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THE DYNAMICS OF THE DAMAGE CONCEPT IN THE CIVIL LAW – SELECTED ISSUES

1. Introductory remarks

The concept of “damage” appears in the language of different communities, regardless of what kind of values the operating law is subordinated to in the spheres where it functions. Without going into detailed theoretical issues, it should be noted that this concept goes beyond the area of social relations regulated by law. It has an interdisciplinary character and a long history. One can discuss damage not only in terms of economic and legal categories (although this is the most common aspect which appears in the colloquial language), but also in the moral and ethical dimensions and many other aspects. In all these areas, this is an important concept, but in the legal system in many cases it can constitute the essential category. Damage is associated with a universally accepted principle whereby a caused damage should be fixed. This is one of the fundamental assumptions protected by both public and private laws.

It should be emphasized that in both legal language and language of law damage is an abstract concept and as a generalization it requires filling with the content.¹ Referring to the role of this concept in the sphere of private law, it is necessary to clearly indicate that the key issue is to determine what damage is because it constitutes a basic premise of liability for damages.

Focusing on the issue of damages in the sphere of private law, it is worth remembering that, despite many wars and turmoil, private law is

¹ M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2008, p. 173 and the literature referred to there.

characterized by stability of “the core of its fundamental institutions”.² It is difficult to talk about this attribute in case of the law branches belonging to public law. This does not mean that private law has a static nature. The law operation is a specific process. Social relations are shaped by the law; at the same time, they affect its content – one deals with a feedback compression here.³ The same can be said about the mutual influence of the environment, in which the law operates, on different concepts and solutions adopted by the legal order, including the concept of “damage”.

It should be noted that particularly in the systems of positive law there is an unquestionable need to study the dynamics and content of the legal solutions. Such a need arises even because law regulates its own creation, in contrast to other systems of norms. The process, during which a legal norm is created, is governed by another legal norm. Typically, not only do they define the creation process, but by constitutional regulations they also indicate values which should be protected by the system of the created values. In the professional literature it is noted that the law cannot be defined otherwise than as a rule and order which should together serve to realize the idea of justice.⁴ In other words, an act cannot be considered to be law if it is deprived of a legal nature. The law should not be associated exclusively with the operation of the state. As it has been pointed out by A. Stelmachowski, the identification of legal norms with the state’s legislative activities and leaving all those standards of conduct that are not secured by the state compulsion result in the two very serious dangers: 1) cutting off the historical roots, 2) departure from the system values which constitute the immanent content of law.⁵

Having these general observations at the background, it is worth considering the content of the “damage” concept in the light of the provisions of the Civil Code, as well as the views presented in the literature and jurisprudence.

In the Polish legal literature, similarly as in the literature of other countries (especially those of the German legislation), damage is most commonly referred to as harm or legally protected property (interests). It is about injury expressed in the difference between the state property, which already

² A. Stelmachowski, *Zarys teorii prawa cywilnego*, Warszawa 1998, p. 11.

³ A. Stelmachowski, *Zarys teorii...*, p. 16.

⁴ G. Radbruch, *Rechtsphilosophie*, Stuttgart 1950, pp. 353–357; E. Bulygin, *Normative Positivism vs the Theory of Legal Argumentation*, in: T. Gizbert-Studnicki, J. Stelmach (eds.), *Law and Legal Cultures in the 21st Century: Diversity and Unity*, Plenary lectures, Warszawa 2007, pp. 226–227.

⁵ A. Stelmachowski, *Zarys teorii...*, p. 16.

existed and which could subsequently arise in the normal way of things, and the state created as a result of the event causing a change in the existing state of things, which is legally associated with liability for damages.⁶ In case of damage we deal with the imbalance in the sphere of legally protected goods and interests. The weight of that balance restoration has been moved by the legislature on a subject other than the victim. The rule is that a legal provision or an agreement indicates who is responsible for fixing a damage. In case of the classical design of the liability for damages, it is not important whether the person responsible has benefited from the event causing the damage.

Based on the above definition of damage, it can be concluded that the content of the damage concept has a significant impact on which property (interests) are classified by law into the sphere protected by it. Basically, a sphere of legally protected property is dynamic. A characteristic feature of this phenomenon is the fact that with the development of civilization the area of the legally protected property expands. Moreover, in retrospect, there appear directions of growing protection. It is enough to mention that in the beginning in the Roman law the concept of damage included a property damage experienced by someone as a result of certain acts, abandonment or coincidence. Only easily visible changes in the surrounding reality (eg. destruction of things) were considered to be a damage.⁷

Reflecting on the type of the protected property, even without a detailed study it can be stated that especially in recent decades, it is clear that more attention is paid to the protection of intangible property. This remark applies to physical and legal persons, consumers and businesses and other legal entities. Various considerations determine that intangible property are becoming increasingly important in legal transactions. Entrepreneurs perceive primarily an economic dimension of this property. Other people recognize its unique importance (especially personal property) and a frequent practical impossibility of their natural restitution.

In addition, there arises one more general remark. The experiences of the so-called countries of people's democracy clearly indicate that the nature and extent of the legally protected property and interests are dependent not only on the progress of civilization, but also on the political system, which

⁶ T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego. Prawo zobowiązań – część ogólna*, Wrocław – Warszawa – Kraków – Gdańsk – Łódź 1981, p. 214 and the literature referred to there.

⁷ A. Szpunar, *Oszkodowanie za szkodę majątkową. Szkoda na mieniu i na osobie*, Bydgoszcz 1998, p. 45.

affects the content of the damage concept. It is also worth noting that in the unacceptable system sooner or later there appears a sharp discord between a social sense of damage (injury) and the values protected by law.

