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A PUBLIC AUTHORITY'S LIABILITY FOR DAMAGES ACCORDING TO THE PRINCIPLE OF EQUITY IN POLISH LAW

1. Among the three principles of liability for tort – guilt, risk and equity – accepting the latter one as justification of liability for damages is of a rather special character. Usually, the problem concerns the situations in which neither the principles of guilt nor risk can be applied and yet, burdening a definite entity with an obligation to repair the damage for the benefit of the injured party is justified by equity, or according to a different terminology – by the principles of social life.[1]

The basis of a public authority's liability for damages according to the principle of equity is settled in Poland pursuant to Art. 417^2 of the Civil Code, according to which if through the legal performance of an act of a public authority a damage was done to a person, the injured party can demand a complete or partial reparation or financial compensation for the damages caused. Such damages may be claimed under principles of equity when the circumstances so require it, and especially when the harm causes the injured person to be unable to perform any work or given the latter's difficult material situation.

2. The state's liability according to the principle of equity has a fairly long tradition in Poland. It was already introduced in the act from 15 November, 1956 on the State's liability for the damages done by state functionaries.[2] Art. 5 of the act provided for the possibility of granting the injured person a complete or partial compensation even in cases where no basis for the state's liability existed ac-

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[1] Cf. W. CZACHÓRSKI (A. BRZOZOWSKI, M. SAFJAN, E. SKOWROŃSKA-BOCIAN), *Zobowiązania. Zarys wykładu*, Warszawa 2007, p. 232.

[2] "Dziennik Ustaw" [Journal of Laws] No. 54, item 243.

cording to the regulations of civil law if as a consequence of the actions of a state official the injured person suffered a bodily injury, health disturbance or a family lost their main bread winner, and respects of equity, particularly the inability of the injured person to do work or the latter's difficult material situation speak in favour of reparation of damages. The text of this footnote, with slight editorial modifications, is found in Article 149 of the Civil Code from 1964[3]. When Article 77 item 1 of the Constitution from 1997[4] came into force, it did not introduce any more serious changes in this respect, apart from an unequivocal settlement of the doubts appearing in jurisdiction and doctrine whether Article 419 of the Civil Code is applicable only in case of damages done by an illegal, though non-culpable act, or also in the case of acts that cannot be described as illegal. Altering the fundamental rule of public authority liability only on the illegality of causative behaviour, the Constitution clarified that the exceptional norm of Article 419 is applicable for so-called legal damages[5].

It should be noted that the idea of the state's liability based on the principle of equity has older roots than the above mentioned normative regulation. The idea of equity refers to one of the fundamental assumptions of liability for legal actions – the principle of equality towards public burdens. Liability is assessed even in cases of lawful activity, in the public interest, where the consequence of such activity is an unexpected or predictable but inevitable damage referring to especially valuable goods such as human life and health. If an individual suffered such a damage then it is just (right) that this burden should be transferred (through liability for damages), at least in part, onto the society which draws benefits from the activity of the public authority.

3. The construction of liability according to the principle of equity is based in principle on the classic, three-element formula of tort (causative act, damage, causal nexus); however, in all particular prerequisites, specific features can be seen which determine the special character of liability under discussion. However, the additional element that requires the case to be judged through the prism of the principle of equity is the most essential.

The supra-legal reference in the form of a general clause, which is of key importance to the discussed regime of liability, has undergone an evolution, which

[3] "Dziennik Ustaw" [Journal of Laws] No. 16, item 93, as amended.

[4] "Dziennik Ustaw" [Journal of Laws] No. 78, item 483, as amended.

[5] Cf. M. KĘPIŃSKI, R. SZCZEPANIAK, *O bezpośrednim stosowaniu artykułu 77 ust. 1 Konstytucji*, "Państwo i Prawo" 2000, 3, p. 83; G. BIENIEK, *Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez funkcjonariuszy po wyroku Trybunału Konstytucyjnego z dnia 4 grudnia 2001 r.*, "Przegląd Sądowy" 2002, No. 4, p. 20 and J. KREMIS, *Skutki prawne w zakresie odpowiedzialności odszkodowawczej państwa na tle wyroku Trybunału Konstytucyjnego*, "Państwo i Prawo" 2002, No. 6, p. 45.

made a specific circle. The act of 1956 refers, maybe carried away by the momentum of pre-war traditions, to the respects of equity. This is even more remarkable because the then binding regulations of the General rules of civil law[6] contained a general clause of „he principles of social life". Art. 419 of the Civil Code already used a new formulation. The clause of the principles of social life was directly taken from the Russian legal system and hence it was strongly imbued ideologically. A departure from the traditional clauses referring to supra-legal moral judgements was connected with an attempt to adapt the social and legal reality to the new ideological and political requirements.[7] Over the course of time, the ideological pressure disappeared and jurisdiction and doctrine gave the principles of social coexistence, the content of which was closer to their traditional counterparts.

