWADOWSKA, ODPOWIEDZIALNOŚĆ CYWILNA ZA SZKODY WYRZĄDZONE PRZY LECZENIU [LIABILITY FOR DAMAGES FOR

the protection of victims of hospital infections, infections stemming from blood transfusions, medical accidents and vaccinations.<sup>104</sup> It is beyond doubt that such high awards have rendered budget management by public hospitals problematic.

The Act of 28 April 2011, on the Revision of the Law on Patients' Rights and the Patients' Ombudsman, introduced a new, extra-judicial procedure for patients' personal injury claims arising from a medical incident.<sup>105</sup> This procedure aims to enable hospital patients to seek compensation relatively swiftly directly from the insurer (or from the hospital, if the insurance coverage is unavailable). The subject matter of the procedure is the establishment of a "medical incident" for which a hospital is liable. The hospital's liability is still considered a civil liability for medical malpractice or a medical accident. However, the compensation available via this legal pathway is capped. Concurrently, a new Law on Healthcare Activity<sup>106</sup> obliged all healthcare entities that manage hospitals to obtain patient insurance against damages caused by medical incidents.

This extra-judicial, administrative (or quasi-administrative) system is based on sixteen regional medical boards (commissions). The boards consist of sixteen lawyers and physicians in equal numbers. They are appointed by the Ministry of Health (one member), the Patients' Ombudsman (one member), and the head of a region (fourteen members) from the candidates recommended by professional corporations and patients' organisations active in a given region.

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TREATMENT] 355 et seq. (Dom Organizatora TNOiK 2007). For an analysis of the hybrid French approach, see Simon Taylor, *Providing Redress for Medical Accidents in France: Conflicting Aims, Effective Solutions?*, 2 JETL 57 (2011).

104. See MIROSLAW NESTEROWICZ, PRAWO MEDYCZNE [MEDICAL LAW] 416 (9th ed., Dom Organizatora TNOiK 2010).

105. Dz.U. 2011, no. 113, item 660. The system became effective as of January 1, 2012 and applies to all medical incidents that occur on or after that date.

106. Act of 18 March 2011, Dz. U. 2011, no. 112, item 654.

A patient, or his or her statutory representative or heirs, may file a claim. The process of seeking redress through a medical complaints board is not synonymous with contemporary forms of alternative dispute resolution. The procedure is neither arbitration nor mediation because the patient may commence the proceedings without the consent of the other party. The legislature thus describes the procedure as alternative, because a patient has a choice: he or she can either follow this procedure, taking his or her matter before a regional board and agreeing to the proposal made by the responding insurer (or hospital), or take his or her claim through the general court system. The legislation does not provide for any judicial control over the decisions of medical boards or the compensation proposals made by the insurers.

The Act introduced the first domestic statutory caps on damages in personal injury cases: the maximum cap of PLN 100,000 (\$33,000) for personal injury, and PLN 300,000 (\$100,000) in the case of a patient's death. The Ministerial Regulation of February 10, 2012,<sup>107</sup> concerning the scope and conditions of evaluation of compensation for a medical incident provided tables for personal injuries and sub-caps in the case of a patient's death: PLN 200,000 (\$66,000) for pecuniary losses of the successors, and a maximum of PLN 100,000 (\$33,000) as non-pecuniary loss damages. More specific tables are also included. Insurers are required to refer to the tables when making an offer of compensation in the special procedure.

There is serious criticism as to the inconsistencies between the Act and the civil code, the establishment of compensation caps that are either too low or too high, or the unreasonably limited scope of application of the procedure. The nature of the procedure also raises serious constitutional questions. This notwithstanding, the general direction of the new law appears to meet the expectations of both legal and social actors. In Poland, more than 60% of all

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107. Dz.U. 2012, item 742.

persons infected with the Hepatitis B virus (including approximately 80% of children under two years old) were infected in a health care institution. The second common source of injury is related to childbirth: between 2001 and 2009, approximately 330 lawsuits annually were brought to court.<sup>108</sup> However, many more cases, especially those involving full or partial disability following a hospital-related injury, were in fact handled within the framework of the social security system. This means that a substantial number of injured patients were either uncompensated or under compensated. The system has been in operation for two years and patients have been successful in approximately 25% of the cases filed.

## VII. CONCLUSION

The evolution of Polish tort law in the last two decades clearly shows that—contrary to what was argued in the previous political system—money damages can play an important social function. They supplement the social benefits paid out from the (public) social security system as well as the public health care system. Damages for non-pecuniary loss aim to compensate victims, as far as money can, for moral harm. In general, in the present practice the sums awarded by Polish courts as compensation for non-pecuniary loss are increasingly high. In certain cases this is the only type of damages received by the victim. Although the awards adjudicated by Polish courts may seem relatively insignificant to American readers, especially when compared with amounts awarded for similar injuries in the U.S., they have sufficient buying power in Poland. The emphasis on the compensatory function has led to the rejection of “moderate” sums or “average standard of living” as an additional yardstick for computing the

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108. The statistical data are attached to the Government Bill Amending the Law on Patients' Rights and the Patients' Ombudsman and Other Laws, Form no. 3488, available at <http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/3488> (last visited May 15, 2015).

award. This is one of the most important developments in the court practice in the last decade.

The other important development is the explicit basis for bereavement damages. It has immediately led to a change in the courts' interpretation of the already-existing rules on personal rights protection in order to ameliorate the lacuna caused by the failure of the legislature to embrace existing, yet unexpired, claims of the next-of-kins.

Another significant legislative reform, brought about by a decision by the Constitutional Tribunal, relates to the extension of, as well as substantial modification in, computing the prescription periods in personal injury cases. The new procedural instruments that have been made available to the victims remain to be assessed. The alternative path for victims of medical incidents seems to have become popular with patients, in contrast to group actions.