2. Evolution of the general concept of damage

In the Civil Code provisions⁸ the concept of “damage” appears repeatedly, which highlighted the necessity of determining its content by means of various techniques of legal interpretation.⁹

Bearing in mind legal solutions accepted by the Code of obligations¹⁰, in the professional literature¹¹ two concepts of damage are present: the first one, narrow, marks only damage to property; the second one, broad, also envelopes moral damage or moral harm. As it has been stressed, property damage is determined by comparing the financial status of the injured person to the state that would have existed had it not been for the fact of the damage caused. In this comparison it is visible that the essence of the problem is either some reduction in the property, or the lack of the increase which could be expected in the ordinary course of affairs. On this basis, within the property damage concept it was possible to distinguish between the loss (*damnum emergens*) and the expected benefit or the lost profit (*lucrum cessans*). Decades ago, F. Zoll stressed that, according to the legal concepts (not to the science of economics which does not consider the individual as property), property damage also includes injuries caused to the body, freedom and honor if it involves reduction of labor force which the individual presents or will present.¹²

In terms of the Code of obligations a moral damage involved only pain (suffering) which was experienced by the victim (physical pain and mental-moral pain). Compensation for the pain by paying a sum of money was justified by the thought that the pain should be compensated by ple-

⁸ The Law dated April 23, 1964. The Civil Code, Journal of Laws Nr 16, pos. 93 with later amendments.

⁹ On the relationship between interpretation and law see J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999, p. 7. Paraphrasing the words of the author – “there is no law before interpretation”, one can say that in terms of law there is no damage before its interpretation.

¹⁰ Regulation of the President of the Republic of Poland dated October 27, 1933 The Code of Obligations, Journal of Laws Nr 82, pos. 598 with later amendments.

¹¹ F. Zoll, *Zobowiązania w zarysie według polskiego kodeksu zobowiązań*, Warszawa 1945, p. 80.

¹² *Ibidem*.

asure to those who suffered, and in the absence of other means it can be an adequate sum of money. In the legal literature it was pointed out that this sum should be big enough to be perceived as the equivalent for the experienced pain.¹³

There is a similar tendency of listing the types of damage both in the Code of Obligations and the Civil Code when it entered into force. Often damages are divided into different groups according to their causes. Given this criterion, one can distinguish: 1) damage caused by one's own actions, 2) damage caused by the acts of other person, 3) damage caused by animals and stuff, 4) damage caused in connection with the use of natural forces.

Certainly, the idea represented by the majority of the representatives of the science¹⁴ that the damage concept has not been strictly defined in the regulations of the Civil Code is right. It should be noted that in the professional literature there are also opposing views, according to which the general concept of damage has been formulated in the art. 361 § 2 of the Civil Code. Its content is revealed by the statement that in the absence of the separate provision of the Act or the provisions of the agreement, fixing the damage includes the loss which the victim has suffered and the benefits that he could have achieved if the damage was not done to him. However, these views do not consider the fact that this provision focuses only on the issues of the damage eligible for fixing, and not damages in general.¹⁵ In this situation, the question arises whether in the absence of the legal definition it is not enough to understand the term "damage" as it is accepted in everyday language? It is necessary to admit that this direction of interpretation is not excluded by many representatives of theory and jurisdiction.¹⁶ (However, this does not mean the principle *clara non sunt interpretanda*).

It seems that there are arguments to defend the position that a statutory definition of damages is not necessary. First of all, the validity of such a definition would provide a basis for formulating a plea of the excessive content narrowing due to the dynamism of the concept. Nevertheless, some doubts remain. T. Dybowski has expressed the opinion that a colloquial understanding of damage does not solve the problem due to its ambiguity and

¹³ *Ibidem*.

¹⁴ M. Kaliński, *Szkoda na mieniu...*, p. 173 and the literature referred to there.

¹⁵ *Ibidem*.

¹⁶ See, for example M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, p. 362; J. Winiarz, *Obowiązek naprawienia szkody*, Warszawa 1970, p. 19; W. Czachórski, *Odpowiedzialność odszkodowawcza w ramach tzw. ujemnego interesu umowy*, *Ruch Prawniczy Ekonomiczny i Socjalny* 1968, nr 3, p. 118.

multiplicity of the events which are attributed to this word.¹⁷ W. Warkało has presented the view that in the civil law damage should be recognized as a technical-legal concept.¹⁸

Pointing to the examples of different views on the concept of damage, one cannot forget the criterion of the damage disadvantageousness evaluation when applied to property and legally protected interests. In this regard, in the Polish literature one may highlight the opinion according to which the damage caused to the victim should be objectively disadvantageous¹⁹ and the view that the negative assessment of the difference in the estate of the victim is to be made from the standpoint of the interests of the injured person, that is, taking into account the subjective criterion.²⁰ It seems that this problem should be settled by the court in each case after taking into account the state of things existing at the time of sentencing. A schematic approach to this issue could affect the realization of the idea of justice.

Goods enjoyed by the entities of the civil law have a dynamic character and their scope is subjected to changes. Consequently, a similar dynamic character is revealed by damage. In this situation it seems that the most appropriate and reasonable concept of damage is offered by T. Dybowski.²¹ The author concludes that property and interests that have been affected by damage should be understood as everything that satisfies material and spiritual needs and goals of the victim. Harmfulness of changes in the property and interests means reducing the ability to satisfy the needs and legally protected goals of the victim by the damaged property and interests. While damage is determined, legally protected property and interests are mentioned so that, for example, lost illegal profits are not regarded as a damage.