After 1990 that process almost led to the obliteration of content limits between the traditional clauses and the principles of social life. As viewed by Z. Radwański, the clause of the principles of social life – according to the democratic rules of a legal state and man's freedoms respected by the former – refers to the values that are commonly recognized in the culture of our society and which are at the same time the heritage and an element of European culture.[8]

Despite the unifying tendencies, the literature drew attention to the need of returning to traditional clauses, which in the light of the new content of reference included in the clause of the principles of social coexistence had a more symbolic dimension, through the cut-off from the meanings originally granted to this clause which were connected to socialist ideology.[9] The new code regulation of public authority liability for damages already refers to the traditional reference to the principles of equity.

4. Equity in law constitutes a directive of two kinds. On the one hand, it is for the state to create just norms of behaviour which are concordant with the socially accepted system of values. On the other, it is for the law user who while establishing the content of the legal relation between definite entities by way of an individual act of application should aim at the consistency of this settlement with the system of supra-legal assessments.

The reference used in the construction of public authority liability on the principles of equity indicates the basic function of general clauses which is

[6] The act from 18.7.1950; "Dziennik Ustaw" [Journal of Laws] No. 34, item 311, as amended.

[7] M. SAFJAN, *Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)*, "Państwo i Prawo" 1990, No. 11, pp. 48-49.

[8] Z. RADWAŃSKI, *Prawo cywilne – część ogólna*, Warszawa 2009, pp. 46-47.

[9] Cf. M. SAFJAN, *Klauzule generalne*, pp. 56-57; Z. RADWAŃSKI, M. ZIELIŃSKI, [in:] *System Prawa Prywatnego*, vol. 1: *Prawo cywilne – część ogólna*, Warszawa 2007, p. 338; T. ZIELIŃSKI, *Klauzule generalne w demokratycznym państwie prawnym*, "Studia Iuridica" 23 (1992), p. 206.

expressed in the flexibility of the process of law application in the static aspect (assessment of a definite case) and the dynamic one reflected in a gradual, evolutionary transformation of law.[10] On the one hand, the above presented evolution of legal regulation of the state's liability based on the principle of equity points to the evolution of the process of interpreting the regulation through changing the content of the reference included in the general clause. On the other, a supra-legal reference allows for an individual estimation of each case and a search for the „golden means", which is a settlement satisfying the sense of justice stemming from the socially accepted axiological basis of the legal system.[11] This possibility is especially significant in cases like the one under analysis, where the question is about extraordinary solutions that are exceptions from the fundamental rule, after all also based on the compensatory justice, according to which illegal damage calls for compensation. Respects of equity, however, point out that in specific cases, although the causative action was undertaken in compliance with the law and in public interest, it would not be just (right) if the burden of this action in the form of a damage in goods especially valued (human life, health) was borne only by the person directly affected by the intervention. Referring to the principle of equity makes it possible to catch the moment when the compensation for this damage is required due to the axiological values lying at the basis of the whole system of law.

5. Respects of equity assume an estimation of the situation when a damage occurred through the prism of moral convictions and axiological principles consolidated in the society and adopted in the legal system.[12] Estimation of the validity of granting compensation should consider the criteria of two-fold nature: objective – the circumstances of the event, and subjective ones – the situation of the injured person himself. With reference to the circumstances, such elements as the situation when the damage was done, the motives of the action undertaken, and the kinds of acts of public authority with which the causative act is connected should be taken into consideration. Estimation of the situation of the injured person should consider their material and family situation, the kind and size of the damage, the inability to work, etc. Such a manner of estimating the validity of claims for compensation allows for the proper balancing of the proportions between the public interests, reflected in the protection of a certain good in re-

[10] Cf. M. SAFJAN, *Klauzule generalne*, p. 51.

[11] Cf. The concept of „individual equity" as viewed by I. C. KAMIŃSKI – *Słuszność w prawie*, Kraków 2003, pp. 34 ff.

[12] Cf. M. SAFJAN, K. MATUSZYK, *Odpowiedzialność odszkodowawcza władzy publicznej*, Warszawa 2009, p. 137 and A. SZPUNAR, *Odpowiedzialność Skarbu Państwa za funkcjonariuszy*, Warszawa 1985, pp. 270-271.

spect of which the activity which is the source of the damage was undertaken, and the individual interest of the injured person[13].