This definition reveals a value of versatility. Reflecting on the practical consequences of adopting a universal definition of damage, it is easy to notice that the lack of clear regulatory guidance may affect a broader “judicature creativity”. At this point one can repeat after A. Stelmachowski²² that here we are dealing with a fundamental contradiction that occurs in the legal system: the postulate of a stable legislation adapted to the social needs

¹⁷ T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego...*, p. 213.

¹⁸ W. Warkało, *Odpowiedzialność odszkodowawcza. Funkcje. Rodzaje. Granice*, Warszawa 1972, s. 123.

¹⁹ M. Kaliński, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6, *Prawo zobowiązań – część ogólna*, Warszawa 2009, p. 77 as well as the views presented there.

²⁰ T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego...*, p. 215.

²¹ *Ibidem*, p. 217.

²² A. Stelmachowski, *Zarys teorii...*, p. 305.

alongside the need to flexibly adapt the law to ongoing changes and an active role played by law. The author highlights that the inevitable consequence of this situation is and must be the court legislation. Recognizing the real state of things should primarily lead to the intensification of the judge's sense of responsibility. Bearing in mind the fact that such a sense was always strongly present in English judges (leading to a far-reaching abstinence in the use of the ability to create precedents), there is no reason why it should be different in case of Polish judges.²³ The authors of this paper believe that there is no need to justify the statement that promoting a stronger position of judges implies much higher requirements put on the holders of the judicature offices. Incidentally, it is worth pointing out the importance of the issue illustrated by the role of the judge in times of law-making floods, the rules which are very far from perfection, and the increased use of "legislative machinery" to "fix" the problems of temporary character and faith that the very issue of regulations will solve prevailing problems. In this context the remark that to a great extent the value of the judiciary standards is established by good judges rather than by laws is very valid today.²⁴

3. Some classifications of the "damage" concept

In the legal literature there is no uniform and static criteria for the classification of "damage". This problem is still the subject of keen interest because of the need for understanding and clarifying the matter being the subject of the legal regulation. In addition, it results from the fact that along with technical advances invading every sphere of life, an individual damage can be seen increasingly in other aspects and dimensions.

In the professional literature and judicature, in addition to the typical division into property and non-property damage or damage to the name and damage to the person, there are new classifications and interpretations of damage formulated on the basis of diverse criteria.

In theory and judicial decisions of the courts a classification of damage into direct and indirect damages has been accepted. A direct damage appears when the harm caused to legally protected property and interests applies to people directly affected by it, whereas indirect damage affects other subjects. In other terms, the criterion of distinction of these two types of damage

²³ *Ibidem*, p. 306.

²⁴ *Ibidem*, p. 308.

is the category of causation, and so direct damage is the damage which is related by direct causal relationship (*causa proxima*) with the event causing the damage. It is usually indicated that the direct damage characteristic feature is the ability to fix it by means of restitution, while generally indirect damage can only be repaired by money.²⁵ In principle, natural restitution is also impossible in case of damage to a person.

Other variants of damage have a shorter history. For example, it can be indicated that literature uses the term “future damage” in the context of art. 444 § 2 of the Civil Code which foresees a claim for a pension (due installments and unmatured installments)²⁶ in the situation where the victim has fully or partially lost his earning capability, or if his needs or future chances of success have decreased. One can argue with such a way of defining a future damage noting that this provision tackles generally the damage that already exists, since according to the art. 444 § 2 of the Civil Code, the victim has already lost the property specified in that provision.

It seems that a future damage can be discussed clearly in the context of the resolution of the Supreme Court, which includes the thesis that in case of damage repairs resulting from the body injury or harm to one’s health the award of a certain benefit does not preclude a simultaneous determination of the defendant’s liability for any damage that may arise in the future due to the same event.²⁷ The above-mentioned decision refers to the state of affairs that may arise in the future in the sphere of the property protected by law; it does not refer to the ways of how to repair the damage which already exists.

A frequently used controversial concept of a “possible damage” including the loss of chances or hope is worth noting.²⁸ A possible damage differs from the lost benefits by the degree of probability of the realization of chances or hope. The boundary between these two concepts is usually very delicate and difficult to establish. A possible damage resulting from the loss of chances is dealt with when the probability of its beneficial realization is less than highly probable. Therefore, the problem is concentrated in the proof of the probability degree of the benefit obtaining – the task which belongs to the court. Previously, it should be established whether the damage was

²⁵ T. Dybowski, in: Z. Radwański (ed.), *System Prawa Cywilnego...*, p. 217.

²⁶ A. Śmieja, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6..., p. 686.

²⁷ Resolution of the Supreme Court dated April 17, 1970, III PZP 34/69, OSNC 1970, nr 12, pos. 217.

²⁸ M. Kaliński, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6..., pp. 103–104 and the views presented there.

covered by the indemnity obligation. While considering the issue whether a future damage should fall within the indemnity obligation, it is necessary to point out that already a few decades ago in the jurisdiction there was a case of the compensation liability of the exclusion from the competition participation²⁹, negligence by a legal representative for the purpose of litigation who failed to introduce attempts to realize the claim the victim was entitled to.³⁰ It should be emphasized, however, that in these situations the court found a high degree of probability of obtaining specific property values by the victim. Again, it is possible to conclude that there can be no question of a schematic approach to a practical significance of the possible damage.

In connection with the unification processes in Europe the terms “purely property damage” and “purely economic damage” have appeared in the professional literature. This type of damage appears as the effects of unfair competition or violation of *know-how*. In practice, determination of the damage can be very difficult. It is recognized as an injury resulting regardless of the violation of any subjective law meant to serve the victim. In the framework of the protection criterion established in art. 361 § 1, 415, 471 of the Civil Code, determination of purely property damage award under the Polish law is relevant only if the regulations limit the compensation for damage to the property or person, which excludes a purely property damage from the scope of indemnification.³¹ In the framework of the Polish regulations such cases are rare. Moreover, in the Polish professional literature one can notice the view that a purely property damage is a kind of damage to property.³²

Bearing in mind its practical importance, it is necessary to mention the term “commercial damage” functioning not only in everyday language. This concept was formed in Poland on the basis of the judicial decisions dealing primarily with the damage caused to motor vehicles (cars). So, in 1971 the Supreme Court stated that if, as a result of the repair, the damaged car was restored to its original state, the car owner could not claim the award in addition to the sum of money equivalent to the lowering of the car

²⁹ Decision of the Supreme Court dated April 28, 1969, II CR 72?69, OSPiKA 1970, nr 3, pos. 63.

³⁰ Decision of the Supreme Court dated November 16, 1962, III CR 8/62, PiP 1964, nr 7, p. 167.

³¹ M. Kaliński, in: A. Olejniczak (ed.), *System Prawa Prywatnego*, Vol. 6..., p. 100.

³² B. Lewaszkiewicz-Petrykowska, *Szkoda jądrowa na osobie i mieniu*, in: S. Sołtysiński (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy)*, Poznań 1990, p. 311.

“commercial value”.³³ And in 2001 the Supreme Court resolved that, apart from the car repair expenses, the compensation for the car damage can also cover a sum of money, corresponding to the difference between the value of the vehicle before it was damaged and after it was repaired.³⁴

In connection with the damage caused by traffic accidents and covered by transport insurance there has also appeared the concept of “total damage”. This concept occurs in the judicial decisions of the courts³⁵ and concerns a way of repairing the damage in cases when the perpetrator of the accident and the insurer are fully responsible for the damage.

Considering different classifications of the “damage” concept made by the judiciary and professional literature and especially justified by the so-called current needs of practice (as demonstrated by the examples above), it should be noted that they focus mainly on the damage to property. In the sphere of the normative matter, it is characteristic that changes made to the Civil Code in recent years did not relate directly to the concept of “damage” itself, but they generally relate to the issues of personal damage and financial compensation.³⁶ It is enough to mention here the provisions of articles 446 § 4, 445, 448 included in the title of VI Civil Code – Unlawful acts.

4. The dynamics of the “non-property damage” term in the background of the Civil Code regulations and judicial decisions of courts

Within the category of damage to person, it is possible to distinguish property damage (any costs associated with fixing the harm) and non-property damage (pain and moral suffering). The terminology used in relation to non-property damage is not uniform. In the legal literature and judicial decisions of courts one can find such terms as “moral damage”, “non-material damage,” and “harm.”³⁷ The latter term to denote

³³ Decision of the Supreme Court dated February 3, 1971, III CRN 450/70, OSNC 1971, nr 11, pos. 205.

³⁴ Resolution of the Supreme Court dated October 12, 2001, III CZP 57/01, OSNC 2002, nr 5, pos. 57. An approbative note was written by A. Szpunar, OSP 2002, nr 11–12, pos. 61.

³⁵ Decision of the Supreme Court dated January 29, 2002., V CKN 682/00, LEX nr 54343.

³⁶ For more information about compensation see J. Matys, *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*, Warszawa 2010.

³⁷ See A. Szpunar, *Zadośćuczynienie za szkodę niemajątkową*, Bydgoszcz 1999, p. 64 and following.

non-property damage is used by the legislator in the above-mentioned provisions of the art. 446 § 4, 445, 448 of the Civil Code. It is worth referring to their content in order to present the property and interests protected by law under the Civil Code because, as it has already been stated, in the development of the Polish civil law there is a tendency to expand the scope of application of the damage compensation institution as an instrument of rewarding the non-property damage resulting from a civil offense.

According to § 1 of the article 445 of the Civil Code, in cases specified in the art. 444 of the Civil Code, and therefore in cases of injury or harm to health, the court may award the victim an adequate sum in compensation for the damage suffered. The second paragraph of the art. 445 of the Civil Code states that the court may also award compensation in case of deprivation of liberty and persuasion to conduct an indecent assault through deception, violence or abuse of dependence. In addition to life and health, which are the most important personal values of individuals, the Polish legislator also gives a special legal protection to such personal rights as freedom and sexual integrity.

One of those provisions, Art. 446 § 4 of the Civil Code, introduced the possibility to claim the damage award in the event of harm arising from the death of a close family member. It should be noted that the previous regulation³⁸ relating to the situation of indirectly affected persons allowed only for the appropriate compensation if, as the result of a close family member's death, there appeared a significant deterioration of one's living situation (art. 446 § 3 of the Civil Code). Although the jurisdiction based on that regulation indicated that it could also be used with non-material damage involving the deterioration of the objective living position of the victim in the external world³⁹, many representatives of the legal doctrine⁴⁰

³⁸ Amendment of the art. 446 of the Civil Code was introduced by the law of May 30, 2008 (Journal of Laws No. 116, pos. 731), it entered into force on August 03, 2008.

³⁹ As a result of the Supreme Court decision dated July 22, 2004, II CK 479/03, Prawnik nr 24010, Also see the decision of the Supreme Court dated February 17, 2004, II CK 17/03, LEX nr 328991, and the decision of the Supreme Court dated November 30, 1977, IV CR 458/77, LEX nr 8032.