Any assessment of the validity of granting compensation based on equity criteria should also take into consideration the analysis of the behaviour of the person injured themselves. The resolution of the full composition of the Civil Chamber of the Supreme Court from 15 February, 1971[14] pointed out that „adjudication of compensation only because of the consequences of the accident cannot meet with social approval if the injured person suffered a damage as a result of a non-culpable intervention of the state organs caused by the injured person's own behaviour, significantly infringing the principles of social life. It is not possible to burden the State as the subject of the national assets and in this way distribute onto the society the burden of the damage suffered by the citizen who does not want to conform to the norms of behaviour determined by the regulations of law and the principles of social life"[15]. The injured person's behaviour, especially that caused by fault, can then justify the exclusion of liability according to the principles of equity if the estimation of all circumstances of the matter speak for it[16]. This results both from the purposeful statutory interpretation and the systemic one, through the possibility of applying the regulations concerning the injured person's contribution to damage (Art. 362 Civil Code).

6. As mentioned above, although the liability of a public authority on the principle of equity is based on a tort theory, each of the elements that make the tort are in this case ascribed additional, specific features.

The specific character of the institution under discussion is already reflected in the character of the causative act that became the source of damage. Liability according to the principle of equity finds its application in the situation when damage is done with a legal act, which means such that fully corresponds to the legal

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[13] Cf. M. SAFJAN, K. MATUSZYK, *Odpowiedzialność odszkodowawcza*, p. 138. Analogously P. DZIENIS, *Odpowiedzialność cywilna władzy publicznej*, Warszawa 2006, p. 235.

[14] The directives of the administration of justice and court practice in the liability of the Treasury as well as the state legal entities for the damages done by the state's functionaries; III CZP 33/70, "Orzecznictwo Sądu Najwyższego" 1971, No 4, item 59.

[15] Also cf. A later decision of the Supreme Court from 5 September, 1980 (II CR 273/80; publ. Computer legal research system LEX, No. 8266), where the Court expressed the following opinion: "Adjudication of compensation for the benefit of the person serving the penalty of imprisonment on the basis of the exceptional regulation of Art. 419 of the Civil Code cannot meet with social approval only in view of the fact that this person found themselves in the living and health conditions that are worse than those of the persons who do not infringe the norms of behaviour determined by the regulations of law or the principles of social life". Analogously, Supreme Court in the sentence from 6 June, 2001 (V CKN 870/00; publ. Computer legal research system LEX, No. 52564).

[16] Cf. A. SZPUNAR, *Odpowiedzialność Skarbu Państwa*, p. 260.

norms regulating a given scope of the activity of public administration (e.g. regulations concerning the police, the norms concerning rescue operations, etc.).

Respects of the system's statutory interpretation require that an authoritarian action must absolutely be adopted. The application of special rules of the liability of the state and other entities of public authority is justified only when it refers to the actions in the sphere of an empire, where the stronger position of the powerful subject towards an individual is used. This justification is excluded in cases of damages caused by the activities in the sphere of dominium, where the public-legal persons act in accordance with the principles binding to all participants in the conduct of law transactions. These remarks are applicable both in relation to the liability of the authority according to the principle of risk and according to the principle of equity, which is confirmed in the wording of Art. 417^2 Civil Code. Therefore, the present legal state, unlike the former one, does not provide for the possibility of applying the discussed regulation as the basis of liability for the damage done with medical treatment in public health care institutions, especially in the case of treatments connected with high risk resulting from new methods of treatments where the treatment was undertaken not only in the patient's interest but also in the public interest, as expressed in the necessity of practical testing of innovative solutions in the context of the development of medicine. In such situations, when on the one hand it is difficult not only to prove guilt but generally the illegality of the activity of the medical staff as public functionaries and on the other it would be wrong to burden the patient himself with the costs (in the form of damage) of risky, innovative treatments, the equity regulation as the basis of compensation for damages could be applicable towards the Treasury, for the account of which a given health care institution worked. The activities undertaken by health care institutions within the frameworks of health services for the benefit of patients cannot be attributed the authoritarian character, hence the application of the rules of public authority liability will not be possible. This also refers to the activities undertaken in the public interest, e.g. those connected with protective vaccination, which is why the literature postulates for a system modelled on the solutions adopted in other countries of the state's warranty liability for the side-effects and unpredictable consequences of such activities.[17]