⁴⁰ Particularly, A. Szpunar, *Wynagrodzenie szkody wynikłej wskutek śmierci osoby bliskiej*, Bydgoszcz 2000, p. 145 and following.; W. Czachórski, in: *System prawa cywilnego*, Vol. III, Part 1, Wrocław – Warszawa 1981, p. 676; Z. Radwański, *Zobowiązania – General Part*, edition 4, Warszawa 2003, p. 231; Differently S. Garlicki, *Odpowiedzialność cywilna za nieszczęśliwe wypadki*, Warszawa 1971, p. 472; M. Wałachowska, *Wynagrodzenie szkód poniesionych na skutek doznania wstrząsu psychicznego spowodowanego śmiercią osoby bliskiej*, Przegląd Sądowy 2004, nr 7–8, pp. 63–64. These authors pointed to the mixed nature of the claim specified in § 3 of the art. 446 of the Civil Code, seeing in it the elements of both property and non-property elements.

claimed that the regulation contained in § 3 art. 446 of the Civil Code applies only to compensation for intangible and unquantifiable special property damages related to a general deterioration of the situation caused by a close family member's death. It was indicated⁴¹ that the regulation does not foresee a possibility to mitigate or reduce pain after losing a close family member. A personal property, that is attachment to a close person, should not be protected by financial means (eg. pecuniary compensation).⁴²

The recently introduced amendments to the Civil Code relating to the possibility of awarding damages in the form of an appropriate sum of money in the event of the loss of a close family member has removed the discrepancies presented above, clearly indicating that a feeling of attachment to a close family member can be a personal property. Thus there was created a situation in which it became necessary to establish the boundary line between property damage and non-property damage which results from the loss of a close person.⁴³ In many cases, the establishment of a significant deterioration of a living situation referred to in § 3 will involve the same facts that would justify an infringement of a personal interest under § 4 of the art. 446 of the Civil Code. For example, in case of the parent's death a child loses support and a sense of security, parent's help in organizing everyday life and a chance to be supported in the future. A similar situation takes place when, as a result of a close family member's death, a person loses his care and signs of daily concern, which, according to psychologists, has a positive influence on the personality development. These circumstances can justify *in casu* the claim for compensation on the basis of a serious deterioration of a living situation as well as compensation under the art. 446 of the Civil Code which can lead to the phenomenon which is undesirable from the standpoint of law, that is an award of the double benefit.⁴⁴

It should also be noted at this stage that before the introduction of a compensation in the form of an appropriate sum of money for those indirectly affected (the art. 446 § 4 of the Civil Code), there were attempts

⁴¹ A. Szpunar, *Wynagrodzenie szkody wynikłej wskutek śmierci...*, p. 143 and following.

⁴² According to the saying "*Les larmes ne se monnaient pas*" – Money cannot dry one's tears.

⁴³ In the foreign literature this type of damage is called the ricochet damage: "*le dommage par ricochet*", because the claim is entitled in connection with the death of the person directly injured. See Y. Lambert-Faivre, *Droit du dommage corporel. Systèmes d'indemnisation*, éditions Dalloz, Paris 2004, p. 283 and following.

⁴⁴ Therefore, much will depend on the assessment of the court, the so-called judicial law will decide not only on the amount of the awarded claim, but also on their appropriate qualifications. See Z. Śtrus, *Uwagi o odszkodowaniu w razie śmierci najbliższego członka rodziny*, Prawo i Medycyna 2010, nr 3, p. 86 and following.

to compensate the harm resulting from the death of a close person under the provisions of the art. 448 of the Civil Code, which gives the victim the opportunity to claim compensation in case of infringement of any personal property (including property in the form of attachment to the dead person).⁴⁵ Without going into details regarding the mutual delimitation of these regulations⁴⁶, it should be noted that under the article 448 of the Civil Code the interpretation of the term “personal property” is essential. Jurisdiction arising in connection with this provision allows to grasp dynamic changes taking place in relation to the concept of non-property damage of the person.

It is possible to distinguish one of the decisions taken by the Supreme Court on February 28, 2007⁴⁷, in which it was stated that serving prison sentences in overcrowded wards with an unseparated toilet, poor sanitary facilities, insufficient bedroom capacity and inadequate ventilation can be a manifestation of humiliating treatment, leading to the violation of the dignity of persons deprived of their liberty. Under the Polish law it can justify the request of compensation award under the article 24 of the Civil Code⁴⁸ in conjunction with the article 448 of the Civil Code as a violation of the offender’s personal rights, that is dignity and the right to privacy. To support the decision, the court emphasized that under the article 30 of the Polish Constitution the inherent and inalienable dignity of man is inviolable, and its respect and protection is the duty of public authorities. This obligation should be implemented by public authorities, especially wherever the state acts within the empire, carrying out their repressive tasks, whose exercise

⁴⁵ As a result of the decision of the Appeal Court in Gdańsk dated August 23, 2005, I ACa 554/05 with the note by M. Wałachowska, *Przegląd Sądowy* 2007, nr 1, p. 135 and following. This view was shared by several representatives of the legal doctrine, See B. Lackoroński, *Zadośćuczynienie pieniężne za krzywdy wynikłe ze śmierci najbliższego członka rodziny na podstawie art. 446 § 4 k.c.*, *Palestra* 2009, nr 7–8 (Part 1), p. 19 and following and nr 9–10 (Part 2), p. 36 and following.

⁴⁶ Regarding a mutual relation between the art. 445 of the Civil Code and 448 of the Civil Code see M. Safjan, *Ochrona majątkowa dóbr osobistych po zmianie kodeksu cywilnego*, *Przegląd Prawa Handlowego* 1997, nr 1, p. 10 and following; A. Szpunar, *Prześlanki przewidzianego w art. 448 k.c. zadośćuczynienia*, *Przegląd Sądowy* 2002, nr 1, p. 7; B. Lewaszkiwicz-Petrykowska, *W sprawie wykładni art. 448 k.c.*, *Przegląd Sądowy* 1997, nr 1, p. 7. Regarding a mutual relation of the art. 448 of the Civil Code and 446 § 4 of the Civil Code see. B. Lackoroński, *Zadośćuczynienie pieniężne za krzywdy wynikłe ze śmierci najbliższego członka rodziny na podstawie art. 446 § 4 k.c.*, *Palestra* 2009 nr 9–10 (Part 2), p. 37 and following.

⁴⁷ V CSK 431/06, OSNIC 2008, nr 1, pos. 13.

⁴⁸ In accordance with the art. 24 of the Civil Code and according to the principles given there, the one whose personal interests have been violated, may demand a financial compensation or an adequate amount of money for the charity.

should not lead to a greater reduction of human rights and dignity, than the one resulting from the protective tasks and measures of repression.

In another decision⁴⁹ the court pointed out that providing inaccurate information regarding the collection and storage of personal data may justify the protection provided for by the art. 23 and 24 of the Civil Code, if it resulted in the violation of personal property. In this case the personal property subjected to protection was the informative autonomy of the person who was several times denied a bank loan in different banks because of the report sent by the defendant bank, which concluded that the plaintiff was an unreliable debtor. At the same time the sued bank assured the plaintiff that there was no data regarding her repayment of the bank loan. In that factual state the court additionally found violation of the plaintiff's reputation by disseminating false information about the accumulations of the repayment of the loan, as well as violation of her property in the sense of confidence and security, understood as the ability to understand one's own situation and direct it on the basis of reliable information. Therefore, there appeared damage caused by violation of the personal rights which required a compensation.

An interesting case regarding the determination of the type of damage was dealt with by the European Court of Human Rights⁵⁰ which decided that the Polish court, basing on the repeated psychiatric examination (a total of five times) in a relatively short period of time in trivial and similar cases, did not keep a due balance between the right to respect the private life of individuals and the interests of justice, hence, the aggrieved had to be compensated.

In the decisions of May 29, 2007⁵¹ and October 14, 2005⁵² the Supreme Court expressed the view about the possibility of awarding the damages in the event of patient rights violation, and not only when the damage is a consequence of the caused injury or health disorder. A patient has the right to compensation even if non-property damage is the result of the lack of his consent to treatment, and if, in connection with the offered health care violation of his dignity and intimacy takes place. Currently, the basis

⁴⁹ Decision of the Supreme Court dated February 15, 2008, I CSK 358/07, OSNIC 2009, nr 4, pos. 63.

⁵⁰ See the decision of ECHR of November 27, 2003, the case of *W. against Poland*, Rzeczpospolita 2003, nr 283.

⁵¹ V CSK 76/07, OSNIC 2008, nr 7–8, pos. 91 with the note by M. Wałachowska, *Przegląd Sądowy* 2009, nr 5.

⁵² III CK 99/05, OSNIC 2006, nr 7–8, pos. 137 with the note by K. Bączyk-Rozwadowska, *Przegląd Sądowy* 2008, nr 5 and M. Świdorska, *OSP* 2008, nr 6, pos. 68.

for awarding compensation in the event of culpable violation of patient's rights is the article 4 of the Act of November 06, 2008 on the rights of the patient and patients' rights spokesman⁵³ in connection with the article 448 of the Civil Code.

The issue of the damage to a person as well as the recognition of new features and positions within this concept is evident particularly against the background of judicial decisions in the so-called medical cases. It is worth considering some of the court decisions for they undoubtedly determine the future directions of the doctrine and judicature in the sphere of the damage to a person.

5. The concept of damage in the so-called medical cases

The first decision⁵⁴, which dealt with an unusual damage to a person, was taken in case brought by Małgorzata A., who claimed that due to the incorrect diagnosis of the stage of her pregnancy she was prevented from obtaining a prosecutor's certificate that the pregnancy was the result of rape. The plaintiff argued that a medical error involving an erroneous interpretation of the ultrasound caused her deprivation of the right to abortion.⁵⁵ These events are in an adequate causal connection with the birth of the unwanted child, and therefore the *wrongful birth* damage. The plaintiff claimed the defendant to order 20 000 zł to be paid as a compensation for violation of her personal rights (Art. 448 of the Civil Code), compensation for the loss of earnings amounting to 15 000 zł and a pension of 800 zł per month equivalent to the cost of the baby's living.

The factual state presented in this way has become a canvas for considerations regarding the admissibility of the complaint for *wrongful birth* in the Polish law, and, in case of its admission, the scope of compensatory claims.

First of all, the establishment of non-property damage was problematic. The Supreme Court in justifying its decision mentioned the violation of the plaintiff's freedom as a result of forcing her to give birth to a child born of

⁵³ Journal of Laws dated 2009, Nr 52, pos. 417.

⁵⁴ Decision of November 21, 2003, V CK 16/03, OSNC 2003, nr 7, pos. 104 with the notes by S. Rudnicki, Monitor Prawniczy 2004, nr 10; T. Justyński, Państwo i Prawo 2004, nr 9; M. Nesterowicz, OSP 2004, nr 10, pos. 25.