In older literature and jurisprudence it was a questionable issue whether compensation is due in situations where the activity that caused the damage was undertaken first of all in the interest of the injured person (it mainly referred to cases

[17] Cf. more broadly E. BAGIŃSKA, *Odpowiedzialność odszkodowawcza za wykrywanie władzy publicznej*, Warszawa 2006, s. 301.

involving medical treatments). Initially, the opinion prevailed that adjudging damages was permissible only when the causative act was undertaken in the general interest and not with the aim of protecting the good of the injured party.[18] However, that standpoint met with criticism from part of the representatives of the doctrine, as a result of which the opposite view prevailed.[19] As rightly remarked by M. Safjan, marking a demarcation line between the spheres of protecting the individual and the general interests would be difficult in practice. The protection of the individual interest through the activity of a public organ is most frequently a sign of competences established in the interest of a community.[20] The direct aim of the causative act should not then be of decisive importance while estimating the validity of claims for damage based on equity criteria.

The exceptional character of liability based on the principle of equity decided upon introducing limitations in the sphere of the prerequisite of damage. Liability includes only and exclusively the damage to a person,[21] which is justified by the specific character of goods included within compensatory protection. Attention should also be paid to the restrictive statutory interpretation of the scope of damages included within the claims, which excluded, for example, the possibility of compensating for damages connected with the considerable deterioration of the life situation.[22]

Postulates appear in literature about broadening the liability of a public authority on the principles of equity onto material damages as well.[23] While evaluating these postulates, attention should be paid to the fact that such a solution is favoured by international standards – the Recommendation of the Council of

[18] Supreme Court in the above mentioned resolution of the full composition of the Civil Chamber from 15 February, 1971.

[19] Cf. e.g. J. KOSIK, *Odpowiedzialność za funkcjonariuszy państwowych w kodeksie cywilnym z perspektywy trzydziestolecia*, "Państwo i Prawo" 1974, facs. 7, pp. 101-102; H. PARUZAL, *Odpowiedzialność Skarbu Państwa z art. 419 k.c. w świetle orzecznictwa Sądu Najwyższego*, "Nowe Prawo" 1970, No. 7-8, p. 1019.

[20] M. SAFJAN, K. MATUSZYK, *Odpowiedzialność odszkodowawcza*, pp. 134-135.

[21] A significant editorial change between Articles 419 and 417^2 of the Civil Code should be directed attention to. The former regulation enumerated specific damages to a person which were subject to reparation – bodily injury, health disturbance, loss of bread-winner. The new regulation uses a synthetic definition – an injury to a person, which is considered as a more advantageous solution from the point of view of the harmed person.

[22] Decision of the Supreme Court from 11 August, 1971 (II CR 304/71; publ. Computer legal research system LEX, No. 6975).

[23] E.g. E. BAGIŃSKA, *Odpowiedzialność odszkodowawcza*, p. 224; P. GRANECKI, *Odpowiedzialność cywilna Skarbu Państwa za szkodę wyrządzoną działaniem swojego funkcjonariusza*, "Palestra" 2000, No. 11-12, p. 24 and E. ŁĘTOWSKA, *W kwestii zmian przepisów KC o odpowiedzialności za szkody wyrządzone działaniem władzy publicznej*, "Państwo i Prawo" 1999, No. 7, p. 81.

Europe No. R(84)15 on public authority liability from 1984 does not introduce such a limitation.[24] The Polish legal order also lacks any other norm giving a general basis for claims for damages in case of damages done by the lawful action of a public authority.[25] On the other hand, voices can be heard that extending the liability of a public authority based on the principles of equity does not seem possible in the present social and economic reality.[26] Besides, although there is no general norm constituting the basis of claims for damages to the property done according to the law of the activity of public authority, there are possibilities of compensating for such damages on the basis of special rules, which is the subject of considerations in another place of this volume.