⁵⁵ Article 4a. Act 1 item 3 of the Act of January 7, 1993 on family planning, protection of the human fetus and conditions for the admissibility of abortion, Law Journal Nr 17, pos. 78, later amended.

the rape crime. In the Polish law, abortion is permissible only before the fetus completes 22 weeks of age, for this age makes it possible for the child to survive outside the mother's body.⁵⁶

S. Rudnicki questioned the accepted construction of damage resulting from the violation of the woman's right to decide about her personal life (the right to abortion). The author argued that the right to abortion is not identical to personal property in the meaning of the article 23 of the Civil Code. The right to abortion is an exceptional solution; it constitutes a deviation from the principle of respect for the life of *nasciturus*, and, therefore, it is considered to be a "lesser evil". Hence, it cannot be any "property". Since the right to abortion is not a personal property, then a claim resulting from the violation of personal property cannot appear here.⁵⁷

In contrast, T. Justynski emphasized the fact that the right to abortion is a legal right, that is a legal sphere of certain conduct granted and protected by the legal norm, the violation of which should have legal consequences. The right to abortion is the result of the legislator's decision to solve the conflict taking place between the woman's right to self-determination and the unborn child's right to life. Therefore, it has been granted to protect the right to self-determination which is a personal property.⁵⁸

Obviously, the statement of the above-mentioned author reveals an extremely positivist approach to the civil law (if the legislator has regulated certain issues, they have to have certain legal consequences) as well as disregarding the system of values which constitute the immanent content of the law.

In this context it is necessary to notice the valuable argumentation presented in the resolution of the Constitutional Tribunal of May 28, 1997⁵⁹, which points out the collision of the two rights, which is typical for the counter-type. On the one hand, there is the right to abortion, on the other hand, there is the unborn child's right to life. In the Polish law a permission to abortion is reserved to exceptional situations. Hence, treatment of the

⁵⁶ The court dismissed the claim for compensation, but only for the reason that the events on which the plaintiff relied, took place under the art. 448 of the Civil Code; in its previous formulation it did not provide the possibility of awarding compensation to the injured party. However, since the content of the provision was changed, now, depending on the determination of whether there is a violation of personal property, an award of compensation for the victim in such cases remains an open question.

⁵⁷ See the author's note cited in the footnote 54.

⁵⁸ See also T. Justynski, "Wrongful conception" w prawie polskim, *Przegląd Sądowy* 2005, nr 1, pp. 43–44. See also M. Nesterowicz, in the note to the decision of the Supreme Court dated November 21, 2003, see the footnote 54.

⁵⁹ K. 26/96, OTK 1997, nr 2, pos. 19.

right to abortion as a component of the right to family planning is unauthorized. It is not possible to consider whether to have a child (family planning) when the child is already conceived.⁶⁰

This argumentation is shared by A. Górski⁶¹ who also indicates that a collision of different values and interests in the sphere of legal protection should lead to their proper balance. Giving priority to a given permission cannot lead to the destruction of the competitive property, that is the unborn child's life. The author concludes that in the jurisdiction the observed trend is to identify specific powers granted by law (the right to abortion) with the content of personal rights is not justified.⁶² Such a trend is sufficient on neither normative nor theoretical grounds.⁶³

The above-mentioned case had its continuation. In connection with its withdrawal to be re-examined, Małgorzata A. expanded her claim demanding covering the child's living expenses until the child reached the capacity for an independent living. She indicated that the child requires constant care due to his sickness; the mother could not work and pay both for the child's care and their maintenance costs. The plaintiff also claimed the reimbursement of the expenses and costs associated with pregnancy and childbirth, and her lost income.

The presented claims resulted in considerable controversy at various stages of the case. At the center of the discussion there was a question of the scope of compensation, which is due in cases resulting from *wrongful birth*.

In the professional literature and jurisdiction⁶⁴ there is a position that

⁶⁰ See also M. Wild, *Roszczenia z tytułu "wrongful birth" w prawie polskim (uwagi na tle wyroku SN z dnia 21.11.2003 r., V CK 16/03)*, Przegląd Sądowy 2005, nr 1, p. 49 and following.

⁶¹ A. Górski, *Roszczenia związane z uniemożliwieniem legalnego przerywania ciąży w aktualnym orzecznictwie Sądu Najwyższego*, Przegląd Sądowy 2007, nr 5, p. 29 and following.

⁶² Also A. Górski, J. P. Górski, *Zadośćuczynienie za naruszenie praw pacjenta*, Paestra 2005, nr 5–6, p. 89.

⁶³ For example, see P. Sut, *Problem twórczej wykładni przepisów o ochronie dóbr osobistych*, Państwo i Prawo 1997, nr 9, p. 31 and following.

⁶⁴ See the literature and jurisdiction referred to by T. Justyński in: *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Kraków 2003; Z. Peplowska, *Odpowiedzialność cywilna lekarza z tytułu "wrongful life, wrongful birth, wrongful conception" w prawie USA*, Prawo i Medycyna 2004, nr 1, p. 100 and following; M. Nesterowicz, *Odpowiedzialność cywilna lekarza wobec narodzonego dziecka z tytułu "wrongful life" w prawie francuskim*, in: *Prawo, społeczeństwo, jednostka. Księga Jubileuszowa dedykowana Prof. Leszkowi Kubickiemu*, eds. A. Łopatka, B. Kunicka-Michalska, S. Kiewlicz, Warszawa 2003; by the same author, *Odpowiedzialność cywilna lekarza i szpitala za "wrongful conception, wrongful birth, wrongful life" w orzecznictwie europejskim (2000–2005)*, Prawo i Medycyna 2007, nr 3, p. 19 and following.

compensation should envelope all the costs resulting from the fact of the child's birth.⁶⁵

In particular, the following costs are mentioned: the costs related to pregnancy and childbirth, reduced earnings of parents and the child's living expenses. The adoption of this compensation concept is possible with the distinction of the person of the child (as a specific value) on the one hand, and the maintenance costs – on the other hand. It is indicated that these values are not mutually exclusive. The violation of legal interests should not be left without a civil penalty only because the damage occurred in connection with the birth of a person.⁶⁶

The decision of the Supreme Court dated February 22, 2006⁶⁷ partly referring to the above-mentioned concept considered that the subject responsible for unlawful preventing from the abortion procedure in case of pregnancy resulting from rape when the perpetrator has not been detected will cover the child's cost of living which the mother is not able to pay for.