Liability according to the principles of equity occurs also on the condition that respects of equity speak for it. As it seems, adjudication of compensation for the damage can be considered only in case of bodily injury or disturbance of health (Art. 417^2 related to Art. 445 Civil Code). If the violation of other personal goods (Art. 23 Civil Code) was a consequence of the legal performance of public functions, it does not seem to provide the basis for claims for a compensation (based on Art. 448 Civil Code).[27] Such claims could not be treated as referring to the respects of equity, since the latter justify the adjudication of special protection – in the form of compensation – exclusively to the goods of the highest value – human health and life. Taking into consideration the character of authoritarian intervention, which is after all undertaken in the public interest, it should be postulated that the court's decision in the question of compensation was preceded by a thorough analysis of all circumstances of the matter from the point of view of the principles of equity.[28]

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[24] Drawn attention to by M. SAFJAN, *Rekomendacja No. R(84)15 w sprawie odpowiedzialności władzy publicznej a stan prawny obowiązujący w Polsce*, [in:] *Standardy prawne Rady Europy. Teksty i komentarze*, vol. II: *Prawo cywilne*, ed. M. SAFJAN, Warszawa 1995, p. 296 and E. BAGIŃSKA, *Odpowiedzialność odszkodowawcza*, p. 224.

[25] Cf. J. PARCHOMIUK, *Odpowiedzialność odszkodowawcza za legalne działania administracji publicznej*, Warszawa 2007, pp. 190 ff.

[26] Cf. P. DZIENIS, *Odpowiedzialność cywilna*, pp. 231-232.

[27] The same but with different justification Z. BANASZCZYK, [in:] *System Prawa Prywatnego*, vol. 6: *Prawo zobowiązań – część ogólna*, ed. A. OLEJNICZAK, Warszawa 2009, pp. 856-857.

[28] Generally, earlier jurisdiction treated as exceptional the adjudication of compensation on the basis of regulations on liability according to the principles of equity – cf. the decision of the Supreme Court from 4 October, 2002 (III CKN 1452/00; Computer legal research system LEX, No. 74410). Despite clear allowing for such a possibility in the now binding regulations, a cautious approach to the possibility of adjudicating compensation in the case under discussion seems to be a permanent tendency of jurisdiction.

It should be observed that reparation of damage according to the basis of the principle of equity can take place wholly or in part, depending on the assessment of an individual case by the court. As rightly stated by M. Safjan, not only the appearance of claims for damage but the height of the compensation as well depend on the assessment of the circumstances from the point of view of the principles of equity.[29]

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[29] Cf. M. SAFJAN, K. MATUSZYK, *Odpowiedzialność odszkodowawza władzy publicznej*, p. 138.

System Prawa Prywatnego, vol. 6: Prawo zobowiązań – część ogólna, ed. A. OLEJNICZAK, Warszawa 2009.

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A PUBLIC AUTHORITY'S LIABILITY FOR DAMAGES ACCORDING TO THE PRINCIPLE OF EQUITY IN POLISH LAW

Summary

The state's liability for tort according to the principle of equity was introduced in Poland for the first time in the act from 1956 on the State's liability for damages done by the state functionaries. Respects of equity assume an assessment of the situation when the damage occurred through the prism of moral convictions and axiological principles consolidated in the society and accepted in the legal system. The assessment of the validity of adjudication for damages should consider both the objective circumstances of the matter and the injured person's situation. Liability comes into play in the situation when the damage was done by the action of an organ of public authority which was according to the law. The exceptional character of liability determines limiting it only to the injuries on a person, which is justified by the special character of goods included within compensation protection.

Key words: tort law; state liability for tort; liability of public authority; principle of equity; polish Civil Code.

ODPOWIEDZIALNOŚĆ ORGANÓW ADMINISTRACJI PUBLICZNEJ ZA SZKODY ZGODNIE Z ZASADĄ SŁUSZNOŚCI W PRAWIE POLSKIM

Streszczenie

Odpowiedzialność państwa za delikt zgodnie z zasadą słuszności została w Polsce wprowadzona po raz pierwszy w ustawie z roku 1956 o odpowiedzialności państwa za szkody wyrządzone przez funkcjonariuszy państwa. Szacunek dla słuszności zakłada ocenę sytuacji, w której szkoda powstała, poprzez pryzmat przekonań moralnych i zasad aksjologicznych uznawanych w społeczeństwie i przyjętych w systemie prawnym. Ocena zasadności wyroku za szkody powinna uwzględniać zarówno obiektywne okoliczności sprawy, jak i sytuację osoby poszkodowanej. Odpowiedzialność wchodzi w grę w sytuacji, kiedy szkoda została wyrządzona poprzez działanie organu władzy, które było zgodne z prawem. Wyjątkowy charakter odpowiedzialności decyduje o ograniczeniu jej jedynie do szkód wyrządzonych osobie, co jest usprawiedliwione przez szczególny charakter dóbr podlegających rekompensacie.

Słowa kluczowe: prawo deliktowe; odpowiedzialność państwa za delikt; odpowiedzialność organów administracji publicznej; zasada słuszności w polskim Kodeksie cywilnym.

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