Justifying its decision, the court emphasized that when deciding to give birth a child, the mother agrees to bear partly the cost of the child's living. A damage is the dimension of the cost of living and education, for which social support is needed. Hence, the court referred to the social argumentation. Recognizing the mother's need to face certain costs, the court decided that, because of her financial situation, part of the costs should be borne by the subject responsible for unlawfully preventing the mother from the abortion procedure after the rape. Justification for the claim limitation may be questionable because it was dependent on the specific financial situation of the mother. In addition, using social argumentation in the case where the defendant is a municipality as a *statio fisci* of the healthcare institution can be understood. However, a similar reference in the relation between the patient and independent healthcare institution would be ineligible. Therefore, the above-mentioned judgment cannot determine a generalized model of conduct in other cases regarding *wrongful birth*.

In another decision of the Supreme Court of October 13, 2005⁶⁸ it was stated that if parents are prevented from taking the opportunity of having

⁶⁵ M. Wild, however, rightly advises caution when reaching for the foreign literature in such cases because of the diversity of legal systems, especially when it comes to setting the boundaries of the right to abortion, M. Wild, *Roszczenia...*, *op. cit.*, p. 50.

⁶⁶ See T. Justyński, *Poczęcie i urodzenie się dziecka...*, *op. cit.*, p. 56.

⁶⁷ III CZP 8/06 OSNC 2006, nr 7–8, pos. 123 with the note by P. Justyński, OSP 2007, nr 2, pos. 16.

⁶⁸ IV CK 161/05, OSP 2006, nr 6, pos. 71 with the notes by M. Nesterowicz, T. Justyński, W. Borysiak, PiP 2006, nr 7.

an abortion in the situation when a prenatal testing or other medical examinations indicate a high probability of severe and irreversible impairment of the fetus and, as a result of this, the birth of a handicapped child contrary to their will, they are entitled to claim an appropriate compensation from the person responsible for that state. Justifying its decision, the Supreme Court clearly stated that the right of parents to family planning is a personal property subjected to legal protection. On the other hand, regarding the scope of the damage, the Supreme Court held that parents of the disabled child were entitled to the reimbursement of the costs of living resulting from the difference between the cost of maintaining a healthy child and a disabled child.

These decisions indicate serious problems with defining the concept of damage for it is difficult to treat the birth of a child in terms of the damage caused to legally protected property, even if the aforementioned differentiation between the fact of the child's birth and child's living expenses is applied. Referring to the issue, M. Wild argues that virtually from the moment of childbirth a property damage associated with having a child loses the characteristics of the damage and becomes a cost (voluntary property loss).⁶⁹

It is also difficult to determine the scope of damage compensation claims. It seems that the Supreme Court is aware of that fact since in the justification of the above-cited resolution dated February 22, 2006 a precedential nature of the case requiring a flexible approach was highlighted. Obviously, the problem goes far beyond the sphere of legal regulation, which is emphasized even by the question whether the use of instruments of the civil law, and in particular the sanctions in the form of liability in this type of "damage" are legally and ethically justified?

6. Conclusions

On the basis of the civil law the concept of "damage" is dynamic and multidimensional. This term has a clear link with the values highly appreciated in the civilized societies. Usually, statutory rules do not keep pace with the needs that arise with the development of the new discoveries and technologies made by man.

⁶⁹ M. Wild, *Roszczenia...*, *op. cit.*, p. 57.

It is worth noting that the dynamics of the term ‘damage’ is shaped differently in the area of the damage to property, and otherwise in the field of personal damage. In the area of property damage there appear still new concepts shaped by the judicature and legal literature. So far, they have no adequate reflection in the legislation and this state of things does not seem to justify the need to multiply the principles governing the matter of property damage, in particular the principles of its compensation.

More sensitive to civilization, constitutional, mental, and ethical changes is the issue of personal damage and protection of non-property damage. In theory and practice, there are numerous discussions and debates about the ways how to repair such damages. Unlike the property damage, the issue has become the subject of important changes in the regulations of the Civil Code, as it was mentioned above.

It should be noted that the tendency to broaden the area of legally protected property and interests meets with a social approval. Unfortunately, the process is accompanied by dysfunctional phenomena, such as the commercialization of specific goods and values, whose roots stem from the ideas which are far from the property dimension. Life experience shows that usually the dynamics of positive phenomena is accompanied by such dysfunctional processes.

Generally, the direction of the “damage” concept changes and the resulting process of expanding the area of assets or interests protected by law must be regarded as a positive phenomenon, stemming primarily from the need to protect the individual.

S U M M A R Y

The problematic of damage occupies an important place in the sphere of the law of obligations. A damage is a basic prerequisite for compensation responsibility and delimits the indemnification liability. That is why determining the content of this notion is of fundamental significance not only at the stage of establishing the actual state justifying legal duty to repair a damage but also it decides about the dimension and the content of the duty.

A damage is a dynamic notion. This feature is related to various phenomena influencing formal changes in private law and the system of values which the law is to serve. The analysis of legal regulations, opinions presented by judicature and observations of the sphere of legally protected goods taking shape, unequivocally indicates that the content of the notion of damage is clearly expanding.